

**THE
INSTITUTES
OF
JUSTINIAN**

2024/25

based on the translation by

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Editor's Notes

This edition contains excerpts, with some adaptations, from T Lambert Mears (tr), *The Institutes of Gaius and Justinian, the Twelve Tables, and the CXVIIIth and CXXVIIth Novels, with Introduction and Translation* (London, Stevens and Sons, 1882).

Some translations by Mears of Latin words or expressions are, the first time they occur, accompanied by their Latin original in square brackets. They are listed at the back of the book. A bracketed ellipsis [...] indicates text omitted in this edition.

This edition of Justinian's *Institutes* comprises the set text for the Law Moderations paper in A Roman Introduction to Private Law.

Some of the text is highlighted in bold, indicating the parts of the *Institutes* of Gaius that Justinian incorporated in his *Institutes*, though this has not been done on a 'word for word' basis. The aim is to alert the reader to the borrowed passages as a stimulus to the historical study.

While the words of the text are those that the Moderators will use, the Latin terms included in the text and the notes accompanying the text may be omitted, and the formatting may differ.

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JUSTINIAN, BOOK I.

Title 1. Of Justice and of Law.

pr. Justice is the continual desire of always rendering to each one that which is his own.

§1. Jurisprudence is the knowledge of things divine and human; the science of that which is lawful and unlawful.¹

§2. Now passing from these general propositions to the study of the laws of the Romans, we think it will be best to commence with a simple and brief exposition, leaving a more careful and accurate examination to a subsequent period; for if at the very outset we overload with a multitude of various details the youthful and untrained mind of the student, one of two things will result, either we shall drive him to abandon his studies or we shall slowly drag him (with great labour to himself and at the risk of giving rise to that diffidence in his own powers which so often turns the student aside) towards that same point to which he might have been readily conducted without weariness or distrust.

§3. The maxims of the law are: to live honestly, to hurt no one, to render to each his own.

§4. Law consists of two parts: public and private. Public law relates to the constitution of the state; private law is concerned with individual interests. Let us now discuss the subject of private law, which is drawn from three sources, viz.: from the precepts due to natural law, the law of nations, and the civil law.

¹ Lawful and unlawful: *iusti et iniusti*, also 'just and unjust'.

Title 2. Of Natural Law, the Law of Nations, and the Civil Law.

pr. Natural law [*ius naturale*] is that which nature teaches to all animals, for it is not peculiar to the human race, but is common to all animals which are produced in the air, on the earth, or in the sea. Hence comes the union of male and female, which we call marriage; hence the procreation and education of their young, for we see, in fact, that the other animals besides man act in conformity with this law as if they were acquainted with it.

§1. Civil law [*ius civile*] may be distinguished from the law of nations [*ius gentium*] thus: **all communities of men governed by statutes [*leges*] and customs, partly use their own particular law [*ius*] and partly that common to all men, for that law which each particular community establishes for itself, is peculiar to that community and is called the civil law [*ius civile*], as being the peculiar law of that community; but that which natural reason [*ratio*] establishes between all men is equally maintained by all communities, and is called the law of nations [*ius gentium*], as being that law which is used by all nations. In this way the Romans use partly their own peculiar law, partly that common to all men. How these distinctions affect the subject we will discuss as occasion arises.**

§2. The civil law derives its name from each particular community, as, for instance, from the Athenians, for it would not be an erroneous expression to call the laws [*leges*] of Solon or Draco the civil law of the Athenians. So we call the law [*ius*] which is used by the Roman people the civil law of the Romans, or that of the Quirites, as being used by the Quirites; for the Romans were called Quirites from Quirinus. But whenever we do not add the name of the community to which the law belongs, we intend to be understood as

referring to our own law; just as when we speak of the poet without any addition, the name understood amongst the Greeks would be that of the famous Homer, with us Virgil. On the other hand, the law of nations is common to the whole human race, for mankind, from the necessities of human life and the demands of the occasion, have established certain laws for themselves, for wars have arisen, followed by captivity and slavery, which are contrary to natural law, and as at the outset, and by natural law all men were born free. And it is through this law of nations that almost all our contracts have been introduced, as purchase and sale, letting and hiring, partnership, deposit, loan in kind [*mutuum*], and innumerable others.

§3. Our law [*ius*], like that of the Greeks, is written or unwritten. Written law consists of **statutes [*leges*], ordinances of the plebeians [*plebiscite*], decrees of the senate [*senatus consultum*], the constitutions of the emperors, the edicts of magistrates, and of the answers of the learned in the law.**

§4. A statute [*lex*] is that which was enacted by the Roman **people** on the proposition of a senatorial magistrate, such as a consul. **An ordinance of the plebeians** is that which was enacted by the plebeians on the proposition of a plebeian magistrate, such as a tribune. **The plebeians differ from the people as the species from its genus; for, under the term people, the whole of the citizens are comprehended, including the patricians and the senators, but under the term plebeians the remainder of the citizens, without the patricians and senators, are referred to;** though, after the passing of the **Hortensian statute**,² ordinances of the plebeians acquired the same force as statutes.

§5. A decree of the senate is that which the senate orders and establishes, for when the Roman people had

² The *lex Hortensia* of 287 BCE.

increased to such an extent that it was a matter of difficulty to convoke them all for the purpose of sanctioning statutes, it seemed expedient that the senate should be consulted instead of the people.

§6. The will of the emperor has also the force of a statute [*lex*]; for by the royal statute which is passed to confer authority on him, the people yield up to him all its authority and power. Whatever, therefore, the emperor directs by rescript, or decrees in a law-suit, or ordains by edict, is admitted to be a statute; and these are called constitutions. Of these obviously some are personal, and are not to be drawn into precedents, since such is not the intention of the emperor; for that which he has granted to anyone as a reward for merit, or that which he has inflicted as a punishment, or that which he has given by way of assistance in an extraordinary case, does not apply beyond the particular individual. But other constitutions, being general, are undoubtedly binding on all.

§7. The edicts of the praetors also carry no slight authority. These we are accustomed to include under the term honorary law [*ius honorarium*, *ius praetorium*], because those who bear honours, that is, the magistrates, have given rise to this description of law. **The curule aediles also used to publish an edict** relative to certain matters, and this edict forms a portion of the honorary law.

§8. The answers of the learned [*responsa prudentium*] are the decisions and opinions of those who were authorised to settle points of law, for it was formerly provided that there should be public interpreters of the law, to whom the power of expounding the law [*ius respondendi*] was given by the emperor, and who were called jurisconsults. The unanimous decisions and opinions of these persons had such weight that it was settled by a constitution that the judge should not be at liberty to decide otherwise.

§9. The unwritten law [*ius*] is that which usage has approved; for daily customs, approved by those in the habit of using them, resemble statutes.

§10. It does not seem unreasonable that the civil law should have been divided into two branches, for the origin of the distinction appears to have been derived from the institutions of two states, viz., that of Athens and Lacedæmon; for in these states it was usual for the Lacedæmonians rather to commit to memory that which they observed as a statute, whilst, on the other hand, the Athenians followed those rules which were set down in writing in their statutes.

§11. The natural laws commonly observed by all nations and established by divine wisdom, always remain fixed and immutable, but those laws which each community establishes for itself are liable to frequent change, either by the tacit consent of the people or in consequence of subsequent legislation [*lex*].

§12. **Now all our law [*ius*] relates either to persons, things or actions, and first let us treat of persons,** for it will avail little to know the law if we do not know the persons for whom the law was established.

[...]

JUSTINIAN, BOOK II.

Title 1. Of the division of things.

pr. In the preceding book we have dealt with the law of persons; now let us treat of things. These are either held in our patrimony, or are considered to be outside our patrimony. For some things are by the law of nature common to all; some are public; some belong to collectivities, and some cannot be claimed by anyone, but most things are the property of individuals, by whom they are acquired in various ways, as will appear hereafter.

§1. According to the law of nature, the following are common to all, viz., the air, running water, the sea, and consequently the shores of the sea. Hence, no one is forbidden to approach the sea-shore, provided he does not interfere with the country houses, monuments, and buildings which he may find there, because these, unlike the sea, are private property.

§2. But all rivers and ports are public; and, therefore, the right of fishing in a port and in rivers is common to all.

§3. The shore of the sea extends up to the point reached by the highest winter tide. §4. The use of the river banks is by the law of nations public, just as is the use of the river itself.

Therefore, anyone is as much at liberty to moor his vessel to the bank, to bind ropes to the trees growing there, and to discharge any part of his cargo there, as he is to navigate the river itself. But the ownership of these banks is in those to whom the adjoining lands belong, and for this reason, the trees that are growing there also belong to the same persons.

§5. The use of the sea-shore, is also, by the law of nations, public, just as is that of the sea itself; and, hence, any person is at liberty to erect a hut there for shelter, as he is to dry his nets there, or haul them out of the sea; but the ownership of the shore is to be deemed incapable of being claimed by anyone, and to be subject to the same rules as apply to the sea itself, and to the earth or sand beneath it. §6. Collective

property, not belonging to individuals, includes, for instance, such things as are found in cities, as theatres, racecourses, and other similar places, and in fact all things which are the common property of the whole city.

§7. Things sacred, religious, and sacrosanct belong to no one; for that which is subject to divine law cannot be included in the property of anyone. **§8. Sacred things are those duly consecrated to God** by the pontiffs, as sacred buildings and offerings, properly dedicated to the service of God, and these latter we have forbidden by a constitution to be alienated or pledged, except for the purpose of ransoming captives. If anyone consecrates a building by his own authority, it is not sacred, but profane. But the ground on which a sacred edifice has once been built, even after the destruction of the building, still continues to be sacred, as Papinian lays down,

§9. Anyone may make of his own free will a place religious by interring a dead body in his own ground, but he may not inter a dead body in land held in common and undefiled against the wish of his co-owner. But in a sepulchre held in common any one co-owner may inter, even against the wishes of the rest. So, if the use and enjoyment is in another, it is held that the owner cannot, without that other person's consent, make the place religious. But a dead body may be interred in a place belonging to another with the latter's consent; and, even if the owner only ratifies the act after the dead body has been interred, still the place will have become religious.

§10. Sacrosanct things also, such as walls and gates, are, in a certain way, subject to divine law, and therefore form no part of the property of anyone. Walls are said to be sacrosanct, because any offence in respect of them is declared to be the subject of a capital penalty. So those parts of statutes, by which punishments are

established against those who transgress the statutes, we term sanctions.

§11. Things become the property of individuals in many ways; of some we acquire the ownership by natural law, which, as we have said, is called the law of nations; of other things we acquire the ownership by the civil law. It will be more convenient to begin with the more ancient law, and it is manifest that the law of nature is the more ancient, because it arose in the nature of things with mankind themselves, for civil law could but then begin when States began to be founded, magistrates to be appointed, and statutes to be written.

§12. Wild beasts, birds, and fishes, that is, all animals which are produced **on land, in the sea, or in the air**, so soon as they are caught by anyone, immediately become his by the law of nations; for, that which previously had no owner by natural reason passes to the first occupant. And it is immaterial whether a man take the wild beasts or birds upon his own ground, or on that of another, though, clearly, if anyone enters the ground of another for the purpose of hunting or snaring birds, he may, if his intention is foreseen, be forbidden by the owner to enter. Whatever you capture of these **are looked upon as yours, so long as they are under your control; but when they have escaped and recovered their natural liberty, they cease to be yours, and again become the property of the first occupant. It is held to have recovered its natural liberty when it has escaped out of your sight, or if, although still in sight, the pursuit of it would be difficult.** §13. The question has arisen whether, if a wild beast has been so wounded that it could be caught, it is to be deemed to be immediately your property. Some have held that it does so become yours, and that it continues to be yours so long as you continue to pursue it, but that if you cease to pursue it, it then ceases to be yours, and again can become the property of the first occupant. Others have thought that

it does not become yours until you have caught it. We decide in favour of the latter opinion, because many things may happen to prevent your capturing it. §14. Bees also are by their nature wild. Therefore, bees settling upon your tree are not held to be yours until you have hived them, any more than the birds which have built their nests on your tree. Hence, if another person hives them, he will be the owner of them. Anyone, too, is at liberty to take the honeycombs these bees may have made. But, clearly, if before anything has been done you see a person coming upon your land, you may lawfully forbid his entering. A swarm which has flown from your hive is held to be yours so long as you can see it, and pursuit is not difficult, otherwise it becomes the property of the first occupant. §15. Peacocks, too, and pigeons are by nature wild, and it is immaterial that they are in the habit of flying away and returning, for bees do the same, and of these it is agreed that they are by nature wild. Some persons have deer tamed in such a way that they go into the woods and return again; yet no one denies that deer are by nature wild. **In respect of those animals in the habit of going and returning, the approved rule is, that they are held to be yours as long as they have the intention of returning; for, if they should cease to have this intention of returning, they cease to be yours, and become the property of the first occupant; and these are deemed to have ceased to have the intention of returning when they have ceased to have a habit of returning.**

§16. Fowls and geese are not by nature wild, which may be gathered from the fact that there are other kinds of fowls and geese which we term wild. And, therefore, if your geese or your fowls should have become from some cause frightened, and have escaped, they are still held to be yours wherever they may be, although you may have lost sight of them; and whoever would retain these animals with the intention of profit is held to be guilty of theft.

§17. Again those things which we capture from the enemy immediately become ours by the law of nations, so that even free men may be thus reduced into our slavery; but if they should escape from us, and return to their own people, they regain their former condition. **§18.** Again precious stones, gems, and other things which are found upon the sea-shore, immediately become, by natural law, the property of the finder. **§19.** Again the offspring of those animals of which you are owner are acquired for you as the result of the same law.

§20. Moreover, the alluvial deposit which is added by a river to your land becomes yours by the law of nations. Now alluvion is an imperceptible increase, and that is considered as added by alluvial deposit which is added so gradually that you cannot detect how much is added at any one moment of time. **§21. But if the force of the current should sweep off a portion from your land, and carry it to that of your neighbour, it clearly still remains yours.** If, however, it continues for a long time adhering to your neighbour's land, and the trees which it carried off with it take root in his ground, from that time the land and the trees are deemed to have become acquired by your neighbour's estate.

§22. When an **island** is formed in the sea, which rarely happens, it becomes the property of the first occupant, for it is held previously to belong to no one. But **if formed in a river**, which frequently happens, and the island occupies the middle of the stream, **it belongs in common to those who possess the lands along the banks on each side of the river**, in proportion to the length of each one's estate along the bank. **But if the island is nearer to one side, then it belongs only to those who own land along that bank.** If a river becomes divided, and lower down is united again, so that some person's land is reduced to the form of an island, the land still remains his whose it was. **§23.** But if a river, entirely forsaking its natural bed, begins

to flow over another part, the former bed belongs to those who possess the land along the old banks in proportion to the length of each one's land along the banks. The new bed becomes subject to the same rules as apply to the river itself, that is, it becomes public. And if, after a time, the river returns to its former bed, the new bed again becomes the property of those who own the land along what were the banks. §24. The case is quite different if the whole of a person's land is inundated; for the inundation does not alter the character of the land, and, therefore, if the waters recede, it is clear that the land remains his whose it was.

§25. When a thing has been made by one person out of materials belonging to another, the question is often asked which of the two persons is, **according to natural reason**, the owner, he who made it, or he who was the owner of the materials. **For instance, if a person has made wine, oil, or corn out of the grapes, olives, or ears of corn belonging to another, or has made some vessel out of gold, silver, or copper belonging to another, or has mixed a sweet drink with another's wine and honey, or has made a plaster or balsam out of another's drugs, or has made a garment out of another's wool, or has constructed a ship, a chest, or a bench with another's planks.** After much diversity of opinion between the Sabinians and Proculians, an intermediate view has been followed in this way, that, if the thing made can be reduced to its former material, then the owner of the material is to be deemed the owner, but if the thing cannot be so reduced, then he is rather to be deemed the owner who made the thing. For example, a vessel which has been cast can be reduced to the raw mass of copper, silver, or gold, but wine, oil, or corn cannot be restored to the condition of grapes, olives, or ears of corn, nor can the sweet drink be resolved into the wine and honey. But if a man has made anything in part with his own materials, and in part with the materials of another, as, for example, if he has made the sweet drink with his own wine and another's honey, or a plaster or balsam out

of his own and another's drugs, or a garment out of his own and another's wool, then in such cases no doubt is to be entertained that he is the owner who made the thing, for he not only gave his labour, but provided also part of the material.

§26. But if a person has woven another's purple in with his own garment, the purple, although the more valuable, falls as an accessory to the garment, and he who was owner of the purple **has an action for theft [*actio furti*], and a personal action [*condictio*] against him who took it**, whether it was he or someone else who made the garment. For, **although things which have been destroyed cannot be claimed in a suit for their recovery, still against thieves and certain other possessors a personal remedy is available.**

§27. If the materials belonging to two persons are mingled with their consent, the total result of the mixture is common to both, as, for example, in the case of their having mixed together their wines, or melted together masses of gold or silver. And although the materials be different, so that a new thing is the result, as when a sweet drink is made with wine and honey, or an artificial metal out of gold and silver, the rule is the same; for, in such a case, there need be no doubt entertained that the thing made is common. And if it is by chance, and not through the will of the owners that the mingling has taken place, still, whether the materials are of the same or of different kinds, it is laid down that the rule is the same.

§28. If the corn of Titius has become mixed with yours, and this is with your consent, the result will be common; because each separate body, that is, each single grain, which before was your particular property has, by your consent, become common; but, if the mixture were the result of accident, or if Titius mixed it without your consent, the result is not held to be common property, because the grains of corn continue distinct in substance, and therefore in such cases the corn is no more common than would a flock be held to be common property, because sheep belonging to Titius had become

mixed with yours; but, if the whole quantity of corn is retained by either of you, the other has an action for the specific recovery [*actio in rem*] of his proportion of the corn, and it is within the province of the judge to estimate the quality of the corn which belonged to each.

§29. If a man builds upon his own ground with the materials of another, he is held to be the owner of the building, because everything built on the ground goes as an accessory to it. But the owner of the materials does not cease to be the owner of them, only in the meantime he cannot claim the materials, nor does a suit for their production [*actio ad exhibendum*] lie, on account of the statute of the Twelve Tables, by which it is provided that no one can be compelled to remove another's beam which has been worked in as part of his own building, but that he may be made, by means of the action in respect of building materials used, to pay double the value. (By the term 'beam', all materials for building are included). The object of this law is to prevent the necessity of buildings being pulled down. But if the building should be from any cause destroyed, then the owner of the materials, if he has not already obtained the double value, may claim them and sue for their production.

§30. On the other hand, if a person builds a house with his own materials on another's ground, the house becomes his to whom the ground belongs. But in this case the owner of the materials loses his property in them, because he is held to have voluntarily parted with them, that is, if he was not ignorant that he was building upon another's land; and, therefore, although the building, should be destroyed, he will not be able to claim the materials. But it is clear that, if the person who built was in possession of the soil, and the owner of the soil claims the house, and will not pay the price of the materials and the wages of the workmen, the owner may be defeated by a plea of fraud [*exceptio doli*], that is, assuming that the possessor who erected the building acted bona fide. For, if he knew that the ground belonged to another, he is

open to the charge of being in fault for rashly building on ground which he knew to belong to another.

§31. If Titius puts another man's plant in his own ground the plant will belong to Titius; on the other hand, if Titius puts his own plant in the ground of Maevius, the plant will belong to Maevius, that is, if, in either case, the plant has taken root; for before it has taken root it remains his whose it was. But, from the time it has taken root, the ownership of it is changed; so much so that, if a neighbour's tree is so close on to the ground of Titius as to take root in it, we lay down that the tree becomes the property of Titius. For reason does not suffer a tree to be deemed the property of anyone else than of him in whose ground it has taken root; and, therefore, if a tree placed near a boundary has extended its roots into the neighbour's land it becomes common property.

§32. By the same reason that plants rooted in the earth are an accessory to the soil, **so corn which has been sown is held to be an accessory to the soil. But just as he who has built on the ground of another, may, as we have said, set up a plea of fraud if the owner of the ground claims the building; so he who, at his own cost and in good faith, has sown another man's field, may protect himself with the aid of a like plea.**

§33. **Written characters, although of gold, are an accessory to the papyrus or parchment,** just as whatever is built on, or sown in, the ground, is an accessory to the ground. Hence, if Titius has written a poem, a history, or an oration on your papyrus or parchment, you, and not Titius, are to be held the owner of the substance. **But if you claim your books or parchment from Titius, and are not ready to pay the cost of the writing,** Titius can defend himself **by a plea of fraud,** assuming that he obtained possession of the papyrus or parchment in good faith. §34. **If a person has painted on the tablet of another,** some think that the tablet goes as an accessory to

the picture, others that the picture, whatever it be, is an accessory to the tablet. But it appears to us to be the better opinion, that the tablet should go as an accessory to the picture; for it is ridiculous that a painting by Apelles or Parrhasius³ should go as an accessory to the most worthless tablet. **Hence, if the owner of the tablet is in possession of the picture, the painter, should he claim it from him, but does not pay the price of the tablet, may be met by the plea of fraud; but, if the painter is in possession of the picture, it follows that an equitable action [*actio utilis*] should be given to the owner of the tablet against him; and in this case, if the owner of the tablet does not pay the cost of the picture, he may also be met by a plea of fraud, assuming that the painter became possessed of the tablet in good faith; for it is clear that, if the tablet has been stolen, whether by the painter or anyone else, an action for theft [*actio furti*] is available to the owner of the tablet.**

§35. If anyone has purchased in good faith land from a person not the owner, but whom he believed so to be, or has received it in good faith from such a person, by gift or other lawful title, it is in accordance with natural reason that the produce which he has gathered should be his in return for his care and culture; and, therefore, if the true owner subsequently appear and claim the land, he cannot sue in respect of the produce consumed; but this allowance is not granted to him who has been in possession of another's estate with knowledge of the fact; and therefore he is compelled to account, together with the land, for all the produce, although consumed. §36. He to whom the use and enjoyment [*usufruct, ususfructus*] of land belongs, does not become owner of the produce [fruits] until he has himself gathered it; and, therefore, if he should die before the produce, though ripe, has been gathered in, it does not

³ Apelles of Kos (4th cent. BCE) and Parrhasius of Ephese (5th century BCE), were regarded in Antiquity as amongst the best painters.

belong to his heir, but is the property of the owner of the soil; and nearly the same reasoning will apply to the case of the farm tenant. §37. The produce of animals includes their young as well as their milk, hair, and wool; and therefore lambs, kids, calves, colts, and sucking pigs, are immediately, by the law of nature, the property of him who has a right to the produce; but the offspring of a female slave is not reckoned as produce, and therefore belongs to the owner of the property. For it seemed absurd that a man should be reckoned amongst produce when it is for the benefit of man that, in the nature of things, all produce is provided. §38. But if a person has the use and enjoyment of a flock, he is bound to replace, by young ones, any of the flock that die; and Julian was of this opinion. So, too, the usufructuary ought to replace dead vines or trees, for he ought to cultivate with fairness and like a good head of a family.

§39. The Emperor Hadrian (117–138), following the rules of natural equity, granted to the finder any treasure which he found in his own land, and settled the same rule in the case of treasure found by chance in a sacred or religious place. If, however, a person found it by chance in another's ground, without expressly working for it, half of it was granted to the owner of the ground. In accordance with this view, he decided that if anything is found in a place belonging to the emperor, half belongs to the finder and half to the emperor. Consistently with this is the rule that, if a person finds anything in a place belonging to the imperial treasury, or to the public, or to a city, half, is to belong to the finder, and half to the imperial treasury or to the city.

§40. Delivery [*traditio*] is also, according to natural law, a mode of acquiring things, for nothing is more consonant with natural equity than that the wishes of the owner of property, desirous of transferring it, should be deemed binding; and, therefore, a corporeal thing of whatever kind, may be delivered over, and when so delivered over by the owner, it is alienated. **In this way are transferred senatorial**

provincial, and imperial provincial lands, that is, lands in the provinces, between which and Italian lands there is now, by our constitution, no difference, so that when delivery is made of them on account of a gift, a marriage portion, or other reason, they are undoubtedly transferred. §41. If things are delivered by way of gift or dowry or for any other reason, they are no doubt transferred. But things sold and delivered, are not acquired by the purchaser until he has paid the price to the vendor, or otherwise satisfied him, as by finding a surety, or giving a pledge. And, although this is a provision of the Twelve Tables, yet it may rightly be said to be deducible from the law of nations, that is, from the law of nature. But, if the vendor has trusted the purchaser, it is to be laid down that the thing immediately becomes the property of the purchaser. §42. It is immaterial whether the owner deliver the thing himself, or someone else by his direction. §43. For this reason, if anyone is entrusted by the owner with the uncontrolled management of all his affairs, and in transacting these affairs he sells and delivers a thing, he passes the property in it to the person who receives it. §44. Sometimes, too, the mere intention of the owner, without delivery, is sufficient to transfer the property in a thing, as, for example, if a person has lent, or let to, or deposited anything with you, and then sells it, or gives it to you; for, although he has not delivered it to you, as the result of the sale or gift, yet in that he suffers it to become yours, you instantly acquire the ownership of it, just as if it had actually been delivered to you for that purpose. §45. So, too, if a person sells goods deposited in a warehouse, as soon as he has handed over the keys of the warehouse to the purchaser, he transfers the ownership of the goods to the purchaser. §46. Nay, more, sometimes the intention of the owner, although directed towards an uncertain person, transfers the ownership of a thing, as, for example, the praetors or consuls throwing largess to the crowd, cannot tell what part of it anyone in the crowd may succeed in getting; yet, as it is their intention that each should have what he gets, they make what each gets to immediately belong to him.

§47. For this reason it seems quite correct to hold that the first occupant of a thing, treated by its owner as abandoned, immediately becomes owner of it; and that is held to be abandoned which its owner has thrown away with the intention that it may no longer form part of his property, as he thereupon immediately ceases to be the owner of it.

§48. It is otherwise with respect to those things which are thrown overboard in a storm for the purpose of lightening the vessel; for they remain the property of their owners, because it is clear that they were not thrown overboard through a wish not to have them, but in order that the ship might escape the perils of the sea. Hence, anyone who, with a view to make a profit of them, carries them off when washed on shore, or even found at sea, is guilty of theft. There is little difference to be discerned between these things and those which, without their owner's knowledge, drop from a vehicle in motion.

Title 2. Of corporeal and incorporeal things.

pr. Some things are corporeal [*res corporales*], others incorporeal [*res incorporales*]. §1. Corporeal things are those which are by their nature tangible, as land, a slave, a garment, gold, silver, and, indeed, other things innumerable. §2. Incorporeal things are those which are not tangible, such are those consisting in a right, as an inheritance, a usufruct, use, or obligations in any way contracted. Nor does it affect the matter that corporeal things are comprised in an inheritance; for produce gathered from the soil is corporeal, and that which is due to us by virtue of an obligation is usually corporeal, as land, a slave, or money; for it is the right itself of inheritance, or the right itself to the use and enjoyment, or the right itself arising out of the obligation, which is incorporeal. §3. Among things

incorporeal are to be included the rights over urban and rural estates, which are also called servitudes.

Title 3. Of servitudes.

pr. Rights appertaining to rural estates are: “iter”, “actus”, “via”, “aquaeductus”. “Iter” is the right enabling a man to go and pass along, but not to lead a beast of burden or a vehicle. “Actus” gives the right of leading a beast of burden or a vehicle. Hence, he who has the first right has not the second, but he who has the second, has the first also, and can make use of his right without having a beast of burden with him. “Via” gives the right of passing, whether driving or walking; for both “iter” and “actus” are included in this right of way. “Aquaeductus” is the right of leading water across another’s estate.

§1. The servitudes of **urban estates** are those attaching to buildings, and they are said to be servitudes of urban estates, because we call all edifices urban estates, although built in the country. Now, servitudes of urban estates are such as these: that a neighbour must support the weight of his neighbour’s house; that he must let his neighbour insert a beam into his wall; **that he must receive, or need not receive, the water that drops from the roof, or that flows from the gutter of another’s house, on to his house, or into his courtyard or drain; that he must not raise his house higher nor block out his neighbour’s lights.** **§2.** Some rightly consider to be amongst servitudes of rural estates the right of drawing water, of driving cattle to water, of pasturage, of burning lime, of digging sand.

§3. These servitudes are called servitudes of estates, because they cannot exist without estates. For no one can acquire or be liable in respect of a servitude over a rural or urban estate, unless he has an estate belonging to him. **§4.** If a person

wishes to create such a right in favour of his neighbour, he must effect the purpose by agreements and stipulations. A person may, also, by testament, forbid his heir to raise his house higher, to obstruct his neighbour's lights, or make him suffer the insertion by a neighbour of a beam into his wall, or to receive the water from his roof, or allow a neighbour to pass or drive beasts of burden or vehicles, or conduct water across his land.

Title 4. Of usufruct.

pr. Usufruct is the right of using and taking the produce of another's property, without altering the substance, for it is a right over the substance, and, if this perish, the usufruct itself necessarily disappears also. §1. The usufruct is capable of being detached from the ownership, and this takes place in many ways, for example, if a person leaves the usufruct to another by way of legacy, for the heir has then the bare ownership, and the legatee has the usufruct; conversely, if he leaves the estate as a legacy, minus the usufruct, the legatee has the bare ownership, and the heir has the usufruct. Again, he may leave the usufruct, by way of legacy, to one, and the estate, minus the usufruct, to another. But, if a person wishes to establish a usufruct otherwise than by testament, he should do it by agreements [*pactiones*] and stipulations. But, lest ownerships should be rendered valueless by reason of the usufruct being for ever detached, it has been thought right that there should be certain ways in which the usufruct should become extinguished, and revert to the ownership. §2. A usufruct may be established, not only in respect of land and buildings, but also over slaves and beasts of burden, and other things, except those which are consumed by the use of them, for, neither by natural or civil law are these susceptible of usufruct. Amongst these are wine, oil, corn, garments, and akin to these is coined money; for it, in the very use, by perpetual interchange, is consumed. However, on the score of utility, the senate resolved that usufruct might be

established even over these things, provided that sufficient security were given on account of them to the heir; and, therefore, if the usufruct of money is left by legacy, the money is so given to the legatee as to become his own, and he has to give security to the heir for the repayment of an equal sum in the event of his death, or undergoing a change of status. The other things mentioned above are delivered to the legatee in such a way as to become his property; but their value is estimated, and security given for the payment of the amount at which they are valued, in the event of his dying, or undergoing a change of status [*capitis deminutio*]. Hence, the senate has not, indeed, established the usufruct of these things, for that could not be done, but, by means of the security, has established a right in the nature of usufruct.

§3. The usufruct terminates by the death of the usufructuary, and by the two kinds of change of status, namely, the greatest and the intermediate, and by not using it in the manner, and at the time fixed; all which points have been settled by our constitution. **The usufruct is also terminated if the usufructuary surrenders it to the owner of the property (for a surrender to a stranger would effect nothing);** or, conversely, by the usufructuary acquiring the ownership of the thing, which is called consolidation. And further than this it is settled that if a building is destroyed by fire, or by an earthquake, or fall by reason of the usufructuary's neglect, the usufruct is extinguished, and the ground on which the building stood is not deemed liable.

§4. When the usufruct is entirely extinguished, it reverts to the ownership; and, the person who had the bare ownership, begins from that moment to have complete power over the thing.

Title 5. Of use and habitation.

pr. The bare use is established and extinguished by the very same means as the usufruct.

§1. But the use is a less extensive right than usufruct; for he who has the bare use of an estate is held to have no further right than that of taking herbs, fruit, flowers, hay, straw, and wood, sufficient for his daily use, and he may stay on the estate so long as he neither annoys the owner of it, nor hinders those who are engaged in its cultivation. He cannot let or sell, or assign gratuitously his right to another, whereas a usufructuary can do all these. §2. So he who has the use of a house is only held to have a right to the extent of living in it himself, and he cannot transfer this right to another; indeed, it seems to have been hardly conceded that he had a right to receive a guest, or to have his wife and children, and freedmen, and other free persons in his service like slaves; or in the case of a wife having the use, of having her husband to live with her. §3. In the same way, he to whom the use of a slave belongs, has only the right of himself using the labour and services of the slave; for in no way is he permitted to transfer his right to another: the same rule of course holds good in respect of a beast of burden. §4. But if the use of a flock or of a herd be given as a legacy, the person who has the use cannot take the milk, the lambs, or the wool, because these are included in the produce; but he may certainly make use of the flock to manure his land.

§5. But if the right of habitation be left to anyone by way of legacy, or granted in any other way, this does not seem to be either a right of user or usufruct, but a peculiar right in itself; and on the ground of utility, following the opinion of Marcellus, we have delivered a decision permitting those who have this right of habitation, not only to live in the place themselves, but also to let it out to others.

§6. This much must here suffice for the subject of servitudes, as well as of usufruct, use, and habitation. We shall treat of inheritances and obligations in their turn. We have already set out briefly the modes by which things are acquired by the law of nations. Let us now pass to the modes in which they are acquired by processes of the civil law.

Title 6. Of acquisition by use [*usucapio*], and of possession of long standing [*longi temporis praescriptio*].

pr. By the civil law it was provided that he who **bona fide** bought a thing, or received it by way of gift, or any other lawful means, from a person who was not the owner, **but whom he thought to be so**, should acquire the thing through having had the use of it **for one year, if it were a movable**, wherever it might be, **or for two years in the case of an immovable**, but this only if it were on Italian soil, the object of the rule being to **prevent the ownership of things remaining in uncertainty**; but though this was so settled by the ancients, on the ground that the above-mentioned time **was sufficient for owners to inquire after their property**, we have come to a better decision, in order to prevent owners being defrauded of their property too quickly, and to prevent the benefit of the rule being restricted to any fixed locality; and, therefore, we have made a constitution, providing that movables may be acquired by a use during three years, but immovables by the possession through a long period (that is, ten years between persons present, and twenty between persons absent): and that by these means not only in Italy, but in every land ruled by us, the ownership of things may be acquired, provided a lawful ground for possession precedes.

§1. But, sometimes, although a person possesses the property of another in perfect good faith, yet no acquisition by use flows from the possession, however long it may be: thus, for example [*veluti*], when anyone possesses a free person, a sacred or religious thing, or a fugitive slave. **§2.** Things stolen, or taken by force, cannot be acquired by use, although they have been bona fide possessed, during the above-mentioned period; for such acquisition by use is prohibited, as to things stolen, by the Twelve Tables, and the Atinian

statute, as to things taken by force, by the Julian and Plautian statute.

§3. When it is said that the acquisition by use of things stolen or taken by force is forbidden by these statutes, this does not mean that the thief himself, or he who possesses himself of the thing by force, is unable to acquire the property (for another reason prevents the acquisition by use, viz., that, of course, their possession is mala fide), but no one else, although he has in good faith purchased from them or received it on any other ground, has the right of acquiring by use. Whence, in respect of movables, it does not easily happen that a bona fide possessor can avail himself of acquisition by use. For whenever a person sells, or delivers for any other reason, a thing belonging to another, it is theft. §4. But yet it may sometimes be otherwise; for, if an heir, supposing a thing lent or hired out to the deceased, or deposited with him, to be part of the inheritance, sells or gives it as a gift or dowry to a person who receives it bona fide, there is no doubt that the person receiving it may acquire the property in it by use, and the thing will not be infected by the vice of theft, for in that the heir has bona fide alienated it as his own, he has not committed theft. §5. So, if he who has the usufruct of a female slave, sells or gives away her offspring, believing it to belong to him, he does not commit theft; for theft is not committed without the intention of stealing. §6. It may also happen in other ways that a person may transfer to another property not his own, without its being infected with the vice of theft, so that the possessor may acquire it by use. §7. But, in respect of things of the class of immovables, the case may more easily arise, as, if a person, without violence, has taken possession of a place vacant through the absence or negligence of the owner, or because he has died without a successor; and although he possesses mala

fide (since he knows that he has occupied **land belonging to another**), yet, if he delivers it to a third person who receives it **bona fide**, this person may acquire the property in it by long possession [*longi temporis praescriptio*], as the thing he receives has neither been stolen nor taken by force. **The opinion of certain of the ancients, who thought that there could be theft of land or of a place, has been abandoned**; and there are imperial constitutions which provide that no possessor of things of the class of immovables shall be deprived of the benefit of a long and undoubted possession. §8. Sometimes even a thing stolen or taken by force may be acquired by use, as where it has returned into the power of the owner; for, then, the vice being purged, the acquisition by use may take place.

§9. Things belonging to our imperial treasury cannot be acquired by use; but Papinian has laid down that, if before property comprising an escheated succession has been reported to the imperial treasury, a bona fide purchaser has received delivery of any part of it, he can acquire the property by use; and the late Emperor Antoninus Pius (138–161), and the late Emperors Severus and Antoninus (198–211), have issued rescripts in accordance with this view.

§10. Lastly, it is to be observed that a thing must be in such a condition as not to be infected with any vice, in order that a bona fide purchaser or person who possesses it on any other lawful ground, may acquire it by use.

§11. But a mistake as to the ground of possession is not available for acquisition by use; as, for example, if a person possesses in the belief that he has bought the thing when he has not bought it, or that he possesses on the ground of a gift, when no gift has been made to him.

§12. Long possession [*longi temporis praescriptio*], which has been running in favour of the deceased, is continued in favour of the heir, or the possessor of the goods, although he

may know that the estate belongs to another; but, if the deceased commenced an unlawful possession, the possession does not avail the heir or the possessor of the goods, although ignorant of this. And, our constitution has settled the same rule as to acquisitions by use, that is, that the time may continue to run on. §13. The late Emperors Severus and Antoninus have decided by rescript that the times of possession of vendor and purchaser shall be reckoned together.

§14. An edict of the late Emperor Marcus Aurelius (169–180) provides, that a person who has purchased from the imperial treasury a thing belonging to another person, may defeat the owner of the thing, if five years have elapsed since the sale, by setting up a plea of that fact. But a constitution of Zeno (474–491), of sacred memory, has wisely provided that those who receive anything from the imperial treasury by sale, gift, or other title, shall be immediately secure, and be victorious, whether they sue, or are themselves sued. Whilst those who think that they have a right of action in respect of the ownership or mortgage of the things alienated, may proceed against the sacred treasury within four years. An imperial constitution, which we ourselves have recently issued, extends to those who have received anything from our palace, or from that of the august empress, the above-mentioned provisions of the constitution of Zeno, relating to alienations by the treasury.

[...]

JUSTINIAN, BOOK III.

[...]

Title 13. Of obligations.

pr. Let us now pass to obligations. An obligation is a tie of law binding us to the fulfilment of something in accordance with the laws of this empire. **§1. The principal division [*summa divisio*] of all obligations is into two kinds**, for they are either civil or praetorian. Civil obligations are those directly established by statute, or at least approved by the civil law. Praetorian obligations are those which the praetor has created by his own authority; they are also called honorary. **§2.** A further division separates them into four kinds, for they arise either from contract/contracting, or what is analogous to a contract [*quasi ex contractu*],⁴ or from delict/wrongdoing, or what is analogous to a delict [*quasi ex maleficio*].⁵ **It will be necessary, first, to treat of those which arise from contract/contracting, of which again there are four kinds**; for they are contracted by the thing [*re*], or by words [*verbis*], or by writing [*litteris*], or by consent [*consensu*]. We must consider each of these separately.

Title 14. Of the modes in which an obligation is contracted by means of the thing itself [*obligationes re*].

pr. An obligation is contracted by means of the thing itself, as, for example [*veluti*], in the case of a loan

⁴ See J. 4.1.pr.

⁵ Or *quasi ex delicto*, as in J. 4.5.

in kind [*mutuum*]. Now the obligation of loan in kind applies to those things which are estimated by weight, number, or measure, as, for example, wine, oil, corn, coined money, copper, silver, gold, which things we give either by counting, or measuring, or weighing them, in order that they may become the property of those receiving them, and the same things lent are not returned to us, but others of the same nature and quality; and, hence, this is called a “*mutuum*”, because the thing is so given by me to you that from being mine it becomes yours [*ex meo tuum*]. From this contract arises the action termed a “*condictio*”. §1. He, also, who receives a thing which is not owed to him from a person who pays it by mistake, is bound by the thing, and the “*condictitia*” action is available to the plaintiff against him for the recovery of the thing, for he can be sued by the personal action “if it appear that he ought to give”, just as if he had received a loan in kind. Hence, a pupil to whom, without the authorisation of his tutor, something has been paid by mistake which was not due, is not liable to a personal action for that which is not due [*condictio indebiti*], any more than he would be by the giving of a loan in kind. But this kind of obligation does not seem to arise out of contract, since he who gives with the intention of paying, is rather desirous of dissolving than of contracting an obligation.

§2. Again, he to whom something is given in order to be used [*commodatum*], that is, lent, is bound by means of the thing itself, and is subject to the action for a specific loan [*actio commodati*]. But his position is widely different from him who receives a loan in kind [*mutuum*]; for the thing is not given him in order that it may become his property, and therefore he is bound to restore the very thing itself. And he who receives a loan in kind, if by any mischance, as, for example, by fire, by the fall of a building, by shipwreck, by the attack of robbers [*latrones*] or enemies, he should lose

what he receives, nevertheless remains bound. But he who receives a thing for use, is indeed required to employ the utmost diligence in the preservation of it, and it will not be sufficient for him to have given the same amount of care which he has been accustomed to give in respect of his own property, if a more careful person might have preserved it in safety; but he is not liable for loss occasioned by superior force [*vis maior*], or unavoidable accident [*casus*], provided only that this mischance was not due to his own fault [*culpa*]; otherwise, if you choose to take with you on a journey the thing simply lent you to use, and you lose it by the attack of enemies or robbers, or by shipwreck, there is no doubt but that you are liable for its restitution. A thing is properly said to be lent for use when the thing is given you to be used, no recompense being received or agreed upon; otherwise, if there is any recompense, the use of the thing is held to be hired out to you, for a loan in specie must be gratuitous.

§3. Further, he also with whom something is deposited [*depositum*] is bound by means of the thing itself, and liable to the action of deposit [*actio depositi*], and he is also liable for the restitution of the thing itself which he received. He is, however, only liable on the ground of having acted with intent [*dolus*], and is not liable under the head of fault [*culpa*], that is, for carelessness or negligence. So, if a thing is stolen from a careless depositor, he is not liable, because he who deposits in the custody of a careless friend has only himself to blame.

§4. The creditor, also, who receives a pledge [*pignus*] is bound by means of the thing itself, and is liable by the action of pledge [*actio pignoratitia*] for the restoration of the very thing which he receives. But since a pledge is given in the interest of both parties, of the debtor that he may the more readily borrow money, and of the creditor that the debt due to him may be better secured, it has been held to be sufficient if he employ the utmost diligence about the custody of the thing, and if he has done this, and he lose the thing by some

accident, he is safe, and is not prevented claiming the sum advanced.

Title 15. Of verbal obligations [*obligationes verbis*].

pr. A verbal obligation is contracted by means of a question and answer, when we stipulate for anything to be given to or done for us, from which two actions arise, viz., a “*condictio*”, when the stipulation is certain, and an action grounded on the stipulation [*actio ex stipulatu*] when it is uncertain. The name stipulation comes from “*stipulum*”, which signified, with the ancients, “firm”, and, perhaps, comes from “*stipes*”, the trunk of a tree.

§1. In this case such words as the following were formerly used: **Do you bind yourself? [*spondes?*] I do bind myself. [*spondeo*] Do you promise? I do promise. Do you become an additional debtor? I do so become. Do you become a surety? I do so become. Will you give? I will give. Will you do? I will do.** But whether the stipulation is expressed in Latin, Greek, or any other tongue is immaterial, provided that both the parties to the stipulation understand it; and it is not necessary for both parties to use the same language, but it suffices if the answer agree with the question, and hence two Greeks may contract an obligation by means of the Latin tongue. Formerly, these solemn words were in actual use, but, subsequently, the constitution of the Emperor Leo (467–474) abolished the solemnity attaching to the words themselves, and required only concordant apprehension and mutual assent, in whatever words expressed.

[...]

Title 19. Of ineffective stipulations

pr. Everything of which we can be owner, whether movable or immovable, may be the subject matter of a stipulation.

§1. But if anyone should have stipulated for a thing, which does not, or cannot, exist, as, for example, for Stichus, who is dead, but whom he thought living, or in respect of **hippocentaurs**, which are non-existent things, the stipulation is ineffective. **§2.** The same rule holds good in the case of a person stipulating for a **sacred or religious** thing, **which he thought to be the subject of commerce**, or for public property appropriated to the perpetual use of the people, as a forum, or theatre, **or for a free man, whom he thought to be a slave**, or for a thing of which he has not the power of disposal, or **for a thing belonging to himself**, nor will the stipulation remain in suspense on the ground that public property may get into private hands, or the freeman may become a slave, or the stipulator may acquire the power of disposing of the thing, or the thing which now belongs to him may cease to be his; but it is then and there ineffective. So, conversely, although a thing may have been validly made the subject matter of a stipulation at the outset, yet, if it subsequently fall within any of the descriptions to which we have above referred, without the act of the promisor, the stipulation is extinguished, and such a stipulation as the following, and others of a similar class, are not even effective at the outset: ‘Do you bind yourself to give Lucius Titius when he shall become a slave?’, for things which, by their nature, are independent of our ownership, cannot in any way be made the subject-matter of an obligation.

§3. If a person has promised that another shall give or do something, he is not bound, as, for example, if he promise that Titius shall give five gold pieces. But if he has promised that he will bring it about that Titius shall give five gold pieces, he is bound.

§4. If a person stipulate on behalf of some other person than him in whose power he is, the stipulation is ineffective. But, clearly, it may be arranged that payment is to be made to a third person (as, if a person stipulate thus: ‘Do you bind yourself to pay me or Seius?’), in which case, the benefit of the obligation is acquired by the stipulator; but payment may be made to Seius, even against the will of the stipulator, and the obligor is released by operation of law, and the stipulator will have an action, grounded on a mandate, against Seius. **If a person stipulate that ten gold pieces shall be paid to him, and to a third person to whose power he is not subjected, the stipulation is valid;** but it has been a matter of doubt whether the whole sum, which formed the subject-matter of the stipulation, is due, or only half; and we think that only half can be claimed. [...]

§5. Moreover, a stipulation, again, is ineffective, if the answer should not agree with the question put; as, for example, if a person stipulate for ten gold pieces to be given by you, and you promise five, or vice versa, or if he stipulate absolutely, and you promise conditionally, or vice versa; provided, of course, that you express this disagreement, that is, if, when a person stipulates conditionally, or for a limited period, you answer: ‘I bind myself for today’; but if you answer only: ‘I promise’, you will seem briefly to have promised, in respect of the time or the condition mentioned; for it is unnecessary that everything should be repeated in the answer, which the stipulator may have expressed.

[...]

§7. It is evident that the dumb can neither stipulate nor promise, and the same restriction applies to the deaf; because he who stipulates ought to be able to hear the words of the promisor, and he who promises, the words of the stipulator. Hence it follows

that we are not speaking of a person who hears with difficulty, but of one who does not hear at all. **§8. A person who is of unsound mind cannot transact any business, because he does not understand what he is doing. [...]**

§12. Again, a verbal obligation entered into between absent persons is ineffective. But as this rule gave ground for lawsuits with contentious men, who, perhaps, after some time had elapsed, set this up in bar, alleging that either they or their opponents were not present, therefore our constitution—which is intended to secure the speedy determination of disputes, and which we addressed to the advocates of Caesarea—has provided that documents showing that the parties were present are to be in all cases believed, unless he who uses such unworthy testimony shall have made it evident by the clearest proofs, whether by writing or by credible witnesses, that either he or his opponent was in some other place during the whole of the day on which the document was prepared.

[...]

§14. Again, if anyone had stipulated thus: ‘If the ship hereafter arrives from Asia, do you bind yourself to give today?’ the stipulation was ineffective, as being preposterously drawn up. But, since the Emperor Leo of glorious memory held that a stipulation of this sort, which is called preposterous, was not to be rejected when relating to marriage portions, we have thought it right to give it full force, so that every stipulation of this sort may be binding, not only when relating to marriage portions, but to anything else. [...] **§16.** So we may validly stipulate for a thing after the death of a third person. **§17.** If the document state that a person has promised, this is to be taken as if an answer had been given to a precedent question. **§18.** Whenever several things are included in one stipulation, the promisor is bound in respect of all if he simply answer: ‘I bind myself to give.’

But if he answer as to giving only one, or some of them, the obligation only extends to those in respect of which he has promised. For, of the several included stipulations, one or some are deemed to have been concluded, for each of the things should be stipulated for and answered singly. **§19.** No one (as has been already stated) can stipulate on behalf of another, for this class of obligations has been invented to enable each person to acquire for himself what will benefit himself, but if it is to be given to another, it is of no benefit to the stipulator. If, however, anyone wish to do this, he should stipulate for a penalty, so that, if the thing is not done as is intended, the stipulation will involve a penalty to him who has no other interest in it, for, when a penalty is stipulated for, the interest of the stipulator is not the point considered, but what is the amount payable under the condition. Therefore, if a person stipulate that a thing shall be given to Titius, he effects nothing, but if he should add as a penalty: 'Do you bind yourself to give so many gold pieces if you do not give?' then the stipulation is binding. **§20.** But if a person stipulate for another, having himself an interest in the matter, it has been decided that the stipulation is effective. [...] So, if a person has stipulated that a thing shall be given to his procurator, the stipulation is effective. So, too, if a person has stipulated that a thing shall be given to his creditor, and the stipulator is interested in the performance of the promise; in that otherwise he may become liable to a penalty, or the estates which he has mortgaged should be sold, the stipulation is effective. **§21.** On the other hand, he who has promised that another shall do, is held not to be liable unless he himself promise to be liable under a penalty. [...] **§23.** If the stipulator has one thing in his mind and the promisor another, an obligation is no more contracted than if there had been no answer to the question; as, for example, if a person has stipulated that you should give the slave Stichus, but you are thinking of Pamphilus, whom you thought was called Stichus. **§24.** A promise grounded on a base purpose, as, for example, if a person promise to commit homicide or sacrilege, is not binding.

[...]

§26. A person who has stipulated that such a thing shall be given to him in such a year or in such a month cannot validly sue until the whole of the year or month has elapsed. **§27.** If you stipulate for an estate, or a slave, you cannot immediately sue unless such a period has elapsed within which delivery could have been made.

[...]

Title 21. Of obligations contracted by entries in writing [*obligationes litteris*].

pr. Formerly an obligation was created by writing [*scriptura*], which was said to be made **by entries**, but these entries are not now in use. Clearly, if a person has stated in writing that he owes a sum which has not been paid over to him, it has been repeatedly decided that he cannot, after a long period has elapsed, set up a plea of not having received the money [*exceptio non numeratae pecuniae*]; and it thus happens that, even at the present day, as he has no redress, he is bound by the writing, and, upon this, a personal action [*condictio*] is grounded, that is, of course, in the absence of any obligation contracted by words. The period of time within which this plea was allowed was formerly fixed, under the imperial constitution, as not less than five years. But, in order that creditors may not run the risk of, perhaps, being defrauded of their money after a longer period, we have, by our constitution, abridged the time, so that this plea is not available after the lapse of two years.

Title 22. Of obligations by consent [*obligationes consensu*].

pr. Obligations are created by consent in purchases and sales [*emptio venditio*], lettings and hirings [*locatio conductio*], partnerships [*societas*] and gratuitous agencies [*mandate*].

§1. An obligation is, in these ways, said to be contracted by consent, because there is no need either for a writing or for the presence of the parties, nor is it necessary that anything should be given to make the obligation acquire binding force; but it is sufficient if those who are transacting the business agree.

§2. Hence, also, such obligations may be contracted between absent persons, as, for example, by letter or messenger.

§3. Again, in contracts of this nature, each party is obliged to act towards the other according to what is fair and equitable, whereas, in verbal obligations, one party stipulates and the other promises.

Title 23. Of purchase and sale [*emptio venditio*].

pr. Purchase and sale is contracted as soon as the price is agreed upon, although the money has not yet been paid, nor even any earnest [*arrha*] given, for what is given by way of earnest is evidence that purchase and sale has been contracted. But this is the case with purchases and sales made without writing; for no alteration has been made by us in such sales. But, in respect of those which are committed to writing, we have enacted that a purchase and sale is not to be complete unless an instrument of purchase has been drawn up, being either written by the contracting parties, or at least signed by them,

if written by another hand; or, if drawn up by a notary, it must be accepted by the parties as completely setting out the terms in all its parts; for, as long as any of these points are wanting, there is opportunity to retract, and either vendor or purchaser may withdraw from the purchase without incurring any penalty. We, however, have only allowed them thus to withdraw without loss, if nothing has already passed by way of earnest; for, if earnest has been given, whether the contract of sale has been created with or without writing, he who declines to complete the contract, if he is the purchaser, is to forfeit the earnest; but, if he is the vendor, he must hand over double the amount, although nothing has been agreed upon about the earnest.

§1. The price, however, should be certain, for there can be no sale without a price. And the price should be certain. What if the parties have agreed that the price shall be what Titius shall value the thing at?

This was a point much debated amongst the ancients, whether this was or was not a sale. But our decision settles the matter in this way, viz., that, whenever a sale is made, the price being “so much as he shall determine”, the contract shall stand on this condition, that, if he who has been so named fix the price, then the price is to be paid according to the amount fixed by him, and the thing delivered, so that the sale may be completed, the purchaser having an action grounded on the purchase [*actio empti*], and the vendor an action grounded on the sale [*actio venditi*]. But, if he who has been named is either unwilling or unable to fix the price, then the sale is void, on account of no price having been agreed upon. This rule, as we have adopted it in respect of sales, may, without absurdity, be applied to letting and hiring.

§2. Again, the price should consist of a sum of money, for it was a point much disputed whether the price can consist of anything else, as, for example, whether a slave, or a piece of land, or a garment can be the price of another thing. Sabinus and Cassius thought that the price could consist of some other thing,

whence arises the common opinion that purchase and sale is contracted by the exchange of things, and that this is the oldest form of purchase and sale, and the Greek poet Homer was quoted, who somewhere says that the army of the Greeks procured themselves wine in exchange for certain things. These are his words:

**“Then straightway the long-haired Greeks bought wine,
Some with copper, others with flashing steel,
Others with ox-skins, and others with the oxen
themselves,
Others with prisoners of war.” — *Iliad*, viii, 472-5**

The leaders of the opposite school viewed the matter otherwise, and thought the exchange of things was one thing and purchase and sale quite another, otherwise there would be no means of ascertaining, on an exchange, which was to be taken to be the thing sold and which given by way of price, for it seemed unreasonable to hold that both were sold and given by way of price; but the opinion of Proculus who maintained that exchange was a peculiar kind of contract apart from sale, has very properly prevailed, for it is supported by other verses of Homer, and confirmed by adducing more weighty grounds; and this has been admitted by the late emperors, who have preceded us, and is more fully discussed in our Digests.

§3. As soon, then, when purchase and sale has been contracted (which will be, as we have said, when the parties are agreed about the price, assuming the transaction is carried out without writing), the risk as to the thing sold immediately falls upon the purchaser, although the thing has not yet been delivered to him. Hence, if the slave die or receive an injury in some part of his body, or the whole or some portion of the house is burnt, or the whole or some portion of the land is swept away by the force of the waters, or is much diminished or deteriorated in value by an

inundation, or by the trees being thrown down by tempest, the loss is on the purchaser, and, although he does not get the thing, he must pay over the price, for the vendor is not responsible for that which happens without fraud or negligence on his part. But if, after the sale, the land is increased by alluvion, the purchaser profits by it, for he who incurs the risk should take the gain. §3a. If, however, a slave, who had been sold, runs away or is stolen, without any fraud or negligence on the part of the vendor, it will be necessary to inquire whether the vendor undertook the safe custody of him until delivery, for, if he undertake this, the risk will clearly be on him; but, if he has not undertaken this, he is safe. The same rules are to be understood as applying to other animals or things; but, in any case, the vendor is bound to assign to the purchaser his right to a real [*rei vindicatio*] or personal action [*condictio*]; for, of course, he who has not yet delivered a thing to the purchaser, is still the owner of it, and the same remarks apply to the action of theft [*actio furti*] and the action for unlawful injury [*actio legis Aquiliae*].

[...]

§5. The purchase, with knowledge of the fact, of a sacred or religious place, or a public place (as, for example, a forum or basilica), is void; but if, deceived by the vendor, he has bought it supposing it to be private property or unconsecrated, he will have an action on the purchase, not for the purpose of getting the property, but for damages for the loss he has sustained by being deceived. The same rule applies to the case of a free man bought as a slave.

Title 24. Of letting and hiring [*locatio conductio*]

pr. Letting and hiring closely resembles purchase and sale, and is regulated by the same rules of law. For just as purchase and sale is contracted when the price is agreed upon, so is letting and hiring held to be contracted when the

sum to be paid for the hire is settled; and the person letting has an action on the letting [*actio locati*], and the hirer an action on the hire [*actio conducti*]. §1. And what we have stated above,⁶ as to the case of the price being left to the decision of a third party, is to be understood as applying also to letting and hiring, **if the sum to be paid by way of hire has been left to the decision of a third party. For this reason, if a person should give clothes to a fuller to be cleaned and pressed, or to a tailor to be mended, without, at the same time, having agreed upon the sum to be paid,** but only that so much shall be given as we subsequently agree upon, letting and hiring cannot properly be held to have been contracted, but a general action on the case [*actio praescriptis verbis*], based upon the agreement of the parties, will be available. §2. Moreover, just as it was commonly doubted whether purchase and sale was contracted by an exchange,⁷ or a similar doubt was raised in the case of letting and hiring, **if, say, a person gave you something to use or take the produce of, and, in return, received from you another thing for his use, or of which he was to have the produce.** And it has been decided that this is not a letting and hiring, but a peculiar kind of contract. So, for example, if a person has an ox, and a neighbour of his also has one, and it is agreed between them that the oxen are to be lent to each other to work for ten days at a time, and the ox of one dies whilst in the possession of the other, no action of letting or of hiring, or of loan, lies, since the loan was not gratuitous, but a general action on the case [*actio praescriptis verbis*] must be brought.

§3. Hence, also, purchase and sale, and letting and hiring, seem to have some resemblance to each other, so that, in certain cases, it is a matter of doubt whether a contract of buying and selling, or of letting and hiring, has been made, as, for example, in the case of those lands which are delivered to

⁶ Above, J. 3.23.1.

⁷ Above, J. 3.23.2.

persons to be enjoyed in perpetuity, that is, that, as long as the rent or price of hire is paid for these lands to the owner, he cannot take away the lands from the hirer or his heir, or anyone to whom the hirer or his heir has sold or delivered over the lands by way of gift or dowry, or otherwise alienated them. But, as this contract was a matter of dispute amongst the ancients, some holding it to be a letting, and others a sale, a statute was passed, by the Emperor Zeno (474–491), which declared the contract of emphyteusis [perpetual lease] to be of a special nature, neither inclining to letting nor to sale, but to rest on its own agreements; and that, if any special pact was made on the subject, it was to be as binding as if it were the nature of the contract to contain such pact; but if no agreement was made respecting the risk, then, if the thing was totally destroyed, the loss should be thrown back on the owner, but a partial loss should fall upon the lessee, and this rule is now in force.

§4. Again, the question arises whether purchase and sale, or letting and hiring, has been contracted when Titius has come to an agreement with a goldsmith that the latter, out of his gold, is to make him rings of a certain weight and of a certain form, and to receive, say, ten gold pieces. Cassius lays down that there is a sale of the material and a hiring of the work; but it has been decided that only purchase and sale has been contracted, though, if Titius gave the gold and came to an agreement as to the price to be paid for the work, there is no doubt but that it is letting and hiring.

§5. The hirer ought to do everything according to the terms of hiring, and, if any condition has been omitted, he ought to supply it, according to what is fair and equitable. He who has given or promised a sum for the hire of clothes or silver, or a beast of burden, must bestow as much care for the preservation of the thing he hires, as the most careful head of a family bestows on the care of his own property; and if he

does do so, and yet the thing is lost through some accident [*casus*], he is not liable for its restoration.

[...]

Title 25. Of partnership [*societas*].

pr. We are in the habit of entering into partnership, either in respect of our whole property, to which the Greeks give the special name of κοινοπραξία [*koinopraxia*], or in respect of some one particular business, as, for example, the sale or purchase of slaves, or of wine, oil, or corn. [...]

Title 26. Of mandate.

pr. Mandate is contracted in five ways, whether by a person commissioning you to act for his benefit, or for his and yours, or for another person's only, or for his and another person's, or for yours and another person's, but a commission given you for **your benefit only is useless**, and therefore no obligation arises out of it, nor does any right of action on the commission [*actio mandati*] exist between you. **§1.** Mandate arises for the benefit of the mandator only; if, for example, a person commission you to conduct his business, or to buy an estate for him, or to become surety for him. **§2.** It arises for your benefit, and that of the mandator; if, for example, he commission you to lend money at interest to a person who borrows it for the affairs of the mandator; or, if, when you, as a creditor, are about to sue him on his suretyship, he commission you to sue the principal debtor at his risk, or to stipulate at his risk, from a person whom he appoints as his substitute for a sum which he owes to you. **§3.** The contract is created for the benefit of a third person; if, for example, you are commissioned to manage the affairs of Titius, or to buy an estate for him, or to become surety for him. **§4.** It

arises for the benefit of the mandator and a third party, if, for example, the mandator commissions you to see to some business transactions in which he and Titius are jointly interested, or to buy an estate for him and Titius, or to become surety for him and Titius. §5. It arises for your and a third party's benefit, if, for example, you are commissioned to lend money at interest to Titius, but if you are to lend the money without interest, only the benefit of the third person would be involved. §6. It arises for your benefit only, if, for example, you are commissioned to place your money out in the purchase of land rather than at interest, or, on the other hand, that you should put it out at interest rather than invest it in land. But this form of gratuitous agency is rather advice than a commission, and on that account is not obligatory, because no one is liable, on the ground of having given advice, even though it may not have been beneficial to him to whom it was given, since everyone is free to consider for himself whether the advice is good.

Hence, if a person should advise you to purchase something with, or lend, the money which you have lying idle at home, although it may not have been advantageous to you to have bought that thing, or to have lent the money, still he is not liable to you on the mandate, and this is so much so that it has been doubted whether he would be liable to an action on the mandate [*actio mandati*], if he commissioned you to lend money at interest to Titius; but the opinion of Sabinus has prevailed that a mandate in such a case would be obligatory, because you would not have lent your money to Titius, unless you had been commissioned to do so.

§7. So a mandate is not obligatory **which is contrary to good morals; as, for example, if Titius commissions you to steal, or do damage, or do him an injury;** for although you incurred the penalty arising from the act you have no action against Titius.

[...]

§13. Finally, it must be noted that, unless a mandate is gratuitous, it falls under the head of some other deal, for, **if the remuneration is agreed upon, it is letting and hiring.** And we lay down, generally, that, in those cases in which the duty is undertaken without any remuneration being agreed upon, and, therefore, mandate or deposit is contracted, in such cases, if remuneration comes in question, letting and hiring is contracted; and hence an **action on the mandate** [*actio mandati*] lies, **if a person gives clothes to a fuller to be cleaned and pressed, or to a tailor to be mended**, without any remuneration being agreed upon or promised.

[...]

JUSTINIAN, BOOK IV.

Title 1. Of obligations arising from wrongs/wrongdoings (delicts).

pr. As in the preceding book we have discussed the subject of obligations arising from contract and quasi-contract, it follows that we should now deal with obligations arising from a wrong [*maleficium*]. The former class, as we pointed out at the time, **are divided into four kinds**, but of these latter there is only **one kind**, for they all arise from the act itself, that is, from the wrong, as, for example, from theft, from robbery, or damage, or outrage.

§1. Theft [*furtum*] is a fraudulent handling [*contrectatio fraudulosa*] of a thing, of its use or the possession of it, and this is forbidden by natural law. **§2.** The word “furtum” is said to come from “furvum”, that is, “black”, because it is done secretly and darkly, and generally by night; or from “fraus”, or from “ferre”, that is, “auferre” [to carry away], or it is derived through the Greeks, who call a thief [*fur*], φῶρ [*phoor*], which, too, comes from φέρειν [*pherein*], to carry off.

§3. There are two kinds of theft, viz., that which is manifest [*furtum manifestum*]; and that which is not manifest [*furtum nec manifestum*]; for that which arises from the discovery of the thing after solemn search, and that which arises from the stolen thing being deposited elsewhere, are rather forms of actions relating to theft than kinds of thefts, as will appear below. A manifest thief is he who the Greeks call “caught in the act” [ἐπ’αὐτοφώρῳ – *ep’autophorooi*], being not only he who is taken in the act of thieving, but also he **who is taken in the place** where it is committed, as, for example, he who has committed theft in a house, and has been caught before he has got out of the door,

or has stolen **olives in an olive-yard, or grapes in a vineyard**, and has been caught **whilst in the olive-yard, or in the vineyard**. Manifest theft must be **further** extended to include the case of the thief **having been seen** or caught, in a public or private place, by the owner or anyone else, whilst still **holding** the thing, and before he has **reached the place to which he intended to carry it**. But if he has carried the thing to the place he intended, although he may be caught with the stolen thing, he is not a manifest thief. **As to what is non-manifest theft may be gathered from what we have said, for that which is not manifest is, of course, non-manifest.**

§4. Theft is said to be “conceptum” when the stolen thing has been searched for, and found in the presence of witnesses in a person’s possession; for a special action [*actio furti concepti*]⁸ lies against him, even though he may not be the thief. Theft is said to be “oblatum” when the stolen thing has been brought to you by someone, and has been found in your possession, that is, if it has been given you with the view of its being found in your possession rather than in his. For you, in whose possession the thing has been found, are entitled to a special action [*actio furti oblatis*]⁹ against him who placed the thing in your possession, although he may not be the thief. There is also an action for opposing a search against him who has prevented a person from searching, in the presence of witnesses, **for stolen goods** [*actio furti prohibiti*]. Moreover, under the edict of the praetor, he who does not produce stolen property searched for, and found in his possession, incurs a penalty by means of the action for not producing stolen goods [*actio furti non exhibiti*]. But these actions, based on the discovery of the stolen thing after search, on the deposit of the stolen thing elsewhere, on the

⁸ The action based on the discovery of the stolen thing after formal search.

⁹ The action based on the bringing of the stolen thing elsewhere.

opposition offered to a search, and on the non-production of stolen goods, have fallen into disuse; for, as searching for stolen property is not now conducted according to the ancient practice, therefore these actions have very properly ceased to be in common use, and it is abundantly clear that all who have knowingly received and concealed stolen property are liable to the action for non-manifest theft.

§5. The penalty for manifest theft is quadruple the value, whether the thief be a slave or a free man; that for non-manifest theft is double the value.

§6. Theft is committed, not only when a person takes away the property of another in order to appropriate it, but generally when a person deals [*contrectat*] with the property of another against that other's will. Hence, if a creditor uses the pledge, or a depositary the thing deposited, or if he, who has the use of a thing, uses it for another purpose than that for which it has been given, he commits theft; as, for example, if a person has borrowed silver plate, as if about to invite friends to supper, and carries it abroad with him, or if anyone, having borrowed a horse for a ride, takes it away with him a long distance, as in the case of him whom the ancient authors quote as having taken the horse into battle. §7. It is, however, settled that those who use things otherwise than was agreed upon when they were lent, only commit theft if they know that they are doing so against the will of the owner, and that he, if he knew of it, would not allow it; but, if they believe that they would be allowed, they are clear of guilt; and this is a most salutary distinction, for theft cannot be committed without the intention of stealing [*animus furandi*].

§8. But, although a person thinks that he is dealing [*contrectare, contrectatio*] with the borrowed thing

in a way contrary to the will of the owner, yet, if the owner is a consenting party, it is laid down that no theft has been committed. Whence arises this question: When Titius had persuaded the slave of Maevius to steal some things from his master, and to bring them to him, and the slave disclosed this to Maevius, and Maevius, wishing to detect Titius in the wrongful act, allowed his slave to take those things to Titius, is Titius liable, either in an action for theft [*actio furti*], or in an action for the corruption of the slave [*actio servi corrupti*], or in neither? The doubt here arising having been submitted to us, we have considered the conflicting opinions of the ancient jurists on the subject, some of whom held that neither the action of theft, nor that for corrupting a slave, were available, while others thought only the action of theft lay; and we, to cut short crafty distinctions of this sort, have decided that both the action of theft and that for the corruption of a slave may be brought against him; for, although the slave has not been depreciated in value by the corruption of the tempter, and, therefore, the rules upon which the action for the corruption of a slave are based do not apply, yet the intention of the corrupter to destroy the honesty of the slave is involved, and he may, therefore, be rendered liable to the penal action, as if the slave had been corrupted by this very act, lest the impunity, in a case of this sort, should incite others to the perpetration of a similar misdeed towards a slave who could easily be corrupted.

§9. Sometimes theft may be committed of free persons, as, for example, if a person has carried off one of our children in our power. §10. A person may even steal his own property, as, for example, if a debtor deprives his creditor of a thing pledged to him.

§11. Sometimes a person is liable to an action for theft [*actio furti*], though he himself has not

committed the theft, as in the case of him by whose help and advice [*ope consilio*] theft has been committed. In this class may be included him who has knocked money out of your hand to enable another to run off with it, or got in your way to enable another to steal, or has scattered your sheep or oxen to enable another to catch them, and the ancient writers include in the same class him who, with a piece of red cloth, has frightened a herd of cattle. If, however, this was done from wantonness, and not with that intention necessary to constitute theft, the action should be one based on the circumstances of the case [*actio in factum*; Gaius: *utilis*]. But where Titius has committed a theft with the assistance of Maevius, both are liable in an action for theft. So he is held liable, as for theft, on the ground of his help and advice, who enables another to commit theft by placing ladders to windows, or breaking open windows or a door, or who, knowing the purpose for which they have been borrowed, has lent tools for housebreaking, or ladders for placing against windows. But a person who does not assist in the commission of a theft, but only advises and urges its commission, is not liable in an action for theft. §12. If those who are in the power of ascendants or masters steal a thing from them, they are guilty of stealing from them, and the thing falls under the head of stolen property (so that no one can acquire it by use until it has again returned into the power of its owner), but an action for theft does not lie, because no action on any ground can arise between them. But, if such a theft has been committed with the help and advice [*ope consilio*] of another, then, as a theft has been committed, this person may properly be held liable to an action for theft, because, in fact, it was by his help and advice that the theft was committed.

§13. An action for theft is available to him whose interest it is that the property should be safe, although he may not be the owner; and, therefore, it

is only available to the owner if it is to his interest that the thing should not perish. §14. Hence it is clear that a creditor may bring an action for theft in respect of a stolen pledge, even though his debtor is solvent, because it is to his advantage, rather, to rely upon the security than to bring a personal action; and this is carried so far that, although the debtor himself has stolen the thing, nevertheless an action for theft lies in favour of the creditor. §15. Again, if a fuller received clothes to be cleaned and pressed, or a tailor has received them to mend for a fixed remuneration, and the clothes are stolen, it is he, and not the owner, who has the action for theft, because the owner is not interested in their preservation, since he can, in an action based on the letting [*actio locati*], sue the fuller or tailor for his property. But, if a thing be stolen from a bona fide purchaser, he is entitled, as in the case of a creditor, to the action for theft, although he may not yet be owner. But the action for theft does not lie in favour of the fuller or the tailor, unless they are solvent, that is, unless they are in a position to pay the owner the value of the thing; for, if they are insolvent, then, as the owner cannot get redress from them, he is entitled to the action for theft, because, in such a case, it is to his interest that the thing should be safe; and the same rule holds although the fuller or the tailor may be partially solvent. §16. What we have said in respect of the fuller and of the tailor was deemed, by the ancients, to be capable of application, also, to the case of the borrower. For, as the fuller, by accepting remuneration, becomes answerable for the safe custody of the thing; so, also, he who derives benefit by the use of the thing incurs a liability for its safe custody [*custodia*]. But our forethought has here, also, introduced an improvement by our decisions, for the owner is to have the right to decide whether he will bring an action based on the loan [*actio commodati*] against him who borrowed the thing, or an action for theft against him who

stole it; but, having made his election to sue either of them, he cannot afterwards fall back on an action against the other, and, if he elect to sue the thief, the borrower is released altogether from liability; but, if he elect to sue the borrower, he cannot bring an action for theft against the thief, but the borrower can sue the thief by the action for theft; though this is to be so only if the owner, knowing the thing to have been stolen, has proceeded against the borrower, for, if he is ignorant of this, or being uncertain whether the property is in the hands of the borrower or not, has commenced an action based on the loan [*actio commodati*], and then afterwards, on ascertaining the facts, wishes to withdraw from the action based on the loan, and commence one for the theft, liberty will be given to do so without any difficulty being thrown in his way, as it was in ignorance of the facts that he sued the borrower, unless reparation has been made to the owner by the borrower, for then the thief is released from any liability to an action for theft on the part of the owner, but the person who has made reparation to the owner, in respect of the thing lent to him, has the right of action transferred to him. In the case, however, of the owner having at the outset, in ignorance that the thing had been stolen, commenced an action against the borrower, based on the loan [*actio commodati*], but, on discovering the truth, has gone against the thief, then it is most clear that the borrower is to be altogether released from liability, whatever may be the result of the action against the thief, just as, in the opposite case, the thief would be released from liability, whether the borrower was in a state of absolute or partial solvency.

§17. But he with whom a thing is deposited is not answerable for its safe custody, and the only liability he incurs, in respect of it, is that arising out of any fraudulent act of his own; for if the thing is stolen from him, as he is not liable to restore it by an action based on the deposit [*actio depositi*], and, for the same reason, has no interest in the preservation of

the thing, therefore, he cannot sue by an action for theft, but that action is available to the owner.

§18. Finally, it must be noted that the question has been raised whether a person under the age of puberty, by carrying off another person's property, commits theft. And it is settled that, since theft turns on the intention, a person under the age of puberty can only be liable if he is approaching the age of puberty, and, consequently, understands that he is doing wrong.

§19. The action for theft, whether for double or quadruple the value, is only for the purpose of recovering the penalty. For the owner can separately sue for the recovery of the thing itself, either by a real [*rei vindicatio*] or a personal [*condictio*] action. The real action lies against the possessor, whether it is the real thief himself who possesses or anyone else; the personal action lies against the thief himself or his heir, although not in possession of the thing.

Title 2. Of the action for robbery with violence [*actio vi bonorum raptorum; rapina*].

pr. He who takes, by violence, another's property, is, indeed, also liable to an action for theft; for who handles [*contrectat*] another's property more against the owner's will than he who takes it with violence? and, therefore, he is rightly said to be a wicked thief; but the praetor has introduced a special action for this kind of wrong, which is called the action for robbery with violence [*actio vi bonorum raptorum*], and, if brought within the year, it is for the fourfold, but, after the year, for the simple value. The action is available although only one single thing has been taken by force, and that of the least possible value. The whole of the quadruple value

is not, however, a penalty, and, besides the penalty, an action for the recovery of the thing [*rei vindicatio*], as we stated to be the case in respect of the action for manifest theft, but the recovery of the thing is included in the quadruple value, so that the penalty is threefold, whether the robber was caught in the act or not. For it would be ridiculous that a person, who takes a thing by force, should be in a better condition than he who secretly removes it. §1. This action, however, only lies when a person has committed the forcible robbery with wrongful intent (*dolo malo*), so that he ought to be held free from liability who, under a mistake, thinking it to be his own property, and, unmindful of law, takes a thing by force, with the idea that the owner may take his own property by force away from persons in whose possession it is; and it is, of course, consistent to hold that a person who, with this view, took a thing by force, would not be liable to an action for theft. But lest, in working out such distinctions as these, a loophole should be discovered, by which robbers may practice, with impunity, their nefarious schemes, it has been wisely provided, by the imperial constitutions dealing with this subject, that it shall be unlawful for anyone to carry off by force a thing that is movable, or moves itself, although he may believe that thing to be his own; and, if anyone should do so in spite of these constitutions, he is to lose the ownership of the thing if it belong to him, and, if it belong to someone else, he must, after making restitution of the thing, also pay the estimated value of it. These constitutions are held to apply, not only to movables capable of being carried off by force, but also to the case of forcible entry upon land, in order that every kind of robbery by force may, on this ground, be prevented. §2. For this action to lie it is not essential that the thing should have formed part of the plaintiff's property, for, whether it was part of his property or not, yet, if it has been taken from amongst his property, the action is available. Hence, if anything has been let, lent, or pledged to Titius, or even deposited with him in such a way that it was to his interest not to have had the thing carried off, as, for example, if he had undertaken to be responsible

for negligence [*culpa*] in the case of the thing deposited, or if he possess it bona fide, or if a person has the use and enjoyment of the thing, or any other right in it that makes it to his interest not to have it taken by force, it is to be laid down that this action lies, not in order that he may get the ownership, but to enable him to get again that which he has lost by violence from amongst his goods, that is, that which has been carried away out of his property; and, generally, it may be taken that the acts which, if committed secretly, are grounds for an action for theft, will be grounds for this action.

Title 3. Of the Aquilian statute.

pr. The action for wrongful damage [*actio damni iniuriae*] is established by the Aquilian statute [*lex Aquilia*]; the first head of which provides that, if a person has wrongfully [*iniuria*] killed a slave, or a quadruped (of the class denominated cattle), the property of another person, he is to be condemned to pay to the owner the highest market value of the slave or animal during the previous year. §1. As the provision of the statute is not in respect of quadrupeds generally, but relates only to those which are included under the head of cattle, we must observe that it does not cover the case of wild animals or dogs, but applies only to animals which can properly be said to feed in flocks, such as horses, mules, asses, sheep, oxen, goats. Swine are also held to be included, since they come under the term cattle, for they feed in flocks, as Ælius Marcianus notes in his Institutes that Homer, in the “Odyssey”, says:

“You will find him sitting by his swine, which are feeding
By the rock of Corax, near the spring of Arethusa” — *Odyssey*, xiii,
407-8.

§2. He is deemed to kill wrongfully [*iniuria*] who does so unlawfully [*nullo iure*: without any right]. Hence, he who

kills a robber is not liable, that is, if he could not by otherwise escape the danger. §3. Nor is he liable under this statute who kills by accident [*casus*], provided there was no fault [*culpa*], for everyone is liable under this statute, not only for his wrongful intent [*dolus*], but also for fault. §4. Hence, if a person, whilst practising with javelins, or being exercised therein, has transfixed your passing slave, a distinction is made; for, if it was done by a soldier in camp, and in the place where it is usual to exercise, he will be deemed free from fault, but if it was done by another person he would be guilty. The same rule would hold in the case of the soldier, if it had been done in some other place than that set apart for military exercises. §5. Again, if a person, whilst pruning a tree, let a bough fall and killed your passing slave, and this was done near a public way or a local passage, and he had not called out, so that the accident might have been avoided, he is guilty of fault; but, if he called out, and the passer-by did not take care to avoid the danger, he is not liable for fault. He would also be deemed equally free from fault if he was lopping the bough away from the road, or in the middle of a field, although he had not called out, for in such a place no stranger had a right to be walking. §6. Further, if a physician, who had performed an operation on your slave, should have neglected to attend to his cure, so that the slave's death was thereby occasioned, he is liable for fault.

§7. Want of skill [*imperitia*] is included under the head of fault, as, in the case of a physician causing the death of your slave, either because he performed an operation badly, or administered improper medicine to him. §8. So, also, if your slave is trampled upon by mules, which a mule-driver from want of skill could not manage, the latter is guilty of fault; and if a stronger person could have held them in, but he, through weakness, could not, he is equally liable. The same rules have been held to apply to him who, whilst riding a horse, is unable, either from weakness or want of skill [*imperitia*], to manage the horse.

§9. These words in the statute, **“the highest market value of the thing during the previous year”**, are intended to mean, that if a person has killed your slave, who was, **at the time of his death, lame, maimed, or blind of an eye**, but quite sound, or of considerable value during that year, the liability is not limited to what he is now worth, **but is reckoned at his highest market value within the year**. Hence, the action resulting from this statute is looked upon as penal, because a person is not only liable for the actual damage he has done, but sometimes for a great deal more, and therefore it is clear that the action does not lie against the heir as it would do if the liability never exceeded the actual loss. §10. It has been decided, not by the very words of the statute, but by their interpretation, that not only is the value of the object destroyed to be estimated, in accordance with what we have said, but also the loss which we may have incurred by the destruction of the object; **as, for example, if a person has killed your slave before he could, by your order, enter upon an inheritance, of which he had been appointed heir**; for it is clear that a calculation must be made of the lost inheritance also. **Again, if one of a pair of mules, or one of a set of four chariot horses, or one slave out of a company of actors is killed, not only is the value of the object killed to be calculated, but also the depreciation in the value of the remainder is to be reckoned.** §11. He, however, whose slave has been killed may sue by the civil action, given under the Aquilian statute, for the damages, and also prosecute the offender for the capital offence.

§12. The second head of the Aquilian statute is not now in use.

§13. By the third head provision is made for every other kind of damage. Therefore, if a person has wounded a slave or a quadruped, included under the class of cattle, or has wounded or killed a quadruped

not included under that class, as a dog, or a wild beast, an action lies under this head. In respect of all other animals, also, as well as in respect of those things which are devoid of life, any loss wrongfully inflicted [*damnum iniuria datum*] may be claimed under this part of the statute. For, if anything has been burnt, broken, or fractured, although the single expression “broken” would suffice to cover all these grounds; as the term “broken” means that which has been in any way damaged.¹⁰ Hence, this word comprises, not only that which is burnt or fractured, but also that which is torn and crushed, and spilt, and in any way destroyed, and deteriorated. Finally, it has been decided that he who has mixed anything with the oil or wine of another, so as to destroy the natural goodness of the wine or oil, is liable under this head of the statute. §14. It is clear that, just as a person is liable under the first head, if, through his intent [*dolus*] or fault [*culpa*], a slave or quadruped has been killed; so, under this head, a person is to be liable for all other kinds of damage, if resulting from intent or fault. Under this head, he who has caused the damage is not liable for the value within the year, but within the thirty nearest days. §15. Even the word “highest” is not added. But Sabinus rightly held that the value was to be estimated as if this word had been inserted in this part also of the statute, on the ground that the plebeians who carried this statute, on the proposition of the tribune Aquilius,¹¹ were satisfied with the use of the word in the first part. §16. But it was held that the action under this statute only lay if a person has caused the damage by his own bodily act [*corpore*]; and therefore it has been usual to give equitable actions [*actiones utiles*] against him who does damage in any other way; as,

¹⁰ These four terms are usually cited as: *urere, frangere, rumpere* and *corrumpere*.

¹¹ The people’s tribune who is said to have proposed the *lex Aquilia*, a plebiscite, in 287 BCE.

for example, if a person has shut up another's slave or cattle, so that they perished by starvation, or has driven a beast of burden so violently as to have caused its death, or frightened cattle to such a degree as to cause them to precipitate themselves headlong, or if a person persuaded another's slave to climb a tree or descend into a well, and in climbing or descending the slave is killed, or injured in some part of his body, then an equitable action is given against him. But, if a person has hurled another's slave from a bridge or bank into a river and the slave is drowned, then, in that he has thrown him over, there can be no difficulty in holding that he has caused the damage with his own body, and therefore he is liable under the Aquilian statute itself. But, if no damage has been done by the body, nor to the body, but the damage has happened in some other way, then, as neither the direct [*actio directa*] nor the equitable Aquilian action [*actio utilis*] apply, it is held that the offender is liable to an action on the case [*actio in factum*], as, for example, if a person has been impelled by compassion to loose the fetters of another's slave, so as to enable him to escape.

Title 4. Of outrages [*iniuriae*].

pr. The word “iniuria”, in its general acceptance, means anything done contrary to law; in a special sense it means sometimes ‘outrage’ [*contumelia*], which comes from ‘to jeer at’ [*contemnere*], the Greek ὕβρις [*hubris*]); sometimes ‘fault’ [*culpa*], which the Greeks call ἀδίκημα [*adikèma*]), as in the Aquilian statute, where damage is spoken of as done wrongfully [*iniuria*]; sometimes, again, it is used in the sense of iniquity and injustice, which the Greeks call ἀδικία [*adikia*]; and the person, against whom the praetor or a judge pronounces an unjust sentence, is said to have had a wrong [*iniuria*] done to him. **§1. Now, an outrage is not only committed when a person is**

struck with the fist or with clubs, or even scourged; but, also, if a crowd has been caused to assemble round him, or if a person has or if his goods have been seized, as if he were the debtor of one who knows that nothing is due to him; or if a person has written, composed, and published a libel or verses defamatory of his character, or has with wrongful intent [*dolus malus*] brought it about that another person did any of these things; or if a person has persistently followed a respectable woman, or a boy or girl, or is alleged to have attempted the chastity of a person, and, in short, it is clear that an outrage may be committed in many other ways. §2. A man may suffer an outrage, not only in his own person, but also in the persons of his children in power, and even in the person of his wife, according to the opinion that has prevailed. Therefore, if you commit an outrage on a person's daughter who is married to Titius, not only can an action for the outrage [*actio iniuriarum*] be brought against you in the name of the daughter, but the father and the husband, may also sue in their own right. On the other hand, if an outrage has been committed on the husband, the wife cannot bring an action, based on the outrage [*actio iniuriarum*], for it is just that wives should be protected by their husbands, but not husbands by their wives; a father-in-law can however sue for an outrage in the name of the daughter-in-law whose husband is in his power. §3. No outrage can be deemed to be committed on slaves themselves, as it is held to be done to the master through them, not however in the same ways as would be considered outrages in the case of our children and wives, but only when a gross outrage has been committed, and one which clearly amounts to an insult to the master, as, for example, if a person has scourged another's slave, in which case an action lies; but a master cannot bring an action against a person who has caused a crowd to collect round his slave, or struck him with his fist. §4. If an outrage has been committed on a slave, held in

common, it is just that the outrage should be estimated, not according to the share each owner has in him, but according to their rank, for the outrage is done to them. §5. But, if Titius has the usufruct of the slave, and Maevius is the owner, the outrage is considered to be done rather to Maevius. §6. But, if the outrage has been done to a free man who is bona fide serving you, no action is given to you, but he can sue in his own name, unless he has been beaten in order to insult you; for, then, an action, based on the outrage [*actio iniuriarum*], is available to you. The same rule holds in the case of the slave of another who is bona fide serving you, for you may bring an action, based on the outrage [*actio iniuriarum*], whenever the outrage has been committed for the purpose of insulting you.

§7. The penalty for outrages, according to the statute of the Twelve Tables, was retaliation for bodily members destroyed; but, for a broken bone, a scale of pecuniary compensation was fixed in accordance with the great poverty of the ancients. But, subsequently, the praetors allowed those who had suffered outrages to estimate the damages themselves, so that the judge would, in his discretion, either award, by his sentence, the damages estimated or a smaller amount. The penalty for outrage, introduced by the Twelve Tables, has fallen into disuse, but that which the praetors have introduced, and which is called “honorary”, is in use in the courts of justice. For the damages for the outrage increase or diminish according to the rank and character of the individual, and the same rule is very properly followed even in the case of a slave, so that a different amount of compensation is awarded in the case of a slave who is a steward to that awarded for a slave filling an intermediate position, or for one of the lowest rank, or wearing fetters. §8. The Cornelian statute, also, deals with the subject of outrages, and introduced an action for outrages [*actio iniuriarum*], which is available on the ground that a person alleges that he has been beaten, or scourged, or that his house

has been entered by force; and the word “house” includes the case of a person living in his own house, or in a hired one, or occupying one gratis or as a guest.

§9. An outrage is deemed grave [*atrox*] either from the nature of the act, as, for example, if a person is wounded or beaten with rods by example, if the outrage has been committed in the theatre or in the forum, or in the presence of the praetor, or from the rank of the person, as, if it is a magistrate who has suffered the outrage, or an outrage has been done to a senator by a person of low repute, or to an ascendant or patron, by descendants or freed-men (for an outrage committed on a senator, an ascendant, or a patron, is estimated differently from that committed on a person of low repute, or a stranger); sometimes it is the part of the body injured that makes the outrage grave, as, if anyone has been struck in the eye. It matters little whether such an outrage has been done to the head of a family or to one in power, as it is, in either case, considered grave.

§10. Finally, it is to be noted that in all cases of outrage the sufferer may proceed criminally or civilly. If the injured party elect to pursue his remedy by civil action, the penalty is imposed according to the measure of damages ascertained in the way we have pointed out. If, however, he proceeds criminally, an extraordinary penalty is inflicted on the guilty party, by virtue of the powers vested in the judge, observing, however, the rule introduced, by a constitution of Zeno (474–491), permitting those of illustrious rank, and those above that rank, to bring or defend a criminal prosecution for outrage by a procurator, in accordance with the terms of that enactment, which will better be understood by reference to it.

§11. Not only, however, is he liable to an action for the outrage [*actio iniuriarum*] who has committed the outrage, that is, he who struck the blow, but he, also, may be sued who

has intentionally [*dolo*] acted or contrived to bring it about, that another should get (for example) his ears boxed. **§12.** The action is extinguished by concealing the fact of the outrage having occurred; and hence, if a person has neglected to take notice of the outrage, that is, if he has not immediately, on suffering the outrage, shown an intention of resenting it, he cannot subsequently change his mind, and revive the outrage he has condoned.

[...]

ENGLISH—LATIN TRANSLATIONS

accident	<i>casus</i>
acquisition by use	<i>usucapio</i>
action based on the partnership	<i>actio pro socio</i>
action for a specific loan	<i>actio commodati</i>
action for robbery with violence	<i>actio vi bonorum raptorum</i>
action for specific recovery	<i>actio in rem</i>
action for that which is not due	<i>condictio indebiti</i>
action for theft	<i>actio furti</i>
action for unlawful injury	<i>actio damni iniuriae</i>
action for wrongful damage	<i>actio damni iniuriae</i>
action grounded on the purchase	<i>actio venditi</i>
action grounded on the sale	<i>actio empti</i>
action of deposit	<i>actio depositi</i>
action of pledge	<i>actio pignoratitia</i>
action on the case	<i>actio in factum</i>
action on the hire	<i>actio conducti</i>
action on the letting	<i>actio locati</i>
action on the mandate	<i>actio mandati</i>
agreements	<i>pactiones</i>
analogous to a contract	<i>quasi ex contractu</i>
analogous to a delict	<i>quasi ex maleficio / delicto</i>
answers of the learned	<i>responsa prudentium</i>
change of status	<i>capitis deminutio</i>
civil law	<i>ius civile</i>

corporeal things	<i>res corporales</i>
to deal/ handle	<i>contrectare</i>
dealing/ handling	<i>contrectatio</i>
decree of the senate	<i>senatus consultum</i>
delivery	<i>traditio</i>
earnest	<i>arrha</i>
equitable action	<i>actio utilis</i>
fault	<i>culpa</i>
fraudulent	<i>fraudulosa</i>
general action on the case	<i>actio praescriptis verbis</i>
(of a) grave (character)	<i>atrox</i>
honorary law	<i>ius honorarium, ius praetorium</i>
incorporeal things	<i>res incorporales</i>
intent, wrongful (fraudulent, malicious)	<i>dolus (malus)</i>
law of nations	<i>ius gentium</i>
letting and hiring	<i>locatio conductio</i>
loan for use	<i>commodatum</i>
loan in kind	<i>mutuum</i>
long possession	<i>longi temporis praescriptio</i>
loss wrongfully inflicted	<i>damnum iniuria [datum]</i>
mandate	<i>mandatum</i>
natural law	<i>ius naturale</i>
obligation(s) arising from wrongs	<i>obligatio(nes) ex delicto</i>
obligation(s) by consent	<i>obligatio(nes) consensu</i>
obligation(s) contracted by the thing	<i>obligatio(nes) re</i>
obligation(s) contracted by words	<i>obligatio(nes) verbis</i>

obligation(s) contracted by writing	<i>obligatio(nes) litteris</i>
ordinance of the plebeians	<i>plebiscitum</i>
outrage(s)	<i>iniuria(e)</i>
partnership	<i>societas</i>
perpetual lease	<i>emphyteusis</i>
plea of fraud	<i>exceptio doli</i>
plea of not having received the money	<i>exceptio non numeratae pecuniae</i>
pledge	<i>pignus</i>
possession of long standing	<i>longi temporis praescriptio</i>
principal division	<i>summa divisio</i>
purchase and sale	<i>emptio venditio</i>
robbery	<i>rapina</i>
suit for the production	<i>actio ad exhibendum</i>
theft	<i>furtum</i>
theft which arises from the discovery of the thing after solemn search	<i>furtum conceptum</i>
theft which arises from the stolen thing being brought elsewhere	<i>furtum oblatum</i>
theft, manifest	<i>furtum manifestum</i>
theft, non manifest	<i>furtum nec manifestum</i>
(use and) enjoyment	<i>ususfructus</i>
verbal obligations	<i>obligationes verbis</i>
want of skill	<i>imperitia</i>
wrong, delict	<i>delictum</i>
wrongfully, wrong	<i>iniuria</i>

LATIN—ENGLISH TRANSLATIONS

<i>actio ad exhibendum</i>	suit for the production
<i>actio commodati</i>	action for a specific loan
<i>actio conducti</i>	action on the hire
<i>actio damni iniuriae</i>	action for wrongful damage
<i>actio depositi</i>	action of deposit
<i>actio empti</i>	action grounded on the sale
<i>actio furti</i>	action for theft
<i>actio in factum</i>	action on the case
<i>actio in rem</i>	action for specific recovery
<i>actio locati</i>	action on the letting
<i>actio mandati</i>	action on the mandate
<i>actio pignoratitia</i>	action of pledge
<i>actio praescriptis verbis</i>	general action on the case
<i>actio pro socio</i>	action based on the partnership
<i>actio utilis</i>	equitable action
<i>actio venditi</i>	action grounded on the purchase
<i>actio vi bonorum raptorum</i>	action for robbery with violence
<i>arrha</i>	earnest
<i>atrox</i>	grave
<i>capitis deminutio</i>	change of status
<i>casus</i>	accident
<i>commodatum</i>	loan for use
<i>condictio indebiti</i>	action for that which is not due

<i>contrectare, contrectat</i>	to deal / handle, deals/ handles
<i>contrectatio</i>	dealing / handling
<i>culpa</i>	fault
<i>damnum iniuria [datum]</i>	loss wrongfully inflicted
<i>delictum</i>	wrong, delict
<i>dolus (malus)</i>	wrongful (fraudulent, malicious) intent
<i>emptio venditio</i>	purchase and sale
<i>exceptio doli</i>	plea of fraud
<i>exceptio non numeratae pecuniae</i>	plea of not having received the money
<i>fraudulosa</i>	fraudulent
<i>furtum</i>	theft
<i>furtum conceptum</i>	theft which arises from the discovery of the thing after solemn search
<i>furtum manifestum</i>	manifest theft
<i>furtum nec manifestum</i>	non manifest theft
<i>furtum oblatum</i>	theft which arises from the stolen thing being brought elsewhere
<i>imperitia</i>	want of skill
<i>iniuria</i>	wrongfully
<i>iniuria(e)</i>	outrage(s)
<i>ius civile</i>	civil law
<i>ius gentium</i>	law of nations
<i>ius honorarium</i>	honorary law
<i>ius naturale</i>	natural law
<i>ius praetorium</i>	honorary law
<i>latro</i>	robber, bandit
<i>locatio conductio</i>	letting and hiring

<i>longi temporis praescriptio</i>	long possession, possession of long standing
<i>mandatum</i>	mandate
<i>mutuum</i>	loan in kind
<i>obligatio(nes) consensus</i>	obligation(s) by consent
<i>obligatio(nes) ex delicto</i>	obligation(s) arising from wrong(s)
<i>obligatio(nes) litteris</i>	obligation(s) contracted by writing
<i>obligatio(nes) re</i>	obligation(s) contracted by the thing
<i>obligatio(nes) verbis</i>	obligation(s) by words
<i>obligationes verbis</i>	verbal obligations
<i>pactiones</i>	agreements
<i>pignus</i>	pledge
<i>plebiscitum</i>	ordinance of the plebeians
<i>quasi ex contractu</i>	analogous to a contract
<i>quasi ex maleficio</i>	analogous to a delict
<i>rapina</i>	robbery
<i>res corporales</i>	corporeal things
<i>res incorporales</i>	incorporeal things
<i>responsa prudentium</i>	answers of the learned in the law
<i>senatus consultum</i>	decree of the senate
<i>societas</i>	partnership
<i>summa divisio</i>	principal division
<i>traditio</i>	delivery
<i>usucapio</i>	acquisition by use
<i>ususfructus</i>	use and enjoyment