PART I. THE LEGACY OF ROMAN LAW

A. JUSTINIAN'S INSTITUTES

Contents, Proemium, 1.1–3, 1.8pr, 1.9–10, 2.1–2, 2.5.6, 2.9.6, 3.13, 4.1pr, 4.6.pr–30
J.B. Moyle trans. (Oxford, 1913) [Some emendations by CD.][1]

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BOOK IV.

PROOEMIUM

IN the name of our Lord Jesus Christ.

The Emperor Caesar Flavius Justinian, conqueror of the Alamanni, the Goths, the Franks, the Germans, the Antes, the Alani, the Vandals, the Africans, pious, prosperous, renowned, victorious, and triumphant, ever august,

To the youth desirous of studying the law:

The imperial majesty should be armed with laws as well as glorified with arms, that there may be good government in times both of war and of peace, and the ruler of Rome may not only be victorious over his enemies, but may show himself as scrupulously regardful of justice as triumphant over his conquered foes.

1. With deepest application and forethought, and by the blessing of God, we have attained both of these objects. The barbarian nations which we have subjugated know our valour, Africa and other provinces without number being once more, after so long an interval, reduced beneath the sway of Rome by victories granted by Heaven, and themselves bearing witness to our dominion. All peoples too are ruled by laws which we have either enacted or arranged. **2**. Having removed every inconsistency from the sacred constitutions, hitherto inharmonious and confused, we extended our care to the immense volumes of the older jurisprudence; and, like sailors crossing the mid-ocean, by the favour of Heaven have now completed a work of which we once despaired. **3**. When this, with God's blessing, had been done, we called together that distinguished man Tribonian, master and ex-quaestor of our sacred palace, and the illustrious Theophilus and Dorotheus, professors of law, of whose ability, legal knowledge, and trusty observance of our orders we have received many and genuine proofs, and specially commissioned them to compose by our authority and advice a book of Institutes, whereby you may be enabled to learn your first lessons in law no longer from ancient fables, but to grasp them by the brilliant light of imperial learning, and that your ears and minds may receive nothing useless or incorrect, but only what holds good in actual fact. And thus whereas in past time even the foremost of you were unable to read the imperial constitutions until after four years, you, who have been so honoured and fortunate as to receive both the beginning and the end of your legal teaching from the mouth of the Emperor, can now enter on the study of them without delay. **4**. After the completion therefore of the fifty books of the Digest or Pandects, in which all the earlier law has been collected by the aid of the said distinguished Tribonian and other illustrious and most able men, we directed the division of these same Institutes into four books, comprising the first elements of the whole science of law. **5**. In these the law previously obtaining has been briefly stated, as well as that which after becoming disused has been again brought to light by our imperial aid. **6**. Compiled from all the Institutes of the

ancient jurists, and in particular from the commentaries of our Gaius on both the Institutes and the common cases, and from many other legal works, these Institutes were submitted to us by the three learned men aforesaid, and after reading and examining them we have given them the fullest force of our constitutions.

7. Receive then these laws with your best powers and with the eagerness of study, and show yourselves so learned as to be encouraged to hope that when you have compassed the whole field of law you may have ability to govern such portion of the state as may be entrusted to you.

Given at Constantinople the 21st day of November, in the third consulate of the Emperor Justinian, Father of his Country, ever august.

BOOK I

TITLE I OF JUSTICE AND LAW

JUSTICE is the set and constant purpose which gives to every man his due. **1**. Jurisprudence is the knowledge of things divine and human, the science of the just and the unjust.

2. Having laid down these general definitions, and our object being the exposition of the law of the Roman people, we think that the most advantageous plan will be to commence with an easy and simple path, and then to proceed to details with a most careful and scrupulous exactness of interpretation. Otherwise, if we begin by burdening the student's memory, as yet weak and untrained, with a multitude and variety of matters, one of two things will happen: either we shall cause him wholly to desert the study of law, or else we shall bring him at last, after great labour, and often, too, distrustful of his own powers (the commonest cause, among the young, of ill-success), to a point which he might have reached earlier, without such labour and confident in himself, had he been led along a smoother path.

3. The precepts of the law are these: to live honestly, to injure no one, and to give every man his due. **4**. The study of law consists of two branches, law public, and law private. The former relates to the welfare of the Roman State; the latter to the advantage of the individual citizen. Of private law then we may say that it is of threefold origin, being collected from the precepts of nature, from those of the law of nations, or from those of the civil law of Rome.

TITLE II OF TME LAW OF NATURE, THE LAW OF NATIONS, AND THE CIVIL LAW

The law of nature is that which she has taught all animals; a law not peculiar to the human race, but shared by all living creatures, whether denizens of the air, the dry land, or the sea. Hence comes the union of male and female, which we call marriage; hence the procreation and rearing of children, for this is a law by the knowledge of which we see even the lower animals are distinguished. **1**. The civil law of Rome, and the law of all nations, differ from each other thus. The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. Those rules which a state enacts for its own members are peculiar to itself, and are called civil law: those rules prescribed by natural reason for all men are observed by all peoples alike, and are called the law of nations. Thus the laws of the Roman people are partly peculiar to itself, partly common to all nations; a distinction of which we shall take notice as occasion offers. **2**. Civil law takes its name from the state wherein it binds; for instance, the civil law of Athens, it being quite correct to speak thus of the enactments of Solon or Draco. So too we call the law observed by the Roman people the civil law of the Romans, or the law of the Quirites; the law, that is to say, which they observe, the Romans being called Quirites after Quirinus. Whenever we speak, however, of civil law, without any qualification, we mean our own; exactly as, when 'the poet' is spoken of, without addition or qualification, the Greeks understand the great Homer, and we understand Vergil. But the law of nations is common to the whole human race; for nations have settled certain things for themselves as occasion and the necessities of human life required. For instance, wars arose, and then followed captivity and slavery, which are contrary to the law of nature; for by the law of nature all men from the beginning were born free. The law of nations again is the source of almost all contracts; for instance, sale, hire, partnership, deposit, loan for consumption, and very many others.

3. Our law is partly written, partly unwritten, as among the Greeks. The written law consists of statutes, plebiscites, senatusconsults, enactments of the Emperors, edicts of the magistrates, and answers of those

learned in the law. **4**. A statute is an enactment of the Roman people, which it used to make on the motion of a senatorial magistrate, as for instance a consul. A plebiscite is an enactment of the commonalty, such as was made on the motion of one of their own magistrates, as a tribune. The commonalty differs from the people as a species from its genus; for 'the people' includes whole aggregte of citizens, among them patricians and senators, while the term 'commonalty' embraces only such citizens as are not patricians or senators. After the passing, however, of the statute called the lex Hortensia, plebiscites acquired for the first time the force of statutes. **5**. A senatusconsult is a command and ordinance of the senate, for when the Roman people had been so increased that it was difficult to assemble it together for the purpose of enacting statutes, it seemed right that the senate should be consulted instead of the people. **6**. Again, what the Emperor determines has the force of a statute, the people having conferred on him all their authority and power by the *lex regia*, which was passed concerning his office and authority. Consequently, whatever the Emperor settles by rescript, or decides in his judicial capacity, or ordains by edicts, is clearly a statute: and these are what are called constitutions. Some of these of course are personal, and not to be followed as precedents, since this is not the Emperor's will; for a favour bestowed on individual merit, or a penalty inflicted for individual wrongdoing, or relief given without a precedent, do not go beyond the particular person: though others are general, and bind all beyond a doubt. **7**. The edicts of the praetors too have no small legal authority, and these we are used to call the *ius honorarium*, because those who occupy posts of honour in the state, in other words the magistrates, have given authority to this branch of law. The curule aediles also used to issue an edict relating to certain matters, which forms part of the *ius honorarium*. **8**. The answers of those learned in the law are the opinions and views of persons authorized to determine and expound the law; for it was of old provided that certain persons should publicly interpret the laws, who were called jurisconsults, and whom the Emperor privileged to give formal answers. If they were unanimous the judge was forbidden by imperial constitution to depart from their opinion, so great was its authority. **9**. The unwritten law is that which usage has approved: for ancient customs, when approved by consent of those who follow them, are like statute. **10**. And this division of the civil law into two kinds seems not inappropriate, for it appears to have originated in the institutions of two states, namely Athens and Lacedaemon; it having been usual in the latter to commit to memory what was observed as law, while the Athenians observed only what they had made permanent in written statutes.

11. But the laws of nature, which are observed by all nations alike, are established, as it were, by divine providence, and remain ever fixed and immutable: but the municipal laws of each individual state are subject to frequent change, either by the tacit consent of the people, or by the subsequent enactment of another statute.

12. The whole of the law which we observe relates either to persons, or to things, or to actions. And first let us speak of persons: for it is useless to know the law without knowing the persons for whose sake it was established.

TITLE III OF THE LAW OF PERSONS

In the law of persons, then, the first division is into free men and slaves. **1**. Freedom, from which men are called free, is a man's natural power of doing what he pleases, so far as he is not prevented by force or law: **2**. Slavery is an institution of the law of nations, against nature subjecting one man to the dominion of another. **3**. The name 'slave' is derived from the practice of generals to order the preservation and sale of captives, instead of killing them; hence they are also called *mancipia*, because they are taken from the enemy by the strong hand. **4**. Slaves are either born so, their mothers being slaves themselves; or they become so, and this either by the law of nations, that is to say by capture in war, or by the civil law, as when a free man, over twenty years of age, collusively allows himself to be sold in order that he may share the purchase money. The condition of all slaves is one and the same: in the conditions of free men there are many distinctions; to begin with, they are either free born, or made free. ...

TITLE VIII OF PERSONS INDEPENDENT OR DEPENDENT

Another division of the law relating to persons classifies them as either independent or dependent. Those again who are dependent are in the power either of parents or of masters. Let us first then consider those who are dependent, for by learning who these are we shall at the same time learn who are independent. ...

TITLE IX OF PATERNAL POWER

Our children whom we have begotten in lawful wedlock are in our power. **1**. Wedlock or matrimony is the union of male and female, involving the habitual intercourse of daily life. **2**. The power which we have over our children is peculiar to Roman citizens, and is found in no other nation. **3**. The offspring then of you and your wife is in your power, and so too is that of your son and his wife, that is to say, your grandson and granddaughter, and so on. But the offspring of your daughter is not in your power, but in that of its own father.

TITLE X OF MARRIAGE

Roman citizens are joined together in lawful wedlock when they are united according to law, the man having reached years of puberty and the woman being of a marriageable age, whether they be independent or dependent: provided that, in the latter case, they must have the consent of the parents in whose power they respectively are, the necessity of which, and even of its being given before the marriage takes place, is recognized no less by natural reason than by law. Hence the question has arisen, can the daughter or son of a lunatic lawfully contract marriage? and as the doubt still remained with regard to the son, we decided that, like the daughter, the son of a lunatic might marry even without the intervention of his father, according to the mode prescribed by our constitution.

1. It is not every woman that can be taken to wife: for marriage with certain classes of persons is forbidden. Thus, persons related as ascendant and descendant are incapable of lawfully intermarrying; for instance, father and daughter, grandfather and granddaughter, mother and son, grandmother and grandson, and so on *ad infinitum*; and the union of such persons is called criminal and incestuous. And so absolute is the rule, that persons related as ascendant and descendant merely by adoption are so utterly prohibited from intermarriage that dissolution of the adoption does not dissolve the prohibition: so that an adoptive daughter or granddaughter cannot be taken to wife even after emancipation.

2. Collateral relations also are subject to similar prohibitions, but not so stringent. Brother and sister indeed are prohibited from intermarriage, whether they are both of the same father and mother, or have only one parent in common: but though an adoptive sister cannot, during the subsistence of the adoption, become a man's wife, yet if the adoption is dissolved by her emancipation, or if the man is emancipated, there is no impediment to their intermarriage. Consequently, if a man wished to adopt his son-in-law, he ought first to emancipate his daughter: and if he wished to adopt his daughter-in-law, he ought first to emancipate his son. **3**. A man may not marry his brother's or his sister's daughter, or even his or her granddaughter, though she is in the fourth degree; for when we may not marry a person's daughter, we may not marry the granddaughter either. But there seems to b.c. no obstacle to a man's marrying the daughter of a woman whom his father has adopted, for she is no relation of his by either natural or civil law. **4**. The children of two brothers or sisters, or of a brother and sister, may lawfully intermarry. **5**. Again, a man may not marry his father's sister, even though the tie be merely adoptive, or his mother's sister: for they are considered to stand in the relation of ascendants. For the same reason too a man may not marry his great-aunt either paternal or maternal. **6**. Certain marriages again are prohibited on the ground of affinity, or the tie between a man or his wife and the kin of the other respectively. For instance, a man may not marry his wife's daughter or his son's wife, for both are to him in the position of daughters. By wife's daughter or son's wife we must be understood to mean persons who have been thus related to us; for if a woman is still your daughter-in-law, that is, is still married to your son, you cannot marry her for another reason, namely, because she cannot be the wife of two persons at once. So too if a woman is still your stepdaughter, that is, if her mother is still married to you, you cannot marry her for the same reason, namely, because a man cannot have two wives at the same time. **7**. Again, it is forbidden for a man to marry his wife's mother or his father's wife, because to him they are in the position of a mother, though in this case too our statement applies only after the relationship has finally terminated; otherwise, if a woman is still your stepmother, that is, is married to your father, the common rule of law prevents her from marrying you, because a woman cannot have two husbands at the same time: and if she is still your wife's mother, that is, if her daughter is still married to you, you cannot marry her because you cannot have two wives at the same time. **8**. But a son of the husband by another wife, and a daughter of the wife by another husband, and vice versa, can lawfully

intermarry, even though they have a brother or sister born of the second marriage. **9**. If a woman who has been divorced from you has a daughter by a second husband, she is not your stepdaughter, but Iulian is of opinion that you ought not to marry her, on the ground that though your son's betrothed is not your daughter-in-law, nor your father's betrothed your stepmother, yet it is more decent and more in accordance with what is right to abstain lO from intermarrying with them. **10**. It is certain that the rules relating to the prohibited degrees of marriage apply to slaves: supposing, for instance, that a father and daughter, or a brother and sister, acquired freedom by manumission. **11**. There are also other persons who for various reasons are forbidden to intermarry, a list of whom we have permitted to be inserted in the books of the Digest or Pandects collected from the older law.

12. Alliances which infringe the rules here stated do not confer the status of husband and wife, nor is there in such case either wedlock or marriage or dowry. Consequently children born of such a connexion are not in their father's power, but as regards the latter are in the position of children born of promiscuous intercourse, who, their paternity being uncertain, are deemed to have no father at all, and who are called bastards, either from the Greek word denoting illicit intercourse, or because they are fatherless. Consequently, on the dissolution of such a connexion there can be no claim for return of dowry. Persons who contract prohibited marriages are subjected to penalties set forth in our sacred constitutions.

13. Sometimes it happens that children who are not born in their father's power are subsequently brought under it. Such for instance is the case of a natural son made subject to his father's power by being inscribed a member of the curia; and so too is that of a child of a free woman with whom his father cohabited, though he could have lawfully married her, who is subjected to the power of his father by the subsequent execution of a dowry deed according to the terms of our constitution: and the same boon is in effect bestowed by that enactment on children subsequently born of the same marriage. ...

BOOK II

TITLE I OF THE DIFFERENT KINDS OF THINGS

IN the preceding book we have expounded the law of Persons: now let us proceed to the law of Things. Of these, some admit of private ownership, while others, it is held, cannot belong to individuals: for some things are by natural law common to all, some are public, some belong to a society or corporation, and some belong to no one. But most things belong to individuals, being acquired by various titles, as will appear from what follows.

1. Thus, the following things are by natural law common all—the air, running water, the sea, and consequently the sea-shore. No one therefore is forbidden access to the seashore, provided he abstains from injury to houses, monuments, and buildings generally; for these are not, like the sea itself, subject to the law of nations. **2**. On the other hand, all rivers and harbours are public, so that all persons have a right to fish therein. **3**. The sea-shore extends to the limit of the highest tide in time of storm or winter. **4**. Again, the public use of the banks of a river, as of the river itself, is part of the law of nations; consequently every one is entitled to bring his vessel to the bank, and fasten cables to the trees growing there, and use it as a resting-place for the cargo, as freely as he may navigate the river itself. But the ownership of the bank is in the owner of the adjoining land, and consequently so too is the ownership of the trees which grow upon it. **5**. Again, the public use of the sea-shore, as of the sea itself, is part of the law of nations; consequently every one is free to build a cottage upon it for purposes of retreat, as well as to dry his nets and haul them up from the sea. But they cannot b.c. said to belong to any one as private property, but rather are subject to the same law as the sea itself, with the soil or sand which lies beneath it. **6**. As examples of things belonging to a society or corporation, and not to individuals, may be cited buildings in cities—theatres, racecourses, and such other similar things as belong to cities in their corporate capacity.

7. Things which are sacred, devoted to superstitious uses, or sanctioned, belong to no one, for what is subject to divine law is no one's property. **8**. Those things are sacred which have been duly consecrated to God by His ministers, such as churches and votive offerings which have been properly dedicated to His service; and these we have by our constitution forbidden to be alienated or pledged, except to redeem captives from bondage. If any one attempts to consecrate a thing for himself and by his own authority, its character is unaltered, and it does not become sacred. The ground on which a sacred building is erected

remains sacred even after the destruction of the building, as was declared also by Papinian. **9**. Any one can devote a place to superstitious uses of his own free will, that is to say, by burying a dead body in his own land. It is not lawful, however, to bury in land which one owns jointly with some one else, and which has not hitherto been used for this purpose, without the other's consent, though one may lawfully bury in a common sepulchre even without such consent. Again, the owner may not devote a place to superstitious uses in which another has a usufruct, without the consent of the latter. It is lawful to bury in another man's ground, if he gives permission, and the ground thereby becomes religious even though he should not give his consent to the interment till after it has taken place. **10**. Sanctioned things too, such as city walls and gates, are, in a sense, subject to divine law, and therefore are not owned by any individual. Such walls are said to be 'sanctioned', because any offence against them is visited with capital punishment; for which reason those parts of the laws in which we establish a penalty for their transgressors are called sanctions.

11. Things become the private property of individuals in many ways; for the titles by which we acquire ownership in them are some of them titles of natural law, which, as we said, is called the law of nations, while some of them are titles of civil law. It will thus be most convenient to take the older law first: and natural law is clearly the older, having been instituted by nature at the first origin of mankind, whereas civil laws first came into existence when states began to be founded, magistrates to be created, and laws to be written.

12. Wild animals, birds, and fish, that is to say all the creatures which the land, the sea, and the sky produce, as soon as they are caught by any one become at once the property of their captor by the law of nations; for natural reason admits the title of the first occupant to that which previously had no owner. So far as the occupant's title is concerned, it is immaterial whether it is on his own land or on that of another that he catches wild animals or birds, though it is clear that if he goes on another man's land for the sake of hunting or fowling, the latter may forbid him entry if aware of his purpose. An animal thus caught by you is deemed your property so long as it is completely under your control; but so soon as it has escaped from your control, and recovered its natural liberty, it ceases to be yours, and belongs to the first person who subsequently catches it. It is deemed to have recovered its natural liberty when you have lost sight of it, or when, though it is still in your sight, it would be difficult to pursue it. **13**. It has been doubted whether a wild animal becomes your property immediately you have wounded it so severely as to be able to catch it. Some have thought that it becomes yours at once, and remains so as long as you pursue it, though it ceases to be yours when you cease the pursuit, and becomes again the property of any one who catches it: others have been of opinion that it does not belong to you till you have actually caught it. And we confirm this latter view, for it may happen in many ways that you will not capture it. **14**. Bees again are naturally wild; hence if a swarm settles on your tree, it is no more considered yours, until you have hived it, than the birds which build their nests there, and consequently if it is hived by some one else, it becomes his property. So too any one may take the honey-combs which bees may chance to have made, though, of course, if you see some one coming on your land for this purpose, you have a right to forbid him entry before that purpose is effected. A swarm which has flown from your hive is considered to remain yours so long as it is in your sight and easy of pursuit: otherwise it belongs to the first person who catches it. **15**. Peafowl too and pigeons are naturally wild, and it is no valid objection that they are used to return to the same spots from which they fly away, for bees do this, and it is admitted that bees are wild by nature; and some people have deer so tame that they will go into the woods and yet habitually come back again, and still no one denies that they are naturally wild. With regard, however, to animals which have this habit of going away and coming back again, the rule has been established that they are deemed yours so long as they have the intent to return: for if they cease to have this intention they cease to be yours, and belong to the first person who takes them; and when they lose the habit they seem also to have lost the intention of returning. **16**. Fowls and geese are not naturally wild, as is shown by the fact that there are some kinds of fowls and geese which we call wild kinds. Hence if your geese or fowls are frightened and fly away, they are considered to continue yours wherever they may be, even though you have lost sight of them; and any one who keeps them intending thereby to make a profit is held guilty of theft. **17**. Things again which we capture from the enemy at once become ours by the law of nations, so that by this rule even free men become our slaves, though, if they escape from our power and return to their own people, they recover their previous condition. **18**. Precious

stones too, and gems, and all other things found on the sea-shore, become immediately by natural law the property of the finder. **19**. And by the same law the young of animals of which you are the owner become your property also.

20. Moreover, soil which a river has added to your land by alluvion becomes yours by the law of nations. Alluvion is an imperceptible addition; and that which is added so gradually that you cannot perceive the exact increase from one moment of time to another is added by alluvion. **21**. If, however, the violence of the stream sweeps away a parcel of your land and carries it down to the land of your neighbour, it clearly remains yours; though of course if in process of time it becomes firmly attached to your neighbour's land, and the trees which it carried with it strike root in the latter, they are deemed from that time to have become part and parcel thereof. **22**. When an island rises in the sea, though this rarely happens, it belongs to the first occupant; for, until occupied, it is held to belong to no one. If, however (as often occurs), an island rises in a river, and it lies in the middle of the stream, it belongs in common to the landowners on either bank, in proportion to the extent of their riparian interest; but if it lies nearer to one bank than to the other, it belongs to the landowners on that bank only. If a river divides into two channels, and by uniting again these channels transform a man's land into an island, the ownership of that land is in no way altered. **23**. But if a river entirely leaves its old channel, and begins to run in a new one, the old channel belongs to the landowners on either side of it in proportion to the extent of their riparian interest, while the new one acquires the same legal character as the river itself, and becomes public. But if after a while the river returns to its old channel, the new channel again becomes the property of those who possess the land along its banks. **24**. It is otherwise if one's land is wholly flooded, for a flood does not permanently alter the nature of the land, and consequently if the water goes back the soil clearly belongs to its previous owner.

25. When a man makes a new object out of materials belonging to another, the question usually arises, to which of them, by natural reason, does this new object belong—to the man who made it, or to the owner of the materials? For instance, one man may make wine, or oil, or corn, out of another man's grapes, olives, or sheaves; or a vessel out of his gold, silver, or bronze; or mead of his wine and honey; or a plaster or eyesalve out of his drugs; or cloth out of his wool; or a ship, a chest, or a chair out of his timber. After many controversies between the Sabinians and Proculians, the law has now been settled as follows, in accordance with the view of those who followed a middle course between the opinions of the two schools. If the new object can be reduced to the materials of which it was made, it belongs to the owner of the materials; if not, it belongs to the person who made it. For instance, a vessel can be melted down, and so reduced to the rude material—bronze, silver, or gold—of which it is made: but it is impossible to reconvert wine into grapes, oil into olives, or corn into sheaves, or even mead into the wine and honey of which it was compounded. But if a man makes a new object out of materials which belong partly to him and partly to another—for instance, mead of his own wine and another's honey, or a plaster or eyesalve of drugs which are not all his own, or cloth of wool which belongs only in part to him— in this case there can be no doubt that the new object belongs to its creator, for he has contributed not only part of the material, but the labour by which it was made. **26**. If, however, a man weaves into his own cloth another man's purple, the latter, though the more valuable, becomes part of the cloth by accession; but its former owner can maintain an action of theft against the purloiner, and also a condiction, or action for reparative damages, whether it was he who made the cloth, or some one else; for although the destruction of property is a bar to a real action for its recovery, it is no bar to a condiction against the thief and certain other possessors. **27**. If materials belonging to two persons are mixed by consent—for instance, if they mix their wines, or melt together their gold or their silver—the result of the mixture belongs to them in common. And the law is the same if the materials are of different kinds, and their mixture consequently results in a new object, as where mead is made by mixing wine and honey, or electrum by mixing gold and silver; for even here it is not doubted that the new object belongs in common to the owners of the materials. And if it is by accident, and not by the intention of the owners, that materials have become mixed, the law is the same, whether they were of the same or of different kinds. **28**. But if the corn of Titius has become mixed with yours, and this by mutual consent, the whole will belong to you in common, because the separate bodies or grains, which before belonged to one or the other of you in severally, have by consent on both sides been made your joint property. If, however, the mixture was

accidental, or if Titius mixed the two parcels of corn without your consent, they do not belong to you in common, because the separate grains remain distinct, and their substance is unaltered; and in such cases the corn no more becomes common property than does a flock formed by the accidental mixture of Titius's sheep with yours. But if either of you keeps the whole of the mixed corn, the other can bring a real action for the recovery of such part of it as belongs to him, it being part of the province of the judge to determine the quality of the wheat which belonged to each. **29**. If a man builds upon his own ground with another's materials, the building is deemed to be his property, for buildings become a part of the ground on which they stand. And yet he who was owner of the materials does not cease to own them, but he cannot bring a real action for their recovery, or sue for their production, by reason of a clause in the Twelve Tables providing that no one shall be compelled to take out of his house materials *tignum*, even though they belong to another, which have once been built into it, but that double their value may be recovered by the action called *de tigno iniuncto*. The term *tignum* includes every kind of material employed in building, and the object of this provision is to avoid the necessity of having buildings pulled down; but if through some cause or other they should be destroyed, the owner of the materials, unless he has already sued for double value, may bring a real action for recovery, or a personal action for production. **30**. On the other hand, if one man builds a house on another's land with his own materials, the house belongs to the owner of the land. In this case, however, the right of the previous owner in the materials is extinguished, because he is deemed to have voluntarily parted with them, though only, of course, if he was aware that the land on which he was building belonged to another man. Consequently, though the house should be destroyed, he cannot claim the materials by real action. Of course, if the builder of the house has possession of the land, and the owner of the latter claims the house by real action, but refuses to pay for the materials and the workmen's wages, he can be defeated by the plea of fraud, provided the builder's possession is in good faith: for if he knew that the land belonged to some one else it may be urged against him that he was to blame for rashly building on land owned to his knowledge by another man. **31**. If Titius plants another man's shrub in land belonging to himself, the shrub will become his; and, conversely, if he plants his own shrub in the land of Maevius, it will belong to Maevius. In neither case, however, will the ownership be transferred until the shrub has taken root: for, until it has done this, it continues to belong to its original owner. So strict indeed is the rule that the ownership of the shrub is transferred from the moment it has taken root, that if a neighbour's tree grows so close to the land of Titius that the soil of the latter presses round it, whereby it drives its roots entirely into the same, we say the tree becomes the property of Titius, on the ground that it would be unreasonable to allow the owner of a tree to be a different person from the owner of tile land in which it is rooted. Consequently, if a tree which grows on the boundaries of two estates drives its roots even partially into the neighbour's soil, it becomes the common property of the two landowners. **32**. On the same principle corn is reckoned to become a part of the soil in which it is sown. But exactly as (according to what we said) a man who builds on another's land can defend himself by the plea of fraud when sued for the building by the owner of the land, so here too one who has in good faith and at his own expense put crops into another man's soil can shelter himself behind the same plea, if refused compensation for labour and outlay. **33**. Writing again, even though it be in letters of gold, becomes a part of the paper or parchment, exactly as buildings and sown crops become part of the soil, and consequently if Titius writes a poem, or a history, or a speech on your paper or parchment, the whole will be held to belong to you, and not to Titius. But if you sue Titius to recover your books or parchments, and refuse to pay the value of the writing, he will be able to defend himself by the plea of fraud, provided that he obtained possession of the paper or parchment in good faith. **34**. Where, on the other hand, one man paints a picture on another's board, some think that the board belongs, by accession, to the painter, others, that the painting, however great its excellence, becomes part of the board. The former appears to us the better opinion, for it is absurd that a painting by Apelles or Parrhasius should be an accessory of a board which, in itself, is thoroughly worthless. Hence, if the owner of the board has possession of the picture, and is sued for it by the painter, who nevertheless refuses to pay the cost of the board, he will be able to repel him by the plea of fraud. If, on the other hand, the painter has possession, it follows from what has been said that the former owner of the board, [if he is to be able to sue at all], must claim it by a modified and not by a direct action; and in this case, if he refuses to pay the cost of the picture, he can be repelled by the plea of fraud, provided that the possession of the painter be in good

faith; for it is clear, that if the board was stolen by the painter, or some one else, from its former owner, the latter can bring the action of theft.

35. If a man in good faith buys land from another who is not its owner, though he believed he was, or acquires it in good faith by gift or some other lawful title, natural reason directs that the fruits which he has gathered shall be his, in consideration of his care and cultivation: consequently if the owner subsequently appears and claims the land by real action, he cannot sue for fruits which the possessor has consumed. This, however, is not allowed to one who takes possession of land which to his knowledge belongs to another person, and therefore he is obliged not only to restore the land, but to make compensation for fruits even though they have been consumed. **36**. A person who has a usufruct in land does not become owner of the fruits which grow thereon until he has himself gathered them; consequently fruits which, at the moment of his decease, though ripe, are yet ungathered, do not belong to his heir, but to the owner of the land. What has been said applies also in the main to the lessee of land. **37**. The term 'fruits', when used of animals, comprises their young, as well as milk, hair, and wool; thus lambs, kids, calves, and foals, belong at once, by the natural law of ownership, to the fructuary. But the term does not include the offspring of a female slave, which consequently belongs to her master; for it seemed absurd to reckon human beings as fruits, when it is for their sake that all other fruits have been provided by nature. **38**. The usufructuary of a flock, as Julian held, ought to replace any of the animals which die from the young of the rest, and, if his usufruct be of land, to replace dead vines or trees; for it is his duty to cultivate according to law and use them like a careful head of a family.

39. If a man found a treasure in his own land, the Emperor Hadrian, following natural equity, adjudged to him the ownership of it, as he also did to a man who found one by accident in soil which was sacred or religious. If he found it in another man's land by accident, and without specially searching for it, he gave half to the finder, half to the owner of the soil; and upon this principle, if a treasure were found in land belonging to the Emperor, he decided that half should belong to the latter, and half to the finder; and consistently with this, if a man finds one in land which belongs to the imperial treasury or the people, half belongs to him, and half to the treasury or the State.

40. Delivery again is a mode in which we acquire things by natural law; for it is most agreeable to natural equity that where a Man wishes to transfer his property to another person his wish should be confirmed. Consequently corporeal things, whatever be their nature, admit of delivery, and delivery by their owner makes them the property of the alienee; this, for instance, is the mode of alienating stipendiary and tributary estates, that is to say, estates lying in provincial soil; between which, however, and estates in Italy there now exists, according to our constitution, no difference. **41**. And ownership is transferred whether the motive of the delivery be the desire to make a gift, to confer a dowry, or any other motive whatsoever. When, however, a thing is sold and delivered, it does not become the purchaser's property until he has paid the price to the vendor, or satisfied him in some other way, as by getting some one else to accept liability for him, or by pledge. And this rule, though laid down also in the statute of the Twelve Tables, is rightly said to be a dictate of the law of all nations, that is, of natural law. But if the vendor gives the purchaser credit, the goods sold belong to the latter at once. **42**. It is immaterial whether the person who makes delivery is the owner himself, or some one else acting with his consent. **43**. Consequently, if any one is entrusted by an owner with the management of his business at his own free discretion, and in the execution of his commission sells and delivers any article, he makes the receiver its owner. **44**. In some cases even the owner's bare will is sufficient, without delivery, to transfer ownership. For instance, if a man sells or makes you a present of a thing which he has previously lent or let to you or placed in your custody, though it was not from that motive he originally delivered it to you, yet by the very fact that he suffers it to be yours you at once become its owner as fully as if it had been originally delivered for the purpose of passing the property. **45**. So too if a man sells goods lying in a warehouse, he transfers the ownership of them to the purchaser immediately he has delivered to the latter the keys of the warehouse. **46**. Nay, in some cases the will of the owner, though directed only towards an uncertain person, transfers the ownership of the thing, as for instance when praetors and consuls throw money to a crowd: here they know not which specific coin each person will get, yet they make the unknown recipient immediate owner, because it is their will that each shall have what he gets. **47**. Accordingly, it is true that if a man takes possession of property abandoned by

its previous owner, he at once becomes its owner himself: and a thing is said to be abandoned which its owner throws away with the deliberate intention that it shall no longer be part of his property, and of which, consequently, he immediately ceases to be owner. **48**. It is otherwise with things which are thrown overboard during a storm, in order to lighten the ship; in the ownership of these things there is no change, because the reason for which they are thrown overboard is obviously not that the owner does not care to own them any longer, but that he and the ship besides may be more likely to escape the perils of the sea. Consequently any one who carries them off after they are washed on shore, or who picks them up at sea and keeps them, intending to make a profit thereby, commits a theft; for such things seem to be in much the same position as those which fall out of a carriage in motion unknown to their owners.

TITLE II OF INCORPOREAL THINGS

Some things again are corporeal, and others incorporeal. **1**. Those are corporeal which in their own nature are tangible, such as land, slaves, clothing, gold, silver, and others innumerable. **2**. Things incorporeal are such as are intangible: rights, for instance, such as inheritance, usufruct, and obligations, however acquired. And it is no objection to this definition that an inheritance comprises things which are corporeal; for the fruits of land enjoyed by a usufructuary are corporeal too, and obligations generally relate to the conveyance of something corporeal, such as land, slaves, or money, and yet the right of succession, the right of usufruct, and the right existing in every obligation, are incorporeal. **3**. So too the rights appurtenant to land, whether in town or country, which are usually called servitudes, are incorporeal things. ...

TITLE V OF USE AND HABITATION

...

6. What we have here said concerning servitudes, and the rights of usufruct, use, and habitation, will be sufficient; of inheritance and obligations we will treat in their proper places respectively. And having now briefly expounded the modes in which we acquire things by the law of nations, let us turn and see in what modes they are acquired by statute or by civil law. ...

TITLE IX OF PERSONS THROUGH WHOM WE ACQUIRE

...

6. So much at present concerning the modes of acquiring rights over single things: for direct and fiduciary bequests, which are also among such modes, will find a more suitable place in a later portion of our treatise. We proceed therefore to the titles whereby an aggregate of rights is acquired. If you become the successors, civil or praetorian, of a person deceased, or adopt an independent person by adrogation, or become assignees of a deceased's estate in order to secure their liberty to slaves manumitted by his will, the whole estate of those persons is transferred to you in an aggregate mass. Let us begin with inheritances, whose mode of devolution is twofold, according as a person dies testate or intestate; and of these two modes we will first treat of acquisition by will. The first point which here calls for exposition is the mode in which wills are made. ...

BOOK III

...

TITLE XIII OF OBLIGATIONS

Let us now pass on to obligations. An obligation is a legal bond, with which we are bound by a necessity of performing some act according to the laws of our State. **1**. The leading division of obligations is into two kinds, civil and praetorian. Those obligations are civil which are established by statute, or at least are sanctioned by the civil law; those are praetorian which the praetor has established by his own jurisdiction, and which are also called honorary. **2**. By another division they are arranged in four classes, contractual, quasicontractual, delictal, and quasi-delictal. And, first, we must examine those which are contractual, and which again fall into four species, for contract is concluded either by delivery, by a form of words, by writing, or by consent: each of which we will treat in detail. ...

BOOK IV

TITLE I OF OBLIGATIONS ARISING FROM DELICT

HAVING treated in the preceding Book of contractual and quasi-contractual obligations, it remains to inquire into obligations arising from delict. The former, as we remarked in the proper place, are divided into four kinds; but of these latter there is but one kind, for, like obligations arising from real contracts, they all originate in some act, that is to say, in the delict itself, such as a theft, a robbery, wrongful damage, or an injury. ...

TITLE VI OF ACTIONS

The subject of actions still remains for discussion. An action is nothing else than the right of suing before a judge for what is due to one.

1. The leading division of all actions whatsoever, whether tried before a judge or a referee, is into two kinds, real and personal; that is to say, the defendant is either under a contractual or delictal obligation to the plaintiff, in which case the action is personal, and the plaintiff's contention is that the defendant ought to convey something to, or do something for him, or of a similar nature; or else, though there is no legal obligation between the parties, the plaintiff asserts a ground of action against some one else relating to some thing, in which case the action is real. Thus, a man may be in possession of some corporeal thing, in which Titius claims a right of property, and which the possessor affirms belongs to r him; here, if Titius sues for its recovery, the action is real. **2**. It is real also if a man asserts that he has a right of usufruct over a landed estate or a house, or a right of going or driving cattle over his neighbour's land, or of drawing water from the same; and so too are the actions relating to urban servitudes, as, for instance, where a man asserts a right to raise his house, to have an uninterrupted prospect, to project some building over his neighbour's land, or to rest the beams of his own house in his neighbour's wall. Conversely, there are actions relating to usufructs, and to rustic and urban servitudes, of a contrary import, which lie at the suit of plaintiffs who deny their opponent's right of usufruct, of going or driving cattle, of drawing water, of raising their house, of having an uninterrupted view, of projecting some building over the plaintiff's land, or of resting the beams of their house in the plaintiff's wall. These actions too are real, but negative, and never occur in disputes as to corporeal things, in which the plaintiff is always the party out of possession; and there is no action by which the possessor can (as plaintiff) deny that the thing in question belongs to his adversary, except in one case only, as to which all requisite information can be gathered from the fuller books of the Digest. **3**. The actions which have hitherto been mentioned, and others which resemble them, are either of statutory origin, or at any rate belong to the civil law. There are other actions, however, both real and personal, which the praetor has introduced in virtue of his jurisdiction, and of which it is necessary to give examples. For instance, he will usually, under the circumstances to be mentioned, allow a real action to be brought with a fictitious allegation— namely, that the plaintiff has acquired a title by usucapion where this, in fact, is not the case; or, conversely, he will allow a fictitious plea on the part of the defendant, to the effect that the plaintiff has not acquired such title where, in point of fact, he has. **4**. Thus, if possession of some object be delivered on a ground sufficient to legally transfer the same—for instance, under a sale or gift, as part of a dowry, or as a legacy—and the transferee has not yet acquired a complete title by usucapion, he has no direct real action for its recovery, if he accidentally loses possession, because by the civil law a real action lies at the suit of the owner only. But as it seemed hard that in such a case there should be no remedy, the praetor introduced an action in which the plaintiff, who has lost possession, fictitiously alleges that he has acquired a full title by usucapion, and thus claims the thing as his own. This is called the Publician action, because it was first placed in the Edict by a praetor called Publicius. **5**. Conversely, if a person, while absent in the service of the State, or while in the power of an enemy, acquires by usucapion property belonging to some one resident at home, the latter is allowed, within a year from the cessation of the possessor's public employment, to sue for a recovery of the property by a rescission of the usucapion: by fictitiously alleging, in other words, that the defendant has not thus acquired it; and the praetor from motives of equity allows this kind of action to be brought in certain other cases, as to which information may be gathered from the larger work of the Digest or Pandects. **6**. Similarly, if a person conveys away his property in fraud of creditors, the latter, on obtaining from the governor of the province a decree vesting in them possession of the debtor's

estate, are allowed to avoid the conveyance, and sue for the recovery of the property; in other words, to allege that the conveyance has never taken place, and that the property consequently still belongs to the debtor. **7**. Again, the Servian and quasi-Servian actions, the latter of which is also called 'hypothecary', are derived merely from the praetor's jurisdiction. The Servian action is that by which a landlord sues for his tenant's property, over which he has a right in the nature of mortgage as security for his rent; the quasi-Servian is a similar remedy, open to every pledgee or hypothecary creditor. So far then as this action is concerned, there is no difference between a pledge and a hypothec: and indeed whenever a debtor and a creditor agree that certain property of the former shall be the latter's security for his debt, the transaction is called a pledge or a hypothec indifferently. In other points, however, there is a distinction between them; for the term 'pledge' is properly used only where possession of the property in question is delivered to the creditor, especially if that property be movable: while a hypothec is, strictly speaking, such a right created by mere agreement without delivery of possession. **8**. Besides these, there are also personal actions which the praetor has introduced in virtue of his jurisdiction, for instance, that brought to enforce payment of money already owed, and the action on a banker's acceptance, which closely resembled it. By our constitution, however, the first of these actions has been endowed with all the advantages which belonged to the second, and the latter, as superfluous, has therefore been deprived of all force and expunged from our legislation. To the praetor is due also the action claiming an account of the *peculium* of a slave or child in power, that in which the issue is whether a plaintiff has made oath, and many others. **9**. The action brought to enforce payment of money already owed is the proper remedy against a person who, by a mere promise, without stipulation, has engaged to discharge a debt due either from himself or from some third party. If he has promised by stipulation, he is liable by the civil law. **10**. The action claiming an account of a *peculium* is a remedy introduced by the praetor against a master or a father. By strict law, such persons incur no liability on the contracts of their slaves or children in power; yet it is only equitable that damages should be recoverable against them to the extent of the *peculium*, in which children in power and slaves have a sort of property. **11**. Again, if a plaintiff, on being challenged by the defendant, deposes on oath that the latter owes him the money which is the object of the action, and payment is not made to him, the praetor most justly grants to him an action in which the issue is, not whether the money is owing, but whether the plaintiff has sworn to the debt. **12**. There is also a considerable number of penal actions which the praetor has introduced in the exercise of his jurisdiction; for instance, against those who in any way injure or deface his album; or who summon a parent or patron without magisterial sanction; or who violently rescue persons summoned before himself, or who compass such a rescue; and others innumerable. **13**. 'Prejudicial' actions would seem to be real, and may be exemplified by those in which It is inquired whether a man is free born, or has become free by manumission, or in which the question relates to a child's paternity. Of these the first alone belongs to the civil law: the others are derived from the praetor's jurisdiction. **14**. The kinds of actions having been thus distinguished, it is clear that a plaintiff cannot demand his property from another in the form 'if it be proved that the defendant is bound to convey'. It cannot be said that what already belongs to the plaintiff ought to be conveyed to him, for conveyance transfers ownership, and what is his cannot be made more his than it is already. Yet for the prevention of theft, and multiplication of remedies against the thief, it has been provided that, besides the penalty of twice or four times the value of the property stolen, the property itself, or its value, may be recovered from the thief by a personal action in the form 'if it be proved that the defendant ought to convey', as an alternative for the real action which is also available to the plaintiff, and in which he asserts his ownership of the stolen property. **15**. We call a real action a 'vindication', and a personal action, in which the contention is that some property should be conveyed to us, or some service performed for us, a 'condiction', this term being derived from *condicere*, which has an old meaning of 'giving notice'. To call a personal action, in which the plaintiff contends that the defendant ought to convey to him, a condiction, is in reality an abuse of the term, for nowadays there is no such notice as was given in the old action of that name.

16. Actions may next be divided into those which are purely reparative, those which are purely penal, and those which are mixed, or partly reparative, partly penal. **17**. All real actions are purely reparative. Of personal actions those which spring from contract are nearly all of the same character; for instance, the actions on loans of money, or stipulations, on loans for use, on deposit, agency, partnership, sale, and hire. If, however, the action be on a deposit occasioned by a riot, a fire, the fall of a building, or a shipwreck, the

praetor enables the depositor to recover double damages, provided he sues the bailee in person; he cannot recover double damages from the bailee's heir, unless he can prove personal fraud against the latter. **18**. In these two cases the action, though on contract, is mixed. Actions arising from delict are sometimes purely penal, sometimes are partly penal and partly reparative, and consequently mixed. The sole object of the action of theft is the recovery of a penalty, whether that penalty be four times the value of the property stolen, as in theft detected in the commission, or only twice that value, as in simple theft. The property itself is recoverable by an independent action in which the person from whom it has been stolen claims it as his own, whether it be in the possession of the thief himself or of some third person; and against the thief himself he may even bring a condiction, to recover the property or its value. **19**. The action on robbery is mixed, for the damages recoverable thereunder are four times the value of the property taken, three-fourths being pure penalty, and the remaining fourth compensation for the loss which the plaintiff has sustained. So too the action on unlawful damage under the lex Aquilia is mixed, not only where the defendant denies his liability, and so is sued for double damages, but also sometimes where the claim is for simple damages only; as where a lame or one-eyed slave is killed, who within the year previous was sound and of large value; in which case the defendant is condemned to pay his greatest value within the year, according to the distinction which has been drawn above. Persons too who are under an obligation as heirs to pay legacies or trust bequests to our holy churches or other venerable places, and neglect to do so until sued by the legatee, are liable to a mixed action, by which they are compelled to give the thing or pay the money left by the deceased, and, in addition, an equivalent thing or sum as penalty, the condemnation being thus in twice the value of the original claim.

20. Some actions are mixed in a different sense, being partly real, partly personal. They are exemplified by the action for the division of a 'family', by which one of two or more joint heirs can enforce against the other or rest a partition of the inheritance, and by the actions for the division of common property, and for rectification of boundaries between adjoining landed proprietors. In these three actions the judge has power, according as shall to him seem fair and equitable, to adjudge any part of the joint property, or of the land in dispute, to any one of the parties, and to order any one of them who seems to have an undue advantage in the partition or rectification to pay a certain sum of money to the other or the rest as compensation. **21**. The damages recoverable in an action may be either once, twice, three, or four times the value of the plaintiff's original interest; there is no action by which more than fourfold damages can be claimed. **22**. Single damages only are recoverable in the actions on stipulation, loan for consumption, sale, hire, agency, and many others besides. **23**. Actions claiming double damages are exemplified by those on simple theft, on unlawful damage under the lex Aquilia, on certain kinds of deposit, and for corruption of a slave, which lies against any one by whose instigation and advice another man's slave runs away, or becomes disobedient to his master, or takes to dissolute habits, or becomes worse in any way whatsoever, and in which the value of property which the runaway slave has carried off is taken into account. Finally, as we remarked above, the action for the recovery of legacies left to places of religion is of this character. **24**. An action for triple damages is grounded when a plaintiff makes an overstatement of his claim in the writ of summons, in consequence of which the officers of the court take too large a fee from the defendant. In such a case the latter will be able to recover from the plaintiff three times the loss which he sustains by the overcharge, including in these damages simple compensation for the sum paid in excess of the proper fee. This is provided by a distinguished constitution in our Code, under which a statutory condiction clearly lies for the damages in question. **25**. Quadruple damages are recoverable by the action on theft detected in the commission, by the action on intimidation, and by the action grounded on the giving of money in order to induce one man to bring a vexatious suit against another, or to desist from a suit when brought. Under our constitution too a statutory condiction lies for the recovery of fourfold damages from officers of the court, who exact money from defendants in excess of its provisions. **26**. There is this difference between the actions on simple theft and for the corruption of a slave, and the other of which we spoke in connexion with them, that by the two former double damages are recoverable under any circumstances; the latter, namely the action on unlawful damage under the lex Aquilia, and that on certain kinds of deposit, entail double damages on the defendant only if he denies his liability; if he admits it, simple damages alone can be recovered. The damages are double under an action for recovery of legacies left to religious places not only when the liability is denied, but also when the defendant delays payment until sued by the order of a

magistrate; if he admits his liability, and pays before being so sued, he cannot be compelled to pay more than the original debt. **27**. The action on intimidation also differs from the others which we mentioned in the same connexion, in that it contains in its very nature an implied condition that the defendant is entitled to acquittal if, on being so ordered by the judge, he restores to the plaintiff the property of which the latter has been deprived. In other actions of the same class this is not so; for instance, in the action on theft detected in the commission, the defendant has under any circumstances to pay fourfold damages. **28**. Again, some actions are equitable, others are actions of strict law. To the former class belong the actions on sale, hire, unauthorized agency, agency proper, deposit, partnership, guardianship, loan for use, mortgage, division of a 'family', partition of joint property, those on the innominate contracts of sale by commission and exchange, and the suit for recovery of an inheritance. Until quite recently it was a moot point whether the lastnamed was properly an equitable action, but our constitution has definitely decided the question in the affirmative. **29**. Formerly too the action for the recovery of a dowry was an equitable action: but as we found that the action on stipulation was more convenient, we have, while establishing many distinctions, attached all the advantages which the former remedy possessed to the action on stipulation, when employed for the recovery of a dowry. The former action being thus by a judicious reform abolished, that on stipulation, by which it has been replaced, has deservedly been invented with all the characteristics of an equitable action, so far as and whenever it is brought for the recovery of a dowry. We have also given persons entitled to sue for such recovery a tacit hypothec over the husband's property, but this right is not to give any priority over other hypothecary creditors except where it is the wife herself who sues to recover her dowry; it being in her interest only that we have made this new provision. **30**. In equitable actions the judge has full power to assess on good and fair grounds the amount due to the plaintiff, and in so doing to take into account counterclaims of the defendant, condemning the latter only in the balance. Even in actions of strict law counterclaims have been permitted since a rescript of the Emperor Marcus, the defendant meeting the plaintiff's claim by a plea of fraud. By our constitution, however, a wider field has been given to the principle of set-off, when the counterclaim is clearly established, the amount claimed in the plaintifFs action, whether real or personal, or whatever its nature, being reduced by operation of law to the extent of the defendant's counterclaim. The only exception to this rule is the action on deposit, against which we have deemed it no less than dishonest to allow any counterclaim to be set up; for if this were permitted persons might be fraudulently prevented from recovering property deposited under the presence of a set-off. **31**. There are some actions again which we call arbitrary, because their issue depends on an '*arbitrium*' or order of the judge. Here, unless on such order the defendant satisfies the plaintiff's claim by restoring or producing the property, or by performing his obligation, or in a noxal action by surrendering the guilty slave, he ought to be condemned. Some of such actions are real, others personal. The former are exemplified by the Publician action, the Servian action for the recovery of a tenant farmer's stock, and the quasi-Servian or so-called hypothecary action; the latter by the actions on intimidation and on fraud, by that for the recovery of a thing promised at a particular place, and by the action claiming production of property. In all these actions, and others of a similar nature, the judge has full power to determine on good and just grounds, according to the circumstances of each particular case, the form in which reparation ought to be made to the plaintiff. ...

B. DIGEST 23.2 (ON THE RITE OF NUPTIALS)

[ed. T. Mommsen and P. Krueger, trans. A. Watson, *The Digest of Justinian* (Philadelphia, 1985),[†] pp. 2:657–68])

2 FORMATION OF MARRIAGE

1. MODESTINUS, *Rules*, book 1: Marriage is the union of a man and a woman, a partnership for life involving divine as well as human law.

2. PAUL, *Edict*, book 85: Marriage cannot take place unless everyone involved consents, that is, those who are being united and those in whose power they are.
