D. PROCEEDINGS CONCERNING THE ADOPTION OF THE THEODOSIAN CODE (438, 443)

in C. Pharr, ed., *The Theodosian Code* (1952) 3-7†

Minutes[1] of the Senate[2] of the City of Rome [Gesta Senatus Urbis Romae]

1. In the year of the sixteenth consulship of Our Lord Flavius Theodosius Augustus[3] and the consulship of the Most Noble Anicius Acilius[4] Glabrio Faustus.—438.[5]

When the Most Noble and Illustrious Anicius Acilius Glabrio Faustus, thrice Ex-Prefect[6] of the City,[7] Praetorian Prefect,[8] and Consul Ordinary,[9] in his home,[10] which is at Palma,[11] and the Most Noble and Illustrious Flavius Paulus, Prefect of the City,[7] the Respectable Junius Pomponius Publianus, Vicar of the Eternal City,[7] men of noble rank,[12] and the Most August Order of the Senate, had assembled and had conferred together for a considerable time, and the Constitutionaries Anastasius and Martinus had entered pursuant to an order, the Most Noble and Illustrious Anicius Acilius[4] Glabrio Faustus, thrice Ex-Prefect of the City,[7] Praetorian Prefect, and Consul Ordinary, spoke as follows:

2. "The felicity that emanates from our immortal Emperors proceeds in its increase to the point that it arrays with the ornaments of peace those whom it defends in the fortunes of war.[13] Last year when I attended, as a mark of devotion, the most felicitous union of all the sacred ceremonies,[14] after the nuptials had been felicitously solemnized, the most sacred Emperor,[15] Our Lord Theodosius, desired to add the

† INTRODUCTORY NOTE: For fuller discussions of official titles, technical terms, and words with special uses in this Code, see the Glossary. A bibliography will be found at the end of the book.

[1] These records of the proceedings of the Senate are not an actual part of the Theodosian Code, but since the discovery of their manuscript in 1820, they are regularly printed as an introduction in editions of the Code.

[2] The Senate of the City of Rome had long since fallen from its high estate, had lost all real power, and had become the subservient tool of the Emperor.

[3] The reigning Emperor was regularly indicated by the title Augustus, though at times he might be called Augustus and Caesar. When the Emperor Designate was actively participating in the administration of the Empire, he was called Caesar. If the Emperor Designate was too young for his administrative duties, he was called *Nobilissimus Puer*, Most Noble Youth, though at times he might be called Most Noble Youth and Caesar.

[4] The manuscript has Achillius. Compare Dessau 1281-1283 for three important inscriptions concerning him. For the significance of his titles, see the Glossary.

[5] All dates in this work are A.D. unless otherwise indicated.

[6] Ex-Prefect may indicate either a person who has actually served as prefect or one upon whom the honorary title of prefect has been conferred by letters patent of nobility that were issued by the Emperor. Such honorary titles of various ranks were eagerly sought, since they conferred many substantial privileges in addition to prestige.

[7] The City may be either of the two capitals, Rome or Constantinople. In this case, it is Rome.

[8] There were four praetorian prefects in the Empire. They were the highest officials next to the Emperor.

[9] As distinguished from an honorary consul, who was lower in rank.

[10] One of the many indications of the low status of the Senate was the fact that it could meet at this time in a private residence.

[11] Palma or Ad Palmam was a region in Rome, near the center of the City, between the Curia, or old Senate House, and the Arch of Septimius Severus. It was probably named from a palm tree that grew there.

[12] *proceres.*

[13] The Emperor was commander-in-chief of the Roman armies. Observe the florid and pompous Byzantine style.

[14] On October 29, 437, at Constantinople, Valentinian III, Emperor of the western part of the Roman Empire was married to Licinia Eudoxia, daughter of Theodosius II, Emperor of the eastern part of the Empire.

[15] Everything connected with the Emperor was considered divine or sacred. Thus there were the sacred imperial palace, the sacred laws the sacred imperial bedchamber, the sacred imperial largesses, the sacred imperial wardrobe, and many others. The government was an absolute autocracy, and the State was thoroughly militarized, with the Emperor in supreme command. He was the sole source of law. His orders or enactments were known as laws, statutes, or edicts, or more commonly as constitutions, since they were the fundamental law. By the simple issuance of such a constitution the Emperor could repeal any previous law or laws. All imperial enactments were considered divine or sacred, since they were the utterances of the Emperor, and the Emperor often proclaimed that the contravention of a given statute would be considered sacrilege and would be punished as such. The penalty for sacrilege was usually death, I, 6, 9; 6, 5, 2; 6, 24, 4; 6, 29, 9; 6, 35, I3; 7, 4, 30, and often throughout the Code.

following high honor also to His world,[16] namely, that He should order to be established the regulations that must be observed throughout the world, in accordance with the precepts of the laws which had been gathered together in a compendium of sixteen books, and these books he had desired to be consecrated by His most sacred name. The immortal Emperor, Our Lord Valentinian, with the loyalty of a colleague and the affection of a son,[17] approved this undertaking.

The assembly shouted: "Thou art newly eloquent! Truly eloquent!"

3. The Most Noble and Illustrious Anicius Acilius Glabrio Faustus, thrice Ex-Prefect of the City, Praetorian Prefect, and Consul Ordinary, said:

"Therefore, the most sacred[15] Emperor summoned me and the Illustrious man[18] who was Prefect of the Orient at that time, and ordered copies of the Code to be delivered from his own divine[15] hand, one to each of us, in order that they might be dispatched throughout the world with all due reverence. Thus it was among the first of His provisions that His forethought should be brought to the knowledge of Your Sublimity.[19] The Code as directed by the order of both Emperors was received into our hands. The constitutionaries are present. If it please Your Magnificence,[19] let Your Magnificence order that those very laws[20] be read to you by which They ordered that this undertaking should be performed, in order that we may obey with proper devotion the most carefully considered precepts of the Immortal Emperors."

The assembly shouted: "It is right! So be it! So be it!"

4. The Most Noble and Illustrious Anicius Acilius Glabrio Faustus, thrice Ex-Prefect[6] of the City, Praetorian Prefect,[8] and Consul Ordinary,[9] read from the first book of the Theodosian Code, under the title, "Constitutions and Edicts of the Emperors."[20]

"Our Lords, Emperors Theodosius and Valentinian Augustuses[21] to the Senate.[22]

We decree that, after the pattern of the Gregorian and Hermogenian Codes,[23] a collection shall be made of all the constitutions that were issued by the renowned Constantine by the sainted[24] Emperors after him and by Us and which rest upon the force of edicts or sacred imperial law of general force.[25]

When numbers are used without identification in this commentary, they refer to passages in the Theodosian Code. Thus I, 6, 9, as given above, means: see Book I, title 6, constitution 9 of the Code. The other references will be self-explanatory.

[16] *Orbis suus*, his realm, his world; the eastern part of the Empire, or possibly the whole Roman Empire. For administrative purposes, the Roman Empire was organized at this time into two territorial divisions. Theodosius II, the senior Emperor, ruled the East with his capital at Constantinople; Valentinian III, the junior Emperor and son-in-law of Theodosius, was Emperor in the West with his residence at Ravenna.

[17] Son-in-law and junior Emperor.

[18] Darius, 6, 23, 4.

[19] *Vestra Sublimitas.* It is characteristic of this period to employ high sounding titles, and this is one of the many features of the highly artificial and rhetorical Byzantine style. The dignitaries of the later Roman Empire rejoiced in such appellations as Your Sublimity, Your Prudence, Your Gravity, Your Magnificence, and many others. When the Emperor referred to himself he used such titles as Our Clemency, Our Omniscience, Our Serenity, and many others.

[20] Only CTh I. I, 5 is found quoted below in the ms. CTh I, I, 6 and NTh I, I (the first Novel of Theodosius) were probably read also to the Senate, since they are later constitutions, and they repeal some of the provisions of CTh I, I, 5. Thus these three constitutions would be "those very laws" (*ipsae leges*) that the speaker has just mentioned. The plural would hardly be used if the speaker were referring to CTh I, I, 5 only. Besides, NTh I, I forms the logical preface of the Code and was probably composed for that purpose. Compare the preface of the Code of Justinian and the prefaces of the various Germanic codes that were either based upon the Theodosian Code or else strongly influenced by it.

[21] In this work most foreign terms that have come into common English usage are consistently anglicized and the English form of the plural is usually preferred. Thus such forms as Augustuses, circuses, bonuses, formulas, and indexes are employed, in harmony with the present tendency in the development of the English language.

An imperial enactment, or constitution, as it was called, bore the names of all the Emperors who were reigning at the time of its issuance, though usually only one Emperor was the author. In the heading, or inscription, as it was called, of the constitution, the names of the Emperors were arranged in the order of the seniority of their accession to the throne. It is often possible to determine the author of a constitution by the place of its issuance or by the geographical location of the addressee. The author of the present constitution was Theodosius, since it was issued at Constantinople, his capital.

[22] Of Constantinople, or New Rome, the capital of the eastern part of the Empire.

[23] The Gregorian and Hermogenian Codes were unofficial compilations of imperial enactments or constitutions as they were called. These codes seem to have been made by two law professors, Gregorius and Hermogenes. The Gregorian Code was compiled shortly after 294 in the East, probably in Beirut, the seat of a great law school. The Hermogenian Code was compiled early in the fourth century. These two codes obtained a wide usage and general acceptance, especially in the law schools. They served as models for the official codes of Theodosius and Justinian.

First, the titles, which are the definite designations of the matters therein,[26] shall be so divided that when the various headings have been expressed, if one constitution should pertain to several titles, the materials shall be assembled wherever each is fitting.[27] Second, if any diversity[28] should cause anything to be stated in two ways,[29] it shall be tested by the order of the readings,[30] and not only shall the year of the consulship be considered and the time of the reign be investigated, but also the arrangement of the work[30] itself shall show that the laws which are later are more valid.[31]

Furthermore, the very words themselves of the constitutions, in so far as they pertain to the essential matter, shall be preserved, but those words which were added, not from the very necessity of sanctioning the law,[32] shall be omitted.

Although it would be simpler and more in accordance with law[33] to omit those constitutions which were invalidated by later constitutions and to set forth only those which must be valid, let us recognize that this Code and the previous ones[23] were composed for more diligent men, to whose scholarly efforts[34] it is granted to know those laws also which have been consigned to silence and have passed into desuetude, since they were destined to be valid for cases of their own time only.

Moreover, from these three Codes[35] and from the treatises and responses of the jurists which are attached to[36] each of the titles, through the services of the same men who shall arrange the third Code, there shall be produced another Code[37] of Ours. This Code shall permit no error, no ambiguities; it shall be called by Our name, and shall show what must be followed and what must be avoided by all. For the consummation of so great a work and the composition of the Codes—the first[38] of which shall collect all the diversity[39] of general constitutions, shall omit none outside itself which are now permitted to be cited in court, and shall reject only an empty copiousness of words, the other[37] shall exclude every contradiction[39] of the law and shall undertake the guidance of life—[40]men must be chosen of singular trustworthiness, of the most brilliant genius. When they have presented the first Code[38] to Our Wisdom

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[24] *divi.* This term cannot be translated satisfactorily. During the period of paganism in the Roman Empire, the Emperors were deified on their death and were given the title *divi*, meaning deified or divine. In Christian times this title was kept to indicate deceased Emperors, and it is translated as sainted, though it is recognized that this is inadequate. Thus many of the worst pagan Emperors and Julian the Apostate were regularly called *divi*.

[25] *sacra generalitas*, as contrasted with grants of special imperial favor to specific persons. The Theodosian Code thus omits all laws that granted such special privileges. From the time of the early Republic and the Laws of the Twelve Tables the Romans sought to establish the principle that all laws should be of universal application and that "Laws that confer special privileges upon specific persons shall not be proposed." This fundamental juristic axiom was often disregarded, even in the time of the Republic, and the Roman Emperors issued a great many constitutions that conferred special privileges upon certain specified persons, contrary to the express provisions of the general laws. This was often done in the interest of equity, when the strict application of a general law would work an injustice, but more often the Emperors issued such constitutions that conferred special favors, often of great value, upon their intimate friends and supporters. An Emperor was regularly surrounded by a group of strong men who were always ready to request or even demand special favors, and the Emperor was not always able to refuse, since his power usually depended upon the vigorous support of such men. The Emperors often sought to protect themselves and the interests of good government by declaring that any imperial grant of special privileges should be void, if it was found to contravene the general laws, if it should prove to be contrary to the public interest, or if it was granted in reply to fraudulent petitions. Cf. especially 1, 1, 4; 1, 2, 2-3; 1, 2, 5-6; 1, 2, 8-9; 10, 8-10; 11, 20; NV 19, 1; NAnth 3. 3.

[26] *negotia.* which … therein: may be a gloss, Kr.

[27] Or: the material everywhere which is related shall be placed together.

[28] *varietas*, diversity of material, a contradiction.

[29] Thus producing a conflict.

[30] The laws shall be arranged chronologically under each title, and thus a law of later date will appear later in any given title.

[31] A fundamental legal principle, D. 1, 4, 4.

[32] Or: for sanctioning the law, but from necessity (of the case); that is, words that are superfluous.

[33] *justius.*

[34] *scholastica intentio*, pursuit of legal studies.

[35] The Gregorian and Hermogenian Codes and the present edition of the Theodosian Code.

[36] Or: closely connected with.

[37] This final code was never compiled. Such a work was ultimately consummated in the Basilica which combined the various types of material into one work. It was published in Greek about the beginning of the tenth century.

[38] The first Theodosian Code in the projected scheme of Theodosius, the Code which we now have.

[39] *diversitas*, diversity, contradiction.

[40] *magisterium vitae.*

and to the public authority, they shall undertake the other,[37] which must be worked over until it is worthy of publication. Let Your Magnificence acknowledge the men who have been selected; We have selected the Illustrious Antiochus, Ex-Quaestor[6] and Ex-Prefect,[41] the Illustrious Antiochus, Quaestor of the sacred[15] imperial palace, the Respectable Theodorus, Count and Master of the Bureau of Memorials, the Respectable Eudicius and Eusebius, Masters of the Bureaus, the Respectable Johannes, Ex-Count of Our sacred imperial sanctuary,[42] the Respectable Comazon and Eubulus, Ex-Masters of the Bureaus, and Apelles, most eloquent jurist.[43]

We are confident that these men who have been selected by Our Eternity will employ every exceptionally learned man, in order that by their common study a reasonable plan of life may be apprehended and fallacious[44] laws may be excluded.

Furthermore, if in the future it should be Our pleasure to promulgate any law in one part of this very closely united Empire, it shall be valid in the other part[16] on condition that it does not rest[45] upon doubtful trustworthiness or upon a private assertion; but from that part of the Empire in which it will be established, it shall be transmitted with the sacred imperial letters,[46] it shall be received[47] in the bureaus of the other part of the Empire also, and it shall be published with the due formality of edicts. For a law that has been sent[48] must be accepted and must undoubtedly be valid, and the power to emend and to revoke shall be reserved to Our Clemency. Moreover, the laws must be mutually announced, and they must not be admitted otherwise. (Etc.)[49]

Given on the seventh day before the kalends of April at Constantinople in the year of the consulship of Florentius and Dionysius.—March 26, 429.

5. The assembly shouted:

"Augustuses of Augustuses, the greatest of Augustuses!"

Repeated[50] eight times.

"God gave You to us! God save You for us!"

Repeated[50] twenty-seven times.

"As Roman Emperors, pious and felicitous, may You rule for many years!"

Repeated twenty-two times.

"For the good of tile human race, for the good of the Senate, for the good of the State, for the good of all!"

Repeated twenty-four times.

"Our hope is in You, You are our salvation!"[51]

Repeated twenty-six times.

"May it please our Augustuses to live forever!"

Repeated twenty-two times.

"May You pacify the world and triumph here in person!"

Repeated twenty-four times.

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[41] M. writes prefect in 1, 1, 5.

[42] *Nostrum sacrarium*, Our sanctuary, the sacred imperial consistory.

[43] *scholasticus*, jurist, advocate.

[44] Or: every fallacy shall be excluded from the law.

[45] Or: in order that it may not rest.

[46] *sacri affatus.*

[47] Or: on condition that it be received.

[48] Under such conditions.

[49] When the Codification Commission compiled the Theodosian Code, they omitted unnecessary portions of the laws, as they found them in the archives, in accordance with their instructions as given above in the first part of this constitution. Thus *Etc.* at the end of a law or *Post alia*, after other matters, at the beginning of a law in this Code indicates that the compilers omitted portions at the end or at the beginning of laws as they found them.

[50] *dictum viii*i may mean shouted eight times in concert, or shouted by eight different Senators. A similar interpretation should be applied to the succeeding acclamations.

[51] *Spes in Vobis; salus in nobis.* The translation is conjectural.

"These are the prayers of the Senate, these are the prayers of the Romal1 people!"

Repeated ten times.

"Dearer than our children, dearer than our parents!"

Repeated sixteen times.

"Suppressors of informers,[52] suppressors of chicanery!"

Repeated twenty-eight times.

"Through You our honors, through You our patrimonies, through You our all!"

Repeated twenty-eight times.

''Through You our military strength, through You our laws!"

Repeated twenty times.

"We give thanks for this regulation of Yours!"

Repeated twenty-three times.

"You have removed the ambiguities of the imperial constitutions!"

Repeated twenty-three times.

"Pious emperors thus wisely plan!"

Repeated twenty-six times.

"You wisely provide for lawsuits, You provide for the public peace!"

Repeated twenty-five times.

Let many copies of the Code be made to be kept in the governmental offices!"

Repeated ten times.

"Let them be kept under seal in the public bureaus!"

Repeated twenty times.

"In order that the established laws may not be falsified, let many copies be made!"

Repeated twenty-five times.

"In order that the established laws may not be falsified, let all copies be written out in letters!" [53]

Repeated eighteen times.

"To this copy which will be made by the constitutionaries let no annotations upon the law be added!"[54]

Repeated twelve times.

"We request that copies to be kept in the imperial bureaus shall be made at public expense!

Repeated sixteen times.

"Hail! Faustus!"[55]

Repeated seventeen times.

"A second term for you in the consulship!"

Repeated fifteen times.

"You regulate everything, you harm no man!"

Repeated thirteen times.

"Let copies be made and dispatched to the provinces!"

Repeated eleven times.

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[52] Informers were especially dreaded by the wealthy, such as the Senators, 10, 10, 19.

[53] Without the use of abbreviations, which were commonly employed in manuscripts of that period.

[54] 0r: let no legal abbreviations (*notae juris*) be written. Or: let no annotations … be used, M. Cf. 1, 4, 3, 3.

[55] The greetings to Faustus, as well as those to Paulus and Aetius below, are parenthetically interjected and disturb the continuity of the various requests by the Senate regarding the Code. These greetings were made by the special friends of these men. Such greetings were incorporated in the minutes and were intended for the eye of the Emperor. They thus served to promote the candidacies of the favorites of these Senators for the consulship, since the consuls were appointed by the Emperor. In this case, the recommendations of the Senate were apparently ineffectual. Paulus did not attain his first consulship or Faustus his second, while Aetius was not appointed to his third consulship until 446, some seven years later.

"Worthy purveyor of such great benefits!" [56]

Repeated ten times.

"Hail! Paulus!"[55]

Repeated twelve times.

"A consulship for you!"

Repeated eleven times.

"We request that the Codes be kept in the public bureaus!"

Repeated fifteen times.

"Let this duty be assigned to the office of the prefects!"

Repeated twelve times.

"Let each prefect affix his own seal!"

Repeated fifteen times.

"Let each have a copy in his own office!"

Repeated twelve times.

"We ask that no laws be promulgated in reply to supplications!"[57]

Repeated twenty-one times.

"Hail! Aetius!"[55]

Repeated fifteen times.

"A third term for you in the consulship!"

Repeated thirteen times.

"Through your vigilance we are safe and secure!"

Repeated twelve times.

"Through your vigilance, through your labors!"

Repeated fifteen times.

"Hail! Faustus!"

Repeated thirteen times.

"A second term for you in the consulship!"

Repeated ten times.

"We ask that you report[58] to the Emperors the desires of the Senate!"

Repeated twenty times.

"Preserver of the laws, preserver of the decrees!"

Repeated sixteen times.

"All the rights of landholders are thrown into confusion by such surreptitious actions!"[59]

Repeated seventeen times.

6. The Most Noble and Illustrious Anicius Acilius Glabrio Faustus, thrice Ex-Prefect of the City, Praetorian Prefect and Consul Ordinary, said:

"That which has been read with due veneration shall be attached to the minutes." And he added,[60] "I count this service also among the benefactions of the immortal Emperors in that through me They

[56] Since Faustus was the imperial messenger who had brought this matter to the Senate.

[57] *preces*, the technical term for a petition to the Emperor, since he was considered divine, nn. 15; 25.

[58] *suggero*, the technical term for making an official report and recommendations to the Emperor, 1, 8, 1, and often in the Code. This request is addressed to Faustus as the imperial messenger.

[59] A reference back to the request that no laws should be promulgated in reply to supplications. A variant translation, "All the law is thrown into confusion by the surreptitious activities of the landholders," seems improbable, became the Senators were the great landholders of the time. Or: Repeated nineteen times. All the rights … by surreptitious actions.

[60] Reading *et adiecit*, with Theresa S. Davidson, AJP 266 (1946), 168-183. M. conjectures *et addentur*: "The constitution of the Emperors which has been read … and the words which have been spoken shall be attached to the minutes and shall be added thereto." The ms. has *et ad inter.* Possibly the corrupt reading conceals a reference to NTh 1, 1, the Validation (*Auctoritas*) of the Theodosian Code. See n. 20.

announce to Your Magnificence those enactments which They have deemed worthy to establish as Their own laws."

The assembly shouted:

"Hail! Faustus!"[55]

Repeated sixteen times.

"A second term for you in the consulship!"

Repeated ten times.

"To the Consul of the Oracle!"[61]

Repeated thirteen times

7. The Most Noble and Illustrious Anicius Acilius Glabrio Faustus, thrice Ex-Prefect of the City, Praetorian Prefect and Consul Ordinary, said:

> "Pursuant to the orders of Our Lords and the desires of Your Eminences, it shall now be an object of my care to provide for the transcription of this Code in three groups[62] through the reliable services of the Respectable Veronicianus, who was selected by agreement between Your Magnificence and me, and by the reliable services of the constitutionaries, Anastasius and Martinus, whom we have already approved as having given long and faultless service to this office. Then, while the copy[63] which I have presented shall remain in the exalted office of the praetorian archives, the bureau of the Magnificent prefect of the City, a man of equal trustworthiness, shall hold the second, but the constitutionaries shall be ordered to retain the third in their own custody faithfully and at their own risk, in order that they may publish it to the people, with this provision, that no copies may be published except such as have been transcribed from this copy[64] by the constitutionaries, in their own hand."

"Likewise, it shall be an object of my care to arrange for this also, that another copy of the Code[65] shall be transcribed by these men and shall be dispatched with like devotion to the Province of Africa, in order that there, too, a model of equal reliability may be preserved."

The assembly shouted: "Hail! Faustus!"

Repeated sixteen times.

"A second term for you in the consulship!"

Repeated fifteen times.

"To a man of all the virtues!"

Repeated ten times.

(*And by another hand.*) *1*, *Fluvius Laurentius*,[66] *Secretary of the Most August Senate*, *have published this on the eighth day*[67] *before the kalends of January.—December 25*, *438.*

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[61] The Oracle was the Emperor Theodosius, as the source of divine responses. The consul of the Oracle was Faustus, the colleague of Theodosius in the consulship for that year, n. 15.

[62] *corpora.*

[63] *codex.*

[64] *corpus.*

[65] *alius codex.*

[66] The epitaph of this Laurentius is published by Ross in *Bull. Crist. 7* (1869), 18: *Hic quiescit in pace Laurentius Scriba Senatus. Dep. die III Idum Mart. Adelfio viro Clarissimo Consule.* March 3, 451.

[67] *sub die viii*, an unusual expression.

[1][THE CONSTITUTIONARIES][1] (DE CONSTTTUTIONARIIS)

8. Our Lords the Emperors and the Caesars[2] to Flavius Anastasius and Hilarius Martinus.

In the matter concerning which the Illustrious Faustus, Praetorian Prefect, consulted Our Divinity, as the Minutes of the Most August Senate as submitted[3] bear witness, We see that the regulations which were prescribed by the most invincible Emperor, the father[4] of Our Clemency, to provide for the preservation of the Theodosian Code were fortified with greater diligence by the Senate, so that the license to publish copies might be granted to those persons only upon whom the risk was to fall if the published copies contained any falsification. Therefore, tile Illustrious prefect of the City, Our Father[5] and Retainer,[6] whose duty it is to enforce very diligently what the Senate has decided for the security of all, shall know that the license to publish copies has been assigned to you; that the production, also, of copies of the aforesaid body of law[7] shall be provided for at the risk of you[8] alone; that those persons[9] may have no traffic in either the publication or production of copies, since it is certain that the hazard of falsification falls upon you; that both the office staff of the court of inquiry and those who have not obeyed Our laws are constrained by the threat of a fine, as stated in your supplication,[10] and by the penalty of sacrilege,[11] and all surreptitious activity shall cease.

Given on the tenth day before the kalends of January at Rome in the year of the second consulship of the most noble Maximus and the consulship of the Most Noble Paterius.—December 23, *443.*

[1–1] The author of this rescript is Valentinian, Min. Sen., n. 21. It is not a part of the Theodosian Code but it is found in most editions, since it is so closely connected with the Code.

[2] It is unusual that the names of the reigning Emperors, Theodosius and Valentinian, are not here given. The reigning Emperors were regularly called *Imperatores* and Augustuses, Min. Sen., n. 3.

[3] *subdita*, appended.

[4] Valentinian, the author of this constitution thus refers to Theodosius, who was his father-in-law and the elder Emperor, Min. Sen., n. 21.

[5] *Parens*, father, near kinsman, cousin**,** patrician, an honorific title, used by the Emperor when referring to a preceding Emperor or to one of the highest ranking members of the nobility. Cf. the modern usage of the word cousin in this sense. Similarly, the Emperors used the word "Brother" (*Frater*) as a purely honorific title. Storacius was Prefect of the City in 443, NVal. 11, 1.

[6] *Amicus.*

[7] *memoratum corpus.* Some would understand this as referring to guilds of copyists.

[8] You constitutionaries.

[9] About whom you complain. Or: other persons, M.

[10] Min. Sen., n. 57.

[11] Since everything connected with the Emperor was sacred and divine, the violation of any law issued by him could be considered as sacrilege, Min. Sen., n. 15. The punishment for sacrilege was usually death.

E. DIGEST 1.2.2pr–53

in A. Schiller, trans., in *Roman Law*: *Mechanisms of Development* (1978), 119–27[†]

POMPONIUS, *Libro singulari enchiridii*:

[Part 1] Accordingly it seems necessary for us to set forth the origin and development of the law itself. **1.** Now at the beginning of our state the people undertook at first to act without fixed statute or fixed law, and everything was personally governed by the kings. **2.** After that, when the state was somewhat enlarged, it is related that Romulus himself divided the people into thirty parts, which parts he called *curiae*, for the reason that he exercised the care (*cura*) of the commonwealth in accordance with the opinions of those parts. Accordingly, he himself proposed to the people certain curiate statutes, and so did succeeding kings. All these exist, written down in the book of Sextus Papirius, who was among the leading men in the time of Superbus, the son of Demaratus of Corinth. This book, as we have said, is

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[†] The text used for translation is that established by Mommsen, with the accepted MS emendations indicated by < >. For conjectured interpolations, see Index Interp. I 3-6, Supp. I 1-2. [CD made some changes in paragraphing and punctuation.]

two from their number should be appointed <to superintend the games>; so the curule aediles were created.

27. And since the consuls were called a way by wars on the borders and there was no one in the state to administer justice, it came to pass that a praetor was also created, who was called *urbanus* because he administered justice in the city. **28.** Some years later, as this praetor did not suffice because great numbers of foreigners (*peregrini*) were coming into the state, another praetor was created in addition, who was called *peregrinus* from the fact that for the most part he administered justice to the foreigners. **29.** Then when it became necessary for magistrates to preside over the court of the spear (*hasta*), ten men for judging causes (*decemviri in litibus iudicandis*) were constituted. **30.** About the same time there were also appointed four men (*quattuorviri*) to take charge of highways, and three men of the mint (*triumviri monetales*) who coined bronze, silver and gold, and three men for capital cases (*triumviri capitales*) who had charge of the prison so that when punishment was to be inflicted it should be done by their agency. **31.** And since it was undesirable for magistrates to be engaged in public affairs in the evening, five men (*quinqueviri*) were appointed this side of the Tiber and beyond the Tiber who might act in place of the magistrates. **32.** Then with the conquest of Sardinia, later Sicily, then Spain, and finally the province of Narbo, as many praetors were created as provinces had been conquered, some to preside over home affairs, others over provincial matters. Later, Cornelius Sulla instituted state trials (*quaestiones publicae*), for example, for forgery, for murder, for stabbers, and he added four praetors. Then Gaius Iulius Caesar appointed two praetors and two aediles to superintend the grain, <called> *cereales*, from Ceres. So there were created twelve praetors and six aediles. Later divus Augustus instituted sixteen praetors. Still later divus Claudius added two praetors who should have jurisdiction over trusts (*fideicommisum*), one of whom divus Titus suppressed; and divus Nerva added one who should have jurisdiction over cases involving the fisc and private persons. Thus eighteen praetors administer justice in the state.

33. And all this holds good as long as the magistrates are within the state; but whenever they leave, one remains to administer justice, he is called the *praefectus urbi*. The *praefectus* was formerly appointed <when the other left>; later, apparently on account of the Latin festivals, (the regular appointment) was introduced and annually made. However, the *praefecti annonae* and *vigilum* are not magistrates, but were created with special power in the public interest. At the same time, tribunes this side of the Tiber (*Cistiberes*) of whom we have spoken, were afterwards by a senatus consultum made aediles. **34.** Therefore, on the basis of the above, ten tribunes of the plebes, two consuls, eighteen praetors and six aediles had legal competence in the state.

[Part3] **35.** The science of the *ius civile* has been professed by many of the greatest men; mention is to be made at this time of such of them as were of first rank in the estimation of the Roman people in order to set forth by whom and in what way the laws were made and handed down. And indeed, of all of those who acquired the knowledge, it is said that no one publicly professed it before Tiberius Coruncanius; all those before him had either thought to keep the *ius civile* secret and only found time for their consultants rather than putting themselves at the disposal of those wishing (to learn). **36.** A learned (jurist) of first rank was Publius Papirius who made a compilation of the royal statutes (*leges regiae*). After him came Appius Claudius, one of the ten men who had the chief part in the composition of the Twelve Tables. After him an Appius Claudius, of the same family, possessed the greatest knowledge (of the law); he was called 'the Hundred-handed'; he laid down the Appian Way and constructed the Claudian aqueduct and voted that Pyrrhus should not be admitted into the city, and it was he, it is said, who first wrote (forms of) actions concerning usurpations, which book is not extant; the same Appius Claudius invented the letter R, and it seems to have followed from this that Valesii become Valerii and Fusii became Furii. **37.** After these there was Sempronius, a man of the greatest learning, whom the Roman people called Σοφὸς ('the Wise'), nor has anyone else before or after him received that surname. (Then there was) Caius Scipio Nasica, who was called by the Senate 'the Best'; besides, a house in the Via Sacra was given to him by the state, so that he could more readily be consulted. Next Quintus Mucius who, having been sent as envoy to the Carthaginians, had two dice laid before him, one for peace and the other for war, and was given the choice of which he desired to carry back to Rome, took them both and said it was for the Carthaginians to ask which of the two they would rather receive.

38. After these there was Tiberius Coruncanius, who, as I have said, first began to profess (the law); however, no writing of his is extant but his *responsa* were many and memorable. Next Sextus Aelius and his brother Publius Aelius and Publius Atilius had great learning in professing (the law), so much so that the two Aelii became consuls; Atilius, moreover, was the first called *Sapiens* ('the Wise') by the

people. Ennius, indeed, praised Sextus Aelius, and a book of his is extant which is entitled ‘tripartita’, containing a sort of cradle of the law; it is called ‘tripartita’ because the interpretation is joined to the prefixed law of the Twelve Tables, and the *legis actio* is added. Three other books are said to be by the same author, but some deny that they are his; Cato followed them to some extent. Next MARCUS CATO, the head of the Porcian family, some of whose books are extant; but many more of his son’s, upon which others are founded.

39. After these there were PUBLIUS MUCIUS and BRUTUS and MANILIUS, who founded the *ius civile*. Of these Publius Mucius left ten treatises, Brutus seven, Manilius three; and the *monumenta* of Manilius, written volumes, are extant. The two former were of consular rank, Brutus praetorian. Publius Mucius, however, even *pontifex maximus*. **40.** By these were instructed PUBLIUS RUTILIUS RUFUS, who was consul at Rome and proconsul of Asia, PAULUS VERGINIUS and QUINTUS TUBERO, the Stoic, auditor of *Pansa*, and himself consul. Moreover SEXTUS POMPEIUS, the paternal uncle of Gnaeus Pompeius, lived at the same time; and COELIUS ANTIPATER, who wrote histories, but gave more time to oratory than to the science of law; also LUCIUS CRASSUS, brother of Publius Mucius, who was called Munianus; Cicero says he was the most eloquent of the jurisconsults.

41. After these, QUINTUS MUCIUS, *pontifex maximus*, son of Publius, was the first to compile the *ius civile*, which he arranged in titles (*generatim*) in eighteen books. **42.** The pupils of Mucius were many, but those of the greatest authority were AQUILIUS GALLUS, BALBUS LUCILIUS, SEXTUS PAPIRIUS, GAIUS IUVENTIUS; of these Servius says Gallus had the greatest weight before the people. All these, moreover, are cited by Servius Sulpicius; but no such works of them are extant as would be demanded generally; indeed, their writings are not generally used for reference, and though Servius compiled his books <from them>, it is through his writings that they are remembered.

43. SERVIUS SULPICIUS, when he held the chief place in pleading cases, or at least second to Marcus Tullius (Cicero), is said to have gone to Quintus Mucius to gain advice on the case of a friend of his, and when the latter had responded to him on the law, Servius understood little; again he asked Quintus, and he was answered by Quintus Mucius, nor did he yet understand, and so he was reproached by Quintus Mucius; for he said that it was disgraceful that a patrician and a noble and a pleader of cases was ignorant of the law in which he was employed. Servius, struck by this insult, we may say, paid attention to the *ius civile* and received a great deal of instruction from those we have mentioned, taught by Balbus Lucilius, instructed most, however, by Gallus Aquilius, who lived at Cercina; accordingly, many books of his, extant, were written at Cercina. When he (Servius) died while a legate, the Roman people erected a statue to him before the rostra, which is to be seen to this day before the rostra of Augustus. A great number of rolls of his works are extant; he left nearly one hundred and eighty books.

44. Many were taught by him, almost all these, moreover, wrote books: ALFENUS VARUS GAIUS, AULUS OFILIUS, TITUS CAESIUS, AUFIDIUS TUCCA, AUFIDIUS NAMUSA, FLAVIUS PRISCUS, GAIUS ATEIUS, PACUVIUS LABEO ANTISTIUS, the father of Labeo Antistius, CINNA, PUBLICIUS GELLIUS. Of these ten, eight wrote books, all of which books were digested by Aufidius Namusa in a hundred and forty books. Among these pupils Alfenus Varus and Aulus Ofilius had the greatest authority, of whom Varus became consul; Ofilius remained in the equestrian rank. The latter was very intimate with Caesar and left many books on the *ius civile*, which serve also as a foundation for every part of the subject. He was the first to write on the statutes regarding five per cent duty (*vicensima*); he was also the first to arrange carefully the edict of the praetor on *iurisdictio*, for before him Servius left two extremely brief books addressed to Brutus (*ad Brutum*) on the edict. **45.** TREBATIUS also lived at the same time, he who was a pupil of Cornelius Maximus; there was AULUS CASCELLIUS, a pupil of Quintus Mucius Volusius; in fact in his honor he made Publius Mucius, the grandson, his heir. Moreover, he was of quaestorian rank, nor did he wish to rise higher though even Augustus offered him the consulship. Of these Trebatius is said to have been a better jurist than Cascellius, Cascellius more eloquent than Trebatius, Ofilius better learned than both. No writings of Cascellius are extant except one book of ‘good maxims’, many of Trebatius but infrequently used. **46.** After these came TUBERO, who attended Ofilius; he was, moreover, a patrician and relinquished pleading cases for the *ius civile*, chiefly because, when he prosecuted Quintus Ligarius before Gaius Caesar, he lost. Quintus Ligarius was the man who, when he held the African coast, would not permit the ill Tubero to land or take water, for which cause he prosecuted him and Cicero defended him; his (Cicero’s) oration exists, a very fine one which is called ‘pro Quinto Ligario’. Tubero, indeed, was considered most learned in the public and private law and left a great many books on both subjects; he affected the usage of ancient language and, accordingly, his books have little weight.

47. After him of greatest authority were ATEIUS CAPITO, who followed Ofilius, and ANTISTLUS LABEO, who listened to all these, but was instructed by Trebatius. Of these Ateius was consul; Labeo, when the consulate was offered to him by Augustus, by which he would have become interim consul (*suffectus*), refused to take the office but gave his attention in the main to his studies. And he so divided the whole year that he was at Rome six months, six months away, and gave his attention to writing books. Accordingly, he left four hundred volumes, many of which are employed constantly. These two founded, as it were, respective schools; for Ateius Capito continued in those things which had been handed down to him; Labeo, by the quality of his originality and the faith of his own learning, having paid attention to other branches of knowledge, endeavored to innovate many things. **48.** And so MASSURIUS SABINUS succeeded Ateius Capito, NERVA Labeo, who then increased these dissensions. This Nerva was very intimate with the emperor. Massurius Sabinus was in the equestrian order and was the first to respond publicly; afterwards, this privilege began to be given, which, however, had been granted to him by Tiberius Caesar. **49.** And as we may observe in passing, before the time of Augustus the right of responding publicly (*ius respondendi publice*) was not given by the emperors, but he who had confidence in his studies responded to his consultants; nor were *responsa* always given under seal, but often they themselves wrote to the *iudices* (judge jurors) or were testified to by those who consulted them. Divus Augustus was the first to decree, in order to ensure greater authority to the law, that they might respond upon his authority; and from that time on, this began to be sought as a favor. And therefore the excellent emperor Hadrian, when praetorian men sought to be allowed to respond, rescripted that this was not to be sought, but was wont to be given, and consequently if anyone had faith in his own ability he (Hadrian) would be pleased to find <that> he was qualified to give *responsa* to the people. **50.** Accordingly, it was conceded to Sabinus by Tiberius Caesar that he might respond to the people; Sabinus was received into the equestrian order when advanced in age, in fact about fifty years old. He did not have ample means but for the most part was supported by his students.

51. GAIUS CASSIUS LONGINUS, born of a daughter of Tubero, who was a grand-daughter of Servius Sulpicius, succeeded him (Sabinus); and accordingly he called Servius Sulpicius his great-grandfather. He was consul along with Quartinus in the time of Tiberius, and he had great authority in the state until Caesar expelled him from the commonwealth. **52.** Banished by him to Sardinia, recalled by Vespasian, he died in his time. Nerva was succeeded by PROCULUS. There lived at the same time NERVA FILIUS; and there was another LONGINUS, indeed, of the equestrian order who afterwards came to the praetorship. But the authority of Proculus was greater, for indeed he had very great influence; the members of the schools were respectively called Cassians and Proculians, the distinction having begun with Capito and Labeo. **53.** CAELIUS SABINUS succeeded Cassius and had great influence in the time of Vespasian; PEGASUS, who was *praefectus urbi* in the time of Vespasian (succeeded) Proculus; PRISCUS IAVOLENUS (succeeded) Caelius Sabinus; CELSUS (succeeded) Pegasus; CELSUS FILIUS and PRISCUS NERATIUS, both of whom were consuls, Celsus, indeed, a second time, (succeeded) Celsus, the father; ABURNIUS VALENS and TUSCIANUS, also SALVIUS IULIANUS (succeeded) Iavolenus Priscus.

F. 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.

3. PAUL, *Sabinus*, book 1: According to Pomponius, if I have a grandson by one son and a granddaughter by another who are both in my power, my authority alone will be enough to allow them to marry, and this is correct.

4. POMPONIUS, *Sabinus*, book 3: A girl who was less than twelve years old when she married will not be a lawful wife until she reaches that age while living with her husband.

5. POMPONIUS, *Sabinus*, book 4: It is settled that a woman can be married by a man in his absence, either by letter or by messenger, if she is led to his house. But where she is absent, she cannot be married by

Naturally in those cases in which a *iudicium contrarium* is possible a *iudicium calumniae* is also open; but one may bring only one or other. Upon the same principle, if an oath disclaiming *calumnia* has been exacted, just as a *iudicium calumniae* is not allowed, so the *iudicium contrarium* ought not to be. **180.** In some cases a penal counter-*stipulatio* is entered into; and just as in a *contrarium iudicium* a plaintiff who has lost his case is invariably condemned, without inquiry as to whether he was aware that his suit was unjustified, so here, if he has failed in his suit, he is invariably condemned in the penal sum of the counter-*stipulatio*. **181.** A plaintiff who incurs the penalty of a counter-*stipulatio* is not faced with a *calumniae iudicium*, nor is he required to take the oath. And in such a case a *contrarium iudicium* is clearly inapplicable.

182. In some actions, such as those on theft, robbery with violence, outrage, and again those on partnership, *fiducia*, tutorship, mandate, and deposit, a defendant who is condemned becomes infamous. Indeed in the actions of theft, robbery, and outrage he is branded with infamy not only if he is condemned, but also if he compromises, as we read in the praetor's Edict; this is right, because there is a very great difference between being liable for delict and under contract. In no part of the Edict, however, is it expressly stated that anyone is to become infamous; but infamous is the current term for anyone who is forbidden to appear in court on another's behalf, or to appoint a *cognitor* or have a *procurator* on his own, or to intervene in a suit as someone else's *procurator* or *cognitor*.

183. Finally, it is to be noted that one who desires to take proceedings against another must summon him to court, and that the person summoned incurs a penalty under the praetor's Edict if he does not come. It is. however, unlawful to summon certain persons to court without the praetor's leave, for example one's parents, one's patron or patroness and the children and parents of one's patron or patroness; and there is a penalty for disobeying these rules. **184.** When a defendant has been summoned to court but the proceedings cannot be finished on the same day, he has to give bail (*uadimonium*), that is, he must enter into an undertaking to appear on a certain day. **185.** Bail is taken in some cases simply, that is without security, in some with security; in some cases it is accompanied by an oath; in some it is taken with *recuperatores* annexed, so that, if the defendant fails to appear, he may forthwith be condemned by the *recuperatores* in the amount of the bail. These several matters are carefully set out in the praetor's Edict.

186. When the action is for a judgment debt or on a payment made by a *sponsor*, bail is taken for a sum equal to that being claimed, but in other cases for the amount sworn to by the plaintiff as demanded with no vexatious intent, subject to this, that bail is not taken for a sum exceeding half the amount of the claim or for more than 100,000 sesterces. Thus where the action is not for a judgment debt or on a payment by a *sponsor*, if the matter in dispute is worth 100,000 sesterces, bail is not taken for more than 50,000. **187.** But persons whom one may not with impunity summon to court without the praetor's leave may similarly not be compelled to give bail, save if the praetor on application gives permission.

3. Justinian, *Institutes* 4.6–4.17

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.

32. It is the judge's duty, in delivering judgement, to make his award as definite as is possible, whether it relate to the payment of money or the delivery of property, and this even when the plaintiffs claim is altogether unliquidated.

33. Formerly, if the plaintiff, in his statement of claim, demanded more than he was entitled to, his case fell to the ground, that is, he lost even that which was his due, and in such cases the praetor usually declined to restore him to his previous position, unless he was a minor; for in this matter too the general rule was observed of giving relief to minors after inquiry made, if it were proved that they had made an error owing to their lack of years. If, however, the mistake was entirely justifiable, and such as to have possibly misled even the discreetest of men, relief was afforded even to persons of full age, as in the case of a man who sues for the whole of a legacy, of which part is found to have been taken away by codicils subsequently discovered; or where such subsequently discovered codicils give legacies to other persons, so that, the total amount given in legacies being reduced under the lex Falcidia, the first legatee is found to have claimed more than the three-fourths allowed by that statute. Over-statement of claim takes four forms; that is, it may relate either to the object, the time, the place, or the specification. A plaintiff makes an over-claim in the object when, for instance, he sues for twenty *aurei* while only ten are owing to him, or when, being only part owner of property, he sues to recover the whole or a greater portion of it than he is entitled to. Overclaim in respect of time occurs when a man sues for money before the day fixed for payment, or before the fulfilment of a condition on which payment was dependent; for exactly as one who pays money only after it falls due is held to pay less than his just debt, so one who makes his demand prematurely is held to make an over-claim. Over-claim in respect of place is exemplified by a man suing at one place for performance of a promise which it was expressly agreed was to be performed at another, without any reference, in his claim, to the latter: as, for instance, if a man, after stipulating thus, 'Do you promise to pay at Ephesus?' were to claim the money as due at Rome, without any addition as to Ephesus. This is an over-claim, because by alleging that the money is due at Rome simply, the plaintiff deprives his debtor of the advantage he might have derived from paying at Ephesus. On this account an arbitrary action is given to a plaintiff who sues at a place other than that agreed upon for payment, in which the advantage which the debtor might have had in paying at the latter is taken into consideration, and which usually is greatest in connexion with commodities which vary in price from district to district, such as wine, oil, or grain; indeed even the interest on loans of money is different in different places. If, however, a plaintiff sues at Ephesus—that is, in our example, at the place agreed upon for the payment—he need do no more than simply allege the debt, as the praetor too points out, because the debtor has all the advantage which payment in that particular place gives him. Over-claim in respect of specification closely resembles over-claim in respect of place, and may be exemplified by a man's stipulating from you 'do you promise to convey Stichus or ten *aurei*?' and then suing for the one or the other—that is to say, either for the slave only, or for the money only. The reason why this is an over-claim is that in stipulations of this sort it is the promisor who has the election, and who may give the slave or the money, whichever he prefers; consequently if the promisee sues, alleging that either the money alone, or the slave alone, ought to be conveyed to him, he deprives his adversary of his election, and thereby puts him in a worse position, while he himself acquires an undue advantage. Other cases of this form of over-claim occur where a man, having stipulated in general terms for a slave, for wine, or for purple, sues for the particular slave Stichus, or for the particular wine of Campania, or for Tyrian purple; for in all of these instances he deprives his adversary of his election, who was entitled, under the terms of the stipulation, to discharge his obligation in a mode other than that which is required of him. And even though the specific thing for which the promisee sues be of little or no value, it is still an over-claim: for it is often easier for a debtor to pay what is of greater value than what is actually demanded of him. Such were the rules of the older law, which, however, has been made more liberal by our own and Zeno's statutes Where the over-claim relates to time, the constitution of Zeno prescribes the proper procedure; if it relates to quantity, or assumes any other form, the plaintiff, as we have remarked above, is to be condemned in a sum equivalent to three times any loss which the defendant may have sustained thereby. **34**. If the plaintiff in his statement of

claim demands less than is his due, as for instance by alleging a debt of five *aurei*, when in fact he is owed ten, or by claiming only half of an estate the whole of which really belongs to him, he runs no risk thereby, for, by the constitution of Zeno of sacred memory, the judge will in the same action condemn the defendant in the residue as well as in the amount actually claimed. **35**. If he demands, the wrong thing in his statement of claim, the rule is that he runs no risk; for if he discovers his mistake, we allow him to set it right in the same action. For instance, a plaintiff who is entitled to the slave Stichus may claim Eros; or he may allege that he is entitled to a conveyance under a will, when his right is founded in reality upon a stipulation.

36. There are again some actions in which we do not always recover the whole of what is due to us, but in which we sometimes get the whole, sometimes only part. For instance, if the fund to which our claim looks for satisfaction be the *peculium* of a son in power or a slave, and it is sufficient in amount to meet that claim, the father or master is condemned to pay the whole debt; but if it is not sufficient, the judge condemns him to pay only so far as it will go. Of the mode of ascertaining the amount of a *peculium* we will speak in its proper place. **37**. So too if a woman sues for the recovery of her dowry, the rule is that the husband is to be condemned to restore it only so far as he is able, that is, so far as his means permit. Accordingly, if his means will enable him to restore the dowry in full, he will be condemned to do so; if not, he will be condemned to pay only so much as he is able. The amount of the wife's claim is also usually lessened by the husband's right of retaining some portion for himself, which he may do to the extent of any outlay he has made on dowry property, according to the rule, stated in the larger work of the Digest, that a dowry is diminished by operation of law to the extent of all necessary outlay thereon. **38**. Again, if a man goes to law with his parent or patron, or if one partner brings an action of partnership against another, he cannot get judgement for more than his adversary is able to pay. The rule is the same when a man is sued on a mere promise to give a present. **39**. Very often too a plaintiff obtains judgement for less than he was owed through the defendant's pleading a set-off: for, as has already been observed, the judge, acting on equitable principles, would in such a case take into account the cross demand in the same transaction of the defendant, and condemn him only in the residue. **40**. So too if an insolvent person, who surrenders all his effects to his creditors, acquires fresh property of sufficient amount to justify such a step, his creditors may sue him afresh, and compel him to satisfy the residue of their claims so far as he is able, but not to give up all that he has; for it would be inhuman to condemn a man to pay his debts in full who has already been once deprived of all his means.

TITLE VII

OF CONTRACTS MADE WITH PERSONS IN POWER

As we have already mentioned the action in respect of the *peculium* of children in power and slaves, we must now explain it more fully, and with it the other actions by which fathers and masters are sued for the debts of their sons or slaves. Whether the contract be made with a slave or with a child in power, the rules to be applied are much the same; and therefore, to make our statements as short as possible, we will speak only of slaves and masters, premising that what we say of them is true also of children and the parents in whose power they are; where the treatment of the latter differs from that of the former, we will point out the divergence.

1. If a slave enters into a contract at the bidding of his master, the praetor allows the latter to be sued for the whole amount: for it is on his credit that the other party relies in making the contract. **2**. On the same principle the praetor grants two other actions, in which the whole amount due may be sued for; that called *exercitoria*, to recover the debt of a ship-master, and that called *institoria*, to recover the debt of a manager or factor. The former lies against a master who has appointed a slave to be captain of a ship, to recover a debt incurred by the slave in his character of captain, and it is called *exercitoria*, because the person to whom the daily profits of a ship belong is termed an *exercitor*. The latter lies against a man who has appointed a slave to manage a shop or business, to recover any debt incurred in that business; it is called *institoria*, because a person appointed to manage a business is termed an *institor*. And these actions are granted by the praetor even if the person whom one sets over a ship, a shop, or any other business, be a free man or another man's slave, because equity requires their application in these latter cases no less than in the former. **3**. Another action of the praetor's introduction is that called *tributoria*. If a slave, with the knowledge of his master, devotes his *peculium* to a trade or business, the rule which the praetor follows, in respect of contracts made in the course of such trade or business, is that the *peculium* so invested and its profits shall be divided between the master, if anything is due to him, and the

other creditors in the ratio of their claims. The distribution of these assets is left to the master, subject to this provision, that any creditor who complains of having received less than his proper share can bring this action against him for an account. **4**. There is also an action in respect of *peculium* and of what has been converted to the uses of the master, under which, if a debt has been contracted by a slave without the consent of his master, and some portion thereof has been converted to his uses, he is liable to that extent, while if no portion has been so con" versed, he is liable to the extent of the slave's *peculium*. Conversion to his uses is any necessary expenditure on his account, as repayment to his creditors of money borrowed, repair of his falling house, purchase of corn for his slaves, or of an estate for him, or any other necessary. Thus, if out of ten *aurei* which your slave borrows from Titius, he pays your creditor five, and spends the remainder in some other way, you are liable for the whole of the five, and for the remainder to the extent of the *peculium*: and from this it i9 clear that if the whole ten were applied to your uses Titius could recover the whole from you. Thus, though it is but a single action which is brought in respect of *peculium* and of conversion to uses, it has two condemnatory clauses. The judge by whom the action is tried first looks to see whether there has been any application to the uses of the master, and does not proceed to ascertain the amount of the *peculium* unless there has been no such application, or a partial application only. In ascertaining the amount of the *peculium* deduction is first made of what is owed to the master or any person in his power, and the residue only is treated as *peculium*; though sometimes what a slave owes to a person in his master's power is not deducted, for instance, where that person is another slave who himself belongs to the *peculium*; thus, where a slave owes a debt to his own vicarial slave, its amount is not deducted from the *peculium*. **5**. There is no doubt that a person with whom a slave enters into a contract at the bidding of his master, or who can sue by the actions *exercitoria* or *institoria*, may in lieu thereof bring an action in respect of the *peculium* and of conversion to uses; but it would be most foolish of him to relinquish an action by which he may with the greatest ease recover the whole of what is owing to him under the contract, and undertake the trouble of proving a conversion to uses, or the existence of a *peculium* sufficient in amount to cover the whole of the debt. So too a plaintiff who can sue by the action called *tributoria* may sue in respect of *peculium* and conversion to uses, and sometimes the one action is the more advisable, sometimes the other. The former has this advantage, that in it the master has no priority; there is no deduction of debts owing to him, but he and the other creditors stand on precisely the same footing; while in the action in respect of *peculium* deduction is first made of debts owing to the master, who is condemned to pay over to the creditors only what then remains. On the other hand, the advantage of the action in respect of *peculium* is that in it the slave's whole *peculium* is liable to his creditors, whereas in the action called *tributoria* only so much of it is liable as is invested in the trade or business; and this may be only a third, a fourth, or even a less fraction, because the slave may have the rest invested in land or slaves, or out on loan. A creditor ought therefore to select the one or the other action by considering their respective advantages in each particular case; though he certainly ought to choose that in respect of conversion to uses, if he can prove such conversion. **6**. What we have said of the liability of a master on the contracts of his slave is equally applicable where the contract is made by a child or grandchild in the power of his or her father or grandfather. **7**. A special enactment in favour of children in power is found in the senatusconsult of Macedo, which has prohibited the giving of loans of money to such persons, and refused an action to the lender both against the child, whether he be still in power, or has become independent by death of the ancestor or emancipation, and against the parent, whether he still retains the child in his power, or has emancipated him. This enactment was made by the Senate because it was found that persons in power, when dragged down by the burden of loans which they had squandered in profligacy, often plotted against the lives of their parents.

8. Finally, it should be observed that where a contract has been entered into by a slave or son in power at his master's or parent's bidding, or where there has been a conversion to his uses, a condiction may be brought directly against the parent or master, exactly as if he had been the original contracting party in person. So too, wherever a man is suable by either of the actions called *exercitoria* and *institoria*, he may, in lieu thereof, be sued directly by a condiction, because in effect the contract in such cases is made at his bidding.

TITLE VII

OF NOXAL ACTIONS

Where a delict, such as theft, robbery, unlawful damage, or outrage, is committed by a slave, a noxal action lies against the master, who on being condemned has the option of paying the damages awarded, or surrendering the slave in satisfaction of the injury. **1**. The wrongdoer, that is, the slave, is called '*noxa*';

'*noxia*' is the term applied to the wrong itself, that is, the theft, damage, robbery, or outrage. **2**. This principle of noxal surrender in lieu of paying damages awarded is based on most excellent reason, for it would be unjust that the misdeed of a slave should involve his master in any detriment beyond the loss of his body. **3**. If a master is sued by a noxal action on the ground of his slave's delict, he is released from all liability by surrendering the slave in satisfaction of the wrong, and by this surrender his right of ownership is permanently transferred; though if the slave can procure enough money to compensate the surrenderee in full for the wrong he did him, he can, by applying to the praetor, get himself manumitted even against the will of his new master. **4**. Noxal actions were introduced partly by statute, partly by the Edict of the praetor; for theft, by the statute of the Twelve Tables; for unlawful damage, by the lex Aquilia; for outrage and robbery, by the Edict. Noxal actions always follow the person of the wrongdoer. Thus, if your slave does a wrong while in your power, an action lies against you; if he becomes the property of some other person, that other is the proper person to be sued; and if he is manumitted, he becomes directly and personally liable, and the noxal action is extinguished. Conversely, a direct action may change into noxal; thus, if an independent person has done a wrong, and then becomes your slave (as he may in several ways described in the first Book), a noxal action lies against you in lieu of the direct action which previously lay against the wrongdoer in person. **6**. But no action lies for an offence committed by a slave against his master, for between a master and a slave in his power there can be no obligation; consequently, if the slave becomes the property of some other person, or is manumitted, neither he nor his new master can be sued; and on the same principle, if another man's slave commits a wrong against you, and then becomes your property, the action is extinguished, because it has come into a condition in which an action cannot exist; the result being that even if the slave passes again out of your power you cannot sue. Similarly, if a master commits a wrong against his slave, the latter cannot sue him after manumission or alienation. **7**. These rules were applied by the ancients to wrongs committed by children in power no less than by slaves, but the feeling of modern times has rightly rebelled against such inhumanity, and noxal surrender of children under power has quite gone out of use. Who could endure in this way to give up a son, still more a daughter, to another, whereby the father would be exposed to greater anguish in the person of a son than even the latter himself, while mere decency forbids such treatment in the case of a daughter? Accordingly, noxal actions are permitted only where the wrongdoer is a slave, and indeed we find it often laid down by old legal writers that sons in power may be sued personally for their own delicts.

TITLE IX

OF PAUPERIES, OR DAMAGE DONE BY QUADRUPEDS

A noxal action was granted by the statute of the Twelve Tables in cases of mischief done through wantonness, passion, or ferocity, by irrational animals; it being by an enactment of that statute provided, that if the owner of such an animal is ready to surrender it as compensation for the damage, he shall thereby be released from all liability. Examples of the application of this enactment may be found in kicking by a horse, or goring by a bull, known to be given that way; but the action does not lie unless in causing the damage the animal is acting contrary to its natural disposition; if its nature be to be savage, this remedy is not available. Thus, if a bear runs away from its owner, and causes damage, the quondam owner cannot be sued, for immediately with its escape his ownership ceased to exist. The term *pauperies*, or 'mischief', is used to denote damage done without there being any wrong in the doer of it, for an unreasoning animal cannot be said to have done a wrong. Thus far as to the noxal action.

1. It is, however, to be observed that the Edict of the aedile forbids dogs, boars, bears, or lions to be kept near where there is a public road, and directs that if any injury be caused to a free man through disobedience of this provision, the owner of the beast shall be condemned to pay such sum as to the judge shall seem fair and equitable: in case of any other injury the penalty is fixed at double damages. Besides this aedilician action, that on *pauperies* may also be sometimes brought against the same defendant; for when two or more actions, especially penal ones, may be brought on one and the same ground, the bringing of one does not debar the plaintiff from subsequently bringing the other.

TITLE X

OF PERSONS THROUGH WHOM WE CAN BRING AN ACTION

We must now remark that a man may sue either for himself, or for another as attorney, guardian, or curator: whereas formerly one man could not sue for another except in public suits, as an assertor of freedom, and in certain actions relating to guardianship. The lex Hostilia subsequently permitted the

bringing of an action of theft on behalf of persons who were in the hands of an enemy, or absent on State employment, and their pupils. It was, however, found extremely inconvenient to be unable to either bring or defend an action on behalf of another, and accordingly men began to employ attorneys for this purpose; for people are often hindered by ill-health, age, unavoidable absence, and many other causes from attending to their own business. **1**. For the appointment of an attorney no set form of words is necessary, nor need it be made in the presence of the other party, who indeed usually knows nothing about it; for in law any one is your attorney whom you allow to bring or defend an action on your behalf. **2**. The modes of appointing guardians and curators have been explained in the first Book.

TITLE XI

OF SECURITY

The old system of taking security from litigants differed from that which has more recently come into use.

Formerly the defendant in a real action was obliged to give security, so that if judgement went against him, and he neither gave up the property which was in question, nor paid the damages assessed, the plaintiff might be able to sue either him or his sureties: and this is called security for satisfaction of judgement, because the plaintiff stipulates for payment to himself of the sum at which the damages are assessed. And there was all the more reason for compelling the defendant in a real action to give security if he was merely the representative of another. From the plaintiff in a real action no security was required if it was on his own account that he sued, but if he was merely an attorney, he was required to give security for the ratification of his proceedings by his principal, owing to the possibility of the latter's subsequently suing in person on the same claim. Guardians and curators were required by the Edict to give the same security as attorneys; but when they appeared as plaintiffs they were sometimes excused. So much for real actions. **1**. In personal actions the same rules applied, so far as the plaintiff was concerned, as we have said obtained in real actions. If the defendant was represented by another person, security had always to be given, for no one is allowed to defend another without security; but if the defendant was sued on his own account, he was not compelled to give security for satisfaction of judgement. **2**. Nowadays, however, the practice is different; for if the defendant is sued on his own account, he is not compelled to give security for payment of the damages assessed, whether the action be real or personal; all that he has to do is to enter into a personal engagement that he will subject himself to the jurisdiction of the court down to final judgement; the mode of making such engagement being either a promise under oath, which is called a sworn recognizance, or a bare promise, or giving of sureties, according to the defendant's rank and station. **3**. But the case is different where either plaintiff or defendant appears by an attorney. If the plaintiff does so, and the attorney's appointment is not enrolled in the records, or confirmed by the principal personally in court, the attorney must give security for ratification of his proceedings by his principal; and the rule is the same if a guardian curator, or other person who has undertaken the management of another's affairs brings an action through an attorney. **4**. If a defendant appears, and is ready to appoint an attorney to defend the action for him, he can do this either by coming personally into court, and confirming the appointment by the solemn stipulations employed when security is given for satisfaction of judgement, or by giving security out of court whereby, as surety for his attorney, he guarantees the observance of all the clauses of the so-called security for satisfaction of judgement. In all such cases he is obliged to give a right of hypothec over all his property, whether the security be given in or out of court, and this right avails against his heirs no less than against himself. Finally, he has to enter into a personal engagement or recognizance to appear in court when judgement is delivered; and in default of such appearance his surety will have to pay all the damages to which he is condemned, unless notice of appeal is given. **5**. If, however, the defendant for some reason or other does not appear, and another will defend for him, he may do so, and it is immaterial whether the action be real or personal, provided he will give security for satisfaction of the judgement in full; for we have already mentioned the old rule, that no one is allowed to defend another without security. **6**. All this will appear more clearly and fully by reference to the daily practice of the courts, and to actual cases of litigation. **7**. And it is our pleasure that these rules shall hold not only in this our royal city, but also in all our provinces, although it may be that through ignorance the practice elsewhere was different; for it is necessary that the provinces generally shall follow the lead of the capital of all our empire, that is, of this royal city, and observe its usages.

TITLE XII

OF ACTIONS PERPETUAL AND TEMPORAL, AND WHICH MAY BE BROUGHT BY AND AGAINST HEIRS

It should be here observed that actions founded on statutes, senatusconsults, and imperial constitutions could be brought at any length of time from the accrual of the cause of action, until certain limits were fixed for actions both real and personal by imperial enactments; while actions which were introduced by the praetor in the exercise of his jurisdiction could, as a rule, be brought only within a year, that being the duration of his authority. Some praetorian actions, however, are perpetual, that is to say, can be brought at any time which does not exceed the limit fixed by the enactments referred to; for instance, those granted to 'possessors of goods' and other persons who are fictitiously represented as heirs. So too the action for theft detected in the commission, though praetorian, is perpetual, the praetor having judged it absurd to limit it by a year. **1**. Actions which will lie against a man under either the civil or the praetorian law will not always lie against his heir, the rule being absolute that for delict—for instance, theft, robbery, outrage, or unlawful damage—no penal action can be brought against the heir. The heir of the person wronged, however, may bring these actions, except in outrage, and similar cases, if any. Sometimes, even an action on contract cannot be brought against the heir; this being the case where the testator has been guilty of fraud, and his heir has not profited thereby. If, however, a penal action, such as those we have mentioned, has been actually commenced by the original parties, it is transmitted to the heirs of each. **2**. Finally, it must be remarked that if, before judgement is pronounced, the defendant satisfies the plaintiff, the judge ought to absolve him, even though he was liable to condemnation at the time when the action was commenced; this being the meaning of the old dictum, that all actions involve the power of absolution.

TITLE XIII

OF EXCEPTIONS

We have next to examine the nature of exceptions. Exceptions are intended for the protection of the defendant, who is often in this position, that though the plaintiff's case is a good one in the abstract, yet as against him, the particular defendant, his contention is inequitable. **1**. For instance, if you are induced by duress, fraud, or mistake to promise Titius by stipulation what you did not owe him, it is clear that by the civil law you are bound, and that the action on your promise is well grounded; yet it is inequitable that you should be condemned, and therefore in order to defeat the action you are allowed to plead the exception of duress, or of fraud, or one framed to suit the circumstances of the case. **2**. So too, if, as preliminary to an advance of money, one stipulates from you for its repayment, and then never advances it after all, it is clear that he can sue you for the money, and you are bound by your promise to give it; but it would be iniquitous that you should be compelled to fulfil such an engagement, and therefore you are permitted to defend yourself by the exception that the money, in point of fact, was never advanced. The time within which this exception can be pleaded, as we remarked in a former Book, has been shortened by our constitution. **3**. Again, if a creditor agrees with his debtor not to sue for a debt, the latter still remains bound, because an obligation cannot b.c. extinguished by a bare agreement; accordingly, the creditor can validly bring against him a personal action claiming payment of the debt, though, as it would be inequitable that he should be condemned in the face of the agreement not to sue, he may defend himself by pleading such agreement in the form of an exception. **4**. Similarly, if at his creditor's challenge a debtor affirms on oath that he is not under an obligation to convey, he still remains bound; but as it would be unfair to examine whether he has perjured himself, he can, on being sued, set up the defence that he has sworn to the non-existence of the debt. In real actions, too, exceptions are equally necessary; thus, if on the plaintiff's challenge the defendant swears that the property is his, there is nothing to prevent the former from persisting in his action; but it would be unfair to condemn the defendant, even though the plaintiff's contention that the property is his be well founded. **5**. Again, an obligation still subsists even after judgement in an action, real or personal, in which you have been defendant, so that in strict law you may be sued again on the same ground of action; but you can effectually meet the claim by pleading the previous judgement. **6**. These examples will have been sufficient to illustrate our meaning; the multitude and variety of the cases in which exceptions are necessary may be learnt by reference to the larger work of the Digest or Pandects. **7**. Some exceptions derive their force from statutes or enactments equivalent to statutes, others from the jurisdiction of the praetor. **8**. And some are said to be perpetual or peremptory, others to be temporary or dilatory. **9**. Perpetual or peremptory exceptions are obstructions of unlimited duration, which practically destroy the plaintiff's ground of action, such as the exceptions of fraud, intimidation, and agreement never to sue. **10**. Temporary or dilatory exceptions are merely temporary

obstructions, their only effect being to postpone for a while the plaintiff's right to sue; for example, the plea of an agreement not to sue for a certain time, say, five years; for at the end of that time the plaintiff can effectually pursue his remedy. Consequently persons who would like to sue before the expiration of the time, but are prevented by the plea of an agreement to the contrary, or something similar, ought to postpone their action till the time specified has elapsed; and it is on this account that such exceptions are called dilatory. If a plaintiff brought his action before the time had expired, and was met by the exception, this would debar him from all success in those proceedings, and formerly he was unable to sue again, owing to his having rashly brought the matter into court, whereby he consumed his right of action, and lost all chance of recovering what was his due. Such unbending rules, however, we do not at the present day approve. Plaintiffs who venture to commence an action before the time agreed upon, or before the obligation is yet actionable, we subject to the constitution of Zeno, which that most sacred legislator enacted as to over-claims in respect of time; whereby, if the plaintiff does not observe the stay which he has voluntarily granted, or which is implied in the very nature of the action, the time during which he ought to have postponed his action shall be doubled, and at its termination the defendant shall not be suable until he has been reimbursed for all expenses hitherto incurred. So heavy a penalty it is hoped will induce plaintiffs in no case to sue until they are entitled. **11**. Moreover, some personal incapacities produce dilatory exceptions, such as those relating to agency, supposing that a party wishes to be represented in an action by a soldier or a woman; for soldiers may not act as attorneys in litigation even on behalf of such near relatives as a father, mother, or wife, not even in virtue of an imperial rescript, though they may attend to their own affairs without committing a breach of discipline We have sanctioned the abolition of those exceptions, by which the appointment of an attorney was formerly opposed on account of the infamy of either attorney or principal, because we found that they no longer were met with in actual practice, and to prevent the trial of the real issue being delayed by disputes as to their admissibility and operation.

TITLE XIV

OF REPLICATIONS

Sometimes an exception, which *prima facie* seems just to the defendant, is unjust to the plaintiff, in which case the latter must protect himself by another allegation called a replication, because it parries and counteracts the force of the exception. For example, a creditor may have agreed with his debtor not to sue him for money due, and then have subsequently agreed with him that he shall be at liberty to do so; here if the creditor sues, and the debtor pleads that he ought not to be condemned on proof being given of the agreement not to sue, he bars the creditor's claim,'for the plea is true, and remains so in spite of the subsequent agreement; but as it would be unjust that the creditor should be prevented from recovering, he will be allowed to plead a replication, based upon that agreement. **1**. Sometimes again a replication, though *prima facie* just, is unjust to the defendant; in which case he must protect himself by another allegation called a rejoinder. **2**. And if this again, though on the face of it just, is for some reason unjust to the plaintiff, a still further allegation is necessary for his protection, which is called a surrejoinder. **3**. And sometimes even further additions are required by the multiplicity of circumstances under which dispositions are made, or by which they are subsequently affected; as to which fuller information may easily be gathered from the larger work of the Digest. **4**. Exceptions which are open to a defendant are usually open to his surety as well, as indeed is only fair: for when a surety is sued the principal debtor may be regarded as the real defendant, because he can be compelled by the action on agency to repay the surety whatsoever he has disbursed on his account. Accordingly, if the creditor agrees with his debtor not to sue, the latter's sureties may plead this agreement, if sued themselves, exactly as if the agreement had been made with them instead of with the principal debtor. There are, however, some exceptions which, though pleadable by a principal debtor, are not pleadable by his surety; for instance, if a man surrenders his property to his creditors as an insolvent, and one of them sues him for his debt in full, he can effectually protect himself by pleading the surrender; but this cannot be done by his surety, because the creditor's main object, in accepting a surety for his debtor, is to be able to have recourse to the surety for the satisfaction of his claim if the debtor himself becomes insolvent.

TITLE XV

OF INTERDICTS

We have next to treat of interdicts or of the actions by which they have been superseded. Interdicts were formulae by which the praetor either ordered or forbad some thing to be done,and occurred most frequently in case of litigation about possession or quasi-possession.

1. The first division of interdicts is into orders of abstention, of restitution, and of production. The first are those by which the praetor forbids the doing of some act—for instance, the violent ejection of a bona fide possessor, forcible interference with the interment of a corpse in a place where that may lawfully be done, building upon sacred ground, or the doing of anything in a public river or on its banks which may impede its navigation. The second are those by which he orders restitution of property, as where he directs possession to be restored to a 'possessor of goods' of things belonging to an inheritance, and which have hitherto been in the possession of others under the title of heir, or without any title at all; or where he orders a person to be reinstated in possession of land from which he has been forcibly ousted. The third are those by which he orders the production of persons or property; for instance, the production of a person whose freedom is in question, of a freedman whose patron wishes to demand from him certain services, or of children on the application of the parent in whose power they are. Some think that the term interdict is properly applied only to orders of abstention, because it is derived from the verb *interdicere*, meaning to denounce or forbid, and that orders of restitution or production are properly termed decrees; but in practice they are all called interdicts, because they are given *inter duos*, between two parties. **2**. The next division is into interdicts for obtaining possession, for retaining possession, and for recovering possession. **3**. Interdicts for obtaining possession are exemplified by the one given to a 'possessor of goods' which is called *Quorum bonorum*, and which enjoins that whatever portion of the goods, whereof possession has been granted to the claimant, is in the hands of one who holds by the title of heir or as mere possessor only, shall be delivered up to the grantee of possession. A person is deemed to hold by the title of heir who thinks he is an heir; he is deemed to hold as mere possessor who relies on no title at all, but holds a portion of the whole of the inheritance, knowing that he is not entitled. It is called an interdict for obtaining possession, because it is available only for initiating possession; accordingly, it is not granted to a person who has already had and lost possession. Another interdict for obtaining possession is that named after Salvius, by which the landlord gets possession of the tenant's property which has been hypothecated as a security for rent. **4**. The interdicts *Uti possidetis* and *Utrubi* are interdicts for retaining possession, and are employed when two parties claim ownership in anything, in order to determine which shall be defendant and which plaintiff; for no real action can be commenced until it is ascertained which of the parties is in possession, because law and reason both require that one of them shall be in possession and shall be sued by the other. As the r"1e of defendant in a real action is far more advantageous than that of plaintiff, there is almost invariably a keen dispute as to which party is to have possession pending litigation: the advantage consisting in this, that, even if the person in possession has no title as owner, the possession remains to him unless and until the plaintiff can prove his own ownership: so that where the rights of the parties are not clear, judgement usually goes against the plaintiff. Where the dispute relates to the possession of land or buildings, the interdict called *Uti possidetis* is employed; where to movable property, that called *Utrubi*. Under the older law their effects were very different. In *Uti possidetis* the party in possession at the issue of the interdict was the winner, provided he had not obtained that possession from his adversary by force, or clandestinely, or by permission; whether he had obtained it from some one else in any of these modes was immaterial. In *Utrubi* the winner was the party who had been in possession the greater portion of the year next immediately preceding, provided that possession had not been obtained by force, or clandestinely, or by permission, from his adversary. At the present day, however, the practice is different, for as regards the right to immediate possession the two interdicts are now on the same footing; the rule being, that whether the property in question be movable or immovable, the possession is adjudged to the party who has it at the commencement of the action, provided he had not obtained it by force, or clandestinely, or by permission, from his adversary. **5**. A man's possession includes, besides his own personal possession, the possession of any one who holds in his name, though not subject to his power; for instance, his tenant. So also a depositary or borrower for use may possess for him, as is expressed by the saying that we retain possession by any one who holds in our name. Moreover, mere intention suffices for the retention of possession; so that although a man is not in actual possession either himself or through another, yet if it was not with the intention of abandoning the thing that he left it, but with that of subsequently returning

to it, he is deemed not to have parted with the possession. Through what persons we can obtain possession has been explained in the second Book; and it is agreed on all hands that for obtaining possession intention alone does not suffice. **6**. An interdict for recovering possession is granted to persons who have been forcibly ejected from land or buildings; their proper remedy being the interdict *Unde vi*, by which the ejector is compelled to restore possession, even though it had been originally obtained from him by the grantee of the interdict by force, clandestinely, or by permission. But by imperial constitutions, as we have already observed, if a man violently seizes on property to which he has a title, he forfeits his right of ownership; if on property which belongs to some one else, he has not only to restore it, but also to pay the person whom he has violently dispossessed a sum of money equivalent to its value. In cases of violent dispossession the wrongdoer is liable under the lex lulia relating to private or public violence, by the former being meant unarmed force, by the latter dispossession effected with arms; and the term 'arms' must be taken to include not only shields, swords, and helmets, but also sticks and stones. **7**. Thirdly, interdicts are divided into simple and double. Simple interdicts are those wherein one party is plaintiff and the other defendant, as is always the case in orders of restitution or production; for he who demands restitution or production is plaintiff, and he from whom it is demanded is defendant. Of interdicts which order abstention some are simple, others double. The simple are exemplified by those wherein the praetor commands the defendant to abstain from desecrating consecrated ground, or from obstructing a public river or its banks; for he who demands such order is the plaintiff, and he who is attempting to do the act in question is defendant. Of double interdicts we have examples in *Uti possidetis* and *Utrubi*; they are called double because the footing of both parties is equal, neither being exclusively plaintiff or defendant, but each sustaining the double rôle.

8. To speak of the procedure and result of interdicts under the older law would now be a waste of words; for when the procedure is what is called 'extraordinary', as it is nowadays in all actions, the issue of an interdict is unnecessary, the matter being decided without any such preliminary step in much the same way as if it had actually been taken, and a modified action had arisen on it.

TITLE XVI

OF THE PENALTIES FOR RECKLESS LITIGATION

It should here be observed that great pains have been taken by those who in times past had charge of the law to deter men from reckless litigation, and this is a thing that we too have at heart. The best means of restraining unjustifiable litigation, whether on the part of a plaintiff or of a defendant, are money fines, the employment of the oath, and the fear of infamy. **1**. Thus, under our constitution, the oath has to be taken by every defendant, who is not permitted even to state his defence until he swears that he resists the plaintiff's claim because he believes that his cause is a good one. In certain cases where the defendant denies his liability the action is for double or treble the original claim, as in proceedings on unlawful damage, and for recovery of legacies bequeathed to religious places. In various actions the damages are multiplied at the outset; in an action on theft detected in the commission they are quadrupled; for simple theft they are doubled; for in these and some other actions the damages are a multiple of the plaintiff's loss, whether the defendant denies or admits the claim. Vexatious litigation is checked on the part of the plaintiff also, who under our constitution is obliged to swear on oath that his action is commenced in good faith; and similar oaths have to be taken by the advocates of both parties, as is prescribed in other of our enactments. Owing to these substitutes the old action of dishonest litigation has become obsolete. The effect of this was to penalize the plaintiff in a tenth part of the value he claimed by action; but, as a matter of fact, we found that the penalty was never exacted, and therefore its place has been taken by the oath above mentioned, and by the rule that a plaintiff who sues without just cause must compensate his opponent for all losses incurred, and also pay the costs of the action. **2**. In some actions condemnation carries infamy with it, as in those on theft, robbery, outrage, fraud, guardianship, agency, and deposit, if direct, not contrary; also in the action on partnership, which is always direct, and in which infamy is incurred by any partner who suffers condemnation. In actions on theft, robbery, outrage, and fraud, it is not only infamous to be condemned, but also to compound, as indeed is only just; for obligation based on delict differs widely from obligation based on contract.

3. In commencing an action, the first step depends upon that part of the Edict which relates to summons; for before anything else is done, the adversary must be summoned, that is to say, must be called before the judge who is to try the action. And herein the praetor takes into consideration the respect due to parents, patrons, and the children and parents of patrons, and refuses to allow a parent to be

summoned by his child, or a patron by his freedman, unless permission so to do has been asked of and obtained from him; and for nonobservance of this rule he has fixed a penalty of fifty *solidi*.

TITLE XVII

OF THE DUTIES OF A JUDGE

Finally, we have to treat of the duties of a judge; of which the first is not to judge contrary to statutes, the imperial laws, and custom. **1**. Accordingly, if he is trying a noxal action, and thinks that the master ought to be condemned, he should be careful to word his judgement thus: 'I condemn Publius Maevius to pay ten *aurei* to Lucius Titius, or to surrender to him the slave that did the wrong.' **2**. If the action is real, and he finds against the plaintiff, he ought to absolve the defendant; if against the latter, he ought to order him to give up the property in question, along with its fruits. If the defendant pleads that he is unable to make immediate restitution and applies for execution to be stayed, and such application appears to be in good faith, it should be granted upon the terms of his finding a surety to guarantee payment of the damages assessed, if restitution be not made within the time allowed. If the subject of the action b.c. an inheritance, the same rule applies as regards fruits as we laid down in speaking of actions for tile recovery of single objects. If the defendant is a *male fide* possessor, fruits which but for his own negligence he might have gathered are taken into account in much tbe same way in both actions; but a *bona fide* possessor is not held answerable for fruits which he has not consumed or has not gathered, except from the moment of the commencement of the action, after which time account is taken as well of fruits which might have been gathered but for his negligence as of those whicl1 have been gathered and consumed. **3**. If the object of the action be production of property, its mere production by the defendant is not enough, but it must be accompanied by every advantage derived from it; that is to say, the plaintiff must be placed in the same position he would have been in if production had been made immediately on the commencement of the action. Accordingly if, during the delay occasioned by trial, the possessor has completed a title to the property by usucapion, he will not be thereby saved from being condemned. The judge ought also to take into account the mesne profits, or fruits produced by the property in the interval between the commencement of the action and judgement. If the defendant pleads that he is unable to make immediate production, and applies for a stay, and such application appears to be in good faith, it should be granted on his giving security that he will render up the property. If he neither complies at once with the judge's order for production, nor gives security for doing so afterwards, he ought to be condemned in a sum representing the plaintiff's interest in having production at the commencement of the proceedings. **4**. In an action for the division of a 'family' the judge ought to assign to each of the heirs specific articles belonging to the inheritance, and if one of them is unduly favoured, to condemn him, as we have already said, to pay a fixed sum to the other as compensation. Again, the fact that one only of two joint-heirs has gathered the fruits of land comprised in the inheritance, or has damaged or consumed something belonging thereto, is ground for ordering him to pay compensation to the other; and it is immaterial, so far as this action is concerned, whether the joint-heirs are only two or more in number. **5**. The same rules are applied in an action for partition of a number of things held by jointowners. If such an action be brought for the partition of a single object, such as an estate, which easily admits of division, the judge ought to assign a specific portion to each jointowner, condemning such one as seems to be unduly favoured to pay a fixed sum to the other as compensation. If the property cannot be conveniently divided—as a slave, for instance, or a mule—it ought to be adjudged entirely to one only of the joint-owners, who should be ordered to pay a fixed sum to the other as compensation. **6**. In an action for rectification of boundaries the judge ought to examine whether an adjudication of property is actually necessary. There is only one case where this is so; where, namely, convenience requires that the line of separation between fields belonging to different owners shall be more clearly marked than heretofore, and where, accordingly, it is requisite to adjudge part of the one's field to the owner of the other, who ought, in consequence, to be ordered to pay a fixed sum as compensation to his neighbour. Another ground for condemnation in this action is the commission of any malicious act, in respect of the boundaries, by either of the parties, such as removal of landmarks, or cutting down boundary trees: as also is contempt of court, expressed by refusal to allow the fields to be surveyed in accordance with a judge's order. **7**. Wherever property is adjudged to a party in any of these actions, he at once acquires a complete title thereto.

TITLE XVIII

OF PUBLIC PROSECUTIONS

Public prosecutions are not commenced as actions are, nor indeed is there any resemblance between them and the other remedies of which we have spoken; on the contrary, they differ greatly both in the mode in which they are commenced, and in the rules by which they are conducted. **1**. They are called public because as a general rule any citizen may come forward as prosecutor in them. **2**. Some are capital, others not. By capital prosecutions we mean those in which the accused may be punished with the extremest severity of the law, with interdiction from water and fire, with deportation, or with hard labour in the mines: those which entail only infamy and pecuniary penalties are public, but not capital. **3**. The following statutes relate to public prosecutions. First, there is the lex Iulia on treason, which includes any design against the Emperor or State; the penalty under it is death, and even after decease the guilty person's name and memory are branded with infamy. **4**. The lex Iulia, passed for the repression of adultery, punishes with death not only defilers of the marriage-bed, but also those who indulge in criminal intercourse with those of their own sex, and inflicts penalties on any who without using violence seduce virgins or widows of respectable character. If the seducer be of reputable condition, the punishment is confiscation of half his fortune; if a mean person, flogging and relegation. **5**. The lex Cornelia on assassination pursues those persons, who commit this crime, with the sword of vengeance, and also all who carry weapons for the purpose of homicide. By a 'weapon', as is remarked by Gaius in his commentary on the statute of the Twelve Tables, is ordinarily meant some missile shot from a bow, but it also signifies anything thrown with the hand; so that stones and pieces of wood or iron are included in the term. '*Telum*,' in fact, or 'weapon', is derived from the Greek τηλοῦ, and so means anything thrown to a distance. A similar connexion of meaning may be found in the Greek word βέλος, which corresponds to our *telum*, and which is derived from βάλλεσθαι, to throw, as we learn from Xenophon, who writes, 'they carried with them βέλη, namely spears, bows and arrows, slings, and large numbers of stones.' *Sicarius*, or assassin, is derived from *sica*, a long steel knife. This statute also inflicts punishment of death on poisoners, who kill men by their hateful arts of poison and magic, or who publicly sell deadly drugs. **6**. A novel penalty has been devised for a most odious crime by another statute, called the lex Pompeia on parricide, which provides that any person who by secret machination or open act shall hasten the death of his parent, or child, or other relation whose murder amounts in law to parricide, or who shall be an instigator or accomplice of such crime, although a stranger, shall suffer the penalty of parricide. This is not execution by the sword or by fire, or any ordinary form of punishment, but the criminal is sewn up in a sack with a dog, a cock, a viper, and an ape, and in this dismal prison is thrown into the sea or a river, according to the nature of the locality, in order that even before death he may begin to be deprived of the enjoyment of the elements, the air being denied him while alive, and interment in the earth when dead. Those who kill persons related to them by kinship or affinity, but whose murder is not parricide, will suffer the penalties of the lex Cornelia on assassination. **7**. The lex Cornelia on forgery, otherwise called the statute of wills, inflicts penalties on all who shall write, seal, or read a forged will or other document, or shall substitute the same for the real original, or who shall knowingly and feloniously make, engrave, or use a false seal. If the criminal be a slave, the penalty fixed by the statute is death, as in the statute relating to assassins and poisoners: if a free man, deportation. **8**. The lex Iulia, relating to public or private violence, deals with those persons who use force armed or unarmed. For the former, the penalty fixed by the statute is deportation; for the latter, confiscation of one third of the offender's property. Ravishment of virgins, widows, persons professed in religion, or others, and all assistance in its perpetration, is punished capitally under the provisions of our constitution, by reference to which full information on this subject is obtainable. **9**. The lex Iulia on embezzlement punishes all who steal money or other property belonging to the State, or devoted to the maintenance of religion. Judges who during their term of office embezzle public money are punishable with death, as also are their aiders and abettors, and any who receive such money knowing it to have been stolen. Other persons who violate the provisions of this statute are liable to deportation. **10**. A public prosecution may also be brought under the lex Fabia relating to manstealing, for which a capital penalty is sometimes inflicted under imperial constitutions, sometimes a lighter punishment. **11**. Other statutes which give rise to such prosecutions are the lex Iulia on bribery, and three others, which are similarly entitled, and which relate to judicial extortion, to illegal combinations for raising the price of corn, and to negligence in the charge of public moneys. These deal with special varieties of crime, and the penalties which they inflict on those who infringe them in no case amount to death, but are less severe in character.

12. We have made these remarks on public prosecutions only to enable you to have the merest acquaintance with them, and as a kind of guide to a fuller study of the subject, which, with the assistance of Heaven, you may make by reference to the larger volume of the Digest or Pandects.

4. Demosthenes, *Against Conon*

in *Demosthenes*, *Speeches 50-59*, Victor Bers trans., The oratory of classical Greece, 6
(Austin: University of Texas Press, 2003), 66–80

INTRODUCTION

From antiquity[1] until the present day, *Against Conon* has been one of the favorite speeches of the Demosthenic corpus. Moderns are amused by its vivid portrayal of drunken brawling in an army camp and in the streets of Athens itself, as well as the other forms of shocking behavior the speaker describes. There is, moreover, much interest in the speaker's discussion of the choices available to a man contemplating a lawsuit and his account of an arbitration hearing.

If we are to believe Ariston, the speaker, there was no enmity between himself and Conon until he had the bad luck to find himself bivouacked near Conon's sons, who for no good reason directed what we can term frank anal aggression against Ariston's slaves. The hostilities continued and escalated when Ariston returned from military duty. This time (so we are told) Conon, the defendant, was not only an active participant in the abuse but took the lead. The actual charge is battery (*aikeia*), but Ariston repeatedly refers to *hybris.* That term, much studied in recent years,[2] may suggest maltreatment intended to diminish the victim's status, but in this speech, "assault" seems a sufficient translation. The speaker offers no definitions of the term *hybris* and *aikeia*, only an indication that the former is the more serious offense. Perhaps the meaning of the words was so well known that a formulation in the form of a written law was unnecessary.[3]

Neither the date of the events Ariston describes nor the date of the trial can be confidently ascertained. In the third section, Ariston places the initial clash at Panactum two years before the trial, and a remark at Demosthenes 19.326 appears to point to 343 as a possible date and to exclude the period 355–346. This reasoning entails a date of either 355 or 341. But Demosthenes may be unreliable in that speech, and the military activity mentioned there may not be the sort described in this one.[4]

There are commented texts by Sandys 1896 and Carey and Reid 1985, and a translation by Carey 1997.

54. AGAINST CONON

[1] I was assaulted,[5] gentlemen of the jury, and at the hands of Conon, the man here, I suffered injuries so severe that for a very long time neither my family nor any of the doctors expected I would survive. But when I unexpectedly recovered and was out of danger, I initiated this private case for battery (*dikē aikeias*) against him. All the friends and relatives whom I asked for advice were saying that for his deeds Conon was liable to summary arrest (*apagogē*)[6] as a cloak stealer, and to public suits for *hybris* (*graphai hubreōs*). But they advised me and urged me not to involve myself in greater troubles than I could handle; and also, not to be seen to complain more than a young man should about what was done to me. I have acted accordingly and, because of those advisers, have instituted a private case, but I would, with the greatest pleasure, men of Athens, have put him on trial on a capital charge. [2] You will all forgive this feeling, I'm sure, when you hear what I suffered. You see, shocking as the assault was, his brutality afterward was no less terrible. I say it is right, and I ask you all without distinction, first, to listen sympathetically to my account of what I suffered, and second, Wit seems that I have been wronged and treated illegally, to help me—as is just. I will tell you from the beginning how each of the events happened, in as few words as I can.

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[1] If we can believe a fourth-century AD account by Eusebius, admiration for the work was first manifested by the plagiarism of *Against Conon* by Demosthenes' enemy Dinarchus in *Against Cleomedon for Battery.*

[2] The matter is highly controversial. Recent discussions include M. Gagarin, "The Athenian Law against *hubris*," in G. W. Bowersock, W Burkert, and M. C. J. Putnam (eds.), *Arkrouros: Hellenic Studies Presented to B. M. W. Knox* (Berlin, 1979), 229-236; N. R. E. Fisher, "The Law of *hubris* in Athens," in P. Cartledge, P. Millert, and S. C. Todd (eds.), *Nomos* (1990), 123—145; and Johnstone 1999, 58.

[3] For *hybris* as an undefined term, see Dem. 21.47. For a short general discussion of the matter of terminology, see Todd 1993: 6i—6z.

[4] In the earlier speech, Demosthenes says, "We go out with arms"; in *Against Conon* the term used is "guard duty". For more detailed discussion, see Carey and Reid 1985: 69, and Carey 1997: 84.

[5] Lit. "subject to *hybris.*" See the Introduction.

[6] This would have been understood as a crime committed not to acquire a valuable object but to humiliate the victim.