

THE CODEX OF JUSTINIAN

*A New Annotated Translation,
with Parallel Latin and Greek Text*

BASED ON A TRANSLATION BY
JUSTICE FRED H. BLUME

BRUCE W. FRIER, GENERAL EDITOR

EDITORS

Serena Connolly

Simon Corcoran

Michael Crawford

John Noël Dillon

Dennis P. Kehoe

Noel Lenski

Thomas A. J. McGinn

Charles F. Pazdernik

Benet Salway

With contributions by Timothy Kearley



Justice Fred H. Blume, circa 1921, the year he acceded to the Wyoming Supreme Court and shortly after he had begun his translation of the Codex of Justinian.

THE CODEX OF JUSTINIAN

*A New Annotated Translation,
with Parallel Latin and Greek Text*

VOLUME 2

Books IV–VII



CAMBRIDGE
UNIVERSITY PRESS

H.U.Beytepe Kütüphanesi

18/34862

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9780521196826

© Cambridge University Press 2016

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2016

Printed in the United Kingdom by TJ International Ltd. Padstow Cornwall

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging in Publication data

Codex (Corpus juris civilis). English.

The Codex of Justinian : a new annotated translation, with parallel Latin and Greek text based on a translation by Justice Fred H. Blume / Bruce W. Frier, General Editor ; Editors: Serena Connolly, Simon Corcoran, Michael Crawford, John Noël Dillon, Dennis P. Kehoe, Noel Lenski, Thomas A. J. McGinn, Charles F. Pazdernik, Benet Salway.

pages cm

Includes bibliographical references and index.

ISBN 978-0-521-19682-6 (hardback)

1. Codex (Corpus juris civilis). 2. Roman law - Sources. I. Blume, Fred H., 1875-1971, translator. II. Frier, Bruce W., 1943- editor. III. Connolly, Serena, editor. IV. Corcoran, Simon, editor. V. Crawford, Michael, editor. VI. Dillon, John Noel, editor. VII. Kehoe, Dennis P., editor. VIII. Lenski, Noel Emmanuel, editor. IX. McGinn, Thomas A. J., editor. X. Pazdernik, Charles Frederick, editor. XI. Salway, Benet, editor. XII. Title.

KJA1192.3 2016

340.5'4-dc23

2015015128

ISBN - 3 Volume Set 978-0-521-19682-6 Hardback

ISBN - Volume I 978-1-107-11975-8 Hardback

ISBN - Volume II 978-1-107-11981-9 Hardback

ISBN - Volume III 978-1-107-11982-6 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

KJA
1192.2
C63
2016
V.2

Contents

VOLUME 1

<i>List of illustrations</i>	<i>page</i> ix
<i>Notes on contributors</i>	xi
<i>Index Titulorum Codicis Iustiniani</i>	xiv
<i>List of Titles in the Codex of Justinian</i>	xv
<i>Justice Fred H. Blume and the Translation of Justinian's Codex</i> Timothy Kearley	lxxv
<i>Revising Justice Blume's Translation of Justinian's Codex,</i> <i>with Note on the Dating of Constitutions</i> Bruce W. Frier and Noel Lenski	lxxix
<i>The Codex of Justinian: The Life of a Text through 1,500 Years</i> Simon Corcoran	xcvii
<i>Bibliography</i>	clxv
<i>List of abbreviations</i>	clxxxii
The Codex of Justinian: Text and Translation	1
The Introductory Constitutions edited by John Noël Dillon and Bruce W. Frier	3
First Book edited by John Noël Dillon	14
Second Book edited by Bruce W. Frier	406
Third Book edited by Serena Connolly	602

VOLUME 2

Fourth Book edited by <i>Dennis P. Kehoe</i>	792
Fifth Book edited by <i>Thomas A. J. McGinn</i>	1086
Sixth Book edited by <i>Simon Corcoran, Michael Crawford, and Benet Salway</i> ; and by <i>Bruce W. Frier, Dennis P. Kehoe, and Thomas A. J. McGinn</i>	1406
Seventh Book edited by <i>Noel Lenski</i>	1768

VOLUME 3

Eighth Book edited by <i>Bruce W. Frier</i>	2024
Ninth Book edited by <i>Thomas A. J. McGinn</i>	2256
Tenth Book edited by <i>Dennis P. Kehoe</i>	2452
Eleventh Book edited by <i>Dennis P. Kehoe</i>	2646
Twelfth Book edited by <i>Charles F. Pazdernik</i>	2818
<i>Glossary of Roman Law Terms</i>	3050
<i>Chronological List of the Constitutions in Justinian's Codex</i>	3088

Liber Quartus

I De Rebus Creditis et De Iureiurando

[1] *Imp. Antoninus A. Herculiano.* Causa iureiurando ex consensu utriusque partis vel adversario inferente delato et praestito vel remisso decisa nec periurii praetextu retractari potest, nisi specialiter hoc lege excipiat.

PP. xv k. Iul. Antonino A. IIII et Balbino cons.

[2] *Imp. Alexander A. Felici.* Iurisiurandi contempta religio satis deum ultorem habet. periculum autem corporis vel maiestatis crimen secundum constituta divorum parentum meorum, etsi per principis venerationem quodam calore fuerit periuratum, inferri non placet.

PP. vi k. April. Maximo II et Aeliano cons.

[3] *Imp. Diocletianus et Maximianus AA. Severae.* In bonae fidei contractibus nec non etiam in aliis causis inopia probationum per iudicem iureiurando causa cognita res decidi potest.

PP. x k. Sept. Maximo II et Aquilino cons.

[4] *Idem AA. Maximae.* Si ad excludendam tutelae actionem pupillus iusiurandum tutori dedit, postea eandem litem exercere non prohibetur.

PP. k. Iul. ipsis IIII et III AA. cons.

Fourth Book

edited by Dennis P. Kehoe

First Title Credit and Oaths¹

[1] *Emperor ANTONINUS Augustus to Herculianus.* A case decided by an oath that is tendered pursuant to the agreement of each party, or when the opponent is tendering one and it is accepted or waived, cannot be reconsidered under the pretext of perjury, unless this should specifically be excepted by a statute.

Posted June 17, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2] *Emperor ALEXANDER Augustus to Felix.* The scorned sanctity of an oath has a sufficient avenger in God. So in accordance with the decisions of My deified parents² it is decided that neither shall bodily danger be inflicted nor the charge of treason be preferred, even if as a result of some impetuousness perjury should have been committed through an oath sworn on the Emperor.

Posted March 27, in the consulship of Maximus, for the second time, and Aelianus (223).

[3] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Severa.* In good faith contracts and indeed in other cases, in the absence of proofs, the case may be decided by the judge, after investigation, on the basis of an oath.

Posted August 23, in the consulship of Maximus, for the second time, and Aquilinus (286).

[4] *The same Augusti to Maxima.* If a ward has given an oath to a tutor to exclude an action on tutorship, afterwards he is not prohibited from bringing the same action.

Posted July 1, in the consulship of the Augusti themselves, Diocletian, for the fourth time, and Maximian, for the third time (290).

¹ See D. 12.1.2. Blume: "On failure or scarcity of proof, the law frequently allowed facts to be settled by one or the other party to a transaction taking an oath, commonly called the decisory or reference oath. This was a peculiar institution of Rome ..."

² D. 12.2.13.6.

[5] *Idem AA. Iuliano.* Cum etiam a pupillorum tutoribus velut ab ipsis pupillis relictā fideicommissa videantur, super fideicommisso praeses provinciae cognoscet et, si id tibi relictum esse constiterit, reddi tibi efficiet. idem, si infitietur, ad iusiurandum, ut desideras, tutorem adiget.

PP. III non. Dec. ipsis IIII et III AA. cons.

[6] *Idem AA. Bessio.* Cum proponas partibus placuisse iurisiurandi religionē generis et ingenuitatis quaestionem decidi, praeses provinciae iuxta decretum arbitri ad voluntatis vestrae placitum amitae tuae filiis consulat.

PP. v id. Febr. Tiberiano et Dione cons.

[7] *Idem AA. et CC. Eutythianae.* Nec filius nec quisquam alius neque litigando neque paciscendo, sed nec iusiurandum citra voluntatem domini rei deferendo praedictum ei facere potest. unde si citra mandatum tuum aliquid erga rem tuam filius tuus gessit nec ratum habuisti, nihil tibi oberit.

S. id. Nov. AA. cons.

[8] *Idem AA. et CC. Alexandro.* Actori delato vel relato iureiurando, si iuraverit vel ei remissum fuerit sacramentum, ad similitudinem iudicati in factum actio competit.

S. XII k. Mai. CC. cons.

[9] *Idem AA. et CC. Marciano.* Delata condicione iurisiurandi reus (si non per actorem, quominus de calumnia iuret, steterit) per iudicem solvere vel iurare, nisi referat iusiurandum, necesse habet.

S. v k. Mai. Sirmi cons.

[10] *Idem AA. et CC. Protogeni.* In actione etiam depositi, quae super rebus quasi sine scriptis datis movetur, iusiurandum ad exemplum ceterorum bonae fidei iudiciorum deferri potest.

S. v k. Dec. CC. cons.

[5]³ *The same Augusti to Julian.* Since trusts are valid that have been bequeathed also by the *tutores* of minor wards just as by the wards themselves, the provincial governor will hold a hearing on the trust and, if it is established that it has been left to you, he will cause it to be returned to you. He will also, as you desire, compel the *tutor* to take an oath, if he should deny it.

Posted December 3, in the consulship of the Augusti themselves, Diocletian, for the fourth time, and Maximian, for the third time (290).

[6] *The same Augusti to Bessius.* Since you state that it was agreed between the parties that the question as to birth and free status be decided by the sanctity of an oath, the provincial governor will look after the interests of the children of your paternal aunt pursuant to the decree of the arbitrator, in accordance with your (plural) wishes.

Posted February 9, in the consulship of Tiberianus and Dio (291).

[7] *The same Augusti and Caesars to Eutychiana.* Neither a son nor anyone else can prejudice the interests of a property owner (*dominus*) by litigation or pact, or by tendering an oath without his consent. Hence, if your son transacted any business in connection with your property without your mandate, and you have not ratified it, it will not harm you.

Written November 13, in the consulship of the Augusti (293).

[8] *The same Augusti and Caesars to Alexander.* An action on the facts (*in factum*), similar to one on the execution of a judgment, is available to the plaintiff if, when an oath has been tendered or re-tendered, he swears it or the oath is waived.

Written April 20, in the consulship of the Caesars (294).

[9] *The same Augusti and Caesars to Marcianus.* When a (testamentary) oath (*condicio iusiurandi*) has been tendered, the defendant (if it is not the plaintiff's doing that he should not swear about tendering a vexatious oath) is compelled by the judge to pay or to swear an oath, unless he has re-tendered an oath.

Written April 27, at Sirmium, in the consulship of the Caesars (294).

[10] *The same Augusti and Caesars to Protogenes.* In an action on a deposit as well, which is brought concerning things delivered as if without written records, an oath may be tendered on the example of the other good faith judgments.

Written November 27, in the consulship of the Caesars (294).⁴

³ = C. 6.42.20, giving just the principle.

⁴ Mommsen dates to September 27, 294.

[11] *Imp. Iustinianus A. Demostheni pp. pr.* Si quis iusiurandum intulerit et necdum eo praestito postea, utpote sibi adlegationibus abundantibus, hoc revocaverit, sancimus nemini licere penitus iterum ad sacramentum recurrere (satis enim absurdum est redire ad hoc, cui renuntian- dum putavit, et, cum desperavit aliam probationem, tunc denuo ad religionem convolare) et iudices nullo modo eos audire ad tales iniqui- tates venientes. 1. Si quis autem sacramentum intulerit et hoc revocare maluerit, licere quidem ei hoc facere et alias probationes, si voluerit, praestare, ita tamen, ut huiusmodi licentia usque ad litis tantummodo terminum ei praestetur. 2. Post definitivam autem sententiam, quae provocatione suspensa non sit vel quae, postquam fuerit appellatum, corroborata fuerit, nullo modo revocare iuramentum et iterum ad pro- bationem venire cuidam concedimus, ne repetita lite finis negotii alte- rius causae fiat exordium.

D. xv k. Oct. Chalcedone Decio vc. cons.

[12] *Idem A. Demostheni pp. pr.* Generaliter de omnibus iuramentis, quae in litibus offeruntur vel a iudice vel a partibus, definiendum est. cum enim iam increbuit iudices in plenissima definitione sacramentum imponere, evenit, ut provocatione lite suspensa hi quidem, qui iusiuran- dum praestare iussi sunt, ab hac forte luce subtrahantur, probationes autem rerum cadant, cum multum discrepat iuramentum hereditarium a principali sacramento. necessitate itaque rerum coacti et probationi- bus pinguius subvenientes ad huiusmodi venimus sanctionem.

1. Omne igitur iuramentum, sive a iudicibus sive a partibus illatum vel in principio litis vel in medio vel in ipsa definitiva sententia, sub ipso iudice detur non expectata vel ultima definitione vel provocationis formidine. 1a. Sed iuramento illato, cum hoc a partibus fuerit factum et a iudice approbatum vel ex auctoritate iudicis cuicumque parti illatum, si quidem is cui imponitur sacramentum nihil ad hoc fuerit reluctatus, et hoc praestetur vel referatur, necessitate imponenda ei cui refertur relationis subire sacramentum, vel, si hoc recusaverit, quasi illato sacra- mento praestito causa vel capitulum decidatur, nullo loco provocationi relinquendo. quis enim ferendus est ad appellationis veniens auxilium in his, quae ipse facienda procuravit?

[11] *Emperor JUSTINIAN Augustus to Demosthenes, Praetorian Prefect. pr.* We ordain that no one, if he has tendered an oath and afterwards revokes it before it is taken, for instance if he has an abundance of proofs, should ever again have recourse to an oath – for it is rather absurd to return to what someone thought best to renounce, and, when he despaired of other proof, then to fly anew to an oath – and that the judges in no way should listen to those taking such an iniquitous course. 1. Still, if someone has tendered an oath but has preferred to revoke it, he is permitted to do this and to furnish other proofs, if he wishes, provided, however, that the privilege of this sort be offered to him only up to the end of the litigation. 2. However, after a final verdict, which has not been suspended by an appeal or which, after it has been appealed, has been confirmed, We permit no one to revoke the tender of oath or to have recourse again to proof, lest, if litigation is reopened, the end of one business become the beginning of another case.

Given September 17, at Chalcedon, in the consulship of the vir clarissimus Decius (529).

[12] *The same Augustus to Demosthenes, Praetorian Prefect. pr.* There must be a general definition concerning oaths that are tendered in a suit, either by the judge or by the parties. For since it has now become a frequent practice for judges to impose an oath with the most complete application,⁵ it happens that, when the litigation is suspended upon appeal, these persons who have been ordered to offer an oath are taken by chance from this light of day and the proofs of the matters fail, since there is a great difference between an oath taken by an heir and that taken by a principal in the transaction. Forced, therefore, by necessity of the situation and assisting more fully in the matter of proof, We come to an enactment as follows.

1. Every oath, accordingly, whether tendered by the judges or the parties, either in the beginning or middle of the litigation or at the final decision itself, should be given before the very judge presiding the case, without awaiting the final judgment or the fear of an appeal. 1a. But when an oath has been tendered, when this has been done by the parties and approved by the judge or has been imposed on either party by the authority of the judge, if indeed the person on whom the oath is imposed has offered no objection to this, the oath should be offered or re-tendered, with the requirement to be imposed on the person to whom the oath is being re-tendered to take the oath, or, if he refuses this, the case or point shall be decided as if the oath had been tendered and offered, with no place to be left for appeal. For who is to be tolerated resorting to the aid of an appeal in those matters that he himself purposely made happen?

⁵ "plenissima definitione"; Blume translates "of most definite scope."

2. Sin autem is, cui sacramentum illatum est vel a parte vel a iudice, hoc subire minime voluerit, licentiam quidem habeat sacramentum recusare, iudex autem, si hoc omnimodo praestandum existimaverit, sic causam dirimat, quasi volente eo sacramentum sit recusatum, et ita cetera sive capitula sive totius negotii summa examinentur et lis suo Marte percurrat, nullo ei obstaculo obviante. **2a.** Ipse autem, qui sacramentum sibi illatum dare recusaverit, vel hoc attestetur vel, si forte non audeat, habeat sibi in ultima provocatione repositum auxilium. **2b.** Et si iudex appellationi praesidens bene quidem illatum iusiurandum, non rite autem recusatum pronuntiaverit, res secundum quod iudicatum est permanebit. **2c.** Sin autem non rite quidem illatum, recte autem recusatum sacramentum pronuntiaverit, tunc ei licebit emendare sententiam iudicis, quae quasi ex recusato sacramento processit, et nihil penitus nec praeiudicii nec iniusti dispendii cuicumque incurret, sed et causae cursus ab initio usque ad novissimum terminum non impediatur et lis aequa lance trutinabitur. 3. Sive autem illatum iuramentum fuerit praestitum sive recusatum, ipsi parti quae hoc intulit nullum provocationis remedium in hoc servabitur, cum nimis crudele est parti quae hoc detulit propter hoc ipsum, quod iudex eius petitionem secutus est, superesse provocationem.

4. His de praesentibus personis statutis nec absentes nos fugiunt, sed etiam eos huic legi subiugamus. **4a.** Et si persona non praesens inveniatur, cui sacramentum illatum est, lite forte per procuratorem ventilata, necesse est vel ipsam principalem personam datis certis indutiis ad iudicem venire, ut ea quae de sacramentis statuta sunt impleat vel, si iudex existimaverit in provincia ubi degit sub actorum testificatione iuramentum ab ea vel dari vel referri vel recusari, hoc procedere, ut singulis casibus eventus iam definitus imponatur. **4b.** Licentia concedenda etiam parti alteri vel per se vel per procuratorem super hoc ipsum ordinatum adesse his, quae de iuramento aguntur, vel si neutrum facere maluerit, et ex una parte, sub fide tamen gestorum, iuramentum praestari vel referri vel recusari. **4c.** Expensis propter huiusmodi causam praestandis officio iudicis trutinandis, an ab utraque parte vel altera oportet eas dependi. **4d.** Nullo tamen ex hoc litibus impedimento generando, sed, donec ea procedunt, aliis vel capitulis vel litis membris a iudice eximinandis et, postquam fuerint ei

2. But if the person to whom an oath has been tendered, either by a party or a judge, does not want to undergo it, he should indeed have the right to refuse the oath; the judge, however, if he thinks that the oath must absolutely be offered, shall decide the case as if the oath had been declined with the person's consent,⁶ and on this basis the remaining matters, either the individual point in dispute or the whole business, should be examined, and the suit should run its course (*suo Marte*), with no obstacle getting in its way. 2a. The very person, however, who refuses to give an oath tendered to himself should either attest to this, or, if by chance he should not dare do this, should have for himself the aid represented in a final appeal. 2b. And if the judge presiding over the appeal pronounces that the oath had been well tendered and not rightfully refused, the matter will remain as it was judged. 2c. If, however, he pronounces that the oath had not rightfully been tendered but correctly refused, then he may modify the decision of the judge, which proceeded as if on the basis that the oath had been refused, and no prejudice at all or unjust expenditure will accrue to anyone, but the course of the case should not be impeded from its beginning to its final termination and the suit will be weighed in an equal balance. 3. If, however, an oath that was tendered was taken or refused, no remedy of appeal will be reserved for the very party that tendered it, since it is quite cruel that an appeal be available to the party that raised an objection on this very basis, that the judge followed his request.⁷

4. While We make these provisions concerning people present, those absent do not escape Us, but We also subject them to this law. 4a. And if a person to whom an oath had been tendered should be found not to be present, perhaps airing his case through a procurator, either the principal must, time being given for that purpose, come before the judge to comply with what has been legislated concerning oaths, or follow this procedure, if the judge decides that, under the testimony of agents (*actores*) in the province where he lives, the oath be given, re-tendered, or refused there, so that the result already defined be imposed on individual cases. 4b. Permission is to be conceded also to the other party, either personally or through a procurator appointed for this very purpose, to be present at the proceedings that are conducted in connection with the oath, or, if he prefers to do neither, that the oath be offered or re-tendered or refused from one party, under the faith, however, of a record of the actions taken (*sub fide gestorum*). 4c. It is the duty of the judge to weigh the expenses incurred on account of a case of this type, whether they are to be paid by each party or by one or the other. 4d. However, no impediment is to be generated from this enactment for lawsuits; but, while these matters are proceeding, the judge should examine other individual points or parts of the

⁶ "volente eo," referring to the person to whom the oath was tendered, not to the judge.

⁷ "quae hoc detulit propter hoc ipsum."

intimata gesta super iuramento subsecuta, tunc iterum ad hoc capitulum iudice redeunte et eo adimpleto ad cetera perveniente. 4e. Omnibus aliis, quae de praesentibus sancita sunt, et in absentium parte observandis.

5. In omnibus autem casibus, in quibus sacramenta praestantur, observationem iudicalem permanere censemus secundum personarum qualitatem, sive sub ipso iudice praestari oportet iuramentum sive in domibus, sive sacris scripturis tactis sive in sacrosanctis oratoriis. 6. Similique modo in sua firmitate manere, quae de calumniae iureiurando vel relato sacramento legibus cauta sunt vel a nobis vel a retro divis principibus inducta. non enim, ut aliquid derogetur antiquioribus legibus, haec prolata sunt, sed ut, si quid deesse eis videbatur, hoc repleatur.

Recitata septimo in novo consistorio palatii Iustiniani. D. III k. Nov. Decio vc. cons.

[13] *Idem A. Iohanni pp. pr.* Cum quis legatum vel fideicommissum utpote sibi relictum exigebat et testamento forte non apparente pro eo sacramentum ei ab herede delatum est et is religionem suam praestavit, adfirmans sibi legatum vel fideicommissum derelictum esse, et ex huiusmodi testamento id quod petebat consecutus est, postea autem manifestum factum est nihil ei penitus fuisse derelictum, apud antiquos quaerebatur, utrum iureiurando standum est, an restituere debet hoc quod accepit: vel, si re vera ei relictum fuerat legatum vel fideicommissum, si demus licentiam heredi Falcidiam, si competat, ex hoc retinere. 1. Nobis itaque melius visum est repeti ab eo legatum vel fideicommissum nullumque ex huiusmodi periurio lucrum ei accedere, sed et si verum fuerit inventum, quartae detentionem introduci (si tamen locum habeat), ne quis ex hoc delicto sibi lucrum impium adferre nostris legibus concedatur.

D. xv k. Nov. Constantinopoli post consulatum Lampadii et Orestae vv. cc.

II Si Certum Petatur

[1] *Impp. Severus et Antoninus AA. Modestino.* Neque aequam neque usitatam rem desideras, ut aes alienum patris tui non pro portionibus

suit and, after the actions that have taken place in connection with the oath have been reported to him, then he returns to this point in the case and when that is completed goes on to the other matters. 4e. All other provisions that have been made concerning persons who are present are to be observed in the case of persons who are absent.

5. Moreover, in all cases in which oaths are offered, We direct that judicial custom should be observed in accordance with the standing of the persons, whether the oath should be offered before the judge himself or in houses, whether by touching the sacred scripture or in sacred chapels (*sacrosanctis oratoriis*). 6. In a similar manner, all provisions remain in force that have been made in the laws concerning an oath on a vexatious lawsuit or a re-tendered oath, whether by Us or by divine emperors in the past. For these regulations have been enacted not so that anything be taken away from the ancient laws, but so that if something should seem to be missing from them, that it be supplied by them.

Recited for the seventh time in the New Consistory of Justinian's Palace. Given October 30, in the consulship of the vir clarissimus Decius (529).

[13] *The same Augustus to John, Praetorian Prefect. pr.* When someone was demanding a legacy or a trust as though left to him and, since by chance the will was not available, an oath was tendered to him on that account by the heir and he offered his solemn oath, affirming that the legacy or trust had been left to him, and he gained from a will of this type what he was seeking, but afterwards it became manifest that nothing at all had been left to him, it was asked among the ancients whether the oath was to be abided by or whether he ought to restore what he had received; or, if in fact a legacy or trust had been left him, whether We should give permission to the heir to retain from this the Falcidian portion, if this should apply. 1. Thus it has seemed better to Us that the legacy or trust be reclaimed from him and that no profit accrue to him from such perjury, so that no one may be permitted by our laws to make an impious profit out of this wrong, but even if it has been found to be true, the retention of the Falcidian quarter should be allowed (provided it should have a place).

Given October 18, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Second Title Claims for Fixed Sums^a

[1] *Emperors SEVERUS and ANTONINUS Augusti to Modestinus.* You desire something that is neither just nor usual, that you and your brother, your

^a See D. 12.1.

hereditariis exsolvatis tu et frater coheres tuus, sed pro aestimatione rerum praelegatarum, cum sit explorati iuris hereditaria onera ad scriptos heredes pro portionibus hereditariis, non pro modo emolumenti pertinere. quod nec ipse ignorare videris, cum creditoribus secundum formam iuris pro portione tua caveris.

D. k. Iul. Cilone et Libone cons.

[2] *Imp. Antoninus A. Hermogeni.* Quamvis pecuniam tuam Asclepiades suo nomine crediderit, stipulando tamen sibi ius obligationis quaesivit. quam pecuniam ut possis petere, mandatis tibi ab eo actionibus consequeris.

PP. VII k. Mai. Messala et Sabino cons.

[3] *Imp. Gordianus A. Sempronio.* Eos, qui officium administrant, neque per se neque per suppositas personas tempore officii sui in provincia fenus agitare posse saepe rescriptum est.

PP. VIII k. Sept. Gordiano A. et Aviola cons.

[4] *Imp. Philippus A. et Philippus C. Maximo. pr.* Si absentis pecuniam nomine eius fenori dedisti ac reprobato nomine mandatis actionibus experiris, praeses provinciae iurisdictionem suam praebebit. 1. Idem, si cessare mandatum animadverterit, utilem tibi adversus debitorem eo nomine actionem competere non negabit.

PP. XV k. Mart. Praesente et Albino cons.

[5] *Impp. Diocletianus et Maximianus AA. et CC. Aristodemo et Proculo. pr.* Si non singuli in solidum accepta mutua quantitate vel stipulanti creditori sponte vos obligastis, licet uni numerata sit pecunia vel intercessionis nomine hanc pro rea suscepistis obligationem, frustra veremini, ne eius pecuniae nomine vos convenire possit, quam alii mutuo dedit, si intra praestitutum tempus rei gestae quaestionem detulistis. 1. Ac multo magis inanem timorem geritis, si pecunia numerata oleum susceptum instrumento sit collatum, cum, si reddendi stipulatio

co-heir, should pay your father's debt, not in proportion to your shares of the inheritance, but in accordance with the valuation the property left to you in specific legacies (*praelegata*),⁹ since it is established law that inherited burdens are the responsibility of the heirs in proportion to their shares of the inheritance, and not according to the measure of their gain. You yourself appear not to be ignorant of this, since you have given promises to the creditors in proportion to your share of the inheritance, in accordance with the rule of law.

Posted July 1, in the consulship of Cilo and Libo (204).

[2] *Emperor ANTONINUS Augustus to Hermogenes.* Although Asclepiades has loaned out your money in his own name, nevertheless by a stipulation he has sought the right to the obligation for himself. You will gain the right to seek the money if he authorizes you to bring actions.

Posted April 25, in the consulship of Messala and Sabinus (214).

[3] *Emperor GORDIAN Augustus to Sempronius.* Rescripts have often been issued that those administering an office cannot during the time of their duty lend money at interest in the province, even through intermediaries (*per suppositas personas*).¹⁰

Posted August 25, in the consulship of Gordian Augustus and Aviola (239).

[4] *Emperors PHILIP Augustus and PHILIP Caesar to Maximus. pr.* If you have loaned an absent person's money out at interest on his behalf, and after he had repudiated the loan you sue for recovery under the mandated actions (*actionibus mandatis*), the provincial governor will offer his jurisdiction. 1. The same person, if he determines a mandate is inapplicable, will not deny you an analogous action (*actio utilis*) against the debtor on this account.

Posted February 15, in the consulship of Praesens and Albinus (246).

[5] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Aristodemus and Proculus. pr.* If you did not individually obligate yourselves willingly to pay the whole amount, either by accepting a loan (*mutuum*) or by promising to a creditor taking a stipulation, although the money was paid out to one person, or you have taken up this obligation as surety on behalf of a female defendant, you are groundlessly fearing that the creditor can sue you for that money, which he has given in loan to another, if you have raised the question about what has been done within the time allowed. 1. You are carrying a fear all the more groundless if, after the money was counted out, it is recorded in a

⁹ That is, legacies of specific property to heirs, in addition to their shares. See note C. 4.16.3; C. 3.36.24 (Blume).

¹⁰ See D. 12.1.33–34 (Blume).

nulla subiecta est et huius rei est habita sollemnis contestatio, in suo statu remanente eo, quod vere factum intercessit, ex olei accepti scriptura nihil deberi manifestum est.

S. v non. Mai. AA. cons.

[6] *Idem AA. et CC. Nicandro. pr.* Si ex pretio debitae quantitatis facta novatione per stipulationem usuras licitas contra quem supplicas stipulatus es, falsa mutuae datae quantitatis demonstratio praemissa, cum obligationis non defecerat substantia, quominus usque ad modum placitum usurae possint exigi, nihil nocet. 1. Si vero citra vinculum stipulationis tantum mutuam pecuniam datam conscriptum est et eius praestari fenus convenit, simulatis pro infectis habitis huiusmodi placitum nihil de praecedenti mutavit obligatione.

S. xv k. Dec. AA. cons.

[7] *Idem AA. et CC. Pactumeiae.* Non unde originem pecunia quae mutuo datur habet, sed qui contraxit si propriam numeravit, in huiusmodi obligationibus requiritur.

S. v non. Oct. Sirmi AA. cons.

[8] *Idem AA. et CC. Proculo.* Si pro mutua pecunia, quam a creditore poscebas, argentum vel iumenta vel alias species utriusque consensu aestimatas accepisti, dato auro pignori, licet ultra unam centesimam usuras stipulanti spopondisti, tamen sors, quae aestimatione partium placito definita est, et usurarum titulo legitima tantum recte petitur. nec quicquam tibi prodesse potest, quod minoris esse pretii pignus quod dedisti proponis, quominus huius quantitatis solutioni pareas.

S. xvii k. Ian. AA. cons.

written document that oil was delivered, since, if no stipulation for returning the oil has been added, and a solemn declaration before witnesses (*contestatio*) has been made about this thing, with what truly happened remaining as it is, it is manifest that nothing is owed by reason of the receipt for the oil that has been received.

Written May 3, in the consulship of the Augusti (293).

[6] *The same Augusti and Caesars to Nicander. pr.* If by stipulation you made a novation of the price for the amount that was owed, and from the person against whom you are petitioning you took a stipulation for (his payment of) lawful interest, (then,) since there had been substance to the obligation, your having made a false claim (*demonstratio*) that the amount was given “as a loan” does not hinder you from exacting up to the agreed-upon measure of interest. 1. But if, without the binding force of a stipulation, it was simply stated in writing that money was given as a loan and it was agreed that interest be paid for this, since fictitious conditions are treated as not made, an agreement of this type changed nothing from the preceding obligation.¹¹

Written November 17, in the consulship of the Augusti (293).¹²

[7] *The same Augusti and Caesars to Pactumela.* In obligations of this sort it is not asked where the money that is given in a loan has its origin, but if the person who has entered into the contract has paid out his own money.¹³

Written October 3, at Sirmium, in the consulship of the Augusti (293).

[8] *The same Augusti and Caesars to Proculus.* If, instead of a cash loan, which you were requesting from the creditor, you received silver or livestock, or other goods whose value was estimated with the consent of both parties, if you have given gold as a pledge, although you have promised by stipulation an interest rate over 12 percent (1 percent per month), nevertheless the principal, which has been defined by agreement based on the valuation of the parties, is rightly claimed, as is the interest, but only at the legal rate. Nor can it be of any benefit to you at all that you allege that the pledge that you have given was of a lower value, to avoid submitting to a payment of this amount.

Written December 16, in the consulship of the Augusti (293).

¹¹ Blume: “In this case a debtor owed an amount of money to a creditor on account of some transaction, e.g. on a sale and purchase. A new contract was made which stated the amount was owing because of a loan of money; and interest was agreed to be paid. When the amount of the principal became due under this new contract, the debtor claimed that he did not owe any interest . . . A novation could only be made by a stipulation.” In section 1, the bare pact could not transform an interest-free debt into an interest-bearing one.

¹² The month here or in the subscription to 7 seems to be corrupt. Mommsen dates this constitution to September 17, 293.

¹³ See C. 3.42.8, 4.27.3, 4.34.8 (Blume).

[9] *Idem AA. et CC. Alexandro.* Cum te in Gallia cum Syntropho certum auri pondus itemque numeratam pecuniam mutuo dedisse, ut Romae solveretur, precibus adseveras, aditus competens iudex, si duos reos stipulandi vel re pro solido tibi quaesitam actionem sive ab heredibus Syntrophī procuratorem te factum animadverterit, totum debitum, alioquin quod dedisti solum restitui tibi iubebit.

S. xv k. Ian. AA. cons.

[10] *Idem AA. et CC. Egi Crispino.* Eo, quod a multis proprii debiti singulorum obligationis uno tantum instrumento probatio continetur, exactio non interpelletur. nam si pro pecunia quam mutuo dedisti tibi vinum stipulanti qui debuerant spoponderunt, negotii gesti paenitentia contractum habitum recte non constituit irritum.

S. prid. non. Febr. Sirmi CC. cons.

[11] *Idem AA. et CC. Maximiano.* Incendium aere alieno non exuit debitorem.

S. ii id. Febr. Sirmi CC. cons.

[12] *Idem AA. et CC. Theophanio.* Si in rem communem cum Ione mutuam sumpsisti pecuniam nec re nec sollemnitate verborum vos obligastis in solidum et post integrum solvisti, de restituenda tibi parte contra Ionem experiri, ut debitum posceres, iudice cognoscente potes.

S. xv k. Sept. CC. cons.

[13] *Idem AA. et CC. Frontoni.* Eum, qui mutuam sumpsit pecuniam, licet in res alienas, creditore non contemplatione domini rerum eam fenori dante, principaliter obligatum obnoxium remanere oportet.

S. xvii k. Nov. Nicomediae CC. cons.

[14] *Idem AA. et CC. Hadriano.* Mutuae pecuniae, quam aliis dedit, creditor citra sollemnitatem verborum subscribentem instrumento non habet obligatum.

Sine die AA. cons.

[9] *The same Augusti and Caesars to Alexander.* Since you claim in your petition that while in Gaul with Syntrophus, you gave a certain weight of gold as a loan along with cash, to be repaid at Rome, when you approach a competent judge, if he decides that you two were joint creditors by stipulation (*reos stipulandi*) or that you have a cause of action for the whole amount from the nature of the contract, or that you have been made procurator by the heirs of Syntrophus, he will order that the whole amount, or otherwise, only what you have given, be restored to you.

Written December 18, in the consulship of the Augusti (293).

[10]¹⁴ *The same Augusti and Caesars to Egis Crispinus.* The exaction of a debt will not be interrupted for the reason that the proof of the obligation of individuals in a debt shared by many is contained in just one document. For if those who had owed you promised wine to you by stipulation instead of the money that you gave as a loan, their change of heart over the transaction does not render invalid a contract executed properly.

Written February 4, at Sirmium, in the consulship of the Caesars (294).

[11] *The same Augusti and Caesars to Maximianus.* A fire does not release a debtor from a debt.

Written February 12, at Sirmium, in the consulship of the Caesars (294).

[12] *The same Augusti and Caesars to Theophantius.* If you and Io borrowed money for a common enterprise and the two of you have not in fact (*re*) or by a stipulation (*sollemnitatis verborum*) obligated yourselves for the whole amount and afterwards you paid it in full, you can proceed against Io about having (his) share (of the loan) restored to you, with a judge hearing the case, to demand what is owed.¹⁵

Written August 18, in the consulship of the Caesars (294).

[13] *The same Augusti and Caesars to Fronto.* A person who has borrowed money, though in connection with the affairs of another, must remain liable as the one principally obligated, since the creditor is lending the money without thinking about the principal in the business (*dominus rerum*).

Written October 16, at Nicomedia, in the consulship of the Caesars (294).¹⁶

[14] *The same Augusti and Caesars to Hadrianus.* A creditor does not hold someone signing a document (promising to pay) liable for money that he has given in loan to others without a stipulation.

Without a day in the consulship of the Augusti (293).¹⁷

¹⁴ Combine with C. 4.49.12 (where the addressee's name is Egis Crispinus).

¹⁵ Mommsen restores *aut indebitum poscere*, "or to demand what is not owed," i.e., to demand what the petitioner was not obligated to pay.

¹⁶ Mommsen restores the date as November 13, 294.

¹⁷ The mss. have the consulship of the Augusti, but Krüger amends to make the date 294.

[15] *Idem AA. et CC. Charidemo.* Non adversus te creditores, qui mutuam pecuniam sumpsisti, sed eius, cui hanc credideras, heredes experiri contra iuris evidenter postulas formam.

S. v k. Dec. Nicomediae CC. cons.

[16] *Imp. Honorius et Theodosius AA. Theodoro pp.* Quisquis iudici fenebrem pecuniam mutuaverit, si in provincia fuerit versatus, quasi emptor legum atque provinciae, vel si quis collectarius honoris pretium dederit ambienti, exilii poena una cum ipso iudice plectetur.

D. xvii k. Nov. Basso et Philippo cons.

[17] *Imp. Iustinianus A. Menae pp.* Super chirographariis instrumentis haec pro communi utilitate sancienda duximus, ut, si quis pecunias credere supra quinquaginta libras auri voluerit vel super reddito debito securitatem accipere, cum amplius sit memorata quantitate, sciat non aliter debere chirographum a debitore vel creditore percipere, quam si testimonium trium testium probatae opinionis per eorum subscriptiones idem chirographum capiat. nam si citra huiusmodi observationem chirographum pro pecuniis memoratam auri quantitatem excedentibus proferatur, minime hoc admitti ab iudicantibus oportet. quod in futuris creditis vel debitorum solutionibus locum habere oportet.

D. k. Iun. Constantinopoli dn. Iustiniano pp. A. ii cons.

III De Suffragio

[1] *Imp. Theodosius Arcadius et Honorius AAA. Rufino pp. pr.* Si qui desideria sua explicare cupientes ferri sibi a quoquam suffragium postulaverint et ob referendam vicem se sponsione constrinxerint, promissa restituant, cum ea quae optaverint consequantur: si artibus moras

[15] *The same Augusti and Caesars to Charidemus.* You are demanding, plainly against the rule of law, that the creditors should not sue you, the person who borrowed the money, but (instead) the heirs of the one to whom you had loaned this sum.

Written November 27, at Nicomedia, in the consulship of the Caesars (294).

[16] *Emperors HONORIUS and THEODOSIUS Augusti to Theodorus, Praetorian Prefect.* Whoever has loaned money at interest to a judge, if he had acted in the province as if he were a purchaser of the laws and the province, or if some money changer (*collectarius*) has given a candidate the price of the office, he will be punished with the penalty of exile along with the judge himself.¹⁸

Given October 16, in the consulship of Bassus and Philippus (408).

[17]¹⁹ *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect.* We have deemed that the following should be ratified for the common benefit concerning written promissory documents (*chirographaria instrumenta*), that if anyone wants to lend money over the amount of 50 pounds of gold or receive a receipt (*securitas*) concerning the repayment of the debt when it is greater than the amount mentioned above, he should know that he should not get a promissory note from the debtor or creditor, unless the same promissory note contains the testimony, through their own signatures, of three witnesses of established reputation. For if, without observing this type of procedure, a promissory note for funds exceeding the quantity of gold mentioned should be introduced, this should not be admitted by those judging the case. This enactment must have a place in future loans or payments of debts.²⁰

Given June 1, at Constantinople, in the consulship of Our Lord Justinian, Ever Augustus, for the second time (528).

Third Title Recommendations²¹

[1]²² *Emperors THEODOSIUS, ARCADIVS, and HONORIUS Augusti to Rufinus, Praetorian Prefect.* **pr.** If any persons wanting to make known their desires (to the Emperor) have asked that a recommendation (*suffragium*) be brought for them by someone and have bound themselves by a solemn promise (*sponsione*)

¹⁸ In this period, the term *iudex* can refer to a provincial governor. See also C. 4.3.1; D. 12.1.34.

¹⁹ Combine with C. 4.20.18, 4.21.17, 4.30.14, possibly 4.30.15, and 5.15.3.

²⁰ Blume: "The foregoing law was modified to some extent by novel 73, cc. 8 and 9, appended to C. 4.21 requiring five instead of three witnesses to such documents, if executed in cities by persons without knowledge of writing, and if involving more than one pound of gold."

²¹ *Suffragia*, recommendations for a privilege or position.

²² = C.Th. 2.29.2. Seeck dates to March 4, 394.

nectent, ad solutionem debiti coartandi sunt. 1. Sed si quid eo nomine in auro vel argento vel ceteris mobilibus datum fuerit, traditio sola sufficiat et contractus habebit perpetuam firmitatem, quoniam collatio rei mobilis inita integra fide hac ratione cumulatur. 2. Quod si praedia rustica vel urbana placitum continebit, scriptura, quae ea in alium transferat, emittatur, sequatur traditio corporalis et rem fuisse completam gesta testentur: aliter enim ad novum dominium transire non possunt neque de veteri iure discedere. 3. Quod si quis, dum solo commonitorio de suffragio nititur, bona duxerit occupanda, reus temeritatis ac violentiae retinebitur atque in statum pristinum possessio reducetur, eo a petitione excluso, qui non dubitavit invadere, quod petere debuisset.

D. III non. Mart. Constantinopoli Arcadio III et Honorio II AA. cons.

III De Prohibita Sequestratione Pecuniae

[1] *Impp. Honorius et Theodosius AA. Iohanni pp.* Quotiens ex quolibet contractu pecunia postulatur, sequestrationis necessitas conquiescat. oportet enim debitorem primo convinci et sic ad solutionem pulsari. quam rem non tantum iuris ratio, sed et ipsa aequitas persuadet, ut probationes secum adferat debitoremque convincat pecuniam petiturus.

D. v id. Iul. Ravennae Honorio XIII et Theodosio X AA. cons.

V De Conditione Indebiti

[1] *Impp. Severus et Antoninus AA. Muciano. pr.* Pecuniae indebitae per errorem, non ex causa iudicati solutae esse repetitionem iure

to return the favor, they should carry out their promises when they gain what they have wished for; if they should create delays by artifices, they are to be compelled to pay their debt. 1. But if anything has been given for that purpose in gold, silver, or other movable property, delivery (*traditio*) alone shall suffice and the contract will have perpetual validity, since the payment of movable property entered into with full faith is completed in this way. 2. But if the agreement will contain rural or urban properties, a written document should be posted that transfers them to another person, the physical delivery should follow, and the public records (*gesta*) should testify to the completion of the transaction; otherwise they (the properties) cannot pass to new ownership or depart from their old legal status. 3. But if someone deems it appropriate to take possession of the property while he is relying only on a letter of instruction asking for a recommendation (*commonitorio suffragio*), he will be held as one guilty of effrontery and violence and the possession will be restored to its previous status, while that person who did not hesitate to take by force (*invadere*) what he ought to have asked for is excluded from any cause of action.²³

Given March 5, at Constantinople, in the consulship of Arcadius, for the third time, and Honorius, for the second time, Augusti (394).

Fourth Title The Prohibited Sequestration of Money²⁴

[1]²⁵ *Emperors HONORIUS and THEODOSIUS Augusti to John, Praetorian Prefect.* Whenever money is demanded from a contract of any sort, the need for sequestration should cease. For the debtor must first be convicted and in this way forced to payment. Not only does the rationale of the law urge this course of action, but also fairness itself, that the person who is going to claim money should bring along proofs and should convict the debtor.

Given July 11, at Ravenna, in the consulship of Honorius, for the thirteenth time, and Theodosius, for the tenth time, Augusti (422).

Fifth Title Claim for Restitution²⁶

[1] *Emperors SEVERUS and ANTONINUS Augusti to Mucianus.*²⁷ *pr.* There is no doubt that there is recovery through a claim for restitution (*condictio*) for

²³ See C.Th. 2.29.2. As Blume argues, the law may have been repealed by Novel 8. It was not legal to purchase an office: C. 9.27.6.

²⁴ *Sequestratio* is a pre-trial process whereby two parties contesting for property deposit it with a third party, the *sequester* (stakeholder).

²⁵ = C.Th. 2.28.1; combine with C. 2.13.2, 4.26.13, 8.15.8, 12.46.17, 12.60.4.

²⁶ See D. 12.6.

²⁷ Based on the date, the emperor in this and in the following ch. should be "Emperor ANTONINUS Augustus."

condictionis non ambigitur. si quid igitur probare potueris patrem tuum, cui heres extitisti, amplius debito creditori suo persolvisse, reperere potes. 1. Usuras autem eius summae praestari tibi frustra desideras: actione enim condictionis ea sola quantitas repetitur, quae indebita soluta est.

PP. III k. Aug. Antonino A. IIII et Balbino cons.

[2] *Idem AA. Secundinae.* Si citra ullam transactionem pecuniam indebitam alieno creditori promittere delegata es, adversus eam quae te delegavit condictionem habere potes.

PP. XIII k. Ian. Antonino A. IIII et Balbino cons.

[3] *Impp. Diocletianus et Maximianus AA. et CC. Pamphilo.* Cum et soluta indebita quantitas ab ignorante repeti possit, multo facilius quantitatis indebitae interpositae scripturae conditio competit vel doli exceptio agenti opponitur.

S. III non. April. Byzantii AA. cons.

[4] *Idem AA. et CC. Heraclio.* Ea, quae per infitiationem in lite crescunt, ab ignorante etiam indebita soluta repeti non posse certissimi iuris est. sed et si cautio indebitae pecuniae ex eadem causa interponatur, condictioni locum non esse constat.

S. v id. April. Byzantii AA. cons.

[5] *Idem AA. et CC. Attalo.* Si a patre emancipatus ei non intra tempora praestituta iure honorario successisti, quidquid indebitum postea per errorem utpote patris successor dedisti, eius condictionem tibi competere non est incerti iuris.

S. XIII k. Mai. AA. cons.

[6] *Idem AA. et CC. Mnaseae.* Si per ignorantiam facti non debitam solutam quantitatem pro alio solvisti et hoc addito rectore provinciae fuerit probatum, hanc ei cuius nomine soluta est restitui eo agente providebit.

S. VI id. Aug. AA. cons.

money not owed but paid by mistake, not on the basis of a judgment (*ex causa iudicati*). If you can prove, therefore, that your father, whose heir you are, paid something above what was owed to his creditor, you can claim it back. 1. But you desire in vain that interest on this sum be provided to you; for in an action for restitution only that amount is claimed back that was paid but not owed.

Posted July 30, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2] *The same Augusti*²⁸ *to Secundina*. If, without any settlement, you were delegated (*delegare*) to promise money not owed to someone else's creditor, you can have a claim for restitution against the woman who ordered you.²⁹

Posted on December 19, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[3] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Pamphilus*. Since money not owed, when paid even by a person unaware, may be claimed back, much more easily is a claim for restitution available for a written document concerning a sum not owed, or the defense of deceit (*dolus*) is opposed against the party suing.

Written April 3, at Byzantium, in the consulship of the Augusti (293).

[4] *The same Augusti and Caesars to Heraclius*. The law is quite certain that sums paid by one not knowing that are increased in a suit as a result of denial cannot be reclaimed even if they were not owed. But even if a written promise should be interposed on the same basis for money not owed, it is agreed that there is no place for a claim for restitution.

Written April 9, at Byzantium, in the consulship of the Augusti (293).

[5] *The same Augusti and Caesars to Attalus*. The law is not uncertain that, if you were emancipated by your father and did not succeed to your father's inheritance within the time fixed by Praetorian law (*iure honorario*), a suit for recovery is available to you for whatever money not owed you paid afterwards by mistake, as if you were your father's successor.

Written April 18, in the consulship of the Augusti (293).

[6] *The same Augusti and Caesars to Mnasea*. If, in ignorance of the facts, you have paid a sum on behalf of another person that was not owed because it had been paid and this is proved to the provincial governor when he is approached, he will see to it that this sum be restored to the person in whose name it was paid, in a suit brought by this person.

Written August 8, in the consulship of the Augusti (293).

²⁸ This should read "*the same Augustus*."

²⁹ Blume. For "delegation," see C. 8.41.

[7] *Idem AA. et CC. Dionysiae.* Fideicommissum vel legatum indebitum per errorem facti solutum repeti posse explorati iuris est.

S. v id. Sept. AA. cons.

[8] *Idem AA. et CC. Ziparo.* Creditoris falso procuratori solventi adversus eum indebiti repetitio, non obligationis liberatio competit.

S. xv k. Nov. CC. cons.

[9] *Idem AA. et CC. Gratianae. pr.* Indebitum solutum sciens non repetit. 1. Citra mandatum autem ab alio re distracta dominus evicta re vel ob praecedens vitium satis emptori faciens non¹ indebitum praetendere, sed per eiusmodi factum ratum contractum habuisse probans a se debitum ostendit solutum.

S. llll non. Dec. Nicomediae CC. cons.

[10] *Imp. Iustinianus A. Iuliano pp. pr.* Si quis servum certi nominis aut quandam solidorum quantitatem vel aliam rem promiserit et, cum licentia ei fuerat unum ex his solvendo liberari, utrumque per ignorantiam dependerit, dubitabatur, cuius rei datur a legibus ei repetitio, utrumne servi an pecuniae, et utrum stipulator an promissor habeat huius rei facultatem. 1. Et Ulpianus quidem electionem ipsi praestat qui utrumque accepit, ut hoc reddat quod sibi placuerit, et tam Marcellum quam Celsum sibi consonantes refert. Papinianus autem ipsi qui utrumque persolvit electionem donat, qui et antequam dependat ipse habet electionem quod velit praestare, et huiusmodi sententiae sublimissimum testem adducit Salvium Iulianum summae auctoritatis hominem et praetorii edicti ordinatorem. 2. Nobis haec decidentibus Iuliani et Papiniani placet sententia, ut ipse habeat electionem recipiendi, qui et dandi habuit.

D. k. Aug. Constantinopoli Lampadio et Oresta vv. cc. cons.

[7] *The same Augusti and Caesars to Dionysia.* It is established law that a trust or a legacy that is not owed but is paid through an error of fact can be claimed back.³⁰

Written September 9, in the consulship of the Augusti (293).

[8]³¹ *The same Augusti and Caesars to Ziparus.* For someone making a payment to someone falsely claiming to be the procurator of the creditor, a claim for restitution is available against this person, not a release from the obligation.

Written October 18, in the consulship of the Caesars (294).

[9] *The same Augusti and Caesars to Gratiana. pr.* A person who has knowingly paid money not owed does not claim it back. 1. When, moreover, property is sold by another person without a mandate, the owner who provides compensation to the buyer when the property has been evicted or because of a preceding fault cannot (subsequently) pretend that the money was not owed; rather, by proving through an act of this type that he considered the contract valid, he shows that he paid what was owed.

Written, December 2, at Nicomedia, in the consulship of the Caesars (294).

[10] *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect. pr.* If someone promised a slave of a certain name or (alternatively) some quantity of gold *solidi* or some other property and, when he had leave to be freed of his obligation by paying one of these, he paid both because of ignorance, it was doubted which thing he is allowed to recover by the laws, whether the slave or the money, and whether a stipulator or a promissor would have a choice in this matter. 1. And Ulpian offers the choice to the very person who has received both to return what he decides, and he reports that both Marcellus and Celsus agree with him.³² Papinian, however, gives the choice to the person who paid both, since he has the choice what he would want to pay before he pays out anything, and he adduces as the most sublime witness for this type of opinion Salvius Julian, a man of the highest authority and the editor (*ordinator*) of the Praetorian edict. 2. In deciding this point, We choose the opinion of Julian and Papinian, that the very person who also had the choice of giving should have the choice of taking back (what he wishes).

Given August 1, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

³⁰ Blume: "Legacies to a church or other holy place excepted."

³¹ Combine with C. 8.41.6. Mommsen dates to October 21, 294.

³² Ulpian, D. 12.6.26.13.

[11] *Idem A. Iuliano pp. pr.* Pro dubietate eorum, qui mente titubante indebitam solverunt pecuniam, certamen legislatoribus incidit, utrumne id, quod ancipiti animo persolverunt, possint repetere an non. 1. Quod nos decidentes sancimus omnibus, qui incerto animo indebitam dederunt pecuniam vel aliam quandam speciem persolverunt, repetitionem non denegari et praesumptionem transactionis non contra eos induci, nisi hoc specialiter ab altera parte approbetur.

D. k. Oct. Constantinopoli Lampadio et Oresta vv. cc. cons.

VI De Condictione ob Causam Datorum

[1] *Imp. Antoninus A. Callistheni.* Pecuniam quam te ob dotem accepisse pactumque interpositum (ut fieri, cum iure matrimonium contrahitur, adsolet) proponis: impediende quocumque modo iuris auctoritate matrimonium constare nullam de dote actionem habet^d et propterea pecuniam, quam eo nomine accepisti, iure condictionis restituere debes et pactum, quod ita interpositum est, perinde ac si interpositum non esset haberi oportet.

PP. VI k. Aug. Laeto II et Cereale cons.

[2] *Imp. Alexander A. Asclepiadi.* Si, ut proponis, pater tuus ea lege sorori tuae praedia ceteraque quorum meministi donavit, ut creditoribus ipsa satisfaceret ac, si placita observata non essent, donatio resolveretur, eaque contra fidem negotii gesti versata est, non est iniquum actionem condictionis ad repetitionem rerum donatarum tibi qui patri successisti decerni.

PP. XIII k. Dec. Albino et Maximo cons.

[3] *Imp. Valerianus et Gallienus AA. Aurelio et Alexandro.* Ea lege in vos collata donatio, ut neutri alienandae suae portionis facultas ulla competeret, id efficit, ne alteruter eorum dominium prorsus alienaret, vel ut donatori vel heredi eius conditio, si non fuerit condicio servata, quaeratur.

PP. k. April. Valeriano III et Gallieno III AA. cons.

^d nulla de dote actio locum habet

[11] *The same Augustus to Julian, Praetorian Prefect. pr.* Concerning the uncertain status of those who, as a result of a wavering mind, have paid money not owed, a contentious debate arose among the legislators whether they should be able to recover what they have paid with a doubtful intention (*ancipiti animo*).
 1. In deciding this, We ordain that recovery is not denied to all those who have given money not owed or some other property as a result of uncertain intention, and that the presumption of a settlement is not raised against them, unless this should be specifically proved by the other party.

Given October 1, at Constantinople, in the consulship of viri clarissimi Lampadius and Orestes (530).

Sixth Title Claim for Restitution over the Reason Things Were Given³³

[1] *Emperor ANTONINUS Augustus to Callisthenes.* As to the money which you state you received as a dowry and concerning which a pact was introduced as customarily happens when a marriage is contracted lawfully, if the authority of the law in any manner impedes the marriage's being valid, there is no place for action on the dowry and, in addition, you should restore the money that you have received on that account, on the basis of the claim for restitution, and the pact, which was introduced in this way, should be considered as if it had not been made.

Posted July 27, in the consulship of Laetus, for the second time, and Cerealis (215).

[2] *Emperor ALEXANDER Augustus to Asclepiades.* If, as you state, your father gave your sister land and other property that you have mentioned under this condition, (namely) that she herself satisfy the creditors and, if the agreement should not be observed, the gift would be rescinded, and she has acted against the faith of the transaction, it is not unjust that you, who have succeeded your father as heir, be granted an action for a claim for restitution.

Posted November 18, in the consulship of Albinus and Maximus (227).

[3] *Emperors VALERIAN and GALLIENUS Augusti to Aurelius and Alexander.* A gift made to (both of) you under this condition, that neither should have any power of alienating his individual portion, has this effect, that neither of them (i.e., you) might alienate ownership, or, if the condition is not maintained, that a claim for restitution be gained for the donor or his heir.

Posted April 1, in the consulship of Valerian, for the fourth time, and Gallienus, for the third time, Augusti (257).

³³ See D. 12.4. Blume: "Concerning condition on the ground of what was given (the ground, or purpose, for which it was given, having failed)."

[4] *Idem AA. et Valerianus C. Aemiliae.* Si, cum exiguam pecuniam re vera susciperes, longe maiorem te accepisse cavisti eo, quod tibi patrocinium adversarius repromitteret, cum dicas fidem promissi non secutam, ut libereris obligatione eius, quod non acceptum propter speratum patrocinium spondidisti, per conditionem consequeris.

PP. v k. Mai. Aemiliano et Basso cons.

[5] *Imp. Diocletianus et Maximianus AA. Martiali.* Si militem ad negotium tuum procuratorem fecisti, cum hoc legibus interdictum sit, ac propter hoc pecuniam ei numerasti, quidquid ob causam datum est, causa non secuta restitui tibi competens iudex curae habebit.

PP. x k. Oct. ipsis IIII et III AA. cons.

[6] *Idem AA. et CC. Curioni et Plotioni.* Cum ancillam patrem vestrum ei, contra quem supplicastis, dedisse proponatis, interest multum, utrumne donandi animo dedit, an ob manumittendam filiam, quam ancillam existimabat, cum perfecta quidem donatio revocari non possit, causa vero dandi non secuta repetitio competat.

S. II id. Mai. AA. cons.

[7] *Idem AA. et CC. Gerontio.* Si repetendi, quod donabas uxori eius, quem ad proficiscendum tecum huiusmodi liberalitate provocare proposueras, nullam addidisti condicionem, remanet integra donatio, cum levitati perfectam donationem revocare cupientium iure occurratur.

S. VII k. Sept. AA. cons.

[8] *Idem AA. et CC. Flaviano.* Dictam legem donationi, si non impossibilem contineat causam, ab eo qui hanc suscepit non impletam conditioni facere locum iuris dictat disciplina. quapropter si titulo liberalitatis res tuas in sponsam conferendo certam dixisti legem nec huic illa, cum posset, paruit, successores ipsius de repetendis quae dederas, si hoc tibi placuerit, convenire non prohiberis.

S. III id. Febr. CC. cons.

[4] *The same Augusti to Aemilia.* If, when you in fact you were taking a small amount of money, you averred (*cavisti*) that you had received a much larger amount for the reason that your adversary was promising to provide you legal representation (*patrocinium*), since you say that the faith of the promise has not ensued, you will gain through a claim for restitution that you be freed from the obligation that you agreed to in exchange for the representation you hoped for but did not receive.

Posted April 27, in the consulship of Aemilianus and Bassus (259).

[5] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Martialis.* If you made a soldier a procurator for your business, although this has been forbidden by the laws, and you have paid out money to him on this account, a competent judge will take care that, since the purpose did not follow, whatever has been given be restored to you.

Posted September 22, in the consulship of the Augusti³⁴ themselves, Diocletian, for the fourth time, and Maximian, for the third time (290).

[6] *The same Augusti and the Caesars to Curio and Plotio.* Since you allege that your father gave a female slave to that person against whom you have petitioned, it makes a great deal of difference whether he gave her with the intention of making a gift, or in order that her daughter, who he thought was a slave, might be manumitted, since a completed gift cannot be revoked. If in fact the reason for giving has not ensued, restitution shall be available.³⁵

Posted May 14, in the consulship of the Augusti (293).

[7] *The same Augusti and Caesars to Gerontius.* If you have added no condition for seeking back what you have given to the wife of that person whom you had proposed to induce to travel with you by means of generosity of this sort, the gift remains in force, since the law opposes the caprice of those desiring to revoke a completed gift.

Posted August 26, in the consulship of the Augusti (293).

[8] *The same Augusti and Caesars to Flavianus.* The discipline of the law dictates that a condition imposed on a gift, if it does not contain an impossible purpose, when it has not been fulfilled by the person who took it up, creates a claim for restitution. Therefore if under the guise of generosity you have stated a precise condition when conferring your property on your betrothed, and she, although able, did not comply with this, you are not prohibited, if you so choose, from suing her heirs to recover what you had given.

Posted February 11, in the consulship of the Caesars (294).

³⁴ "Augusti" is supplied by Krüger.

³⁵ Blume. See Bas. 24.1.34 for an explanation of this law.

[9] *Idem AA. et CC. Bibulo.* Si liber constitutus, ut filiae tuae manumittantur, aliquid dedisti, causa non secuta de hoc tibi restituendo conditio competit. nam si quid servus de peculio domino dederit, contra eum nullam actionem habere potest: sed dominum, qui semel accipere pecuniam pro libertate passus est, aditus rector provinciae hortabitur salva reverentia (favore scilicet libertatis) placito suo stare.

S. III id. Febr. Sirmi CC. cons.

[10] *Idem AA. et CC. Cononiana.* Pecuniam a te datam, licet causa, pro qua data est, non culpa accipientis, sed fortuito casu secuta non est, minime repeti posse certum est.

S. III non. Dec. Nicomediae CC. cons.

[11] *Idem AA. et CC. Stratonicae.* Advocationis causa datam pecuniam, si per eos qui acceperant, quominus susceptam fidem impleant, stetisse probetur, restituendam esse convenit.

S. XVII k. Ian. CC. cons.

VII De Conditione ob Turpem Causam

[1] *Imp. Antoninus A. Ingenuo.* Si ex cautione tua conveniri coeperis, nullam te pecuniam accepisse, sed ob turpem causam et quam fieri prohibitum est interpositam ei, qui super ea re cogniturus est, probandum est et eo impleto absolutio sequetur.

Sine die et consule.

[2] *Idem A. Longino.* Cum te propter turpem causam contra disciplinam temporum meorum domum adversariae dedisse profitearis, frustra eam restitui tibi desideras, cum in pari causa possessoris melior condicio habeatur.

PP. xv k. Dec. Laeto II et Cereale cons.

[9] *The same Augusti and Caesars to Bibulus.* If you, having been established as a free person, have given something so that your daughters might be manumitted, if the purpose does not ensue, you have a claim for restitution concerning this. For if a slave has given something from his *peculium* to his owner, he cannot have any action against him. But the provincial governor when approached will encourage the owner, who at one time permitted receiving money for liberty, to stand by his decision, while maintaining the reverence due a master from his slave – that is, because of the presumption favoring liberty (*favor libertatis*).

Written February 11, at Sirmium, in the consulship of the Caesars (294).

[10] *The same Augusti and Caesars to Cononiana.* It is certain that money given by you cannot at all be recovered, although the reason for which it was given has not ensued, (if this occurred) not as a result of the fault of the person receiving it but of an unavoidable accident (*casus fortuitus*).

Posted December 3, at Nicomedia, in the consulship of the Caesars (294).

[11]³⁶ *The same Augusti and Caesars to Stratonica.* It is generally agreed that money given for the sake of advocacy must be restored, if it should be proved that it was on account of those who had received the money that they did not fulfill the promise that they had undertaken.

Posted December 16, in the consulship of the Caesars (294).

Seventh Title Claim for Restitution on Account of an Immoral Purpose³⁷

[1] *Emperor ANTONINUS to Ingenuus.* If a suit has begun against you on a written promise, it must be proved to the judge who will try this matter that you have not received any money, but that the promise was given on account of an immoral purpose and one that has been prohibited. When this is fulfilled release from the obligation will follow.

Without day and consul.

[2] *The same Augustus to Longinus.* Since you acknowledge that you have given your home to your female adversary on account of an immoral purpose against the discipline of My times, you desire in vain that it be restored to you, since in an equal situation (where both parties are at fault) the case of the possessor is considered better.

Posted November 17, in the consulship of Laetus, for the second time, and Cerealis (215).

³⁶ Combine with C. 2.40.4 (December 15), 5.42.3. December 15 is the preferable date (Connolly).

³⁷ See D. 12.5.

[3] *Imp. Diocletianus et Maximianus AA. Dizoni militi.* Quod evitandi tirocinii causa dedisse te apud competentem iudicem ei de quo quereris indubia probationis luce constiterit, instantia eius recipies: qui memor censurae publicae post restitutionem pecuniae etiam concussionis crimen inultum esse non patietur.

PP. III k. Aug. ipsis III et III AA. cons.

[4] *Idem AA. et CC. Rufino.* Quotiens accipientis, non etiam dantis turpis invenitur causa, licet haec secuta fuerit, datum condici tantum, non etiam usurae peti possunt.

S. VII id. Ian. Sirmi AA. cons.

[5] *Idem AA. et CC. Bitho.* Promercalem te habuisse uxorem proponis: unde intellegis et confessionem lenocinii preces tuas continere et cautae quantitatis ob turpem causam exactioni locum non esse. quamvis enim utriusque turpitudine versatur ac soluta quantitate cessat repetitio, tamen ex huiusmodi stipulatione contra bonos mores interposita denegandas esse actiones iuris auctoritate demonstratur.

S. VI id. Mai. CC. cons.

[6] *Idem AA. et CC. Eutychie.* Ob restituenda quae subtraxerat accipientem pecuniam, cum eius tantum interveniat turpitudine, conditione conventum hanc restituere debere convenit.

D. XV k. Iun. CC. cons.

[7] *Idem AA. et CC. Zenonidae.* Eum, qui ob restituenda quae abegerat pecora pecuniam accepit, tam hanc quam quae per hoc commissum tenuit restituere debere convenit, licet mortua vel alio fortuito casu perisse dicantur, cum in hoc casu in rem mora fiat.

D. V k. Dec. Nicomediae CC. cons.

[3] *Emperors DIOCLETIAN and MAXIMIAN AUGUSTI to Dizon, a soldier.* Whatever it has been made apparent by the unambiguous light of proof before a competent judge that you gave to the person against whom you are complaining for the sake of avoiding being a new recruit, you will receive the money back with his (the judge's) perserverance. Being mindful of public censure after the restitution of the money the judge will also not allow the crime of extortion to be unavenged.

Posted on July 30, in the consulship of the Augusti themselves, Diocletian, for the fourth time, and Maximian, for the third time (290).

[4] *The same Augusti and Caesars to Rufinus.* Whenever the purpose of the recipient, and not of the giver, is found to be immoral, although this has been attained, only what has been given can be claimed back, and interest may not be sought.

Written January 7, at Sirmium, in the consulship of the Augusti (293).

[5] *The same Augusti and Caesars to Bithus.* You state that you put your wife for sale on the open market. From this you understand that your petition contains a confession of pandering and that there is no place for collecting a sum of money promised for an immoral purpose. Although the disgraceful action of each party is involved and restoration is inapplicable when the sum has been paid, nevertheless it is shown by the authority of the law that actions are to be denied on the basis of a stipulation of this type made against good morals.

Written May 10, in the consulship of the Caesars (294).

[6] *The same Augusti and Caesars to Eutychia.* It is agreed that a person who received money to restore what he had stolen, since his disgrace alone is involved, should restore it when sued in a claim for restitution.

Written May 18, in the consulship of the Caesars (294).

[7] *The same Augusti and Caesars to Zenonides.* It is agreed that a person who has received money to restore the livestock that he has driven off should restore both the money and the property he held through this act, although they are said to be dead or to have perished through some other accident, since in this case his delay (in restoring) is pertinent.

Given November 27, at Nicomedia, in the consulship of the Caesars (294).

VIII De Condictione Furtiva

[1] *Impp. Diocletianus et Maximianus AA. et CC. Hermogeni.* Praeses provinciae sciens furti quidem actione singulos quosque in solidum teneri, condictiois vero nummorum furtim subtractorum electionem esse ac tum demum, si ab uno satisfactum fuerit, ceteros liberari, iure proferre sententiam curabit.

S. VI k. Mai. CC. conss.

[2] *Idem AA. et CC. Aristaeneto.* Ante oblationem interemptae rei furtivae damnum ad furem pertinere certissimum est.

D. k. Mai. CC. conss.

VIII De Condictione ex Lege et sine Causa vel Iniusta Causa

[1] *Impp. Diocletianus et Maximianus AA. et CC. Ulpio.* Licet ante tempus debita exigere non possunt, tamen si te ex primipilo debitorem fisci constitutum ac patrimonium tuum exhaustum praeses provinciae compererit, ut ad solutionis securitatem solum fenebris pecuniae subsidium superesse videatur, commonebit debitorem tuum, si saltem ipse solvendo sit, ut ante definitum tempus debita tibi repraesentet, ut fisco, cuius ob necessitates publicas causam potiore esse oportet, debita pecunia exsolvatur.

S. XIII k. Aug. Sirmi CC. conss.

[2] *Idem AA. et CC. Scylacio.* Dissolutae quantitatis retentum instrumentum inefficax penes creditorem remanere et ideo per conductionem reddi oportere non est iuris ambigui.

S. III non. April. AA. conss.

[3] *Idem AA. et CC. Galatiae.* Mala fide possidens de proprietate victus extantibus fructibus vindicatione, consumptis vero conductione conventus horum restitutioni parere compellitur.

S. VI id. Febr. CC. conss.

Eighth Title Claim for Restitution of Stolen Property³⁸

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Hermogenes.* The provincial governor, knowing that all individuals are held fully liable in an action on theft, will take care to offer his decision in accordance with the law that there be a choice of defendants in a claim for restitution for money taken by theft and only then, if satisfaction has been rendered by one, that the others be released.

Written April 26, in the consulship of the Caesars (294).

[2] *The same Augusti and Caesars to Aristaenetus.* It is absolutely certain that the responsibility belongs to the thief for stolen property that has been destroyed before its return is offered.

Given May 1, in the consulship of the Caesars (294).

Ninth Title Claim for Restitution by Statute, and When There is No Purpose or an Unlawful Purpose

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Ulpian.* Although debts cannot be exacted before their time, nevertheless if the provincial governor learns that because of your office as *primipilus* (first centurion) you have been made a debtor to the Treasury and that your property is exhausted, so that it appears that the only resource to secure your payment is money lent by you at interest, he will order your debtor, at least if he is solvent, to pay you in advance what he owes, so that your debt be paid to the Treasury, whose interests must take priority because of public necessity.

Written July 20, at Sirmium, in the consulship of the Caesars (294).³⁹

[2] *The same Augusti and Caesars to Scylactus.* The law is not doubtful that a document for a paid sum of money, though it is retained, is valueless in the hands of a creditor and therefore must be returned through a claim for restitution.

Written April 3, in the consulship of the Augusti (293).⁴⁰

[3] *The same Augusti and Caesars to Galatia.* A person possessing in bad faith, having been defeated in a suit concerning ownership, is compelled in a suit for ownership to submit to the restoration of the fruits when standing, and when consumed under a claim for restitution.

Written February 8, in the consulship of the Caesars (294).

³⁸ See D. 13.1.

³⁹ Mommsen dates to February 17, 293.

⁴⁰ The date of this rescript falls before that of the previous one, which Mommsen emends with "Written February 17, at Sirmium, in the consulship of the Augusti (293)."

[4] *Idem AA. et CC. Alexandro.* Si non est numeratum, quod velut acceptum te sumpsisse mutuo scripsisti, et necdum transisse tempus statutum vel intra hunc diem habitam contestationem monstrando reddi cautionem praesidali notione postulare potes.

D. XVII k. Ian. CC. cons.

X De Obligationibus et Actionibus

[1] *Imp. Gordianus A. Valeriae.* Data certae pecuniae quantitate ei cuius meministi in vicem debiti actiones tibi adversus debitorem, pro quo solvisti, dicis esse mandatas et, antequam eo nomine litem contestarieris, sine herede creditorem fati munus implere proponis. quae si ita sunt, utilis actio tibi competit.

PP. v k. Mai. Attico et Praetextato cons.

[2] *Imp. Valerianus et Gallienus AA. Celso.* Nominibus in dotem datis, quamvis nec delegatio praecesserit nec litis contestatio subsequuta sit, utilem tamen marito actionem ad similitudinem eius qui nomen emerit dari oportere saepe rescriptum est.

PP. XIII k. Febr. Saeculari II et Donato cons.

[3] *Imp. Diocletianus et Maximianus AA. Rusticiano.* Ob causas proprii debiti locatoris conveniri colonos pensionibus ex placito satisfaciunt perquam iniuriosum est.

PP. prid. k. Iun. Tiberiade Maximo II et Aquilino cons.

[4] *Idem AA. Liciniae.* Bonam fidem in contractibus considerari aequum est.

PP. non. Oct. ipsis IIII et III AA. cons.

[4] *The same Augusti and Caesars to Alexander.* If what you have acknowledged in writing to have received and taken as a loan has not been counted out, by showing that the statutory time has not yet passed or that you have made a declaration before a witness prior to this day, you can demand with the governor's investigation that the written promise (*cautio*) be returned through a claim for restitution.

Given December 16, in the consulship of the Caesars (294).

Tenth Title Obligations and Actions⁴¹

[1] *Emperor GORDIAN Augustus to Valeria.* Having given a certain sum of money to the person whom you have mentioned, you say that the actions against the debtor, on whose behalf you have made the payment, were mandated to you in exchange for the debt, and that before you came to a joinder of issue on this account, you state that the creditor passed away without an heir. If these matters are the case, then an analogous action (*utilis actio*) is available to you.

Posted April 27, in the consulship of Atticus and Praetextatus (242).

[2] *Emperors VALERIAN and GALLIENUS Augusti to Celsus.* If debt accounts (*nomina*) have been given as part of a dowry, although neither delegation of them has preceded nor a joinder of issue has ensued, even so; rescripts have often been issued that an analogous action must be given to the husband as if to a person who has purchased a debt.

Posted January 19, in the consulship of Saecularis, for the second time, and Donatus (260).

[3] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Rusticianus.* It is thoroughly unlawful that tenant farmers who are making good on their payments in accordance with their agreement be sued for the personal debt of the lessor.

Posted May 31, at Tiberias, in the consulship of Maximus, for the second time, and Aquilinus (286).

[4]⁴² *The same Augusti to Licinia.* It is fair that good faith be considered in connection with contracts.

Posted October 7, in the consulship of the Augusti themselves, for the fourth and third time, respectively (290).

⁴¹ See D. 44.7; Inst. 3.1.3-4, 6.

⁴² Combine with C. 5.74.1.

[5] *Idem AA. et CC. Camerino et Marciano.* Sicut initio libera potestas unicuique est habendi vel non habendi contractus, ita renunciare semel constitutae obligationi adversario non consentiente minime potest. quapropter intellegere debetis voluntariae obligationi semel vos nexos ab hac non consentiente altera parte, cuius precibus fecistis mentionem, minime posse discedere.

D. non. April. Byzantii AA. conss.

[6] *Idem AA. et CC. Maurico.* Si in solutum nomen debitoris sui tibi debitor dedit tuus ac te in rem tuam procuratorem fecit, pignora, quae specialiter vel generaliter habes obligata, perseguere. quod si ab his, quibus fuerant obligata, cum potiores erant, distracta probentur, ab emptoribus avocari non posse perspicis.

D. VIII k. Iul. Sirmi AA. conss.

[7] *Idem AA. et CC. Euelpisto. pr.* Si a creditore nomen comparasti, ea pignora, quae venditor nominis consequi posset, apud praesidem provinciae vindica. nam si debitum ex eius personaⁱⁱⁱ res obligatas tenentes non transferant, iure communi pignora distrahere non prohiberis. 1. Sane si creditoribus in ordine pignorum antecedentibus venumdantibus qui possident comparaverunt vel longi temporis praescriptione muniti perhibentur, pignorum distrahendorum te non habere facultatem perspicis.

S. III k. Ian. Sirmi AA. conss.

[8] *Idem AA. et CC. Crescentioni.* Si quidem donationis causa ei, quem adfectione patris te dilexisse proponis, tuam accipere pecuniam permisisti, et hanc tuam liberalitatem remunerans te a procuratore suo aliam pecuniam sumere praecepit, rebusque humanis ante perceptionem fuit exemptus, nec quod dederas recuperare, cum perfectam habuit donationem, nec quod tibi dari mandaverat, necdum tibi traditum petere potes a procuratore. quod si mutuo dedisti nec a delegato dari novandi causa stipulatus es, successores eius solutioni parere compellentur.

ⁱⁱⁱ [ex eius persona]

[5] *The same Augusti and the Caesars to Camerinus and Marcianus.* Just as at the outset each person has the free power of making or not making a contract, in the same way one cannot renounce an obligation once it has been established without the consent of one's adversary. On account of this you should understand that, once you are bound to a voluntary obligation, you cannot withdraw from it without the consent of the other party whom you have mentioned in your petition.

Given April 5, at Byzantium, in the consulship of the Augusti (293).

[6] *The same Augusti and Caesars to Mauricus.* If to pay off an obligation your debtor has given the claim on his debtor to you and made you the formal plaintiff (*procurator in rem tuam*),⁴³ you will pursue the pledges, which you hold as either specifically or generally obligated. But if they should be proved to have been sold by people to whom they were obligated, when they had a prior claim, you see that they cannot be called back from the purchasers.

Given June 23, at Sirmium, in the consulship of the Augusti (293).⁴⁴

[7]⁴⁵ *The same Augusti and Caesars to Buelpistus. pr.* If you have purchased an account (*nomen*) from a creditor, in the court of the provincial governor sue to recover (*vindica*) those pledges that the seller of the claim might be able to pursue. For if those holding the property obligated should not transfer the debt (to you), by general law (*ius commune*) you are not prohibited from selling the pledges. 1. Of course, if those who possess them have purchased the pledges under a sale made by creditors with a prior right, or if they are understood to be protected by long-time prescription, you see that you do not have the capacity to sell the pledges.

Written December 30, at Sirmium, in the consulship of the Augusti (293).⁴⁶

[8] *The same Augusti and Caesars to Crescentio.* If, for the purpose of a gift, you have permitted a person, whom you state you cherished with the affection of a father, to receive your money, and he, to pay back your generosity, instructed you to take other money from his procurator, and he passed away before you received the money, you cannot recover what you had given, since he had a completed gift, nor can you seek back from the procurator what he had ordered be given you but had not been delivered. But if you have given a loan and have not exacted a stipulation that the money be given by a substituted debtor as part of a transfer of the obligation (*novandi causa*), his heirs will be compelled to submit to payment.⁴⁷

⁴³ The Bas. version has *procurator in rem suam*, "when he survives you can sue as if from his person."

⁴⁴ Mommsen dates to December 24, 293.

⁴⁵ Combine with C. 9.33.3.

⁴⁶ C. 9.33.3 has "written January 9, at Sirmium, in the consulship of the Augusti (293)."

⁴⁷ Blume: "A novation of a debt by giving – assigning – a new debtor to the creditor, was not complete till the new debtor had promised to pay the debt by stipulation. C. 8.41.1."

S. XIII k. Febr. Sirmi CC. cons.

[9] *Idem AA. et CC. Glyconi.* Negantes debitores non oportet armata vi terreri: sed petitore quidem non implente suam intentionem vel exceptione submoto absolvi. convictos autem condemnari ac iuris remediis ad solutionem urgueri convenit.

D. id. Febr. CC. cons.

[10] *Idem AA. et CC. Rufino.* Adversus debitorem electis pignoribus personalis actio non tollitur, sed eo, quod de pretio servari potuit, in debitum computato de residuo manet integra.

D. III non. April. CC. cons.

[11] *Idem AA. et CC. Paulae.* Nimia credulitate circumventa es, quia, quod colonis in rem suam mutuo dedisti, a domino praedii postulare posse credidisti: nec ad eum obligandum actorum ipsius adiuvat te praesentia.

D. VIII k. Aug. CC. cons.

[12] *Idem AA. et CC. Iovino.* Ob aes alienum servire liberos creditoribus iura compelli non patiuntur.

D. XIII k. Nov. CC. cons.

[13] *Idem AA. et CC. Barsimio.* Eum, cui mutuam dedisti pecuniam, ad solutionem urguere competenti debes actione. nam adversus negotiatores, quos ex mercibus pecunias abstulisse tuo debitori proponis, nullam habes actionem.

D. XI k. April. CC. cons.

[14] *Idem AA. et CC. Hermodoto et Nicomacho.* Est in arbitrio vestro, personali debitoris heredes actione, an eum, qui ab his distracta sibi tradita pignora tenet, in rem Serviana, si non longi temporis praescriptione munitus sit, an utrosque conveniatis.

D. v k. Dec. Nicomediae CC. cons.

Written January 20, at Sirmium, in the consulship of the Caesars (294).

[9]⁴⁸ *The same Augusti and Caesars to Glyco.* Debtors who deny they owe anything should not be terrified by armed force; but it is held that they are absolved if the plaintiff does not satisfy the legal requirements for his claim or if he is removed by a defense. But if convicted they are condemned and are compelled to pay by the remedies of the law.

Given February 13, in the consulship of the Caesars (294).

[10] *The same Augusti and Caesars to Rufinus.* An action *in personam* against debtors is not removed when pledges have been chosen (for sale), but after what was realized from the price has been calculated against the debt the action remains in force for the remainder.

Given April 3, in the consulship of the Caesars (294).

[11] *The same Augusti and Caesars to Paula.* You have fallen prey to excessive credulity, because you believed that you could demand from the owner of the property what you gave as a loan to the tenants on their own account (*in rem suam*); and the presence of his managers (*actores*) does not help you in obligating him.

Given July 25, in the consulship of the Caesars (294).

[12] *The same Augusti and Caesars to Jovinus.* The law does not allow free people to be compelled to serve (as slaves) to their creditors on account of debt.

Given October 20, in the consulship of the Caesars (294).

[13] *The same Augusti and Caesars to Barsimius.* With the appropriate action you should compel payment from the person to whom you have given money as a loan. For you have no action against the merchants who you allege took money from your debtor as a result of their deals.

Given March 22, in the consulship of the Caesars (294).⁴⁹

[14] *The same Augusti and Caesars to Hermodotus and Nicomachus.* It is your choice whether you sue the heirs of the debtor in an action *in personam*, or the person who holds the pledges sold by them and delivered over to him, *in rem* by a Servian action,⁵⁰ if he is not protected by a long-time prescription, or you may sue both.

Given November 27, at Nicomedia, in the consulship of the Caesars (294).

⁴⁸ Cuiacius combines this with C. 7.53.9 (written November 7, 294).

⁴⁹ Mommsen dates to October 22, 294.

⁵⁰ The *actio Serviana* allowed a creditor to sue to recover property pledged by a debtor.

XI Ut Actiones et ab Herede et Contra Heredem Incipiant

[1] *Imp. Iustinianus A. Iohanni pp. pr.* Cum et stipulationes et legata et alios contractus post mortem compositos antiquitas quidem respuebat, nos autem pro communi hominum utilitate recepimus, consentaneum erat etiam illam regulam, qua vetustas utebatur, more humano emendare. 1. Ab heredibus enim incipere actiones vel contra heredes veteres non concedebant contemplatione stipulationum ceterarumque causarum post mortem conceptarum. 2. Sed nobis necesse est, ne prioris vitii materiam relinquamus, et ipsam regulam e medio tollere, ut liceat et ab heredibus et contra heredes incipere actiones et obligationes, ne propter nimiam subtilitatem verborum latitudo voluntatis contrahentium impediatur.

D. xv k. Nov. Constantinopoli post consulatum Lampadii et Orestae vv. cc.

XII Ne Uxor pro Marito vel Maritus pro Uxore vel Mater pro Filio Conveniatur

[1] *Impp. Diocletianus et Maximianus AA. Asclepiodotae.* Frustra disputas de contractibus cum marito tuo habitis, utrumne iure steterint an minime, cum tibi sufficiat, si proprio nomine nullum contractum habuisti, quominus pro marito tuo conveniri possis, quod nec, si sponte pro eo intercessisses, quicquam a te propter senatus consultum exigere potuisset.

D. prid. id. April. Diocletiano III et Maximiano AA. conss.

[2] *Idem AA. Terentiae.* Ob maritorum culpam uxores inquietari leges vetant, proinde rationalis noster, si res quae a fisco occupatae sunt dominii tui esse probaveris, ius publicum sequetur.

D. III non. Sept. Diocletiano^{iv} et Maximiano AA. conss.

[3] *Idem AA. et CC. Carpophoro.* Cum te possessiones non in dotem pro filia tua dedisse, sed ad sustentandam eam extra dotis causam filiae tuae

Eleventh Title How Actions Arise from the Heir and Against the Heir

[1] *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* Since antiquity rejected stipulations and legacies and other contracts taking effect after death, but We have allowed them for the common benefit of humanity,⁵¹ it was proper to amend in a humane manner even that rule that antiquity used. 1. The jurists of old did not allow actions on the basis of stipulations or other claims that go into effect after death to arise from heirs or against heirs. 2. But it is necessary for Us, lest We leave a trace of the prior fault, to remove the very rule from our midst, so that it be permitted that actions and obligations arise both from heirs and against heirs, lest the scope of the wishes of the contracting parties be impeded by an excessive subtlety of words.

Given October 18, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Twelfth Title A Wife Is Not to Be Sued for Her Husband, or a Husband for His Wife, or a Mother for Her Child

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Asclepiodota.* You are unnecessarily disputing over the contracts made with your husband, whether there is a lawful basis or not, since it should be sufficient for you that, if you had no contract under your own name, you cannot be sued for your husband, since, because of the decree of the Senate, nothing could lawfully have been exacted from you if you willingly interceded for him.⁵²

Given April 12, in the consulship of Diocletian, for the third time, and Maximian, Augusti (287).

[2] *The same Augusti to Terentia.* The laws prohibit wives from being troubled on account of the fault of their husbands. Therefore Our Comptroller (*rationalis*), if you prove that the property that has been seized by the Treasury is under your ownership, will follow public law.

Given September 3, in the consulship of Diocletian, for the third time,⁵³ and Maximian, Augusti (287).

[3] *The same Augusti and the Caesars to Carpophorus.* Since you submit that you gave property (*possessionses*) for your daughter not as her dowry, but that

⁵¹ C. 8.37.1.

⁵² The *senatusconsultum Velleianum* prohibited women from taking up obligations on behalf of others; see C. 4.29.

⁵³ "For the third time" is added by Mommsen.

praedia adsignasse proponas, civilium munerum vel onerum municipalium obtentu ex persona mariti eius, quomodo matres ex persona filiorum interpellari non possunt, cum neque maritum pro uxoris obligatione conveniri posse constat, nisi ipse pro ea se obnoxium fecit. certissimum enim est ex alterius contractu neminem obligari.

III id. Sept. Sirmi AA. cons.

[4] *Idem AA. et CC. Philoterae.* Cum te ideo ex persona filii tui commemores conveniri, quod pro debitis eius aliquid intulisse videaris, defensionibus tuis uti apud eum, cuius super ea re notio est, minime prohiberis, ut is ad solutionem alieni debiti urgueri te non patiat.

D. x k. Sept. Titiano et Nepotiano cons.

XIII Ne Filius pro Patre vel Pater pro Filio Emancipato vel Libertus pro Patrono Conveniatur

[1] *Imp. Gordianus A. Candido militi. pr.* Neque ex eius filii persona, qui, cum sui iuris esset, mutuam pecuniam accepit, pater eius, si non fidem suam obstrinxit, conveniri potest, neque ex eius quem in potestate habet, si sine eius iussu contractum est neque contra senatus consultum Macedonianum mutua data est, amplius dumtaxat de peculio actionem sustinere cogitur. 1. Quapropter pater quoque tuus, si ei pecunia a creditore fratris tui extorta est, ob quam reddendam non tenebatur, praesidis provinciae auctoritate eam recuperabit.

PP. III non. Oct. Pio et Pontiano cons.

[2] *Impp. Diocletianus et Maximianus AA. Neoterio et Eutolmio.* Ne contra iuris auctoritatem ab eo, qui patrem vestrum, a quo emancipatos vos dicitis, ad munus civile devocaverat, inquietemini, praeses provinciae providebit.

D. VIII k. Febr. Maximo II et Aquilino cons.

you assigned to your daughter properties (*praedia*) for her support outside of the dowry, they (cannot be seized for)⁵⁴ obligatory public services (*munera*) or municipal burdens on the basis of the person of her husband, just as mothers cannot be sued on the basis of the persons of their children, since it is also agreed that a husband cannot be sued for the obligation of his wife unless he has made himself personally liable on her behalf. For it is most certain that no one can be obligated as a result of another's contract.

September 11, at Sirmium, in the consulship of the Augusti (293).

[4] *The same Augusti and Caesars to Philotera.* Since you mention that you are being sued for your son precisely because you seem to have contributed something for his debts, you are not at all prohibited from using your defenses (in a trial) before the person who has jurisdiction over this matter, so that he will not allow you to be forced to pay another's debt.

Given August 23, in the consulship of Titianus and Nepotianus (301).

Thirteenth Title A Son Is Not to Be Sued for His Father, or a Father for His Emancipated Son, or a Freedman for His Patron

[1]⁵⁵ *Emperor GORDIAN Augustus to Candidus, a soldier. pr.* A father, if he did not pledge his own credit, cannot be sued for a son who, when he was *sui iuris*, received money as a loan. Nor can he be compelled to sustain an action for more than the *peculium* for a son whom he has in his power if the contract was made without his order and the money was not loaned in violation of the *SC Macedonianum*.⁵⁶ 1. Therefore your father too, if money has been extorted from him by your brother's creditor that he was not held liable to return, will recover it by means of the authority of the provincial governor.

Posted October 5, in the consulship of Pius and Pontianus (238).

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Neoterius and Eutolmius.* The provincial governor will see to it that you are not disturbed, contrary to the authority of the law, by that person who had appointed your father, by whom you say you have been emancipated, to perform an obligatory public service (*munus civile*).

Given January 25, in the consulship of Maximus, for the second time, and Aquilinus (286).

⁵⁴ As Mommsen points out, some phrase has fallen out here.

⁵⁵ Combine with C. 2.2.1.

⁵⁶ See C. 4.28, where the *SC Macedonianum* is explained.

[3] *Idem AA. et CC. Theogeni.* Si filius familias invito patre decurio creatus fuerit, pro eo patrem inquietari non posse iure manifestissimo cautum est.

S. x k. Mai. Sirmi CC. cons.

[4] *Idem AA. et CC. Achaeo.* Patris nomine superstitis filium nec munerum civilium nec debiti causa personali posse conveniri constat actione.

S. xii k. Mart. Sirmi CC. cons.

[5] *Idem AA. et CC. Lampetio.* Ex patroni vel domini contractu liberti vel servi conveniri non possunt.

S. iiii id. April. CC. cons.

XIII An Servus ex Suo Facto post Manumissionem Teneatur

[1] *Imp. Severus A. Ioviano.* Quamvis cum statulibero contraxeris, tamen ex ante gesto te non habere cum eo post impletam condicionem libertatis actionem scire debes.

PP. iiii id. Dec. Dextro ii et Prisco cons.

[2] *Imp. Antoninus A. Baetico.* Creditoribus tuis, qui tibi in servitute pecuniam crediderunt, nulla adversus te actio competit, maxime cum peculium tibi non esse legatum proponas.

PP. iiii k. Sept. Laeto ii et Cereale cons.

[3] *Imp. Alexander A. Aurelio Herodi.* Promissae tibi pecuniae a servo tuo, ut eum manumitteres, si, posteaquam manumisisti, stipulatus ab eo non es, adversus eum petitionem per in factum actionem habes.

PP. Id. Sept. Alexandro A. cons.

[4] *Imp. Gordianus A. Heroni.* Licet servitutis tempore quae pecuniam matris tuae subripuisse dicitur, ob eiusmodi admissum conveniri non

[3] *The same Augusti and the Caesars to Theogenes.* If a son in his father's power has been elected a decurion against his father's will, it has been provided in the clearest law that the father cannot be disturbed on his account.

Written April 22, at Sirmium, in the consulship of the Caesars (294).⁵⁷

[4] *The same Augusti and Caesars to Achaeus.* It is established that a son cannot be sued in the name of his surviving father in an action *in personam* for obligatory public services or for a debt.

Given February 18, at Sirmium, in the consulship of the Caesars (294).

[5] *The same Augusti and Caesars to Lampetius.* Freedmen or slaves cannot be sued on the basis of a contract of their patron or owner.

Written April 11, in the consulship of the Caesars (294).

Fourteenth Title Whether a Slave, after Manumission, Is Held Liable for His Own Act

[1] *Emperor SEVERUS Augustus to Jovianus.* Although you have made a contract with a conditionally freed slave (*statuliber*), even so you ought to know that, after the fulfillment of his condition for freedom, you do not have an action against him for something he did previously.

Posted December 10, in the consulship of Dexter, for the second time, and Priscus (196).

[2] *Emperor ANTONINUS Augustus to Baeticus.* Your creditors, who loaned you money while you were a slave, have no right of action against you, especially since you allege that your *peculium* was not bequeathed to you.

Posted August 30, in the consulship of Laetus, for the second time, and Cerealis (215).

[3]⁵⁸ *Emperor ALEXANDER Augustus to Aurelius Herodes.* You have an analogous action (*in factum*) against him for the money promised by your slave for his manumission, if, after you manumitted him, you did not exact a stipulation from him.

Posted September 13 in the consulship of Alexander Augustus (222).

[4] *Emperor GORDIAN Augustus to Hero.* Although the woman who is said to have stolen money belonging to your mother while a slave could not be sued

⁵⁷ Mommsen dates to April 22, 293.

⁵⁸ Combine with C. 6.2.4 (whence the *nomen* of the addressee).

poterat, ad libertatem tamen perducta (nam caput noxa sequitur) furti actione tenetur.

PP. id. Sept. Pio et Pontiano cons.

[5] *Idem A. Chresto.* Si, ut adlegas, antequam a domina manumittereris, fundos eius coluisti posteaque adempto peculio libertate donatus es, ob reliqua, si qua pridem contracta sunt, res bonorum, quas postea propriis laboribus quaesisti, inquietari minime possunt.

PP. xvi k. Dec. Arriano et Papo cons.

[6] *Imp. Diocletianus et Maximianus AA. et CC. Feliciano. pr.* Sive servi sunt ii, quorum precibus fecisti mentionem, domi eos conveni, quia inter dominos ac servos iudicium constare nullum potest: sive post delictum manumissi sunt, ex antecedentibus post datam libertatem eos nulla ratio iuris a dominis quondam conveniri patitur. 1. Sane si post manumissionem quid illicite commiserunt, hoc apud praesidem provinciae argue accepturus ex iure sententiam.

D. 11 id. April. Byzantio AA. cons.

XV Quando Fiscus vel Privatus Debitoris Sui Debitores Exigere Potest

[1] *Imp. Severus et Antoninus AA. Valeriano.* Propter aes alienum pupilli res tutoris, qui nihil ex bonis eius tenet, pignori capi non oportet.

PP. xi k. Iun. Laterano et Rufino cons.

[2] *Imp. Antoninus A. Marco.* Si in causa iudicati Valentis, quem tibi condemnatum esse proponis, nihil est, quod sine quaestione pignoris loco capi et distrahi possit, debitores eius conventi ad solutionem auctoritate praesidis provinciae compelluntur.

D. vi non. April. Geta cons.

[3] *Imp. Gordianus A. Primiano.* Si debitum non infitiantur hi, quos obnoxios debitoribus fisci esse proponis, potest videri non esse iniquum quod desideras, ut ad solutionem per officium procuratoris

on account of an act of this sort, when she has been brought to freedom she is held in an action on theft, since noxal liability follows the person.

Posted September 13, in the consulship of Pius and Pontianus (238).

[5] *The same Augustus to Chrestus.* If, as you allege, before you were manumitted by your owner, you cultivated farms belonging to her and afterwards you were given freedom but your *peculium* was taken away, the property that you have acquired subsequently by your own labors cannot be disturbed on account of arrears, if any were contracted previously.

Posted November 16, in the consulship of Arrianus and Papus (243).

[6] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Felicianus. pr.* If those people whom you have mentioned in your petition are slaves, sue them within the household, since no lawsuit can arise between owners and slaves; if they have been manumitted after their offense, no logic of the law allows them to be sued by their former owners after they are given freedom. 1. Clearly if after their manumission they have done something illicitly, make an accusation of this before the provincial governor and you will receive a verdict according to the law.

Posted April 12, at Byzantium, in the consulship of the Augusti (293).

Fifteenth Title When the Treasury or a Private Person Can Exact Payment from the Debtors of their Debtor

[1] *Emperors SEVERUS and ANTONINUS Augusti to Valerianus.* Property of a tutor, who holds none of his ward's property, must not be taken as a pledge on account of the latter's debt.

Posted May 22, in the consulship of Lateranus and Rufinus (197).

[2] *Emperor ANTONINUS Augustus to Marcus.*⁵⁹ If in the condemnatory judgment (*causa iudicati*) Valens, against whom you allege you have a judgment, has no property that could be taken in the place of a pledge and be sold without an investigation, his debtors, when sued, are compelled to pay by the authority of the provincial governor.

Given April ??, in the consulship of Geta (205).

[3] *Emperor GORDIAN Augustus to Primianus.* If these people, who you allege are indebted to debtors of the Treasury, do not deny the debt, what you desire may seem not unfair, that they be compelled to pay through the official staff of

⁵⁹ The date indicates that the name of Septimius Severus belongs in the address.

compellantur. nam si quaestio aliqua refertur, id concedi non oportere et ipse perspicis.

PP. VI k. Febr. Sabino II et Venusto cons.

[4] *Imp. Diocletianus et Maximianus AA. et CC. Zosimo.* Non prius ad eos, qui debitoribus fisci nostri sunt obligati, actionem fiscalem extendi oportere, nisi patuerit principales reos idoneos non esse, certissimi iuris est.

S. XII k. Mai. AA. cons.

[5] *Idem AA. et CC. Nanidia.* In solutum nomine dato non aliter nisi mandatis actionibus ex persona sui debitoris adversus eius debitores creditor experiri potest. suo autem nomine utili actione recte utetur.

D. k. Ian. CC. cons.

XVI De Actionibus Hereditariis

[1] *Imp. Gordianus A. Hermeroti.* Pecuniam, quam tibi a matre debitam fuisse dicis, ab heredibus eius coheredibus tuis pro parte tibi competentis petere debes. sed et res, si quae tibi ob idem debitum obligatae sunt, persequi non prohiberis.

PP. XI k. Mart. Gordiano A. II et Pompeiano cons.

[2] *Imp. Decius A. Telemachae.* Pro hereditariis partibus heredes onera hereditaria agnoscere etiam in fisci rationibus placuit, nisi intercedat pignus vel hypotheca: tunc enim possessor obligatae rei conveniendus est.

PP. XIII k. Nov. Aemiliano et Aquilino cons.

[3] *Imp. Diocletianus et Maximianus AA. et CC. Maximae.* Heredem mariti quondam tui de dote reddenda tibi conveni: personalem enim actionem contra debitores hereditarios decerni tibi frustra postulas.

PP. XIII k. Mai. AA. cons.

[4] *Idem AA. et CC. Crispo.* Sub praetextu aetatis pupilli debitoris hereditarii creditorum exactionem differri non posse nimis evidens est.

the Procurator. For if any question (about the status of their debt) is reported, even you see yourself that this cannot be conceded.

Posted January 27, in the consulship of Sabinus, for the second time, and Venustus (240).

[4] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Zosimus.* The law is quite certain that an action on behalf of the Treasury should not be extended to those who are obligated to debtors of the Treasury before it is evident that the principal defendants are not capable of paying.

Written April 20, in the consulship of the Augusti (293).

[5] *The same Augusti and Caesars to Nanidia.* When a claim is given in payment the creditor cannot bring suit against the debtors of his own debtor except on the basis of actions mandated from that person. He will, however, correctly use an analogous action (*utilis actio*) under his own name.

Given January 1, in the consulship of the Caesars (294).

Sixteenth Title Actions Concerning Heirs

[1] *Emperor GORDIAN Augustus to Hermeros.* The money that you say was owed to you by your mother you should seek from her heirs, that is, your co-heirs, in proportion to the share accruing to yourself. But you are not prohibited from pursuing property, if any has been obligated to you on account of the same debt.

Posted February 19, in the consulship of Gordian Augustus, for the second time, and Pompeianus (241).

[2] *Emperor DECIUS Augustus to Telemache.* It has been decided that, in the accounts of the Treasury as well, heirs acknowledge inherited debts in proportion to their shares of the inheritance, unless a pledge or a hypothec should intervene. Then the possessor of the property that has been obligated should be sued.

Posted October 19, in the consulship of Aemilianus and Aquilinus (249).

[3] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Maxima.* Sue the heir of your former husband about returning the dowry to you; you ask in vain that an action *in personam* be granted you against the debtors to the estate.

Posted April 18, in the consulship of the Augusti (293).

[4] *The same Augusti and Caesars to Crispus.* It is quite evident that the enforcement by creditors against a ward who has inherited a debt cannot be

unde cum te tutorem proponas, quemadmodum a pupillis creditoribus satisfiat, eniti debes.

D. x k. Dec. Sirmi AA. cons.

[5] *Idem AA. et CC. Iulio.* Ut debitum ante de hereditate tibi solvatur ac tunc, si ad te pertineret, quaeri iubeamus, praepostera petitio est. etenim cum tibi soceri successionem quaesitam patuerit, debiti petitionem per confusionem extinguere non ambigitur.

D. prid. non. Mart. Sirmi CC. cons.

[6] *Idem AA. et CC. Domno.* Si adulta, cuius curam geris, pro triente patruo suo, quem etiam tutelam eius administrasse proponis, heres extitit nec ab eo quicquam exigere prohibita est, debitum a coheredibus pro besse petere non prohibetur, cum ultra eam portionem qua successit petitio non confundatur. nam adversus adultam tuam rescindi postulas testamentum, si quidem coheredes eius adeuntes hereditatem se etiam obligant et, si non solvendo constituti probentur, postulata separatio nullum ei damnum fieri patietur.

D. k. Dec. CC. cons.

[7] *Idem AA. et CC. Apolausto.* Creditores hereditarios adversus legatarios non habere personalem convenit actionem, quippe cum evidentissime lex duodecim tabularum heredes huic rei faciat obnoxios.

D. vi id. Dec. Nicomediae CC. cons.

XVII Ex Delictis Defunctorum in Quantum Heredes Conveniantur

[1] *Imp. Diocletianus et Maximianus AA. et CC. Macedonae.* Post litis contestationem eo qui vim fecit vel concussionem intulit vel aliquid deliquit defuncto successores eius in solidum, alioquin in quantum ad eos pervenit conveniri iuris absolutissimi est, ne alieno scelere ditentur.

D. v k. Mai. Sirmi CC. cons.

delayed under the pretext of his age. Therefore since you submit that you are a *tutor*, you must try whatever means by which satisfaction may be made to creditors by your wards.

Given November 22, at Sirmium, in the consulship of the Augusti (293).

[5] *The same Augusti and Caesars to Julius.* It is an anomalous request that a debt from an inheritance be paid to you first and then that We order an investigation whether the inheritance belongs to you. For since it was clear that succession to your father-in-law has been obtained by you, there is no doubt that the petition for the debt is extinguished by the identity (*confusio*; i.e., the merger) of the creditor and the debtor.

Given March 6, at Sirmium, in the consulship of the Caesars (294).

[6]⁶⁰ *The same Augusti and Caesars to Domnus.* If the adult woman, whose curatorship you manage, is heir to one-third of the estate of her paternal uncle, who you state also served as her *tutor*, and she was not forbidden to extract payment from him (of an independent debt he owed her), she is not prohibited from seeking two-thirds of the (uncle's) debt (to her) from her co-heirs, since beyond that portion by which she succeeded her claim is not merged. For it is against the interests of your adult woman that you are requesting that the will be rescinded, if indeed her co-heirs, in taking up the inheritance, should also obligate themselves; and if they should be proved to be insolvent, a requested separation (of property) will not allow any loss to accrue to her.

Given December 1, in the consulship of the Caesars (294).

[7] *The same Augusti and Caesars to Apolaustus.* It is agreed that creditors of an estate do not have a personal action against legatees, since quite obviously the law of the Twelve Tables makes heirs liable in such a case.

Given December 8, at Nicomedia, in the consulship of the Caesars (294).

Seventeenth Title To What Extent Heirs Should Be Sued for the Delicts of the Deceased

[1]⁶¹ *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Macedona.* After joinder of issue, if the person who brought force, or engaged in extortion, or committed any type of delict dies, the law is very absolute that his heirs are sued for the whole amount, otherwise up to the amount that comes to them through the inheritance, lest they be enriched by another person's crime.

Given April 27, at Sirmium, in the consulship of the Caesars (294).

⁶⁰ = C. 7.72.7, with significant change of the hypothetical (the ward is the recipient's wife).

⁶¹ Bas. 24.7.8.

XVIII De Constituta Pecunia

[1] *Imp. Gordianus A. Felici*. Si pro alieno debito te soluturum constituisti, pecuniae constitutae actio non solum adversus te, sed etiam adversus heredes tuos perpetuo competit.

D. VII k. Iul. Sirmi CC. cons.

[2] *Imp. Iustinianus A. Iuliano pp. pr.* Recepticia actione cessante, quae sollemnibus verbis composita inusitato recessit vestigio, necessarium nobis visum est magis pecuniae constitutae naturam ampliare. 1. Cum igitur praefata actio, id est pecuniae constitutae, in his tantummodo a veteribus conclusa est, ut exigeret res quae in pondere numero mensura sunt, in aliis autem rebus nullam haberet communionem et neque in omnibus casibus longaeva sit constituta, sed in speciebus certis annali spatio concluderetur, et dubitaretur, si pro debito sub condicione vel in diem constituto eam possibile est fieri et si pure constituta pecunia contracta valeret, hac apertissima lege definimus, ut liceat omnibus constituere non solum res quae pondere numero mensura sunt, sed etiam alias omnes sive mobiles sive immobiles sive se moventes sive instrumenta vel alias quascumque res, quas in stipulationem possunt homines deducere: et neque sit in quocumque casu annalis, sed (sive pro se quis constituat sive pro alio) sit et ipsa in tali vitae mensura, in qua omnes personales sunt actiones, id est in annorum metis triginta: et liceat pro debito puro vel in diem vel condicionali constitui:

et non absimilem penitus stipulationi habeat dignitatem, suis tamen naturalibus privilegiis minime defraudata: sed et heredibus et contra heredes competat, ut neque recepticiae actionis neque alio indigeat res publica in huiusmodi casibus adminiculo, sed sit pecuniae constitutae actio per nostram constitutionem sibi in omnia sufficiens, ita tamen, ut hoc ei inhaereat, ut pro debito fiat constitutum (cum secundum antiquam recepticiam actionem exigebatur et si quid non fuerat debitum), cum satis absurdum et tam nostris temporibus quam iustis legibus contrarium est permittere per actionem recepticiam res indebitas consequi

Eighteenth Title A Promise to Pay an Existing Debt⁶²

[1] *Emperor GORDIAN Augustus to Felix.*⁶³ If you have promised that you will pay for another person's debt, the action on money promised (*pecuniae constitutae actio*) is available not only against you but also against your heirs in perpetuity.

Given June 25, at Sirmium, in the consulship of the Caesars (294).

[2] *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect. pr.* Since the action against a banker's undertaking is dormant (*recepticia actione cessante*), which, composed in customary words, has receded as an outmoded vestige, it has seemed necessary to Us to amplify the nature of the promise to pay an existing debt (*constitutum*). 1. Since, therefore, the aforesaid action, that is, for an existing debt of money (*pecuniae constitutae*), was confined by the ancient jurists solely to these circumstances, (namely) that there might be a claim for things that are calculable in weight, number, or volume, but that it might have nothing in common in other matters and not be established in all cases to be long-lasting, but to be confined in certain matters to the space of a year, and there was doubt whether it can arise for a debt under a condition or one due to be paid on a certain date (*in diem constituto*) and whether the promise for money contracted unconditionally was valid, in this pellucid law We define that it be permitted to everyone to make a promise to pay not only things that are calculable in weight, number, or measure, but also all other types of property, whether they are movable or immovable, or self-propelling, or documents or any other types of things that people can make part of a stipulation; and it should not be for a year in any case, but – whether one makes a promise for himself or for another – it should also be for such a duration of life that applies to all actions *in personam*, that is, within a limit of thirty years; and it should be permitted that a promise be made for a pure debt or for one due on a future date (*in diem*) or for a conditional one.

And it shall have a status not at all dissimilar from a stipulation, however not at all deprived of its natural privileges; but it shall also be available to heirs and against heirs, so that the republic not require actions for a banker's undertaking (*recepticiae actiones*) or another support in cases of this type, but that the action on the payment of an existing debt of money be self-sufficient for all matters through Our constitution, with this restriction, that this remain part of it, that there be a promise for a debt – since in accordance with the old

⁶² See D. 13.5. The action described in this title – *constitutum debiti*, an informal promise by a debtor to repay his preexisting debt – was expanded by Justinian so as to replace the *actio recepticia* to enforce the *receptum argentarii*, a banker's promise to pay another's debt by a certain date.

⁶³ Based on the date, the address should read "Emperors Diocletian and Maximian Augusti and Caesars." But the corruption may be deeper.

et iterum multas proponere conditiones, quae et pecunias indebitas et promissiones corrumpi et restitui definiunt. 1a. Ut non erubescat igitur tale legum iurgium, hoc tantummodo constituatur, quod debitum est, et omnia, quae de recepticia in diversis libris legislatorum posita sunt, aboleantur et sit pecunia constituta omnes casus complectens, qui et per stipulationem possint explicari.

1b. Et neminem moveat, quod sub nomine pecuniae etiam omnes res exigi definimus, cum et in antiquis libris prudentium, licet pecunia constituta nominabatur, tamen non pecuniae tantum per eam exigebantur, sed omnes res quae pondere numero mensura constitutae sunt. 1c. Sed et possibile est omnes res in pecuniam converti. si enim certa domus vel certus ager vel certus homo vel alia res quae expressa est in constituendis rebus ponatur, quid distat a nomine ipsius pecuniae? 1d. Sed ut et subtilitati eorum satisfiat, qui non sensum, sed vana nominum vocabula amplecti desiderant, ita omnes res veniant in constitutam, tamquam fuisset ipsa pecunia constituta, cum etiam veteres pecuniae appellatione omnes res significari definiunt et huiusmodi vocabulum et in libris iuris auctorum et in alia antiqua prudentia manifestissime inventum est.

2. His videlicet, quae argenti distractores et alii negotiatores indense constituerint, in sua firmitate secundum morem usque adhuc obtinentem durantibus.

D. x k. Mart. Constantinopoli post consulatum Lampadii et Orestae vv. cc.

[3] *Idem A. Iohanni pp.* Divi Hadriani epistulam, quae de periculo dividendo inter mandatores et fideiussores loquitur, locum habere et in his qui pecunias pro aliis simul constituunt necessarium est: aequitatis enim ratio diversas species actionis excludere nullo modo debet.

D. k. Nov. Constantinopoli post consulatum Lampadii et Orestae vv. cc.

action on a banker's undertaking one could also make a claim if something had not been owed – since it is quite absurd and contrary both to Our times and to just laws to allow the pursuit of things not owed through the action on a banker's undertaking and again to set forth many types of claims (*condictiones*), which define how both sums of money not owed and promises are corrupted and restored. 1a. Therefore, so that such a criticism of the laws not cause embarrassment, a promise should be established for this alone, namely, what is owed, and all things that have been included in the different books of the jurists (*legislatores*) concerning the action on recovery should be abolished, and it should be a promise for money that embraces all cases that can also be explicated through a stipulation.

1b. And it should disturb no one that We define that all things may be exacted under the name of money, since in the ancient books of the juriconsults (*prudentes*), although a claim for money was named, nevertheless not just sums of money could be exacted through this action, but all things that have been established in weight, number, or measure. 1c. But it is also possible for all things to be converted into money. For if a certain house should be mentioned or a certain field or a certain human being or some other thing that has been described in establishing claims, how does that differ from the category of money itself? 1d. But so as to satisfy the cleverness of those people who desire to embrace not the sense, but the empty names, all things should come under the action on the promise to pay an existing debt, as if money itself had been promised; since even the jurists of old make clear that all things are designated by the name of money and a term of this type has been found very clearly in the books of the authors of the law and in other ancient jurisprudence.

2. It is to be understood that whatever the moneychangers (*argenti distractores*) and other businessmen have unconditionally promised remains in force in accordance with the custom that obtains until this time.

Posted April 22, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[3] *The same Augustus to John, Praetorian Prefect.* It is necessary that the letter of the deified Hadrian that speaks of dividing the risk between mandators and sureties also apply to those people who make promises to pay debts of money on behalf of others, since considerations of equity should in no way exclude other types of actions.⁶⁴

Given November 1, at Constantinople, in the post-consulate of viri clarissimi Lampadius and Orestes (531).

⁶⁴ In a note on this passage, Krüger cites Papinian, D. 27.7.7, and favors reading *rationem diversa*: "the different type of action should in no way exclude considerations of equity."

XVIII De Probationibus

[1] *Imp. Severus et Antoninus AA. Faustino.* Ut creditor, qui pecuniam petit, numeratam implere cogitur, ita rursum debitor, qui solutam adfirmat, eius rei probationem praestare debet.

PP. prid. k. Iul. Dextro II et Prisco cons.

[2] *Imp. Antoninus A. Auluzano.* Possessiones, quas ad te pertinere dicis, more iudiciorum persequere. nec enim possessori incumbit necessitas probandi eas ad se pertinere, cum te in probatione cessante dominium apud eum remaneat.

PP. xv k. Dec. Laeto et Cereale cons.

[3] *Imp. Alexander A. Leaenae et Lupo.* Ex persona collegae avi vestri conveniri non debetis, si eundem collegam tempore depositi officii solvendo fuisse ostenderitis.

PP. v k. Ian. Pompeiano et Peligno cons.

[4] *Idem A. Avito.* Proprietatis dominium non tantum instrumento emptionis, sed ex quibuscumque aliis legitimis probationibus ostenditur.

PP. k. Nov. Alexandro A. cons.

[5] *Imp. Philippus A. et Philippus C. Sertorio.* Instrumenta domestica seu privata testatio seu adnotatio, si non aliis quoque adminiculis adiuvetur, ad probationem sola non sufficiunt.

PP. vii id. April. Philippo A. et Titiano cons.

[6] *Idem A. et C. Romulo. pr.* Rationes defuncti, quae in bonis eius inveniuntur, ad probationem sibi debitae quantitatis solas sufficere non posse saepe rescriptum est. i. Eiusdem iuris est et si in ultima voluntate defunctus certam pecuniae quantitatem aut etiam res certas deberi sibi significaverit.

PP. id. Mai. Philippo A. et Titiano cons.

[7] *Imp. Gallienus A. Sabino.* Exemplo perniciosum est, ut ei scripturae credatur, qua unusquisque sibi adnotatione propria debitorem constituit, unde neque fiscum neque alium quemlibet ex suis subnotationibus debiti probationem praebere posse oportet.

Nineteenth Title Proofs⁶⁵

[1] *Emperors SEVERUS and ANTONINUS Augusti to Faustinus.* Just as a creditor, who seeks money, is compelled to fulfill a cash payment (prior to making his claim), so too a debtor, who is affirming that the money has been paid, should provide a proof of this matter.

Posted June 30, in the consulship of Dexter, for the second time, and Priscus (196).

[2] *Emperor ANTONINUS Augustus to Auluzanus.* Pursue the properties, which you say belong to you, by the usual procedure of the courts. For the necessity of proving ownership over them does not fall upon the possessor, since if you fail in your proof, ownership remains with him.

Posted November 17, in the consulship of Laetus and Cerealis (215).

[3] *Emperor ALEXANDER Augustus to Leaena and Lupus.* You should not be sued on account of the colleague (in a magistracy) of your grandfather, if you show that the same colleague was solvent when he gave up his office.

Posted December 28, in the consulship of Pompeianus and Pelignus (231).

[4] *The same Augustus to Avitus.* The ownership of property is shown not just by a document of purchase, but from any other legitimate proofs.

Posted November 1, in the consulship of Alexander Augustus (222).

[5] *Emperor PHILIP Augustus and PHILIP Caesar to Sertorius.* Personal documents (of a litigant), whether a private declaration or a notation, if they are not aided by other supports, do not alone suffice for proof.

Posted April 7, in the consulship of Philip Augustus and Titianus (245).

[6] *The same Augustus and Caesar to Romulus. pr.* Rescripts have often been issued that the accounts of a deceased person, which are found among his property, do not alone suffice as proof of a debt owed to him. 1. The law is the same even if by his last wish the deceased signified that a certain amount of money or other certain things are owed to him.

Posted May 15, in the consulship of Philip Augustus and Titianus (245).

[7] *Emperor GALLIENUS Augustus to Sabinus.* It is a harmful precedent that a written document should be credited in which anyone establishes his debtor through his own notation. Therefore neither the Treasury nor any other person should be able to offer proof of a debt from his own notations.

⁶⁵ See D. 22.3.

PP. prid. non. Sept. Gallieno A. v et Faustino cons.

[8] *Impp. Diocletianus et Maximianus AA. Publicio et Optato.* Frustra veremini, ne ab eo qui lite pulsatur probatio exigatur.

PP. XIII k. Dec. Basso et Quintiano cons.

[9] *Idem AA. et CC. Marcianae.* Cum te minorem quinque et viginti annis esse proponas, adire praesidem provinciae debes et de aetate probare.

D. id. April. AA. cons.

[10] *Idem AA. et CC. Isidoro.* Neque natales tui, licet ingenuum te probare possis, neque honores, quibus te functum esse commemoras, idoneam probationem pro filiae tuae ingenuitate continent, cum nihil prohibeat et te ingenuum et eam ancillam esse.

D. XVIII k. Mai. AA. cons.

[11] *Idem AA. et CC. Antoniae.* Si scriptum heredem ab amita tua vel testamenti vitio vel quacumque alia ratione non posse obtinere hereditatem probari a te posse confidis, de hac hereditate apud rectorem provinciae agere potes.

S. v k. Mai. Heracliae AA. cons.

[12] *Idem AA. et CC. Chroniae.* Cum res non instrumentis gerantur, sed in haec gestae rei testimonium conferatur, factam emptionem et in vacuum possessionem inductum patrem tuum pretiumque numeratum quibus potes iure proditis probationibus docere debes.

D. v non. Oct. AA. cons.

[13] *Idem AA. et CC. Iustino. pr.* Non epistulis necessitudo consanguinitatis, sed natalibus vel adoptionis sollemnitate coniungitur, nec adversus absentem hereditatis dividundae gratia velut contra fratrem pro ancilla petitus arbiter substantiae perimit veritatem. 1. Sive itaque quasi ad sororem, quam ancillam te posse probare confidis, epistulam emisisti, sive familiae erciscundae quasi pro coherede petitus arbiter doceatur, fraternitatis quaestio per haec tolli non potuit.

D. k. Dec. AA. cons.

Posted September 4, in the consulship of Gallienus Augustus, for the fifth time, and Faustinus (262).

[8] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Publicus and Optatus.* You have no need to fear that the burden of proof should be demanded of the person who is attacked with a lawsuit.

Posted November 19, in the consulship of Bassus and Quintianus (289).

[9] *The same Augusti and the Caesars to Marciana.* Since you state that you are below the age of 25 years, you should approach the provincial governor and offer proof about your age (so as to obtain *restitutio in integrum*).

Given April 13, in the consulship of the Augusti (293).

[10] *The same Augusti and Caesars to Isidorus.* Neither your birth, granted that you can prove that you are free-born, nor the offices that you say you have filled carry with them a suitable proof of the free birth of your daughter, since nothing prohibits you from being free-born and her from being a slave.

Given April 14, in the consulship of the Augusti (293).

[11] *The same Augusti and Caesars to Antonia.* If you are confident that it can be proved by you that the heir written by your paternal aunt cannot obtain the inheritance either because of a flaw in the will or for some other reason, you can sue over this inheritance before the provincial governor.

Given on April 27, at Heraclea, in the consulship of the Augusti (293).

[12] *The same Augusti and Caesars to Chronia.* Since business is not transacted in documents (themselves), but testimony as to the business transacted is (instead) compared with them, you should show, by producing what records you lawfully can, that the sale was completed, that your father was brought into quiet possession, and that the price was paid.

Given October 3, in the consulship of the Augusti (293).

[13] *The same Augusti and Caesars to Justinus. pr.* A blood relationship is not formed by letters, but by birth or the formality of an adoption, nor can a judge arbitrator undo the truth of the facts when he is approached to divide an inheritance, as it were, against an absent brother on behalf of a slave woman. 1. So whether you have sent a letter as if to a sister to someone whom you are confident you can prove to be a slave, or the judge arbitrator should be shown to have been approached to divide the inheritance (*familiae erciscundae*) as if on behalf of a co-heir, the question of the (actual) relationship could not be eliminated through these means.

Given December 1, in the consulship of the Augusti (293).

[14] *Idem AA. et CC. Muciano.* Non nudis adseverationibus nec ementita professione, licet utrique consentiant, sed matrimonio legitimo concepti vel adoptione sollemni filii civili iure patri constituuntur. si itaque hunc contra quem supplicas alienum esse confidis, per te vel per procuratorem adfirmationem eius falsam detege.

D. k. Dec. AA. cons.

[15] *Idem AA. et CC. Antonino.* Vis eius, qui se dominum contendit, ad imponendum onus probationis servo minime prodest. cum igitur aufugisse te de domo Severi profitearis, verum nec ab illo iusto initio, sed per violentiam adseveres esse detentum, inquisito prius, an in possessionem libertatis sine dolo malo constitutus sis, tunc etiam, onus probationis qui debeat subire, per huiusmodi eventum declarabitur.

D. vi k. Ian. AA. cons.

[16] *Idem AA. et CC. Philippo et Sebastianae.* Sive possidetis praedia, quae a patre communi sibi fratres emancipati donata contententes vindicant, ipsis incumbit facti probationis necessitas, sive ipsis ea praedia, quasi a patre vestro sibi donata, tenentibus vos heredes constituti patris petitis, ut intentionem vestram non constituisse detegant, unde domini facti sunt, emergente quaestione docere compelluntur.

D. x k. Febr. CC. cons.

[17] *Idem AA. et CC. Paulinae.* Matrem tuam consecutam libertatem ac te post editam, ut ingenua probari possis, ostendi convenit. quod enim fratribus tuis nulla movetur quaestio, ad defensionem tuam nihil prodesse potest.

D. v id. Febr. CC. cons.

[18] *Idem AA. et CC. Violentillae. pr.* Cum precibus tuis significes ignorante te praedium eum cuius meministi sibi velut a te donatum instrumentis inseri fecisse, si vera sunt quae indidisti, nec ad nomen factae donationis fundus iste pervenit. 1. Unde adito iudice competenti

[14] *The same Augusti and Caesars to Mucianus.* Children are established for a father in civil law not by bare assertions or by a contrived profession, although both parties might agree, but when they are conceived in a lawful marriage or through formal adoption. So if you are confident that the person against whom you are pleading belongs to someone else, reveal, either by yourself or through your procurator, the falseness of his affirmation.

Given December 1, in the consulship of the Augusti (293).

[15] *The same Augusti and Caesars to Antoninus.* The power of the person who contends that he is owner (of a slave) cannot at all serve to impose the burden of proof on the slave. Since, then, you claim that you have fled from the home of Severus, and you assert that you have been detained by him, not on any just claim, but through violence, when there first has been an inquiry whether you have been established in the possession of liberty without deceit (*dolus malus*), through the outcome of this type of proceeding it will then be declared who ought to sustain the burden of proof.

Given December 27, in the consulship of the Augusti (293).

[16] *The same Augusti and Caesars to Philippus and Sebastiana.* If you possess properties, over which your brothers, who were emancipated by your common father, claim ownership, contending that they were given to them as a gift, the necessity of proving the fact is incumbent upon them. If you as the heirs established by your father seek these properties from them, when they hold them as if they were given to them by your father, in the emerging investigation they are compelled to demonstrate on what basis they have become owners, so that they might show that your claim is not established.

Given January 23, in the consulship of the Caesars (294).

[17] *The same Augusti and Caesars to Paulina.* It is generally accepted that, for you to be proved to be free-born, it be shown that your mother gained liberty and that you were born afterwards. The fact that no question is raised by your brothers⁶⁶ cannot provide any help for your defense.

Given February 9, in the consulship of the Caesars (294).

[18] *The same Augusti and Caesars to Violentilla. pr.* Since you indicate in your petition that, without your knowledge, the person whom you have mentioned had the property inserted in the documents (of a gift) as if he had been given it by you, if what you have indicated is true, then that farm does not belong with the entry of the donation that was carried out. 1. Therefore after

⁶⁶ Blume translates: "that no such question is raised as to your brothers."

probare te oportet contra tuam voluntatem hunc fundum instrumento adversarium tuum sibi adscribi laborasse, ut secundum tenorem rescripti nostri possis consequi sententiam.

D. vii id. April. Byzantii CC. cons.

[19] *Idem AA. et CC. Menandro.* Exceptionem dilatoriam opponi quidem initio, probari vero, postquam actor monstraverit quod adseverat, oportet.

D. xvi k. Dec. Nicomediae CC. cons.

[20] *Idem AA. et CC. Phronimae.* Si de possessione servitutis emptionis instrumentis subtractis in libertatem proclamat Eutychia, cum petitori probationis onus incumbat, intentione sua defecta his iuvare minime potest. nam si in servitutem petatur, ad emptionis probationem non est indicia aliis opus, sed instrumentorum furtum monstrare sufficit.

iiii non. Dec. Nicomediae CC. cons.

[21] *Idem AA. et CC. Crispo. pr.* Ad probationem uti domini aliena subtrahentes instrumenta his minime possunt, quippe cum horum lectio non recitanti, sed quem tenor scripturae designat, adiuvat. 1. Cum itaque nec cetera probationum indicia reprobentur, iure competenti praediorum, quae in quaestionem veniunt, dominium ad te ostendere pertinere. nam res vindicantem ab emptore suos numeratos nummos adseverantem erga probationem laborare non convenit, si quidem huiusmodi, licet probetur, factum intentioni nullum praestet adminiculum.

S. vi id. Dec. Singiduni CC. cons.

[22] *Idem AA. et CC. Agathocleae.* Ad probationem servitutis Glyconis matrem eius ac fratrem servilia fecisse ministeria non sufficit, cum neque ingenuorum coniventia coniunctis necessitudine praeiudicet neque de servis ex eadem matre natis unus libertatem adipisci prohibeatur.

D. viii k. Ian. ipsis CC. cons.

[23] *Idem AA. et CC. Menelao.* Actor quod adseverat probare se non posse profitendo reum necessitate monstrandi contrarium non adstringit, cum per rerum naturam factum negantis probatio nulla sit.

approaching a competent judge you must prove that your opponent caused this farm to be assigned to himself against your will, so that you can gain a judgment in accordance with the tenor of Our rescript.

Given April 7, at Byzantium, in the consulship of the Caesars (294).

[19] *The same Augusti and Caesars to Menander.* A motion for continuance (*exceptio dilatoria*) must be proffered at the outset but proved after the plaintiff has demonstrated what he alleges.

Posted November 16, at Nicomedia, in the consulship of the Caesars (294).

[20] *The same Augusti and Caesars to Phronima.* If Eutychia claims liberty from your possession (of her) as a slave after the loss of the documents concerning her purchase, since the burden of proof is incumbent on the petitioner, if her assertion is defective she cannot at all be helped by this. For if she should be claimed into slavery, there is no need for other evidence of the proof of the purchase, but it is enough to demonstrate the theft of the documents.⁶⁷

Posted December 6, at Nicomedia, in the consulship of the Caesars (294).

[21] *The same Augusti and Caesars to Crispus. pr.* Those who remove documents belonging to others cannot at all use these for proof of ownership, since their reading does not help the person reciting, but the person whom the sense of the text designates. 1. So since the other evidence provided by the proofs is not refuted, show by the appropriate law that the ownership of the properties in question belongs to you. For it is not fitting that someone suing for ownership of property should work toward a proof by claiming that his money was paid out by the buyer, if a fact of this sort, assuming that it should be proved, should not offer any support for his claim.

Posted December 8, at Singidunum, in the consulship of the Caesars (294).

[22] *The same Augusti and Caesars to Agathoclea.* It is not sufficient to prove the slave status of Glyco that his mother and brother performed slave duties, since neither the connivance of free-born persons is prejudicial to those joined by a familial relationship nor is one of the slaves born from the same mother prohibited from gaining liberty.

Posted December 24, in the consulship of the Caesars (294).

[23] *The same Augusti and Caesars to Menelaus.* A plaintiff, by acknowledging that he cannot prove his allegations, does not impose on the defendant the necessity of proving the contrary, since by the nature of things there is no burden of proof on one denying a fact.

⁶⁷ Blume refers to C. 4.20.2, which shows that testimony of witnesses alone is insufficient to show free birth.

D. VIII k. Ian. CC. cons.

[24] *Imppp. Valens Gratianus et Valentinianus AAA. ad Antonium pp.* Iubemus omnes deinceps, qui scripturas suspectas comminiscuntur, cum quid in iudicio prompserint, nisi ipsi adstruxerint veritatem, ut nefariae scripturae reos et quasi falsarios esse detinendos.

D. prid. id. Ian. Treviris Valente VI et Valentiniano II AA. cons.

[25] *Imppp. Gratianus Valentinianus et Theodosius AAA. Floro pp.* Sciant cuncti accusatores eam se rem deferre debere in publicam notionem, quae munita sit testibus idoneis vel instructa apertissimis documentis vel indiciis ad probationem indubitatis et luce clarioribus expedita.

D. xv k. Iun. Constantinopoli Antonio et Syagrio cons.

XX De Testibus

[1] Κατὰ ἐγγράφου μαρτυρίας ἄγραφος μαρτυρία οὐ προσφέρεται.

[2] *Imp. Alexander A. Carpo.* Si tibi controversia ingenuitatis fiet, defende causam instrumentis et argumentis, quibus putas: soli etenim testes ad ingenuitatis probationem non sufficiunt.

PP. x k. Mai. Maximo II et Aeliano cons.

[3] *Impp. Valerianus et Gallienus AA. Rosae.* Etiam iure civili domestici testimonii fides improbat.

PP. III k. Sept. Valeriano III et Galliено II AA. cons.

[4] *Imppp. Carus Carinus et Numerianus AAA. Aurelio.* Solam testationem prolatam nec aliis legitimis adminiculis causa approbata nullius esse momenti certum est.

PP. VIII k. Dec. Carino II et Numeriano AA. cons.

Posted December 25, in the consulship of the Caesars (294).

[24]⁶⁸ *Emperors VALENS, GRATIAN, and VALENTINIAN Augusti to Antonius, Praetorian Prefect.* We order that henceforth all those who fabricate suspect written documents, when they have brought something forward in a court, unless they have demonstrated their veracity, should be detained as charged with executing a nefarious document and as forgers.

Given January 12, at Trier, in the consulship of Valens, for the sixth time, and Valentinian, for the second time, Augusti (378).

[25]⁶⁹ *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS Augusti to Florus, Praetorian Prefect.* All accusers should know that they should report a matter for judicial enquiry that has been fortified with suitable witnesses or furnished with the most transparent documents or equipped with evidence indisputable for proof and clearer than the light of day.

Posted May 18, at Constantinople, in the consulship of Antonius and Syagrius (382).

Twentieth Title Witnesses⁷⁰

[1] Unwritten testimony is not put forward against written testimony.⁷¹

[2] *Emperor ALEXANDER Augustus to Carpus.* If a dispute about your being free-born arises, defend your case with whatever documents and proofs you think (best); but witnesses alone do not suffice for proof of free-born status.

Posted April 22, in the consulship of Maximus, for the second time, and Aelianus (223).

[3] *Emperors VALERIAN and GALLIENUS Augusti to Rosa.* Even in civil law the trustworthiness of the testimony of family members is rejected.

Posted August 30, in the consulship of Valerian, for the third time, and Gallienus, for the second time, Augusti (255).

[4] *Emperors CARUS, CARINUS, and NUMERIAN Augusti to Aurelius.* It is certain that no force attaches to the sole statement (of one person⁷²) that has been brought forward but without its case confirmed by other lawful evidence.

Posted November 24, in the consulship of Carinus, for the second time, and Numerian (284).

⁶⁸ = C.Th. 11.39.7; combine with C. 9.46.9.

⁶⁹ = C.Th. 9.37.3 (quite differently worded); combine with C. 9.46.9.

⁷⁰ See D. 22.5.

⁷¹ From Bas. 21.1.25. That is, the written documents prevail as a matter of law.

⁷² This phrase is in Bas.

[5] *Impp. Diocletianus et Maximianus AA. Candido.* Eos testes ad veritatem iuvandam adhiberi oportet, qui omni gratiae et potentatui fidem religioni iudiciariae debitam possint praeponere.

PP. v k. Mai. Maximo II et Aquilino cons.

[6] *Idem AA. et CC. Tertullo.* Parentes et liberi invicem adversus se nec volentes ad testimonium admittendi sunt.

PP. IIII non. Dec. Nicomediae CC. cons.

[7] *Idem AA. et CC. Diogeni et Ingenuo.* Nimis grave est, quod petitis urgueri ad exhibitionem partem diversam eorum, per quos sibi negotium fiat. unde intellegitis, quod intentioni vestrae proprias adferre debetis probationes, non adversus se ab adversariis adduci.

D. vi k. Mai. AA. cons.

[8] *Idem AA. et CC. Deruloni.* Servos pro domino, quemadmodum adversus eum interrogari non posse, pro facto autem suo interrogari posse non ambigitur.

D. k. Nov. Reginassi CC. cons.

[9] *Imp. Constantinus A. ad Iulianum praesidem.* Iurisiurandi religione testes, priusquam perhibeant testimonium, iam dudum artari praecepimus et ut honestioribus potius fides testibus habeatur, simili more sanximus, ut unius testimonium nemo iudicum in quacumque causa facile patiatur admitti. et nunc manifeste sancimus, ut unius omnino testis responsio non audiat, etiamsi praeclarae curiae honore praeferat.

D. VIII k. Sept. Naissi Optato et Paulino cons.

[10] *Imppp. Valens Gratianus et Valentinianus AAA. ad Gracchum pu.* Omnibus in re propria dicendi testimonia facultatem iura submoverunt.

[5] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Candidus.* Those witnesses should be summoned to support the truth who are able to place the trust owed to their judicial oath above all influence and power.

Posted April 27, in the consulship of Maximus, for the second time, and Aquilinus (286).

[6] *The same Augusti and the Caesars to Tertullus.* Parents and children in turn may not be admitted to testimony against one another even voluntarily.⁷³

Posted December 2, at Nicomedia, in the consulship of the Caesars (294).

[7]⁷⁴ *The same Augusti and Caesars to Diogenes and Ingenius.* It is too much what you ask, that the opposite party be pressed to produce those people through whom a judicial matter might arise for themselves (*per quos sibi negotium fiat*; i.e., the defendants need not produce witnesses to prove the plaintiff's case). Therefore you understand that, because you should bring your own evidence to (support) your claim, this is not to be adduced by your opponents against themselves.

Given April 26 in the consulship of the Augusti (293).

[8] *The same Augusti and Caesars to Derulo.* There is no doubt that slaves cannot be interrogated (under torture) on behalf of their master, any more than against him, but they can be interrogated as to their own act.

Given November 1, at Reginassi, in the consulship of the Caesars (294).⁷⁵

[9]⁷⁶ *Emperor CONSTANTINE Augustus to Julian, Governor.* We have long since directed that witnesses, before they give their testimony, be put under the sanctity of an oath, and also that more credence be accorded to witnesses of more honorable rank (*honestiores*). In a similar manner We have ordained also that no judge readily allow the testimony of (only) one person to be admitted in any case whatsoever. Now We plainly ordain that the response of a single witness should not be heard, even if he is resplendent with the office of the illustrious city council.

Given August 25, at Naissus, in the consulship of Optatus and Paulinus (334).

[10]⁷⁷ *Emperors VALENS, GRATIAN, and VALENTINIAN Augusti to Gracchus, City Prefect.* The laws have deprived everyone of the capacity to offer testimony in their own cause.

⁷³ This text may be connected with 8 below.

⁷⁴ = *Collatio* 6.14, where the name is Aurelius Diogenes.

⁷⁵ Mommsen emends this to October 25, 294, which Seeck accepts.

⁷⁶ = C.Th. 11.39.3.

⁷⁷ = C.Th. 2.2.1; combine with C. 3.5.1.

Lecta k. Dec. Valente V et Valentiniano AA. cons.

[11] *Impp. Honorius et Theodosius AA. Caeciliano pp. pr.* Quoniam liberi testes ad causas postulantur alienas, si socii et participes criminis non dicantur, sed fides ab his notitiae postuletur, in exhibitione necessariorum personarum, hoc est testium, talis debet esse cautio iudicantis, ut his venturis ad iudicium per accusatorem aut ab his, per quos fuerint postulati, sumptus competentes dari praecipiat. 1. Idem iuris est et si in pecuniaria causa testes ab alterutra parte producendi sunt.

D. XII k. Febr. Ravennae Honorio VIII et Theodosio III AA. cons.

[12] *Idem AA.* Libertorum adversus patronos illicitas atque improbas voces poenae obiectione praecludimus atque ita, ut non modo sponte prodire non audeant, sed nec vocati quidem in iudicium venire cogantur.

D. III id. Aug. Ravennae Mariniano et Asclepiodoto cons.

[13] *pr.* Ὅ τὰ ψευδῆ μαρτυρήσας πρότερον μὲν ἐπιiorκεῖ, δεύτερον δὲ καὶ ὡς πλαστογράφος ἐνάγεται καὶ ἐν αὐτῷ καιρῷ τῆς μαρτυρίας ὑπονοηθεὶς ψεύδεσθαι βασάνοις ὑπόκειται. 1. Εἰ δὲ βουλευθεὶς ὁ ἐκ τῆς ψευδοῦς μαρτυρίας καταδικασθεὶς πολιτικῶς κινήσῃ κατὰ τοῦ ψευδομαρτυρήσαντος, λήψεται παρ' αὐτοῦ πᾶσαν ἣν ὑπέστη ζημίαν πρὸς τῷ καὶ τὴν ἀπὸ τῶν νόμων ὠρισμένην τιμωρίαν ὑφίστασθαι. 2. Εἰ δὲ καὶ ἐν αὐτῇ τῇ πρωτοτύπῳ δίκη ψευσάμενος ἐλεγχθεῖ, ἔργον ἔστω τοῦ δικάζοντος ἢ εἰς πᾶσαν τὴν ἐπιφερομένην ἐκείνῳ, καθ' οὗ ἔμαρτύρησε, δίκην καταδικάζειν αὐτόν ἢ εἰς ἕλαττον καὶ τιμωρίαις ὑποβάλλειν αὐτόν· φυλαττομένων πάντων τῶν ἤδη νενομοθετημένων περὶ τῶν τὰ ψευδῆ μαρτυρούντων.

Read December 1, in the consulship of Valens, for the fifth time, and Valentinian, Augusti (376).

[11]⁷⁸ *Emperors HONORIUS and THEODOSIUS Augusti to Caecilianus, Praetorian Prefect. pr.* Since free persons (*liberi*) are summoned as witnesses to cases affecting others, if they should not be alleged to be associates and participants in the crime, but faithful disclosure of their knowledge should be asked from them, such should be the care of the person judging in producing necessary persons, that is, witnesses, namely, that he direct that appropriate expenses be given to these persons when they are going to come to court at the behest of the accuser or (of the other party) by whom they were summoned. 1.⁷⁹ The law is the same even if, in a case involving money, witnesses are to be produced by either party.

Given January 21, at Ravenna, in the consulship of Honorius, for the eighth time, and Theodosius, for the third time, Augusti (409).

[12]⁸⁰ *The same Augusti (to the Senate).* We exclude the illicit and wicked words of freedmen against their patrons under the threat of punishment and in such a way that they not only not dare to come forward of their own accord, but also that they not be forced to come into court upon being summoned.

Given August 10, at Ravenna, in the consulship of Marinianus and Asclepiodotus (423).

[13]⁸¹ *pr.* Whoever gives false testimony first perjures himself; then he is prosecuted as a forger, and if he is suspected of lying in the very moment of his testimony he is subject to torture. 1. If the person condemned on the basis of false testimony should wish to bring civil suit against the false witness, he will receive from him the entire damages to which he was subject, in addition to his (the perjurer's) submitting to the punishment established by the laws. 2. If he should be caught lying in the original trial, it should be the duty of the judge either to condemn him to the entire amount (involved in the litigation) impending against the person against whom he gave witness, or to subject him a lesser amount in addition to penalties. All measures that have already been enacted against those who give false testimony remain in force.

⁷⁸ = C.Th. 11.39.13 (which has *ingenui*, not *liberi*); combine with C. 1.4.9, 1.55.7–9, 9.44.2, and C.Th. 9.2.6, 9.31.1, 9.37.4.

⁷⁹ See 16 below; according to Mommsen, this section is Justinianic.

⁸⁰ = C.Th. 9.6.4; combine with C. 6.7.3 (which gives the addressee), 9.1.21, 9.2.17, 9.46.10, C.Th. 1.6.11, 2.1.12. Seeck dates to August 6, 423.

⁸¹ = Bas. 21.1.37; the address is lost.

[14] *Imp. Zeno A. Arcadio pp.* Nullum penitus, cum semel ad iudicem quemlibet, licet non suum, dicendi gratia testimonii fuerit ingressus, armatam forte militiam vel quamlibet aliam fori praescriptionem ad evadendum iudicis motum, quem vel testimonii verborum improbitas vel rei qualitas flagitaverit, posse praetendere praecipimus, sed omnes, qui in civili scilicet causa suum praebant testimonium, separato et tamquam ante iudicium interim deposito exceptionis fori privilegio huiusmodi praesidio denudatos, ita iudicantis intrare secretum, ut, quodcumque aures eius offenderit, non dubitent sibimet formidandum: data cunctis iudicibus absque ullo praescriptionis obstaculo (sicut saepe dictum est) testes, quorum voces falsitate vel fraude non carere perspexerint, pro qualitate videlicet delicti animadvertendi licentia.

D. XII k. Iun. Constantinopoli Longino cons.

[15] *pr.* Ἡ διάταξις ἀκολουθῶς τῇ πρὸ αὐτῆς ἐπιτρέπει τοῖς διαιτηταῖς ἐξουσίαν ἔχειν τοὺς τὰ ψευδῆ μαρτυροῦντας ὑποβάλλειν σωφρονισμῷ τῷ δέοντι. 1. Ἐάν ἰδιωτικὴν μὲν ὑπογραφόμενοι τύχην, δύνανται βασανισθῆναι, ἢ, ἐάν συνιδῶσιν αὐστηροτέρας τὸ πρᾶγμα δεῖσθαι κολάσεως, καὶ διὰ τοῦ πραιτῶρος τοῦ δήμου τούτους ἐπιστρέφειν.

2. Εἰ δὲ ζώνην τυχὸν εἶη ὁ μάρτυς περιβεβλημένος καὶ μὴ δύναται παρὰ τοῦ διαιτητοῦ σωφρονίζεσθαι, τότε γίνεσθαι μὲν ἀναφορὰν πρὸς τὸν ἄρχοντα τὸν πέμψαντα αὐτῷ τὴν ὑπόθεσιν τὰ περὶ τοῦ πράγματος μηνύουσας, καὶ ἡ τοιαύτη ἀναφορὰ ἀζημίως ἐμφανιζέσθω παρὰ τῷ ἄρχοντι, καὶ λοιπὸν ὁ ἄρχων δεχόμενος τὴν περὶ τῶν μαρτύρων ἀναφορὰν, εἰ μὲν εὖροι τὸ πρᾶγμα τελείως κεκριμένον ἐκ τῆς τῶν μαρτύρων, τὰ περὶ αὐτῶν τῶν μαρτύρων ἐξετάσας παρέχει τὴν αὐτοτελεῖ ψήφον· ἐάν δὲ συνίδῃ καὶ μετὰ τὴν τῶν μαρτύρων ἐξέτασιν δεόμενον τὸ πρᾶγμα ζητήσεώς τινος, τῆνικαὐτά πάλιν παραπεμπέτω τὰ λοιπὰ τοῦ πράγματος πρὸς τὸν διαιτητὴν. 3. Ὅφειλει δὲ οὕτω τὰς μαρτυρίας κρίνειν, ὥς εἴρηται ἐν τῇ πρὸ ταύτης διατάξει, τουτέστιν ἵνα μηδεμίαν φόρου παραγραφὴν δύνωνται προβάλλεσθαι πρὸς ἀποφυγὴν τῆς κατ' αὐτῶν ἀγανακτήσεως, ὥς ἅπας ἐκουσίως ἐλόμενοι μαρτυρήσαι.

4. Ἐάν δὲ τις τὸν ἴδιον ἀντίδικον περὶ συγγενείας ἀπαιτήσῃ συστάσεις, λέγων αὐτὸν μὴ εἶναι συγγενῆ, καὶ ἐλεγχθεῖν ψευδόμενος, ταύτην ἀπολαμβάνετω τὴν τιμωρίαν, ἵνα, κὰν ταῖς ἀληθείαις ἐστὶ συγγενής,

[14] *Emperor ZENO Augustus to Arcadius, Praetorian Prefect.* We instruct that no one at all, once he has approached any judge, except his own, for the sake of providing testimony, be able to pretend, for instance, armed military service or any other excuse about the forum (i.e., that it is not his own) for evading the judge's action as to what either the dishonesty of the words of his testimony or the quality of the matter has demanded. But all who offer their testimony in a civil matter, having divested themselves of and set aside as if before the court the privilege of objecting to the forum, enter the sanctuary of the judge, stripped of a defense of this type, in such a way that they may not doubt that they should fear whatever meets his ears. The authority is given to all judges without any obstacle of a defense – as has often been pronounced – of punishing, in accordance with the quality of their crime, witnesses whose words they perceive not to lack in falseness or fraud.

Given May 21, at Constantinople, in the consulship of Longinus (486).

[15]⁸² pr. This constitution, in accordance with the one preceding, allows delegated judges to have the authority to subject those who have given false testimony to the appropriate punishment. 1. If they are of private rank, they can be tortured, or, if they (the judges) should recognize that the matter requires more austere punishment, they can correct them through the Praetor of the People (*praetor populi*).

2. If the witness happens to bear the rank of office and cannot be punished by the deputy judge, then there should be a report of the case to the magistrate who delegated the case to him (the delegated judge), making clear the situation concerning the matter, and this report should be exhibited before the magistrate without cost. And then the magistrate, having received the report about the witnesses, if he should find the matter judged completely on the basis of the witnesses' testimony, having investigated the matters concerning the witnesses themselves, issues a final verdict. If he should determine that, even after the examination of the witnesses, the matter requires some investigation, under this circumstance he should send the rest of the case back to the delegated judge. 3. He (the delegated judge) must judge the testimonies in such a way as has been said in the constitution preceding this one, that is, so that they cannot pretend any excuse on the basis of the forum to escape punishment looming against them, when once they have willingly undertaken to testify.

4. But if someone should demand confirmation concerning a relationship from his own adversary, denying that he is a relative, and should be caught lying, he should take this punishment, that, even if he is a relative in truth, he should lose the rights of intestate succession regarding the one from whom he

⁸² Bas. 21.1.39, summarizing the original (which lacks an address). Additional material comes from the *adnotatio Anatolii*. The *praetor populi* was created in 525; Nov. 13.

ἀπολέσει τὰ ἐξ ἀδιαθέτου δίκαια τὰ πρὸς ἐκεῖνον, ὃν ἀπήτησε τὰς περὶ τῆς συγγενείας ἀποδείξεις. 5. Μᾶλλον δὲ ἐπειδὴ τοῦτο τὸ προνόμιον εὐκαταφρόνητον ἦν, ἐκάστου λέγοντος, ὅτι, κἂν μὴ δουλαγωγῶ, οὐ πάντως ἐγὼ μέλλω κληρονομεῖν αὐτόν, ἴσως γὰρ ἐπὶ διαθήκῃ τελευτᾷ, κελεύει ἡ διάταξις τὸν ἀπαιτοῦντα γένους σύστασιν τέως πρὸ πάντων ὁμνύναι, ὡς νομίζων μὴ εἶναι συγγενῇ τὸν διάδικον τοῦτο λέγει. καὶ εἰ μὲν ἐπομόσεται, δύναται κληρονομήσαι, λοιπὸν δὲ μετὰ τὸν τούτου ὅρκον ὀφείλει ὁ τὰς συστάσεις ἀπαιτούμενος ταύτας παρασχεῖν.

6. Χρεῖα δὲ ἐν τῇ ἀποδείξει μαρτύρων πέντε, ἐὰν μὴ ὥσι δικαιώματα πρὸς σύστασιν ἐπιτήδεια· εἰ δὲ εἰσὶ δικαιώματα, ἀρκούμεθα τρισὶ μάρτυσιν· εἰ δὲ τὸ δικαίωμα τοιοῦτόν ἐστι, ὥστε ἀντὶ πάντων ἀρκεῖν (ἴσως γὰρ ὑπόμνημα δημόσιον ἦν), τότε οὐδὲ δεόμεθα μαρτύρων. 7. Ἐπιφέρει δὲ καὶ ἕτερον κεφάλαιον ἡ διάταξις τοιοῦτον· ἐὰν τις ἐν ὑπομνήμασι καὶ ἐν συμβολαίῳ προσμαρτυρήσῃ, ἀνάγκην ἔχῃ πᾶσι τρόποις καὶ δίκῃς ἐπὶ τῷ πράγματι κινουμένης μαρτυρῆσαι, κἂν ἕτερον φόρον ἐπιγράφῃται· εἰ γὰρ μὴ τοῦτο εἴπωμεν, βλάπτεται ὁ δεηθεὶς τῆς αὐτοῦ μαρτυρίας.

[16] *pr.* Ἡ διάταξις κελεύει μὴ μόνον ἐν ταῖς ἐγκληματικαῖς δίκαις, ἀλλὰ καὶ ἐν ταῖς χρηματικαῖς ἕκαστον ἀναγκάζεσθαι μαρτυρεῖν μεθ' ὅρκου δόσεως, ἅπερ ἐπίσταται, ἢ ὁμνυεῖν, ὡς οὐκ ἐπίσταται, ὑπεξηρημένων τῶν προσώπων τῶν ἀπὸ νόμου κωλυομένων μαρτυρεῖν καὶ τῶν ἰλλουστρίων καὶ τῶν ὑπερβεβηκότων αὐτούς, εἰ μὴ θεῖος γένηται τύπος. 1. Καὶ εἰ μὲν ἐνδημοῦσιν ἐν τῇ βασιλίδι πόλει, δι' οἰκείας φωνῆς μαρτυρεῖν, εἰ δὲ ἀπολιμπάνονται, στέλλεσθαι τοὺς τῶν μερῶν ἐντολέας, ἐφ' ᾧ καταθέσθαι, ἅπερ ἐπίστανται, ἢ ἀπομόσασθαι, ἅπερ ἀγνοοῦσι· δηλονότι καὶ ἐπὶ τῆς ἐν ὑπομνήμασι μαρτυρίας τῶν αὐτῶν προσώπων ὑπεξηρημένων. 2. Πάσας δὲ τὰς ἐπὶ τούτοις διαλαλίας καὶ τὰς παραγωγὰς ἀζημίους εἶναι τοῖς μάρτυσιν.

[17] *Imp. Iustinianus A. Menae pp. pr.* Si quis testibus usus fuerit idemque testes adversus eum in alia lite producantur, non licebit ei personas eorum excipere, nisi ostenderit inimicitias inter se et illos postea emersas fuisse, ex quibus testes repelli leges praecipiunt: non adimenda scilicet ei licentia ex ipsis depositionibus testimonium eorum arguere. 1. Sed et si liquidis probationibus datione vel promissione pecuniarum eos corruptos esse ostenderit, eam etiam adlegationem integram ei servari praecipimus.

D. k. Iun. Constantinopoli dn. Iustiniano pp. A. II cons.

demanded the proofs of relationship. 5. Indeed since this privilege can be easily scorned, with each person saying: "Even if I do not vindicate him as a slave, I will certainly not be his heir in any event, for perhaps he will die with a will," the constitution orders that the person demanding proof of birth before all swear that he says this on the basis of his considered opinion that his opponent is not related. And if he swears, he can inherit, but after this his oath the one from whom the proofs were demanded should provide them.

6. Five witnesses are needed in proving the case (*apodeixis*), if there are not suitable documents for proof (*systasis*). If there are documents, We are satisfied with three witnesses. If the document is of such a type that it is sufficient instead of everything else – perhaps it was a public memorandum – then We do not require witnesses. 7. The constitution includes another chapter to this effect: if someone has offered testimony in memoranda and in a contract, he absolutely must offer testimony when a case has been brought concerning this matter, even if he should be subject to a different jurisdiction (*forum*). For if We should not say this, the one who has requested his testimony is harmed.

[16]⁸³ *Emperor JUSTINIAN Augustus. pr.* The constitution orders that each person be compelled, not only in criminal trials but also in civil cases, to testify under oath what he knows, or to swear that he does not have any knowledge, excepting the persons who are prevented by law from offering testimony, both the *illustres* and those who exceed them in rank, unless there should be an imperial rescript (*theios typos*). 1. If they live in the Imperial City, they should offer testimony through their own voice, but if they are away, the procurators of the parties should be sent, so that they might set down what they know, or swear to their ignorance. It is clear that the same persons are exempted with respect to documentary testimony. 2. All orders concerning testimonies and their production are to be without charge to the witnesses.

(527?)

[17] *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect. pr.* If someone has made use of witnesses and the same witnesses should be produced against him in another trial, he will not be permitted to object to their persons, unless he shows that enmity has arisen afterwards between himself and them, for which reason the laws instruct that witnesses be rejected; but the opportunity to dispute their testimony on the basis of the depositions themselves is not to be taken away from him. 1. But if he shows by clear proofs that they have been corrupted by a gift or promise of money, We instruct that this allegation also be preserved for him intact.

Given June 1, at Constantinople, in the consulship of Our Lord Justinian, Ever Augustus, for the second time (528).

⁸³ Bas. 21.1.39, supplemented from Nov. 99.8.

[18] *Idem A. Menae pp. pr.* Testium facilitatem, per quos multa veritati contraria perpetrantur, prout possibile est, resecantes omnibus praedicimus, qui in scriptis a se debita rettulerunt, quod non facile audientur, si dicant omnis debiti vel partis solutionem sine scriptis fecisse velintque viles et forsitan redemptos testes super huiusmodi solutione producere, nisi quinque testes idonei et summae atque integrae opinionis praesto fuerint solutioni celebratae hique cum sacramenti religionem deposuerint sub praesentia sua debitum esse solutum, ut scientes omnes ita ea statuta esse non aliter debitum vel partem eius persolvant, nisi vel securitatem in scriptis capiant vel observaverint praefatam testium probationem:

his scilicet, qui iam sine scriptis debitum vel partem eius solverunt, praesenti sanctione merito excipiendis. 1. Sin vero facta quidem securitas sit, fortuito vero casu vel incendii vel naufragii vel alterius infortunii perempta, tunc liceat his qui hoc perpessi sunt causam peremptionis probantibus etiam debiti solutionem per testes probare damnumque ex amissione instrumenti effugere.

D. k. Iun. Constantinopoli dn. Iustiniano pp. A. II cons.

[19] *Idem A. Iuliano pp. pr.* Si quando invitos testes in pecuniariis causis ex nostra lege aliquis trahere maluerit, si quidem sua sponte fideiussionem suae personae sine damno praestare velint, hoc fieri, sin autem noluerint, non carcerali custodia detrudi, sed sacramento eos committi censemus. 1. Si enim pro toto litis certamine iuriurando credendum esse testium putaverunt hi qui eos produxerunt, multo magis praesentiam suam testibus sacramento eorum credere debent.

2. Sed cum oportet minime testes in huiusmodi casibus protelari et pro alienis commodis suas invenire difficultates, disponimus non amplius testes observare iudices compelli, postquam fuerint admoniti, nisi tantum quindecim dies, intra quos iudices provideant, quatenus cognitionem suscipiant, in qua testes necessarii visi fuerint, ut omnimodo licentia eis concedatur et alterutra parte cessante et minime eos

[18]⁸⁴ *The same Augustus to Menas, Praetorian Prefect. pr.* Restraining to the extent possible the heedlessness of witnesses, through whom many things contrary to the truth are perpetrated, We announce to all those who have reported in writing debts owed by themselves, that they will not readily be heard if they should say that they have made payment of all of the debt or of part of it without written documentation and they should want to produce lowly and perhaps corrupted witnesses concerning a payment of this kind, unless five witnesses suitable and of the highest and untarnished reputation have been present at the payment made openly and these testify under oath that the debt was paid in their presence, so that everyone, knowing that these measures have been enacted, should not pay off a debt or part of one in any other way, unless they gain assurance in written documentation or have observed the aforesaid proof by witnesses.

To be sure, these people who already have paid a debt or a part of one without written documentation are rightly to be exempted from the present sanction. 1. But if indeed a written receipt has been made, but it has been destroyed by an accident of a fire or shipwreck or some other misfortune, then the ones who have suffered this, upon proving the reason for the loss (of the documents), shall be permitted to prove the payment of the debt through witnesses and escape the loss resulting from the destruction of the documents.

Given June 1, at Constantinople, in the consulship of Our Lord Justinian, Ever Augustus, for the second time (528).

[19]⁸⁵ *The same Augustus to Julian, Praetorian Prefect. pr.* If ever someone, in accordance with Our law,⁸⁶ should prefer to dragoon unwilling witnesses in monetary (i.e., civil) cases, if they should be willing to offer suretyship for their own person without expense, We decree that this should happen; but if they are unwilling to do so, they should not be constrained by being held in jail, but be committed by an oath. 1. For if those who have produced them have thought that the witnesses' oath should be believed for the entire hearing of the case, all the more ought they to trust their witnesses for their presence because of their oath.

2. But since witnesses in cases of this type should not be hounded and encounter their own difficulties for other people's benefit, We dispose that witnesses not be compelled to wait for judges longer than fifteen days after they have been notified, within which time the judges should see at what point they will undertake the hearing in which the witnesses have been deemed to be necessary, so

⁸⁴ Combine with C. 4.2.17, 4.21.17, 4.30.14, 15?, and 5.15.3.

⁸⁵ Combine with C. 4.21.20. Lounghis *et al.* give March 18, 530.

⁸⁶ 16 above.

observare volente, si per executores admoniti venire noluerint, testes accipere et alterutra parte praesente, quae eos introducit, testimonia eorum capere. 3. His autem diebus effluentibus liceat quidem testibus decedere a iudice nullam habente licentiam eos, postquam afuerint, iterum retrahere: ipsum autem iudicem, si per eum steterit, quominus testimonium praestetur, parti laesae omnem iacturam pro huiusmodi causa illatam ex suis facultatibus resarcire.

D. XII k. April. Constantinopoli Lampadio et Oresta vv. cc. cons.

[20] *Idem A. Iuliano pp.* Cum apud compromissarios iudices testes fuissent producti, variatum erat, utrum deberet eorum depositionibus in iudicio litigator uti, an non esset audiendus. sancimus, si quidem in compromissis aliquid pro huiusmodi causa statutum est, hoc observari:

sin autem nihil conventum est, in huiusmodi casibus, si quidem supersint testes, licentiam habere eum, contra quem depositiones eorum proferuntur, si eas recusaverit, concedere testes iterum adduci et non opponi eis, quod iam testimonium suum dederunt, vel, si hoc concedere minime maluerit, depositiones eorum quasi factas accipere, omni iure legitimo quod ei competit adversus eas servato: sin autem omnes ab hac luce subtracti sunt, tunc necessitatem ei imponi fide scripturae approbata, in qua depositiones eorum referuntur, eas quasi factas accipere. sin vero res permixtae fuerint et quidam ex his mortui, alii viventes, tunc in superstitum quidem testimonio eandem electionem servari litigatori, adversus quem testimonia proferuntur, in morientium autem personas depositiones eorum non esse respuendas: omni, secundum quod iam praediximus, adversus eas et testes iure legitimo, quod ei competit adversus quem proferuntur, integro reservato.

D. VI k. April. Constantinopoli Lampadio et Oresta vv. cc. cons.

[21] ...

that in all circumstances they (sc. the judges) be granted the right, when one party or the other is both absent and unwilling to wait for them, if they have been unwilling to come after being notified by court clerks, to receive witnesses and to take their testimony in the presence of one party or the other that introduced them. 3. But when these days pass the witnesses should be permitted to depart from the judge, who has no permission to draw them back again after they have been away; but the judge himself, if it is because of him that the testimony not be offered, should make good out of his own resources all the loss inflicted on the injured party for a reason of this sort.

Given March 21, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[20]⁸⁷ *The same Augustus to Julian, Praetorian Prefect.* When witnesses have been produced before settlement arbitrators (*compromissarii iudices*), opinions varied whether the litigant ought to use their depositions in court, or whether he should not be heard. We ordain that, if in settlements anything has been established for such a case, this be observed (i.e., the depositions can be used).

But if nothing has been agreed upon in cases of this type, if the witnesses should be alive, the person against whom their depositions are brought forward should have the right, if he has refused them, to allow the witnesses to be summoned again and not to be opposed to them on the grounds that they have already given their testimony, or, if he prefers not to allow this, to accept their depositions as if complete, preserving every lawful right that he has against them (the depositions). If, however, all have been withdrawn from this light (i.e., are dead), the necessity is imposed on him, having approved the reliability of the transcript in which their testimonies are reported, of accepting their depositions as if complete. But if the situation is mixed and some of them are dead and others living, then the litigant against whom it is produced should have the same choice as to the testimony of the survivors, but as to dead persons their testimonies should not be rejected. Every lawful right is preserved for the one against whom the witnesses are produced, in accordance with what We have already declared, against the witnesses and their testimonies.

Given March 27, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[21] <A constitution has been lost here.>⁸⁸

⁸⁷ Combine with C. 2.55.5.

⁸⁸ Bas. 20.1.45 suggests that C. 1.5.21 was repeated.

**XXI De Fide Instrumentorum et Amissione Eorum et
Antapochis Faciendis et de His Quae sine Scriptura Fieri Possunt**

[1] *Imp. Antoninus A. Septimiae Marciae.* Debitores tuos quibuscumque rationibus debere tibi pecuniam si probaveris, ad solutionem compellet aditus praeses provinciae: nec oberit tibi amissio instrumentorum, si modo manifestis probationibus eos debitores esse apparuerit.

PP. v id. Sept. Antonino A. IIII et Balbino cons.

[2] *Imp. Alexander A. Maniliano.* Si uteris instrumento, de quo alius accusatus falsi victus est, et paratus es, si ita visum fuerit a quo pecuniam petis, eiusdem criminis te reum facere et discrimen periculi poenae legis Corneliae subire, non oberit sententia, a qua nec is contra quem data est appellavit nec tu, qui tunc crimini non eras subiectus, appellare debuisti.

PP. III k. Oct. Maximo II et Aeliano cons.

[3] *Idem A. Aeliano.* Si adversarius tuus apud acta praesidis provinciae, cum fides instrumenti quod proferebat in dubium revocaretur, non se usurum contestatus est, vereri non debes, ne ex ea scriptura, quam non esse veram etiam professione eius constitit, negotium denuo repetatur.

PP. III non. Mai. Alexandro A. II et Marcello cons.

[4] *Imp. Gordianus A. Marciano.* Illatae dispensatori pecuniae, si ob amissorum instrumentorum casum probatione defeceris, inspectio rationum fiscalium fidem demonstrabit.

D. II id. Febr. Gordiano A. et Aviola cons.

[5] *Idem A. Aurelio Prisco et Marco mil.* Sicut iniquum est instrumentis vi ignis extinctis debitores quantitatum debitarum renuere solutionem,

**Twenty-First Title The Reliability of Documents, Their Loss,
Making Counter-Receipts, and Matters That Can Be Transacted
Without Written Documentation⁸⁹**

[1]⁹⁰ *Emperor ANTONINUS Augustus to Septimia Marcia.* If you prove by whatever means that your debtors owe money to you, the provincial governor, when approached, will compel them to pay; nor will the loss of documents prejudice you as long as it is apparent by clear proofs that they are your debtors.

Posted September 9, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2] *Emperor ALEXANDER Augustus to Manilianus.* If you use a document concerning which another person has been accused and convicted of forgery, and you were prepared, if the person from whom you seek money thought so, to make yourself a defendant on the same charge and to undergo the risk of the peril of the Cornelian law's punishment, the verdict will not prejudice you which the person against whom it was given has not appealed and which you, who at that time had not been subject to the charge, did not need to appeal.

Posted September 29, in the consulship of Maximus, for the second time, and Aelianus (223).

[3] *The same Augustus to Aelianus.* If your adversary has attested in the written record (*apud acta*) of the provincial governor that he will not use a document that he was bringing forward, since its reliability was being called into question, you should not fear that a suit will begin anew on the basis of the writing, which has been established not to be genuine even by his own acknowledgment.

Posted May 5, in the consulship of Alexander Augustus, for the second time, and Marcellus (226).

[4] *Emperor GORDIAN Augustus to Marcianus.* An inspection of the accounts of the Treasury (*rationum fiscalium*) will demonstrate that money was paid to the paymaster (*dispensator*) if on account of the unfortunate loss of documents you are lacking proof (of payment).

Given February 12, in the consulship of Gordian Augustus and Aviola (239).

[5]⁹¹ *The same Augustus to Aurelius Priscus and Marcus, soldiers.* Just as it is unjust that debtors refuse the payment of the amounts owed when documents

⁸⁹ See D. 22.4.

⁹⁰ = C. Greg. Visig. 21.1.

⁹¹ = C. Greg. Visig. 12.2.

ita non statim casum conquerentibus facile credendum est. intellegere itaque debetis non existentibus instrumentis vel aliis argumentis probare fidem precibus vestris adesse.

PP. III k. Iul. Sabino II et Venusto cons.

[6] *Impp. Diocletianus et Maximianus AA. Luscidi.* Statum tuum natali professione perdita mutilatum non esse certi iuris est.

D. XIII k. Febr. Nicomediae Maximo II et Aquilino cons.

[7] *Idem AA. Zinimae.* Si sollemnibus stipendiis honeste sacramento solutus es, licet super huiusmodi re instrumenta, ut dicis, facta perdita sunt, tamen, si aliis evidentibus probationibus veritas ostendi potest, veteranorum privilegia etiam te usurpare posse dubium non est.

D. xv k. Iun. Maximo II et Aquilino cons.

[8] *Idem AA. Alexandrae.* Si constiterit proprietatem possessionis de qua agitur apud vos esse, providebit iudex ex persona fructuarii nullum praeiudicium dominio comparari propter amissionem instrumentorum.

D. xv k. Mart. Diocletiano III et Maximiano AA. cons.

[9] *Idem AA. et CC. Aristaeneto.* Instrumentis etiam non intervenientibus semel divisio recte facta non habeatur irrita.

PP. VI k. Iul. AA. cons.

[10] *Idem AA. et CC. Victorino.* Cum instrumentis etiam non intervenientibus venditio facta rata maneat, consequenter amissis etiam quae intercesserant non tolli substantiam veritatis placuit.

D. VIII k. Nov. Reginassi CC. cons.

are destroyed by the force of fire, so too must one not easily believe those immediately lamenting the misfortune. Accordingly, you should understand, if documents do not exist, how to prove by other arguments that there is credibility in your petition.

Posted June 29, in the consulship of Sabinus, for the second time, and Venustus (240).

[6] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Luscides.* The law is certain that your status is not damaged by the loss of your birth declaration.

Given January 20, at Nicomedia, in the consulship of Maximus, for the second time, and Aquilinus (286).

[7] *The same Augusti to Zinima.* If you have been released honorably from the customary military service by oath, although, as you say, the documents concerning a matter of this kind have been destroyed, if the truth can be shown by other clear proofs, there is no doubt that you can claim the privileges of veterans.

Given May 18, in the consulship of Maximus, for the second time, and Aquilinus (286).

[8] *The same Augusti to Alexandra.* If it has been established that the ownership of the property in litigation belongs to you, the judge will see to it that no prejudice is created to your ownership from the person of the usufructuary (*fructuarius*) on account of the loss of documents.

Given February 15, in the consulship of Diocletian, for the third time, and Maximian, Augusti (287).

[9] *The same Augusti and the Caesars to Aristaenetos.* Even if no documents were prepared, a division (of property), once made properly, should not be considered invalid.

Posted June 26, in the consulship of the Augusti (293).

[10] *The same Augusti and Caesars to Victorinus.* Since a sale transacted even without the preparation of documents remains valid, it has properly been decided that the reality of the truth is not destroyed by the loss of documents that had been prepared.

Given October 25, at Reginassi, in the consulship of the Caesars (294).

[11] *Idem AA. et CC. Theageni.* Emancipatione facta, etsi actorum tenor non existat, si tamen aliis indubiis probationibus vel ex personis vel ex instrumentorum incorrupta fide factam esse emancipationem probari possit, actorum interitu veritas convelli non solet.

D. III id. Nov. CC. cons.

[12] *Idem AA. et CC. Dionysiae.* Non idcirco minus in vacuam inductus praedii donationis causa possessionem, quod eius facti praetermissum instrumentum adseveratur, hanc obtinere potes.

D. id. Dec. Nicomediae CC. cons.

[13] *Idem AA. et CC. Leontio.* Apud eos, qui rem gestam ignoraverunt, amissorum instrumentorum habita testatio nihil ad probationem veritatis prodesse potest.

D. XVI k. Ian. Nicomediae CC. cons.

[14] *Idem A. et C. ad Severum comitem Hispaniarum.* Scripturae diversae et fidem sibi invicem derogantes ab una eademque parte prolatae nihil firmitatis habere potuerunt.

D. IIII non. Mai. Constantinopoli Dalmatio et Zenophilo cons.

[15] *Imp. Constantinus A. ad populum.* In exercendis litibus eandem vim obtinent tam fides instrumentorum quam depositiones testium.

D. Romae XII k. Aug. Gallicano et Basso cons.

[16] *pr.* Ἐὰν ἐναγόμενός τις ἀρνήσῃται χεῖρα ἰδίαν προφερομένην ἐν γραμματεῖᾳ ἢ ἐν πυκτῇ ἢ ἐν ἐτέρῳ χάρτῃ, εἰ μὲν ἀπὸ συγκρίσεως ἐλεγχθεῖ, τοῦτέστιν αὐτοῦ ἐτέρας προφερομένης χειρὸς καὶ ἀντεξεταζομένης πρὸς τὴν ἐν τῷ γραμματεῖᾳ κειμένην, διδόναι αὐτὸν λόγῳ προστίμου τῷ ἐνάγοντι ὑπὲρ αὐτοῦ τοῦ ψεύδους κδ' νομίσματα. 1. Ἐὰν δὲ ἡ συμβολαιογράφος παρενεχθῇ, παρ' ᾧ τὸ συμβόλαιον ἐγράφη, ἢ καὶ ἕτεροὶ τινες μαρτυροῦντες τῇ ἀληθείᾳ, τότε αὐτὸν πρὸς τῷ ἐπιτιμίῳ τῶν κδ' νομισμάτων οὐδὲ

[11] *The same Augusti and Caesars to Theagenes.* When an emancipation has taken place, even if the record (*tenor*) of the acts should not exist, nevertheless if it could be proved that the emancipation took place by other indisputable evidence, either from persons or from the unquestioned trustworthiness of documents, the truth is not customarily undermined by the destruction of the acts.

Given on November 11, in the consulship of the Caesars (294).

[12] *The same Augusti and Caesars to Dionysia.* Having been brought into (*inductus*: masculine!) quiet possession of a property given as a gift, you are not any the less able to obtain this for the reason that a document concerning this fact is alleged to have been overlooked.

Given December 13, at Nicomedia, in the consulship of the Caesars (294).

[13] *The same Augusti and Caesars to Leontius.* Testimony about the loss of documents cannot be of help for proving the truth before those who were unaware that a matter had been carried out.

Given December 17, at Nicomedia, in the consulship of the Caesars (294).

[14]⁹² *The same Augustus and Caesar to Severus, Count of the Spains (Comes Hispaniarum).* Different written documents, brought forth by one and the same party, if they detract from their respective trustworthiness, have not been able to have any reliability.

Given May 4, at Constantinople, in the consulship of Dalmatius and Zenophilus (333).

[15] *Emperor CONSTANTINE Augustus to the People.* The trustworthiness of documents holds the same force as the testimonies of witnesses in prosecuting lawsuits.

Given July 21, at Rome, in the consulship of Gallicanus and Bassus (317).

[16]⁹³ *pr.* If a defendant in a lawsuit should deny his own handwriting introduced in a written document or a tablet or in any other writing material, if he should be shown to be wrong through a comparison, that is, if another example of his handwriting should be introduced and compared with the one lying in the document, he should pay the plaintiff as punishment 24 solidi for his lie. 1. But if the notary by whom the document was written should be produced or other people attesting to the truth, then, in addition to the penalty of 24 solidi,

⁹² = C.Th. 11.39.2; combine with C. 8.53.27; this fragment should be placed after 15; the emperor is Constantine.

⁹³ = Bas. 22.1.75 (address lost).

παρρησίαν δύνασθαι ἔχειν πρὸς τὸ ἀντιτιθέναι τὴν τῆς ἀναργυρίας παραγραφὴν, λέγοντα ὅτι, κὰν τὸ συμβόλαιον ἐγένετο, οὐκ ἐδόθησαν τὰ ἐν αὐτῷ γεγραμμένα, ἀλλὰ πάντως καταδικάζεσθαι, κὰν εἰ μηδὲν αὐτῷ ταῖς ἀληθείαις κατεβλήθη.

2. Ταῦτα μὲν, ἐὰν ἐνάγηται τις ἐξ οἰκείου συναλλάγματος. εἰ δὲ ἐπίτροπός ἐστιν ἢ κουράτωρ ἑνὸς τῶν κουρατορευομένων προσώπων, ἄρρην εἴτε θήλεια κατὰ τὰς διατάξεις ἐπιτροπεύουσα τῶν ἰδίων παιδῶν, καὶ χεῖρα ἰδίαν προφερομένην ἐν τῷ συναλλάγματι τῶν ἐπιτροπευομένων ἢ κουρατορευομένων ἀρνήσεται, τῆνικαῦτα, εἰ μὲν ἀπὸ μόνης συγκρίσεως ἐλεγχθεῖσαν ψευδόμενοι, παρέχειν αὐτοὺς τὰ κδ' νομίσματα· εἰ δὲ ἐκ παραγωγῆς συμβολαιογράφου ἢ μαρτύρων, τὴν μὲν τῆς ἀναργυρίας παραγραφὴν μὴ ἀναιρεῖσθαι ταῖς ἐπιτροπευομένοις ἢ κουρατορευομένοις προσώποις (οὐδὲν γὰρ ἡμαρτον ἐκεῖνοι), αὐτοὺς δὲ τοὺς ἐπιτρόπους ἢ κουράτορας ἐτέρους κδ' χρυσοὺς λόγῳ προστίμου διδόναι τῷ ἐνάγοντι, ἔχοντων τῶν ἐπιτροπευομένων καὶ κουρατορευομένων σωζομένην αὐτοῖς τὴν τῆς ἀναργυρίας παραγραφὴν. οὐδὲ γὰρ δίκαιόν ἐστιν αὐτοὺς ἐξ ἄλλοτρίων ἀμαρτημάτων ζημιοῦσθαι.

3. Ταῦτα περὶ τῶν ἐναγομένων εἰποῦσα ἡ διάταξις ἔρχεται καὶ εἰς τὸ τῶν ἐναγόντων πρόσωπον κελεύουσα, ἵνα, ἐὰν ὁ ἐνάγων χεῖρα ἰδίαν ἀρνήσεται κειμένην ἐν χάρτῃ κατ' αὐτοῦ προφερομένῳ (τυχὸν ἐν ἀποληπτικῇ ὁμολογίᾳ), καὶ αὐτὸς ὁμοίως, εἰ μὲν ἐκ μόνης συγκρίσεως ἐλεγχθεῖ, παράσχη τὰ κδ' νομίσματα, εἰ δὲ ἐκ παραγωγῆς συμβολαιογράφου ἢ μαρτύρων, τῆνικαῦτα πᾶσι τρόποις ὑπολογίζεσθαι αὐτὸν τὰ ἐν ἐκείνῃ τῇ ἀποδείξει περιεχόμενα, κὰν μὴ ταῖς ἀληθείαις κατεβλήθησαν ἐπὶ αὐτοῦ. 4. Ταῦτα, ἐὰν οἰκείῳ ὀνόματι ἐνάγηται. ἐὰν δὲ ἐπίτροπός ἐστιν ἢ κουράτωρ, δίδωσι μὲν διπλάσιον τὸ ἐπιτίμιον τῶν κδ' νομισμάτων, ὁ δὲ ἐπιτροπευόμενος ἢ κουρατορευόμενος δύναται ἀντιτιθέναι τῇ ἀποδείξει τὴν ἀναργυρίαν.

[17] *Imp. Iustinianus A. Menae pp. pr.* Contractus venditionum vel permutationum vel donationum, quas intimari non est necessarium, dationis etiam arrarum vel alterius cuiuscumque causae, illos tamen, quos in scriptis fieri placuit, transactionum etiam, quas instrumento recipi convenit, non aliter vires habere sancimus, nisi instrumenta in mundum recepta subscriptionibusque partium confirmata et, si per tabellionem conscribantur, etiam ab ipso completa et postremo a partibus absoluta sint, ut nulli liceat prius, quam haec ita processerint, vel a scheda conscripta, licet litteras unius partis vel ambarum habeat, vel ab ipso mundo, quod necdum est impletum et absolutum, aliquod ius sibi ex eodem contractu vel transactione vindicare: adeo ut nec illud in

he cannot have any right to make the defense of money not paid, saying that, even if the document is genuine, the things written in it were not given, but he should be condemned altogether, even if in truth nothing was paid to him.

2. These measures apply if someone should be sued on the basis of a private contract. But if he is a *tutor* or a *curator* of one of the persons who require a *curator*, whether a male or a female serving as *tutor* of her own children in accordance with the constitutions, and should deny his or her own hand when it is adduced in the contract of the persons under tutorship or curatorship, then, if they should be caught lying on the basis of a single comparison, they should pay the 24 solidi; if, however, (they should be caught) as the result of the introduction of a notary or witnesses, the defense of money not paid should not be taken away from the persons under tutorship or curatorship – for they committed no wrong – but the *tutores* themselves or *curatores* should pay another 24 solidi as a penalty to the plaintiff, with the persons under tutorship or guardianship preserving intact the defense of money not paid to them. For it is not just that they should be penalized for the misdeeds of others.

3. Having said these provisions about those who are sued, the constitution goes on also to the plaintiffs, ordering that, if the plaintiff should deny his own hand lying in writing material (*charte*) introduced against himself (for example in a receipt), he likewise, if he should be shown to be wrong through a single comparison, should pay the 24 solidi, but if (is should be shown to be wrong) as a result of the production of a notary or witnesses, then he should be liable in every way for the matters contained in the document, even if in truth they have not been paid to him. 4. These things apply if he should sue in his own name. But if he is a *tutor* or a *curator*, he gives twice the fine of 24 solidi, while the person under tutorship or curatorship can offer against the document the defense of money not paid.

[17]⁹⁴ *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect. pr.* We ordain that contracts of sales or barter (*permutationes*) or gifts, which do not have to be registered, or of the giving of earnest money or of any other transaction but those which it has been decided to have in writing, and also contracts of settlements, which it has been agreed to record in a document, do not otherwise have validity, unless the documents have been rendered in fair copy (*mundum*) and have been confirmed with the signatures of the parties, and, if they should be written by a notary, they have been completed (*completa*) by that very person and afterwards have been executed (*absoluta*) by the parties, so that no one be permitted to claim for himself any right from the same contract or settlement before these matters have proceeded, whether it was written from a draft (*scheda*), although it might have the signature of one party or both, or from the fair copy itself, which has not yet been completed

⁹⁴ Combine with C. 4.2.17, 4.20.18, 4.30.14, 15(?), 5.15.3.

huiusmodi venditionibus liceat dicere, quod pretio statuto necessitas venditori imponitur vel contractum venditionis perficere vel id quod emptoris interest ei persolvere.

1. Quae tam in postea conficiendis instrumentis quam in his, quae iam scripta nondum autem absoluta sunt, locum habere praecipimus, nisi iam super his transactum sit vel iudicatum, quae retractari non possunt: exceptis emptionalibus tantum instrumentis iam vel in scheda vel in mundo conscriptis, ad quae praesentem sanctionem non extendimus, sed prisca iura in his tenere concedimus. 2. Illud etiam adicientes, ut et in posterum, si quae arrae super facienda emptione cuiuscumque rei datae sunt sive in scriptis sive sine scriptis, licet non sit specialiter adiectum, quid super isdem arris non procedente contractu fieri oporteat, tamen et qui vendere pollicitus est, venditionem recusans in duplum eas reddere cogatur, et qui emere pactus est, ab emptione recedens datis a se arris cadat, repetitione earum deneganda.

D. k. Iun. Constantinopoli dn. Iustiniano A. II cons.

[18] *Idem A. Menae pp.* Iudices sive in hac inclita urbe sive in provinciis ea quae disposuimus (ut possint, si hoc perspexerint, occasione testium in aliis locis degentium litigantes vel procuratores eorum ibi destinare, ut depositionibus sub utriusque partis praesentia factis res ad eos referatur) etiam in illis servare volumus, qui prolatis instrumentis fidem adhibere exiguntur, ut, si poposcerint in aliis locis id eis facere permitti et hoc iuste peti iudex invenerit, similis proferatur sententia, ut, postquam in locis opportunis fides instrumento data vel minus data fuerit, referatur negotium ad priorem iudicem.

D. VIII id. April. Decio vc. cons.

[19] *Idem A. Demostheni pp. pr.* Plures, apochis vel redituum vel usurarum perceptis, si quando super his fuerit dubitatio exorta, eas habere negando ius agentium faciunt vacillare, cum coloni ad dominum certantes et sibi iniquam forte libertatem vindicantes vel debitores creditoribus suis temporalem praescriptionem opponere cupientes ad

and executed. This is true to the extent that it should not be permitted in sales of this type to say that, once the price is established, the seller is bound either to complete the contract of sale or to pay the buyer his interest.

1. We order that these matters have place both in the preparation of documents hereafter as well as in those which have already been written but have not yet been executed, unless there has already been a settlement or a judgment over these matters that cannot be reconsidered. Excepted alone are purchase documents that have been written already in a draft (*scheda*) or in a fair copy, to which We do not extend the present ordinance, but We concede that the old law holds in these. 2. We add, however, this provision, that in the future, if any earnest money has been given in connection with making a purchase of anything whatsoever whether accompanied by writing or not, although no specific provision has been added as to what should happen concerning the same earnest money if the contract does not proceed, nevertheless both the person who has promised to sell, when refusing the sale, should be compelled to repay double the sum, and the person who has contracted to buy, if he withdraws, should lose the earnest money that he has given, with the right of reclaiming it to be denied him.

Given June 1, at Constantinople, in the consulship of Our Lord Justinian Augustus, for the second time (528).

[18] *The same Augustus to Menas, Praetorian Prefect.* We want judges, whether in this Famous City or in the provinces, to maintain what We have set in place⁹⁵ – namely, that they might, if they have examined this, in the circumstance of witnesses residing in other locations, designate litigants or their procurators there, so that, when the depositions have been made in the presence of both parties, the matter might be reported to them – also for those witnesses who are compelled to attest to their trustworthiness when documents have been introduced, so that, if they have requested that it be permitted for them to do this in another location and the judge has found that this has been asked justly, a similar verdict should be rendered, so that, after the trustworthiness has or has not been attested to for the document in a convenient location, the business should be referred back to the first judge.

Given April 6, in the consulship of the vir clarissimus Dectus (529).

[19] *The same Augustus to Demosthenes, Praetorian Prefect. pr.* Many people cause the right of litigants to totter, after receipts for rents (*reditus*) or interest have been taken, if ever a doubt about these has arisen, by denying their having occurred, (for example,) when bound tenants (*coloni*) vying to be owners and perhaps claiming for themselves an unjust liberty, or debtors desiring to raise the defense of a long-time prescription (*temporalis praescriptio*) against

⁹⁵ C. 4.20.16.

easdem infitiationes perveniunt. 1. Quod resecantes iubemus, ut in praefatis casibus vel aliis privatis similibus, si voluerit is qui apocham conscripsit vel exemplar cum subscriptione eius qui apocham suscepit ab eo accipere vel antapocham suscipere, omnis ei licentia hoc facere concedatur: necessitate imponenda apochae susceptori antapocham reddere, ita tamen, ut si hoc is qui apocham conscribit facere neglexerit vel non curaverit, nullum ei praeiudicium ex eo, quod antapocham non recepit, generetur, cum hoc, quod pro quibusdam introductum est, inferre eis iacturam minime rationi convenit aequitatis.

D. XII k. Oct. Chalcedone Decio vc. cons.

[20] *Idem A. Iuliano pp. pr.* Comparationes litterarum ex chirographis fieri et aliis instrumentis, quae non sunt publice confecta, satis abundeque occasionem criminis falsitatis dare et in iudiciis et in contractibus manifestum est. 1. Ideoque sancimus non licere comparationes litterarum ex chirographis fieri, nisi trium testium habuerint subscriptiones et prius litteris eorum fides imponatur vel ex ipsis hoc deponentibus (sive cunctis sive omnimodo duobus ex his) sive comparatione litterarum testium procedente, et tunc ex huiusmodi chartula iam probata comparatio fiat.

2. Aliter etenim fieri comparationem nullo concedimus modo, licet in semet ipsuin aliquis chartam conscriptam proferat, sed tantummodo vel ex forensibus vel publicis instrumentis vel ex huiusmodi chirographis quae enumeravimus comparatione trutinanda. 3. Omnes autem comparationes non aliter fieri concedimus, nisi iuramento antea praestito ab his qui comparationes faciunt fuerit adfirmatum, quod neque lucri causa neque inimicitii neque gratia tenti huiusmodi faciunt comparationem.

4. Et hoc observari tam in omnibus sacris scriniis nostris quam in apparitione omnis sublimissimae praefecturae nec non magisteriae potestatis ceterisque omnibus iudiciis, quae in orbe nostro constituta sunt, his omnibus in posterum observandis. comparationes etenim iam antea factas retractari extra periculum minime est.

D. XIII k. April. Constantinopoli Lampadio et Oresta vv. cc. cons.

creditors, resort to the same denials. 1. To curtail this We order that, in the afore-said or in other similar private cases, if the person who has written a receipt should wish either to receive a copy from the person who took the receipt with his signature or to take a counter-receipt, he should be granted every right to do this. The person taking the receipt is required to return a counter-receipt with this provision that, if the person who wrote the receipt has neglected or not taken care to do this, no prejudice should arise against him because he did not receive a counter-receipt, since it is not consistent with the logic of fairness that this measure, which has been introduced for certain people, should cause a loss to them.

Given September 17,⁹⁶ in the consulship of the viri clarissimi Chalcedon and Decius (529).

[20]⁹⁷ *The same Augustus to Julian, Praetorian Prefect. pr.* It is manifest that comparisons of handwriting from promissory notes (*chirographa*) or other documents that have not been completed publicly readily provide an opportunity for a charge of forgery both in courts and in contracts. 1. For this reason We ordain that comparisons of handwriting may not be done from promissory notes unless they have the signatures of three witnesses and trust in the handwriting is previously verified either through their own attestation – whether all of them or at least two – or when a comparison of the handwriting proceeds, and then the comparison should take place on the basis of this type of document (whose genuineness has been) approved.

2. We do not allow a comparison (of handwriting) to take place in any other way, although someone may introduce a signed document against himself, but handwriting is to be compared only on the basis of judicial or public documents or of promissory notes of the type that We have enumerated. 3. We also do not allow any comparisons to be made in any other way unless affirmed under an oath offered previously by those who make the comparisons, that they are making a this type of comparison neither for the sake of gain nor bound by enmity or influence.

4. And this is to be observed both in all Our sacred bureaus (*scrinia*) and by the servants of every most sublime prefecture as well as of (every) magistral office (*magisteria potestas*) and in all the other courts that have been established in Our world. All these measures are to be observed (only) in the future. For it is not without danger if comparisons previously made be reconsidered.

Given March 18,⁹⁸ at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

⁹⁶ September 17 is Krüger's date (adopted also by Lounghis *et al.*), although the manuscripts say September 20.

⁹⁷ Combine with C. 4.20.19.

⁹⁸ Krüger, based on C. 4.20.19; Lounghis *et al.* concur.

[21] *Idem A. Iuliano pp. pr.* Cum quidam instrumentum protulerit vel aliam chartulam eique fidem imposuerit, postea autem persona, contra quam ista chartula vel instrumentum prolatum est, quasi falsum hoc constitutum redarguere niteretur, ne diutius dubitetur, utrum necessitatem ei qui protulit imponi oporteret repetita vice hoc proferre, an sufficiat ei fides iam pridem approbata, sancimus, si aliquid tali eveniat, eum, qui petit eam chartam iterum proferri, prius sacramentum praestare, quod existimans se posse falsum redarguere quod prolatum est ad huiusmodi venit petitionem.

quid enim, si, cum nosset deperditam esse chartam vel forte concrematam vel alio modo diminutam, hanc requiri adsimulans et ad difficultatem productionis respiciens huiusmodi facit petitionem?

1. Et postquam hoc ab actore vel petitore fuerit iuratum et inscriptio-num pagina apud competentem iudicem deposita, tunc necessitatem imponi ei, qui protulit chartam de qua quaeritur, iterum eam apud iudicem criminis proferre, quatenus possit apud eum crimen falsitatis ventilari. 2. Sin autem dicat non esse sibi possibile eam ostendere, quia per fortuitos casus huiusmodi copia ei abrepta est, tunc subeat sacramentum, quod neque habet eandem chartulam neque alii eam dedit nec apud alium voluntate eius constituta est nec dolo malo fecit, quominus ea appareat, sed re vera ipsa chartula sine omni dolo deperdita est et productio eius sibi impossibilis est: et si tale subeat sacramentum, ab huiusmodi necessitate eum relaxari.

3. Quod si praedictum iusiurandum subire minime maluerit, tunc quasi falsa chartula nullas habeat vires adversus eum, contra quem prolata est, sed sit penitus vacuata: neque enim ulterius poenam produci contra eos qui non iuraverunt volumus, cum forsitan quidam subtili reverentia tenti nec verum sacramentum praestare patiuntur. 4. Eandem autem copiam ei praestamus, donec causa apud iudicem ventilatur. si enim iam plenissimum finem accepit et neque per appellationem suspensa est neque per solitam retractationem adhuc lis vivere speratur, tunc satis durum est huiusmodi querellae indulgeri, ne in infinitum causae retractentur et sopita iam negotia per huiusmodi viam iterum aperiantur et contrarium aliquid nostro eveniat proposito.

[21] *The same Augustus to Julian, Praetorian Prefect. pr.* When someone has produced a document or another writing and has averred its reliability, but afterwards the person against whom that writing or document has been produced should endeavor to reply that it is forged, lest there be doubt any longer whether it be necessary that the obligation be imposed on the person who produced it to do so a second time (*repetita vice*), or whether the reliability already approved should be sufficient for him, We ordain, if something like this should transpire, that the person who is asking that the document be produced again should first offer an oath that he has come to this type of request on the basis of his judgment that he can prove as forged what has been produced.

But what about the case in which if, when he knew that the document had been lost or perhaps burned up or otherwise damaged, he makes a request of this type under the pretence that the document is being asked for with an eye to the difficulty of producing it?

1. And after this was sworn to by the plaintiff or petitioner, and the page with signatures has been deposited with a competent judge, then the necessity is imposed on the one who produced the document about which there is a question to produce it again before the judge for the charge, so that the charge of forgery can be aired before him. 2. But if he should say that it is not possible for him to show this (the document), because his access to it has been snatched away because of unavoidable accidents, then he should submit to an oath that he neither has this document nor has he given it to another person nor has it been placed with another person by his will, nor has he acted with malicious intent to prevent it from appearing, but in fact the document itself without any deceit has been lost and its production is impossible for him; and if he should submit to such an oath than he should be released from the necessity of this type.

3. But if he prefers not to submit to swearing the aforesaid oath, then the document, as if forged, should have no force against the person against whom it has been submitted, but it should be completely void; for We do not want punishment to be directed any longer at those who have not sworn, since perhaps some people are bound by a subtle reverence and do not endure to offer a true oath. 4. However, We offer him the same opportunity, until the case is aired before the judge. For if the case has already received its final disposition and has not been suspended because of an appeal, and there is no hope for the suit to remain alive through the customary reconsideration, then it is quite harsh to indulge this kind of complaint, lest cases be considered endlessly and business that has already been put to rest be opened again through this kind of pathway and some outcome arise contrary to Our enactment.

D. v k. Mart. Lampadio et Oresta vv. cc. conss.

[22] [Ὁ αὐτὸς βασιλεὺς.] **pr.** Ἐὰν τις ἀπαιτούμενος ἐν δικαστηρίῳ παραγαγεῖν δικαίωμα οὐ καθ' ἑαυτοῦ, ἀλλὰ καθ' ἑτέρου τινός, συμβαλλόμενον δὲ ἐτέρῳ τινί, παραιτεῖται τοῦτο παραγαγεῖν ὥς ἐκ τούτου βλάβην εὐλαβούμενος, ὁ δὲ ἀπαιτῶν τὸν χάρτην προενεχθῆναι λέγει μηδὲν αὐτὸν ἀδικεῖσθαι, ἀλλ' ἢ χρήματα εἰληφέναι παρὰ τῶν μελλόντων ἐλέγχεσθαι ὑπὸ τοῦ προφερομένου δικαίωματος ἢ ἑτέραν τινὰ προβάλλεσθαι πρόφασιν, ἑαυτὸν δὲ μεγάλα βλάπτεσθαι μὴ προφερομένου τοῦ χάρτου, βούλεται μὲν ἡ διάταξις τὸν ἔχοντα τὸ δικαίωμα προφέρειν αὐτό, εἰ μηδὲν ἐκ τῆς προκομιδῆς αὐτοῦ μέλλει καταβλάπτεσθαι· εἰ δὲ τῇ ἀληθείᾳ βλάβην αὐτῷ ποιεῖ προφερόμενον τὸ δικαίωμα, μὴ ἀναγκάζεσθαι αὐτὸν προκομίζειν αὐτό, ἐπειδὴ συμφέρει αὐτῷ μᾶλλον κρύπτειν ἢ δημοσιεύειν αὐτό. 1. Εἰ δὲ ὁ τοῦ συμβολαίου δεόμενος διαβεβαιοῦται μηδὲν αὐτὸν ἀδικεῖσθαι, ὅρκον διδόντω μόνον, ὥς νομίζων βλάβην περὶ τὴν ἰδίαν οὐσίαν ὑπομένειν ἐκ τῆς τοῦ συμβολαίου προκομιδῆς διὰ τοῦτο παραιτεῖται προκομίσαι.

2. Ἴνα δὲ μὴ αὐτὸ τοῦτο τὸ μὴ κερδάναι τὰ ἐπαγγελθέντα αὐτῷ πρὸς τὸ μὴ κομίσαι τὸν χάρτην βλάβην οἰκείαν νομίζῃ, περιεργότερον παρεχέτω τὸν ὅρκον, λέγων, ὅτι οὐ διὰ τὸ λαβεῖν χρήματα ἢ ἑτερόν τι διὰ τὸ μὴ προκομίσαι τὸν χάρτην ἢ διὰ τὸ ἔχειν ἐπαγγελίαν δόσεως οὔτε διὰ φόβον ἐκείνου, καθ' οὗ ζητεῖται τὸ δικαίωμα, οὔτε διὰ φιλίαν αὐτοῦ παραιτεῖται τὴν τοῦ χάρτου προκομιδὴν, ἀλλ' ὥς ἐξ ὀρθοῦ περὶ τὴν ἰδίαν οὐσίαν μεγάλα βλαπτόμενος. 3. Ὡς περ γὰρ ὁ νομιζόμενος εἰδέναι τὸ ἀληθὲς περὶ τίνος ὑποθέσεως ἀναγκάζεται καὶ ὅκων πρὸς μαρτυρίαν, καὶ οὐδὲ εἰ ἐπαγγελίαν ἔχει χρημάτων ὑπὲρ τοῦ μὴ μαρτυρῆσαι οὐδὲ εἰ κατὰ φίλων ἔρχεται μαρτυρῆσαι, παραιτεῖται τὴν μαρτυρίαν, οὕτως οὐδὲ τὰ συμβόλαια ἀπαιτούμενος προενεγκεῖν οὔτε διὰ τὸ εἰληφέναι τι ἢ ἐλπίζειν λαμβάνειν οὔτε διὰ φιλίαν τῶν μελλόντων ἐκ τοῦ συμβολαίου βλάπτεσθαι δύναται τὴν προκομιδὴν αὐτοῦ παραιτεῖσθαι.

4. Ἄλλ' εἰ μὲν τις ἐπομόσεται μὴ ἔχειν τὸ ζητούμενον δικαίωμα, μηδὲ ὅλως ἀναγκάζεσθαι προφέρειν ὅπερ μὴ ἔχει· εἰ δὲ οὐκ ἀνέχεται τὸν τοιοῦτον ὅρκον ὑποσχεῖν, πάντως ἀναγκάζεσθω προφέρειν τὸ ἐπιζητούμενον δικαίωμα· εἰ δὲ ἑαυτὸν ἀποκρύψει ὥς μήτε ὁμόσαι μήτε παραγαγεῖν τὸ δικαίωμα, πᾶσαν τὴν ἐκ τούτου συμβησομένην ζημίαν τῷ δεδομένῳ τοῦ δικαίωματος οἴκοθεν καταβαλλέτω.

Given February 25, in the consulship of the viri clarissimi Lampadius and Orestes (530).⁹⁹

[22]¹⁰⁰ (*The same Augustus*). **pr.** If someone is asked in a court to produce a document, not against himself, but against some other person, and the document benefits another person, and he declines to produce this out of caution that he will incur harm from it, but the person demanding that the document be produced says that he is not being injured (*adikeisthai*), but that he has either taken money from the people who are about to be scrutinized on the basis of the document being produced or that some other pretext is being proffered, but that he himself (the claimant) is greatly harmed if the document is not produced, the constitution wants the one who has the document to produce it if he is not going to be harmed by its being brought forward. But if in truth producing the document causes harm to him, he is not to be compelled to produce it, since it is more to his benefit to hide it than to make it public. 1. But if the one requiring the contract affirms that he (the one who has it) is not at all injured (by its production), let the latter give an oath on one matter, that he declines to produce the document for the reason that he thinks that he will endure harm to his property from its production.

2. So that he not reckon as a personal loss not obtaining what was promised to him for not producing the document, let him offer a more elaborate oath, saying that he does not refuse the production of the document because he took money or received some other consideration for not producing it, or because he has a promise of being given something or because of fear of the person against whom the document is sought, or because of friendship with that person, but because he will suffer directly great harm concerning his private property. 3. For just as one who is considered to know the truth about some question is compelled to testify even unwillingly, and he does not refuse testifying even if he has a promise of money not to testify or if he is going to testify against friends, thus the person who is asked to produce a contract cannot refuse its production either because he has received something or hopes to do so or because of friendship with those who will be injured by the contract.

4. But if someone swears that he does not have the document being sought, he certainly is not compelled to produce what he does not have. But if he is unwilling to offer such an oath, he should by all means be compelled to produce the requested document; but if he hides so that he does not have to swear or produce the document, then he must pay from his own property the entire loss resulting from this to the person requesting the document.

⁹⁹ Krüger amends this to "February 20, in the post-consulate of Lampadius and Orestes ..." (i.e., 531), a date accepted by Lounghis *et al.*

¹⁰⁰ Bas. 22.1.80. Lounghis *et al.* date this constitution to between 531 and 534.

5. Τῶν αὐτῶν κρατούντων καὶ εἰς τὰ ἀργυροπρατικά βρέβια ἢ τὰ παρ' ἐτέρων τινῶν συνταπτόμενα, ἅπερ τις ἐπιζητεῖ προκομισθῆναι οὐ κατὰ τῶν τὰς πυκτὰς ταύτας συντεθεικότων, ἀλλὰ καθ' ἐτέρων τινῶν. 6. Ταῦτα δὲ τότε κρατεῖν ἢ διάταξις βούλεται, ὅτε ἐπὶ τῆς αὐτῆς πόλεως διάγουσιν ὁ θέλων προκομισθῆναι τὸ δικαίωμα ἢ τὰς πυκτὰς καὶ ὁ τοῦτο λεγόμενος ἔχειν καὶ ὁ δικάζων τῇ ὑποθέσει· οὐδὲ γὰρ ἀναγκάζεσθαι δεῖ τὸν ἔχοντα δικαιώματα εἰς ἑτέραν χώραν ἐκπέμπειν αὐτὰ ἢ κινδυνεύειν ἐπ' αὐτοῖς διὰ τὴν ἑτέρου χρεῖαν. 7. Εἰ μέντοι καὶ ἐν ἑτέρᾳ χώρᾳ κείμενα τὰ δικαιώματα ἐπιζητεῖ προκομισθῆναι τις παρὰ τῷ ἐκδίκῳ τῶν τόπων καὶ ἐν ὑπομνήμασιν ἐφανισθῆναι πρὸς τὸ λαβεῖν τὴν ἐπὶ τούτων πρᾶξιν καὶ χρήσασθαι αὐτῇ ἐν τῷ δικαστηρίῳ, ἐν ᾧ δικάζεται, τότε οὐδὲν ἔστι βαρὺ τὸ ἐν αὐτῇ τῇ πόλει, ἐν ᾗ ὑπάρχει τὰ δικαιώματα, προσάγεσθαι αὐτὰ καὶ ἐμφανίζεσθαι.

8. Ἐκεῖνοι δὲ ἀναγκαζέσθωσαν προφέρειν πυκτὰς ἢ δικαιώματα οἱ καὶ μαρτυρεῖν κατὰ τινων ἀναγκαζόμενοι· καθ' ὧν γὰρ προσώπων ἄκων τις οὐ μαρτυρεῖ, κατὰ τούτων οὔτε προκομίζειν πυκτὰς ἢ δικαιώματα ἢ ἑτερόν τι ἀναγκάζεται τοιοῦτον. 9. Πρόδηλοι δὲ εἰσιν ἐκ τῶν νόμων οἱ μὴ ἀναγκαζόμενοι κατὰ τινων μαρτυρεῖν ἄκοντες καὶ ἐκεῖνοι, καθ' ὧν οὐκ ἀναγκάζονται τινες μαρτυρεῖν.

10. Οὐδενὶ δὲ ἔξεστιν ἄλλως ἀναγκάζειν προφέρεσθαι δικαιώματα εἰ μὴ ἐν αὐτῷ τῷ δικαστηρίῳ, παρ' ᾧ κινεῖται ἡ ὑπόθεσις, καὶ τότε δὲ ἀναλώμασι τοῦ ζητοῦντος γίνεσθαι τὴν προκομιδὴν τῆς πυκτῆς ἢ τῶν δικαιωμάτων. 11. Χρὴ δὲ γίνεσθαι τὴν ἐμφάνειαν αὐτῶν πρὸς ἅπαξ μόνον· εἰ δὲ ἅπαξ προκομισθέντος τοῦ συμβολαίου ἐπιζητεῖ καὶ δεύτερον γενέσθαι τὴν προκομιδὴν αὐτοῦ ὁ τοῦτου δεόμενος, εἰ εὐλογον φανείῃ τῷ δικαστῇ τὸ καὶ δεύτερον προενεχθῆναι τὸν χάρτην, ὁ δὲ προκομίσας αὐτὸν ἤδη παραιτεῖται ἀπαρνούμενος τὴν δευτέραν προκομιδὴν λέγων ἀπολωλεκέναι τὸν χάρτην ἢ ἄλλως πως μὴ ἔχειν εὐχέρειαν τῆς τοῦτου προκομιδῆς, ὅρκῳ μόνῳ τοῦτο αὐτὸ πιστούσθω καὶ μηκέτι ἀναγκαζέσθω προφέρειν αὐτόν. 12. Τούτων κρατούντων οὐ μόνον ἐν τῇ βασιλίδι πόλει, ἀλλὰ καὶ ἐν πάσῃ τῇ πολιτείᾳ.

XXII Plus Valere Quod Agitur Quam Quod Simulate Concipitur

[1] *Impp. Valerianus et Gallienus AA. Rufino. In contractibus rei veritas potius quam scriptura prospici debet.*

PP. III k. Iun. Aemiliano et Basso cons.

5. These same provisions apply also to the accounts of bankers or those kept by other people, when someone seeks to have them produced not against those who have kept these tablets, but against some other parties. 6. The constitution intends these provisions to have force at that time when the person who wants the document or the tablets to be produced lives in the same city as (both) the person who is said to have them and the judge of the case; the person holding documents must not be compelled to send them to another place or to run a risk on account of them because of the need of another. 7. If indeed someone seeks to have documents that are situated in another location produced before the defender (*defensor*) of the place and to have them be entered into the records so as to take the business (*praxis*) concerned with them and use it in the court in which the case is being judged, then there is no difficulty in taking the documents in the same city in which they are located and entering them in the records.

8. Those who are compelled to testify against others should also be compelled to produce documents or tablets; as to the people against whom someone does not testify unwillingly, he is also not compelled to produce tablets against them or documents or any other such thing. 9. Those who are not compelled to testify unwillingly against some people are clear from the laws, as are those against whom certain people are not compelled to testify.

10. It is not possible for anyone to compel the production of documents in any other way if not in the same court in which the case is being tried, and then the production of the tablets or the documents is at the expense of the one requesting them. 11. Their production must occur one time only. If, after the contract has been produced once, the person needing it requests that its production occur a second time, if producing the document a second time should seem reasonable to the judge, and the person who has produced it already refuses and declines producing it a second time, saying that the document has been destroyed or that in some other way it is not possible to produce it, he should vouch for this very thing in a single oath and should no longer be compelled to produce it. 12. These provisions apply not only in the Imperial City, but in the entire State.

Twenty-Second Title What Is Done Has Greater Value Than What Is Contrived in Pretence

[1] *Emperors VALERIAN and GALLIENUS Augusti to Rufinus.* In contracts the truth of the matter, rather than the writing, should be considered.

Posted May 30, in the consulship of Aemilianus and Bassus (259).

[2] *Impp. Diocletianus et Maximianus AA. et CC. Soteri.* Acta simulata, velut non ipse, sed eius uxor comparaverit, veritatis substantiam mutare non possunt. quaestio itaque facti per praesidem examinabitur provinciae.

D. x k. Mai. CC. conss.

[3] *Idem AA. et CC. Marinae.* Emptione pignoris causa facta non quod scriptum, sed quod gestum est inspicitur.

D. k. Mai. Sirmi CC. conss.

[4] *Idem AA. et CC. Decio.* Si quis gestum a se fecerit alium egisse scribi, plus actum quam scriptum valet.

D. viii k. Dec. CC. conss.

[5] *Idem AA. et CC. Victori.* Si falsum instrumentum emptionis conscriptum tibi, velut locationis quam fieri mandaveras, subscribere, te non relecto, sed fidem habente, suasit, neutrum contractum in utroque alterutrius consensu deficiente constituisse procul dubio est.

D. xiii k. Ian. CC. conss.

XXIII De Commodato

[1] *Impp. Diocletianus et Maximianus AA. et CC. Sisolae.* Ea quidem, quae vi maiore auferuntur, detrimento eorum quibus res commodantur imputari non solent. sed cum is, qui a te commodari sibi bovem postulabat, hostilis incursionis contemplatione periculum amissionis ac fortunam futuri damni in se suscepisse proponatur, praeses provinciae, si probaveris eum indemnitate tibi promisisse, placitum conventionis implere eum compellet.

D. vi k. Iun. ipsis AA. conss.

[2] *Idem AA. et CC. Auluzano.* Cum eum, qui temporalis ministerii causa suscepit ancillam, ad restitutionem eius bona fides urgeat, consequens est socerum tuum huius rei causa tradidisse ancillam adito praeside provinciae probare, ut fidem susceptam is adversus quem supplicas compellatur agnoscere.

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Soter.* Fictitious documents saying that he himself did not make the purchase, but his wife did, cannot change the substance of the truth. Accordingly, the question of fact will be examined by the provincial governor.

Given April 22, in the consulship of the Caesars (294).

[3] *The same Augusti and Caesars to Marina.* In a purchase made on account of a pledge, not what has been written but what has been carried out is examined.

Given May 1, at Sirmium, in the consulship of the Caesars (294).

[4] *The same Augusti and Caesars to Decius.* If someone has caused it to be written that another person carried out what was done by himself, the action carries more weight than the writing.

Given November 24, in the consulship of the Caesars (294).

[5] *The same Augusti and Caesars to Victor.* If he has persuaded you to sign a false contract for sale written for you as if (it was) for the lease that you had (actually) mandated, when you had not read it over but had relied on his good faith, it is far from doubtful that neither contract (i.e., neither the sale nor the lease) was valid, since in each one the consent of one side or the other was lacking.

Given December 20, in the consulship of the Caesars (294).

Twenty-Third Title Gratuitous Loan for Use¹⁰¹

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Sisola.* Things that are carried off by higher force (*vis maior*) are not customarily charged as a loss for the parties to whom the property is loaned. But since that person, who was requesting that an ox be loaned to him by you, is alleged to have taken upon himself, in contemplation of a hostile incursion, the risk for its loss and the chance of future damage, the provincial governor, if you prove that he promised indemnity to you, will compel him to fulfill the agreement in the contract.

Given May 27, in the consulship of the Augusti themselves (290 or 293).

[2] *The same Augusti and Caesars to Auluzanus.* Since good faith urges the person who has taken up a slave woman for temporary service to restore her, it follows that, having approached the provincial governor, you prove your father-in-law handed over the slave woman for this purpose, so that the person against whom you are petitioning will be compelled to acknowledge the terms (*fides*) he has undertaken.

¹⁰¹ *Commodatum*, loan for use, where the return of the loaned object is anticipated; see D. 13.6.

S. prid. non. Nov. ipsis AA. cons.

[3] *Idem AA. et CC. Soteræ.* De restituendis rebus, quas obligandas pro se dederas, postquam debitum fuerit extenuatum, commodati actionem etiam adversus heredes eius exercere potes.

D. III id. April. Sirmi CC. cons.

[4] *Idem AA. et CC. Faustinae.* Praetextu debiti restitutio commodati non probabiliter recusatur.

D. XII k. Dec. ipsis CC. cons.

XXIII De Actione Pigneraticia

[1] *Imp. Severus et Antoninus AA. Metrodoro.* Οἱ ἐκ τοῦ ἐνεχύρου ληφθέντες καρποὶ ψηφίζονται εἰς τὸ χρέος καὶ, ἂν ἱκανοὶ γένωνται πρὸς τὸ ὅλον χρέος, λύεται ἡ ἀγωγή καὶ ἀποδίδεται τὸ ἐνέχυρον. εἰ δὲ καὶ πλείονές εἰσι τοῦ χρέους οἱ καρποὶ, ἀποδίδονται οἱ περιττεύοντες.

PP. id. Oct. Apro et Maximo cons.

[2] *Imp. Alexander A. Demetrio.* Quod ex operis ancillae vel ex pensionibus domus, quam pignori detineri dicis, perceptum est, debiti quantitatem relevabit.

PP. k. Oct. Antonino IIII et Alexandro cons.

[3] *Idem A. Victori.* Creditor, qui praedium pignori sibi nexum detinuit, fructus quos percepit vel percipere debuit in rationem exonerandi debiti computare necesse habet et, si agrum deteriore constituit, eo quoque nomine pigneraticia actione obligatur.

PP. VI id. Dec. Antonino IIII et Alexandro cons.

[4] *Idem A. Hermaeo et Maximillae.* Pactum vulgare, quod proposuistis, ut, si intra certum tempus pecunia soluta non fuisset, praedia pignori

Written November 4, in the consulship of the Augusti themselves (293).

[3] *The same Augusti and Caesars to Sotera.* You can bring an action on loan for use (*commodatum*) even against his heirs for the restoration of property that you have given to someone to pledge for his own debt, after the debt has been extinguished.

Given April 11, at Sirmium, in the consulship of the Caesars (294).

[4] *The same Augusti and Caesars to Faustina.* The restitution of a loan for use (*commodatum*) is not credibly refused on the pretext of a debt (owed by the lender to the borrower).

Given November 20, in the consulship of the Caesars themselves (294).

Twenty-Fourth Title The Action on Pledge¹⁰²

[1] *Emperors SEVERUS and ANTONINUS Augusti to Metrodorus.*¹⁰³ The fruits (*fructus*) taken from a pledged property are counted toward the debt, and, if they should be sufficient for the entire debt, the action is ended and the pledge is returned. If the fruits are greater than the debt, the surpluses are returned.

Posted October 15, in the consulship of Aper and Maximus (207).

[2] *Emperor ALEXANDER Augustus to Demetrius.* The amount taken from the labor services (*operae*) of a slave woman, or from the payments for a house which you say is held as a pledge, will reduce the amount of the debt.

Posted October 1, in the consulship of Antoninus, for the fourth time, and Alexander (222).

[3] *The same Augustus to Victor.* A creditor who held as pledge a property under his lien must count the crops (*fructus*) that he harvested or should have harvested toward reducing the debt. If he has made the farm worse, he is also obligated under the action on pledge on that account.

Posted December 8, in the consulship of Antoninus, for the fourth time, and Alexander (222).

[4] *The same Augustus to Hermaeus and Maximilla.* The common pact that you have mentioned, whereby, if the money should not have been paid within

¹⁰² See D. 13.7. This section goes both to a security possessed by the creditor and to one in which the debtor retains possession. Terminology is inconsistent, but *pignus* is often used for the first type and *hypotheca* for the second.

¹⁰³ = Bas. 25.1.43.

vel hypothecae data vendere liceret, non adimit debitori adversus creditorem pigneraticiam actionem.

PP. XII k. Mai. Maximo II et Aeliano cons.

[5] *Idem A. Dioscoridae.* Si creditor sine vitio suo argentum pignori datum perdidit restituere id non cogitur: sed si culpa reus deprehenditur vel non probat manifestis rationibus se perdidisse, quanti debitoris interest condemnari debet.

PP. XIII k. Mai. Iuliano et Crispino cons.

[6] *Idem A. Trophimae.* Quae fortuitis casibus accidunt, cum praevideri non potuerant, in quibus etiam adgressura latronum est, nullo bonae fidei iudicio praestantur: et ideo creditor pignora, quae huiusmodi causa interierunt, praestare non compellitur nec a petitione debiti submovetur, nisi inter contrahentes placuerit, ut amissio pignorum liberet debitorem.

PP. id. April. Fusco et Dextro cons.

[7] *Idem A. Iuliano. pr.* Creditor, qui fundos et domos pignori vel hypothecae accepit, damnum in decidendis arboribus domibusque destruendis ab eo datum in rationem deducere cogitur et, si dolo vel culpa rem suppositam deteriore fecerit, eo quoque nomine pigneraticia actione tenebitur, ut talem restituat, qualis fuerat tempore obligationis. 1. Creditor autem necessarios sumptus, quos circa res pigneraticias fecit, exigere non prohibetur.

PP. XIII k. Aug. Gordiano A. II et Pompeiano cons.

[8] *Imp. Philippus A. et Philippus C. Saturnino.* Si nulla culpa seu segnitia creditori imputari potest, pignorum amissorum dispendium ad periculum eius minime pertinet. sane si simulata amissione etiam nunc eadem pignora, ut adseveras, a parte diversa possidentur, adversus eum experiri potes.

PP. VIII k. Mart. Praesente et Albino cons.

a certain time, it would be permitted to sell the property given as a pledge or as a hypothec, does not take away from the debtor an action on pledge against the creditor.

Posted April 20, in the consulship of Maximus, for the second time, and Aelianus (223).

[5] *The same Augustus to Dioscorides.* If a creditor through no fault of his own has lost the silver given as a pledge, he is not compelled to restore it; but if he is discovered to be guilty of fault or does not prove with clear reasons that he has lost it (without his fault), he should be condemned for the debtor's interest.

Posted April 19, in the consulship of Julian and Crispinus (224).

[6] *The same Augustus to Trophima.* Events that happen as a result of unavoidable accidents, among which is included an attack of brigands, when they could not be foreseen, are recompensed in no good faith trial; and for this reason the creditor is not compelled to furnish the pledges which have been destroyed for a reason of this type, nor is he debarred from seeking the debt, unless it has been agreed between the contracting parties that the loss of the pledges frees the debtor.

Posted April 13, in the consulship of Fuscus and Dexter (225).

[7] *The same Augustus¹⁰⁴ to Julian. pr.* A creditor who has received farms and houses as a pledge or hypothec is compelled to account for a loss caused by him in cutting down trees or in destroying houses, and, if he has made the property pledged worse by deliberate misconduct (*dolus*) or fault (*culpa*), on that account he will be held liable in an action on pledge to restore it to its condition at the time of its being obligated. 1. A creditor, however, is not prohibited from exacting necessary expenses that he has incurred in connection with the property pledged.

Posted July 20, in the consulship of Gordian Augustus, for the second time, and Pompeianus (241).

[8] *Emperors PHILIP Augustus and PHILIP Caesar to Saturninus.* If no fault or carelessness can be imputed to the creditor, the expense for the loss of the pledges is not at all his risk. Clearly if, as you allege, the same pledges even now are possessed by the other party after their loss was feigned, you can bring an action against him.

Posted February 22, in the consulship of Praesens and Albinus (246).

¹⁰⁴ Actually from Gordian, as the date indicates.

[9] *Impp. Diocletianus et Maximianus AA. et CC. Georgio.* Pignus in bonis debitoris permanere ideoque ipsi perire in dubium non venit. cum igitur adseveres in horreis pignora deposita, consequens est secundum ius perpetuum, pignoribus debitori pereuntibus, si tamen in horreis, quibus et alii solebant publice uti, res depositae sunt, personalem actionem debiti reposcendi causa integram te habere.

PP. VI non. Mai. Mediolani AA. cons.

[10] *Idem AA. et CC. Apollodora. pr.* Nec creditores nec qui his successerunt adversus debitores pignori quondam res nexas petentes, reddita iure debita quantitate vel his non accipientibus oblata et consignata et deposita, longi temporis praescriptione muniri possunt. 1. Unde intellegis, quod, si originem rei probare potes, adversario tenente vindicare dominium debeas. 2. Ut autem creditor pignoris defensione se tueri possit, extorquetur ei necessitas probandi debiti vel, si tu teneas, per vindicationem pignoris hoc idem inducitur et tibi non erit difficilis vel solutione vel oblatione atque sollemni depositione pignoris liberatio.

D. non. Mai. ipsis AA. cons.

[11] *Idem AA. et CC. Ammiano.* Pignoris causa res obligatas soluto debito restitui debere pigneraticiae actionis natura declarat. quo iure, si titulo pignoris obligasti mancipia, per eandem actionem uti potes nec creditor citra conventionem vel praesidalem iussionem debiti causa res debitoris arbitrio suo auferre potest.

D. v k. Ian. Sirmi ipsis CC. cons.

[12] *Idem AA. et CC. Heraisco.* Quominus fructuum, quos creditor ex rebus obligatis accepit, habita ratione ac residuo debito soluto, vel si per creditorem factum fuerit, quominus solveretur, pignora quae in eadem causa durant restituat debitori, nullo spatio longi temporis defenditur.

D. XII k. Dec. Nicomediae CC. cons.

[9] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Georgius.* It is not in doubt that a pledge remains in the property of the debtor and perishes at his risk. Since therefore you allege that the pledges were placed in storehouses, it follows in accordance with the perpetual edict (*secundum ius perpetuum*) that, since the pledges perish at the risk of the debtor, as long as the items were deposited in storehouses that others were accustomed to use publicly, you have an unimpaired action *in personam* for demanding back the debt.

Given May 2, at Milan, in the consulship of the Augusti (293).¹⁰⁵

[10] *The same Augusti and Caesars to Apollodora. pr.* Neither creditors nor those who succeed them can be protected by a long-time prescription against debtors seeking property previously pledged as security, when the amount owed has been lawfully returned or when they (the creditors) do not accept what has been offered, sealed, and deposited. 1. Therefore you understand that, if you can prove the origin of the property, you should bring a suit on ownership (*vindicare*) when your adversary holds it. 2. So that, however, the creditor can protect himself with a defense that the property is a pledge (*pignoris defensione*), the necessity of proving the debt is required of him or, if you should hold (the property in question), this same process is undertaken through a suit on ownership of the pledge, and the liberation of the pledge will not be difficult for you either by paying or by making an offer and the customary deposit.

Given May 7, in the consulship of the Augusti themselves (293).

[11] *The same Augusti and Caesars to Ammianus.* The nature of the action on pledge makes clear that property pledged as security should be restored when the debt is paid. You can use this right through the same action if you have obligated slaves as pledges, and the creditor cannot on his own judgment carry away the property of the debtor for the sake of a debt without an agreement or an order from the governor.

Given December 28, at Sirmium, in the consulship of the Caesars themselves (294).¹⁰⁶

[12] *The same Augusti and Caesars to Heraiscus.* There is no defense on the basis of the passing of a long time (prescription) that the creditor not restore to the debtor pledges that remain in the same status (i.e., in the possession of the creditor), when account has been taken of the fruits that the creditor has received from the pledged property and the remaining debt has been paid, or it has been the creditor's doing that the debt not be paid.

Given November 20, at Nicomedia, in the consulship of the Caesars (294).

¹⁰⁵ According to Mommsen and Krüger, the place of promulgation is erroneous.

¹⁰⁶ Mommsen dates this constitution to December 28, 293.

XXV De Exercitoria et Institoria Actione

[1] *Imp. Antoninus A. Hermeti.* Servus tuus pecuniam mutuam accipiendo ita demum te institoria actione obligavit, si, cum eum officio alicui vel negotiationi exercendae praeponeres, etiam ut id faceret, ei permissum a te probetur. quod si ea actio locum non habet, si quid in rem tuam verum probabitur, actione in eam rem proposita cogeris exsolvere.

PP. VIII k. Sept. duobus Aspris cons.

[2] *Imp. Alexander A. Callisto.* Ex contractibus servorum quamvis de peculio dumtaxat domini teneantur, de eo tamen, quod in rem eorum verum est vel cum institore ex causa cui praepositus fuit contractum est, in solidum conveniri posse dubium non est.

PP. III k. Mai. Alexandro A. cons.

[3] *Idem A. Marciae.* Institoria tibi adversus eum actio competit, a quo servum mensae praepositum dicis, si eius negotii causa, quod per eum exercebatur, deposita pecunia nec reddita potest probari.

PP. non. Mai. Agricola et Clemente cons.

[4] *Imp. Diocletianus et Maximianus AA. et CC. Antigone.* Et si a muliere magister navis praepositus fuerit, ex contractibus eius ea exercitoria actione ad similitudinem institoriae tenetur.

D. XVI k. Nov. Sirmi AA. cons.

[5] *Idem AA. et CC. Gaio.* Si mutuam pecuniam accipere Demetriano Domitianus mandavit et hoc posse probare confidis, ad exemplum institoriae eundem Domitianum apud competentem iudicem potes convenire.

D. III k. Nov. ipsis CC. cons.

**Twenty-Fifth Title The Action on
Shippers and Managers¹⁰⁷**

[1] *Emperor ANTONINUS Augustus to Hermes.* Your slave, by accepting a loan of money, obligated you under an action on managers (*institoria actio*) only if, when you put him in charge of some job or of conducting some business, it should be proved that it was approved by you that he do this (take money on loan). But if this action does not have a place, (then) if it is proved that anything has turned to your benefit (*si quid in rem tuam versum*), you will be compelled to pay in the action proposed for that situation.

Given August 25, in the consulship of the two Aspri (212).

[2] *Emperor ALEXANDER Augustus to Callistus.* On the basis of contracts of slaves, although strictly speaking their owners are liable (only) to the extent of the *peculium*, there is no doubt that they can be sued for the whole amount for what has turned to their benefit (*quod in rem eorum versum est*) or for what was contracted for with a manager (*institor*) from the enterprise in whose charge he was placed.

Posted April 29, in the consulship of Alexander Augustus (222).

[3] *The same Augustus to Marcia.* The action on managers (*institoria actio*) is available to you against the person by whom you say a slave was placed in charge of a bank, if it can be proved that money was deposited and not returned in order to benefit the business that was being transacted through him (the slave).

Posted May 7, in the consulship of Agricola and Clemens (230).

[4] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Antigona.* Even if a master of a ship was appointed by a woman, there is liability for his contracts by that action on shippers (*actio exercitoria*) in a manner similar to the action on managers (*actio institoria*).

Given October 17, at Sirmium, in the consulship of the Augusti (293).

[5] *The same Augusti and Caesars to Gaius.* If Domitianus ordered Demetrianus to receive money on loan (*mutuam pecuniam*) and you are confident you can prove this, you can sue the same Domitianus before a competent judge on an action analogous to the one on managers (*ad exemplum institoriae*).

Given October 29, in the consulship of the Caesars themselves (294).

¹⁰⁷ D. 14.1, 3. The *actio institoria* establishes an owner's liability to third parties for the transactions of a "manager" (*institor*) placed in charge of the owner's business. The *actio exercitoria*, here largely assimilated to the *actio institoria*, establishes the parallel liability of a shipowner or charterer (*exercitor navis*) for the acts of a captain placed in charge of the ship.

[6] *Idem AA. et CC. Onesimae.* Qui secutus domini voluntatem cum servo ipsius habuit contractum, ad instar actionis institoriae recte de solido dominum convenit.

D. XIII k. Dec. CC. cons.

XXVI Quod cum Eo Qui in Aliena Est Potestate Negotium Gestum Esse Dicitur, vel de Peculio seu Quod Iussu aut de in Rem Verso

[1] *Imp. Severus et Antoninus AA. Aelio.* Cum filius familias tutor aut curator datur, pater tutelae vel negotiorum gestorum iudicio de peculio et de in rem verso conveniendus est. quod si voluntate eius filius decurio sit creatus et a magistratibus tutor constitutus, pater in solidum satisfacere cogitur, cum id onus exemplo ceterorum munerum civilium inductum intellegatur.

D. VII id. Nov. Dextro II et Prisco cons.

[2] *Idem AA. Annio.* Eius rei nomine, quae cum filio familias contracta est sive sua voluntate sive eius in cuius potestate fuit, sive in peculium ipsius sive in rem patris ea pecunia redacta est, et si paterna hereditate abstinuit, actionem nisi in id quod facere possit non dari perpetui edicti interpretatione declaratum est.

PP. VIII k. Dec. Dextro II et Prisco cons.

[3] *Imp. Antoninus A. Artemoni.* Etiam si non mandante neque subscribente neque iubente domina pecuniam mutuam servo Priscæ

[6] *The same Augusti and Caesars to Onesima.* A person who, following the wish of the owner had a contract with this very person's slave, appropriately sues the owner for the whole amount on an action analogous to the one on managers (*ad instar actionis institoriae*).

Given November 18, in the consulship of the Caesars (294).

**Twenty-Sixth Title Business That is Said to Have Been
Transacted with a Person Who Is in Another's Power, or
Regarding the *Peculium*, or on an Order, or Regarding What Has
Been Turned to One's Profit¹⁰⁸**

[1] *Emperors SEVERUS and ANTONINUS Augusti to Aelius.* When a son in his father's power is appointed as a *tutor* or a *curator*, his father is to be sued for the tutorship or the management of affairs (*negotiorum gestorum*) in a judgment on the *peculium* or on what has turned to his profit. But if with his consent the son has been elected decurion and has been appointed *tutor* by the magistrates, the father is compelled to be liable for the whole amount (*in solidum satisfacere*), since this burden is understood to have been taken up on the pattern of other civic obligations (*munera*).

Given November 7, in the consulship of Dexter, for the second time, and Priscus (196).

[2] *The same Augusti to Annius.* By an interpretation of the Perpetual Edict, it has been declared that, on account of a contract entered into with a son in his father's power either by his own intent or by that of the person in whose power he was, regardless whether the money was obtained for his own *peculium* or for his father's property, as long as he abstained from (accepting) his father's estate, an action is not given except for what he might be able to pay.¹⁰⁹

Posted November 24, in the consulship of Dexter, for the second time, and Priscus (196).

[3] *Emperor ANTONINUS Augustus to Artemo.* Even if you gave money as a loan to Prisca's slave without the owner's mandating it, signing for it, or ordering it,

¹⁰⁸ See D. 14.5, 15.1–4; Inst. 4.7. This section amalgamates several theories concerning vicarious liability of the head of a household for the transactions of children-in-power or slaves. Such liability is often limited to the value of the dependant's *peculium* unless the transaction was ordered or ratified by the household head (*quod iussu*) or the transaction benefited him (*in rem versum*).

¹⁰⁹ Blume: "The edict here mentioned is found in D. 14.5.2. A son under power could be sued the same as any other man. D. 44.7.39. But if he was emancipated, or disinherited, or he did not accept his father's inheritance, he could claim what is called the benefit of competence, namely to be condemned in a suit on his contract only to the amount which he was able to pay. This was one of the peculiar institutes of the Roman law ... But it was justly applied in this instance, since the property of a son under paternal power was ordinarily that of his father. The benefit could not be claimed by him, if he was guilty of fraud in misrepresenting his status, or of tort." Krüger deletes *et*, "even."

dedisses, tamen ea quantitas si in rem dominae eius iustis erogationibus versa est, de in rem verso apud suum iudicem eam conveni, consecuturus secundum iuris formam id quod tibi deberi apparuerit.

D. III k. Iul. Laeto II et Cereale cons.

[4] *Idem A. Leontio.* Si ex contractu patris iussu eius pecuniam accepisti teque eius hereditate abstines, frustra vereris, ne a creditoribus eius conveniaris.

D. V k. Ian. Sabino et Anullino cons.

[5] *Imp. Alexander A. Asclepiadi.* Nulla res prohibet filios familias, si pro aliis maiores viginti quinque annis fideiusserint, actione adversus eos competenti teneri. sed si dumtaxat de peculio tecum agatur, defensionibus, si quae tibi competunt, uteris.

PP. VI id. Dec. Maximo II et Aeliano cons.

[6] *Imp. Valerianus et Gallienus AA. et Valerianus nob. C. Matronae.* Si servus tuus sine permissu tuo accepta pecunia mutua in usurarum vicem habitandi facultatem concessit, nullo iure adversarius tuus hospitium ex hac causa sibi vindicat, cum te servi factum non obligaverit: et ingrediens rem tuam contra vim eius auctoritate competentis iudicis protegeris.

D. XII k. Iul. Aemiliano et Basso cons.

[7] *Imp. Diocletianus et Maximianus AA. et CC. Crescenti. pr.* Ei, qui servo alieno dat mutuam pecuniam, quamdiu superest servus, item post mortem eius intra annum de peculio contra dominum competere actionem vel, si in rem domini haec versa sit quantitas, post annum etiam esse honorariam non est ambigui iuris. 1. Quapropter si quidem in rem domini versa pecunia est, heredes eius convenire potes de ea summa, quae in rem ipsius processit. 2. Si vero hoc probari non potest, consequens est, ut superstite quidem servo dominum de peculio convenias vel, si iam servus rebus humanis exemptus est vel distractus seu manumissus nec annus excessit, de peculio quondam adversus eum experiri possis.

nevertheless if that quantity has been turned to the benefit of his owner by just expenditures, sue her before her judge (*apud suum iudicem*) on (the action for) what has turned to one's benefit, to gain what it will have appeared you are owed in accordance with the rule of law.

Given June 29, in the consulship of Laetus, for the second time, and Cerealis (215).

[4] *The same Augustus to Leontius.* If you received money on the basis of a contract of your father on his authorization (*iussum*) and you are refusing his inheritance, you fear needlessly that you might be sued by his creditors.

Given December 28, in the consulship of Sabinus and Anullinus (216).

[5] *Emperor ALEXANDER Augustus to Asclepiades.* No circumstance prevents sons in their fathers' power, if, when over the age of 25, they have become surety for others, from being held liable in an appropriate action against them. But if the lawsuit with you should only concern the *peculium*, you will use whatever defenses are available to you.

Posted December 8, in the consulship of Maximus, for the second time, and Aelianus (223).

[6] *Emperors VALERIAN and GALLIENUS Augusti and VALERIAN most noble Caesar to Matrona.* If your slave, after receiving money on loan without your permission, granted (to the lender) a right of habitation instead of interest, by no legal basis does your adversary claim accommodation on this basis, since the act of your slave has not obligated you; and when you enter your property you are protected against his force by the authority of a competent judge.

Given June 20, in the consulship of Aemilianus and Bassus (259).

[7] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Crescens. pr.* It is not doubtful law that a person who lends money to someone else's slave has available an action on the *peculium* against the owner, as long as the slave survives, and even within one year after his death, or, if the amount has been turned to the owner's profit, that he has a Praetorian (*honoraria*) action after the year. 1. Therefore if indeed the money has been turned to the owner's profit, you can sue his heirs for that sum that has passed into his own property. 2. But if this cannot be proved, it follows that, if the slave is still alive, you should sue the owner on the *peculium*, or if the slave has already been removed from human affairs (i.e., died) or has been alienated or manumitted and a year has not passed, you can bring a suit against him (the owner) for the former *peculium*.

3. Alioquin si cum libero rem agente eius, cuius precibus meministi, contractum habuisti et eius personam elegisti, pervides contra dominum nullam te habuisse actionem, nisi vel in rem eius pecunia processit vel hunc contractum ratum habuit.

D. non. April. Byzantii AA. cons.

[8] *Idem AA. et CC. Isidoro.* Si ex alio contractu, non ex illicita mutui datione debitor extitisti vel quod patrem tuum in fide suscepisti, tam in patris positus potestate iure teneris quam etiam morte genitoris tui iuris effectus: et si quidem patris heres extitisti, in solidum, alioquin in quantum facere potes, secundum edicti formam. sed et si emancipatione tui iuris factus es, similiter conveniri te posse debes intellegere.

D. vi id. April. Byzantii AA. cons.

[9] *Idem AA. et CC. Diogenio.* Si mandator pro filio tuo extitisti vel iussu tuo cum eo quem in potestate tunc habuisti contractum est, intellegis et sorti et usuris te parere oportere, si te his omnibus obligasti, ut res quae pignoris iure detinentur liberari possint. quod si fideiussor creditae pecuniae intercessisti, teneri te ex ea obligatione explorati iuris est.

D. iii k. Mai. CC. cons.

[10] *Idem AA. et CC. Aphrodisio. pr.* Si liberam peculii administrationem habentes equas cum fetu de peculio servi venumdederunt, reprobandi contractum dominus nullam habet facultatem. 1. Quod si non habentes liberam peculii administrationem rem dominicam eo ignorante distraxerunt, neque dominium, quod non habent, in alium transferre possunt neque condicionem eorum servilem scientibus possessionis iustum adferunt initium: unde non immerito nec temporis praescriptionem huiusmodi possessoribus prodesse manifestum est, ideoque res mobiles ementes etiam furti actione tenentur.

D. v non. Oct. Sirmi CC. cons.

[11] *Idem AA. et CC. Attalo.* Cum ancilla contrahenti, quam iure non obligari constat, adversus dominum in quantum locupletius eius

3. Otherwise, if you had a contract with a free person conducting the business of the one you have mentioned in your petition and you chose (to do business with) his person (*et eius personam elegisti*), you see that you have had no action against the owner, unless the money was turned to his profit or he ratified this contract.

Given April 5, at Byzantium, in the consulship of the Augusti (293).

[8] *The same Augusti and Caesars to Isidorus.* If you have become a debtor from another contract and not from the illicit donation of a loan or because you have stood surety for your father (*in fide suscepisti*), you are bound by the law both while established in the father's power and when you are made *sui iuris* by the death of your parent. If you have become your father's heir, (you are liable) for the whole amount, or otherwise to the extent that you are able (to pay), in accordance with the rule of the (Perpetual) Edict. But if you have come into your own power (*tui iuris*) by emancipation, you should understand that you can be sued in a similar fashion.

Given April 8, at Byzantium, in the consulship of the Augusti (293).

[9] *The same Augusti and Caesars to Diogenius.* If you were mandator to your son or, in accordance with your order, a contract has been made with him when you held him in your power, you understand that you must pay (*parere oportere*) both the principal and the interest, if you have obligated yourself for all of these, so that the property that is held by right of pledge can be liberated. But if you have stepped in as a surety for money loaned, it is established law that you are liable on the basis of this obligation.

Given April 29, in the consulship of the Caesars (294).¹¹⁰

[10] *The same Augusti and Caesars to Aphrodisius. pr.* If slaves holding free administration of their *peculium* have sold from it mares along with their offspring, the owner has no capacity to repudiate the contract. **1.** But if without having free administration of the *peculium* they have sold property belonging to the owner without his knowledge, they cannot transfer ownership, which they do not have, to another person, nor can they bring about the lawful beginning of possession in those who know of their servile condition. Therefore it is manifest that a long-time prescription rightly does not benefit possessors of this type, and for that reason if they purchase movable property they are also liable in an action on theft.

Given October 3, at Sirmium, in the consulship of the Caesars (294).

[11] *The same Augusti and Caesars to Attalus.* There is no doubt that a person entering into a contract with a slave woman, who it is established cannot lawfully

¹¹⁰ Mommsen dates this constitution and the two below to 293 (the consulship of the Augusti).

peculium factum est ea superstitute ac post mortem intra utilem annum dandam actionem non ambigitur.

D. prid. k. Dec. Sirmi CC. cons.

[12] *Idem AA. et CC. Victori.* Dominum per servum obligari non posse ac tantum de peculio (deducto scilicet, quod naturaliter servus domino debet) eius creditoribus dari actionem vel, si quid in rem eius versum probetur, de in rem verso edicto perpetuo declaratur.

D. XIII k. Febr. Sirmi CC. cons.

[13] *Impp. Honorius et Theodosius AA. Iohanni pp. pr.* Dominos ita constringi manifestum est actione praetoria, quae appellatur quod iussu, si certam numerari praeceperint servo actorive pecuniam. 1. Igitur in perpetuum edictali lege sancimus, ut, qui servo colono conductori procuratori actorive possessionis pecuniam mutuam det, sciat dominos possessionum cultoresve terrarum obligari non posse.

2. Neque familiares epistulas, quibus homines plerumque commendant absentem, in id trahere convenit, ut pecuniam, quam non rogatus fuerat, impendisse pro praediis mentiatur, cum, nisi specialiter ut pecuniam praestet a domino fuerit postulatus, idem dominus teneri non possit. 3. Creditaque quantitate multari volumus creditores, si huiusmodi personis non iubente domino nec fideiussoribus specialiter acceptis fuerit credita pecunia.

4. Sane creditori licentiam damus, ut, si liber a rationibus quas gerbat fuerit inventus actor servus procuratorve praediorum, utilis actio pateat de peculio.

D. v id. Iul. Ravennae Honorio XIII et Theodosio x AA. cons.

XXVII Per Quas Personas Nobis Adquiritur

[1] *Impp. Diocletianus et Maximianus AA. Marcello. pr.* Excepta possessionis causa per liberam personam, quae alterius iuri non est subdita,

be obligated, must be allowed to bring an action against her owner while she is alive and after her death within the established year, for the amount that her *peculium* was enriched.

Given November 30, at Sirmium, in the consulship of the Caesars (294).

[12] *The same Augusti and Caesars to Victor.* It is declared in the Perpetual Edict that a master cannot be obligated through his slave and that an action is given to his creditors only for the *peculium* – of course with a deduction for what the slave owes the master in an informal manner – or, for what has been turned to his (the owner's) profit if it should be proved that something has accrued to his property.

Given January 20, at Sirmium, in the consulship of the Caesars (294).

[13]^m *Emperors HONORIUS and THEODOSIUS Augusti to John, Praetorian Prefect. pr.* It is clear that masters are liable in the Praetorian action that is called "what by order" (*quod iussu*) if they have instructed that a certain amount of money be paid to their slave or manager (*actor*). 1. Therefore we establish in perpetuity in an edictal law that whoever should give a loan of money to a slave, bound tenant (*colonus*), lessee, procurator, or manager (*actor*) of an estate (*possessio*) should know that the owners of the estate or the cultivators of the land cannot be obligated (otherwise).

2. And is not it appropriate to draw friendly letters into this, in which people provide a general commendation for an absent person, so that someone might falsely allege that he has spent for properties a sum of money for which he was not (actually) asked, since, unless he had been specifically asked by the owner to provide the money, the same owner cannot be held liable. 3. We want creditors to be fined the amount of money loaned, if money has been loaned to persons of this type without the owner's order and without sureties having been specifically received.

4.¹¹² Of course, We give permission to a creditor that an analogous action be available on the *peculium* if the manager, slave, or procurator of the estates has been found to have free management of the accounts.

Given July 11, at Ravenna, in the consulship of Honorius, for the thirteenth time, and Theodosius, for the tenth time, Augusti (422).

Twenty-Seventh Title Through Which Persons Acquisition Is Made for Us¹¹³

[1]¹¹⁴ *Emperors DIOCLETIAN and MAXIMIAN Augusti to Marcellus. pr.* It is indisputably the law that, except for possession, nothing can be acquired

¹¹¹ = C.Th. 2.31.1; combine with C. 2.13.2, 4.4.1, 8.15.8, 11.48.17, 12.60.4 (C.Th. 2.32.1 = par. 4).

¹¹² = C.Th. 2.32.1. Blume translates differently: "if a manager, actor, slave, or procurator of landed estates has made a complete settlement of his accounts."

¹¹³ See Inst. 2.9.3, 28.

¹¹⁴ See C. 4.35.9.

nihil adquiri posse indubii iuris est. 1. Si igitur procurator non sibi, sed ei, cuius negotia administrabat, redintegratae rei vindicationem pactus est idque pactum etiam stipulatio insecuta est, nulla domino obligatio acquisita est. servis autem res traditae dominis adquiruntur.

D. k. Iul. ipsis IIII et III AA. cons.

[2] *Imp. Iustinianus A. Iuliano pp. pr.* Si duo vel plures communem servum habeant et unus ex his iussit, ut nomine suo servus ab aliquo stipuletur decem puta aureos vel aliam rem, ipse autem servus non eius nomine qui iussit, sed alicuius ex dominis suis mentionem fecit et nomine illius stipulatus est, inter antiquam sapientiam quaerebatur, cui acquiritur actio et lucrum, quod ex hac accidit causa, utrumne ei qui iussit an ei cuius servus mentionem fecit an ambobus.

1. Cumque ex omni latere magna pars auctorum multum effudit tractatum, nobis verior eorum sententia videtur, qui domino qui iussit adferunt stipulationem et ei tantummodo adquiri dixerunt, quam aliorum, qui in alias opiniones deferuntur, neque enim malignitati servorum indulgendum est, ut liceat eis domini iussione contempta sua libidine facere stipulationem et ad alium dominum, qui eum forsitan corrumpit, alienum lucrum transferre: quod neque ferendum est, si servus impius domino quidem qui iussit minime oboediendum existimaverit, alii autem, qui forsitan ignorat et nescit, repentinum adducit solacium.

2. Quod enim saepe apud antiquos dicebatur iussionem domini non esse absimilem nominationi, tunc debet obtinere, cum servus iussus ab uno ex dominis stipulationem facere sine nomine stipulatus est: tunc etenim soli ei acquirit qui iussit: sin autem expresserit alium dominum, soli illi necesse est acquisitionem celebrari: multo etenim amplius oportet valere dominici nominis mentionem quam herilem iussionem.

D. xv k. Dec. Lampadio et Oresta vv. cc. cons.

[3] *Idem A. Iohanni pp. pr.* Cum per liberam personam, si pecunia alterius nomine fuerit numerata, acquiritur ei cuius nomine pecunia credita

through a free person who is not subjected to the power of another. 1. If, therefore, a procurator has made a pact concerning a claim on ownership (*vindicatio*) of property restored not to himself, but to the person whose affairs he was administering, and (even if) a stipulation has followed the pact, no obligation has been acquired for the owner. However, property delivered to slaves is acquired for their owners.

Given July 1, in the consulships of (the Augusti) themselves for the fourth and third time, respectively (290).

[2](3)¹¹⁵ *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect. pr.* If two or more people should have a slave in common and one of these has ordered the slave to take a stipulation in his name from someone, say for 10 aurei or other property, but the slave has made mention not of the person who ordered it but of someone else among his owners and has taken the stipulation in the name of that person, it was debated among the ancient authorities (*inter antiquam sapientiam quaerebatur*) for whom the right of action and the profit is acquired that results from this, whether for the person who gave the order or for the one whose name the slave mentioned or for both.

1. Since a large portion of the authors have produced a great deal of treatment from every side of the issue, the opinion seems truer to Us of those (jurists) who assign the stipulation to the owner who gave the order and who have said that that acquisition is made for him alone, than of those who are led into other views. For one must not indulge the malice of slaves, so that they not be allowed to scorn the order of an owner at their whim and make a stipulation and transfer someone's profit to another owner, who had perhaps corrupted him (the slave). It is not to be tolerated if an impious slave thinks that he does not have to obey a master who has given an order, and brings a sudden gain to another owner, who perhaps is unaware and does not know about it.

2. What was often said by the ancient authorities, that the order of a master is not dissimilar from his being named, should then obtain, when a slave, having been ordered by one of the owners to take a stipulation, has done so without a name; in this circumstance he acquires only for the one who gave the order. If, however, he has named another owner, acquisition must be recognized for that one alone; mentioning the owner's name must count more than a master's order.¹¹⁶

Given November 17, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[3] (2) *The same Augustus to John, Praetorian Prefect. pr.* Since (in traditional law), if money has been paid out in the name of another through a free

¹¹⁵ The order of chapters 2 and 3 is not consistent in the manuscripts.

¹¹⁶ As Blume notes, section 2 contradicts the rest of the constitution.

est per huiusmodi numerationem condictio, non autem hypotheca vel pignus, quae procuratori data vel supposita sunt, dominis contractus acquiritur, talem differentiam expellentes sancimus et conductionem et hypothecariam actionem vel pignus ipso iure et sine aliqua cessione ad dominum contractus pervenire. 1. Si enim procuratori necessitas legibus imposita est domino contractus cedere actionem, quare non ab initio quemadmodum in personali actione cessio supervacua videbatur, non etiam in hypothecis et pignoribus simili modo dominus contractus habeat hypothecariam actionem seu pignoris vinculum vel retentionem sibi adquisitam?

D. k. Nov. Lampadio et Oresta vv. cc. cons.

XXVIII Ad Senatus Consultum Macedonianum

[1] *Imp. Pertinax A. Atilio.* Si filius, cum in potestate patris esset, mutua a te pecuniam accepit, cum se patrem familias diceret, eiusque adfirmationi credidisse te iusta ratione edocere potes, exceptio ei denegabitur.

PP. x k. April. Falcone et Claro cons.

[2] *Imp. Severus et Antoninus AA. Sophiae.* Zenodorus cum sui iuris esse publico^v videretur aut patris voluntate contraxit aut in eam rem pecuniam accepit, quae patris oneribus incumberet, vel suae potestatis constitutus novatione facta fidem suam obligavit vel alias agnovit debitum, non esse locum decreto amplissimi ordinis rationis est.

PP. v k. Mart. Saturnino et Gallo cons.

[3] *Idem AA. Macrino.* Si filius familias aliquid mercatus pretium stipulanti venditori cum usurarum accessione spondeat, non esse locum senatus consulto, quo fenerare filiis familias prohibitum est, nemini dubium est: origo enim potius obligationis quam titulus actionis considerandus est.

PP. id. Mart. Saturnino et Gallo cons.

^v publicum

person, the claim for restitution is acquired for the one in whose name the money was lent through this type of payment, but the hypothec or pledge, which are given to or set aside for the procurator, are not acquired for the principals (*domini*) of the contract, rejecting such a distinction. We establish that both the claim for restitution and the action on hypothec or pledge accrue to the principal of the contract by mere operation of the law (*ipso iure*) and without any assignment. 1. If the need has been imposed by the laws on the procurator to assign his right of action to the principal of the contract, for what reason, just as the assignment seemed superfluous in an action *in personam*, should not the principal of the contract in a similar manner have from the beginning in the case of hypothecs and pledges an action on hypothec or the bond of a pledge or its retention that has been acquired for himself?

Given November 1, in the consulship of the viri clarissimi Lampadius and Orestes (530).

Twenty-Eighth Title The *Senatus Consultum Macedonianum*¹⁷

[1] Emperor PERTINAX Augustus to Atilius. If a son, when he was in the power of his father, received a loan of money from you, when he said he was a *paterfamilias*, and you can demonstrate that you believed his affirmation for a just reason, the defense (based on the *SC Macedonianum*) will be denied to him.

Posted March 23, in the consulship of Falco and Clarus (193).

[2] Emperors SEVERUS and ANTONINUS Augusti to Sophia. Zenodorus, when he seemed to be *sui iuris*, either made a public contract (*publicum*, i.e., with the Treasury) in accordance with his father's wish or received money for a matter that impinged on his father's obligations, or, once he was established in his own power, when the debt was novated (*novatione facta*) he obligated his faith or otherwise acknowledged the debt, it is reasonable that there is no place for (a defense based on) the decree of the highest order (*amplissimi ordinis*, the Senate).

Posted February 25, in the consulship of Saturninus and Gallus (198).

[3] The same Augusti to Macrinus. If a son in his father's power, when purchasing something, promises the price with the addition of interest to the seller taking a stipulation, it is doubtful to no one that there is no place for (a defense based on) the decree of the Senate whereby lending at interest to sons in their fathers' power has been prohibited; for the origin of the obligation must be considered rather than the title of the action.

Posted March 15, in the consulship of Saturninus and Gallus (198).

¹⁷ The *SC Macedonianum* (on which, D. 14.6.) protects fathers from liability for the debts of their sons in power by making certain loans to the sons unenforceable.

[4] *Idem AA. Cyrillae.* Si permittente patre filio familias pecuniam mutuam dedisti, senatus consulti potestas non intervenit, et ideo persecutio pignoris quod in bonis patris fuit non denegabitur, praesertim cum eidem filius heres extiterit, modo si nullus alius iure conventionis ratione temporis et ordinis potior apparuerit.

PP. XII k. Mai. Fabiano et Muciano cons.

[5] *Imp. Alexander A. Septimiae Musae. pr.* Macedoniani senatus consulti auctoritas petitionem eius pecuniae non impedit, quae filio familias studiorum vel legationis causa alibi degenti ad necessarios sumptus, quos patris pietas non recusaret, credita est. 1. Sed ex contractu filii post mortem eius de peculio actio in patrem competere ita demum potest, si anni utilis spatium petitionem non impedit. 2. Sane si iussu patris datum mutuum probetur, nec in quos usus versa sit pecunia disquiri necesse est perpetua in patrem etiam mortuo filio actio est.

PP. prid. k. Mart. Agricola et Clemente cons.

[6] *Imp. Philippus A. et Philippus C. Theopompo. pr.* Si filius tuus in potestate tua agens contra senatus consultum Macedonianum mutuam sumpsit pecuniam, actio de peculio adversus te eo nomine efficaciter dirigi nequaquam potest. 1. Quod senatus consulti auxilium, licet filii familias meminit, ad nepotes et ad pronepotes porrigitur.

PP. VI non. Mart. Philippo A. et Titiano cons.

[7] *Imp. Iustinianus A. Iuliano pp. pr.* Si filius familias citra patris iussionem vel mandatum vel voluntatem pecunias creditas acceperit, postea autem pater ratum habuerit contractum, veterum ambiguitatem decidentes sancimus, quemadmodum, si ab initio voluntate patris vel mandato filius familias pecuniam creditam accepisset, obnoxius firmiter constituebatur, ita et si postea ratum pater habuerit contractum, validum esse huiusmodi contractum, cum testimonium paternum respuere satis iniquum est. necesse est enim patris ratihabitionem principali patris mandato vel consensui non esse absimilem, cum nostra novella

[4] *The same Augusti to Cyrilla.* If with his father's permission you have given a loan of money to a son in his father's power, the power of the decree of the Senate does not intervene, and for that reason a claim for the pledge, which was from the father's property, will not be denied, especially when the son is heir to the same father, as long as no one else has appeared with a stronger claim by the right of an agreement or a consideration of time and order (of priority).

Posted April 20, in the consulship of Fabianus and Mucianus (201).

[5]¹¹⁸ *Emperor ALEXANDER Augustus to Septimia Musa. pr.* The authority of the *SC Macedonianum* does not impede seeking money that was lent for necessary expenses, which a father's familial loyalty (*pietas*) would not refuse, to a son in his father's power living in another place for his studies or on a foreign mission (*legatio*). 1. But after the son's death an action for his *peculium* on the basis of his contract is valid against the father only if the period of the year available does not (by lapsing) impede the claim. 2. Clearly if the loan should be proved to have been given on the father's order, it is not necessary to investigate to what uses the money was put, and the right of action against the father is perpetual even following the son's death.

Posted February 28, in the consulship of Agrippa and Clemens (230).

[6] *Emperors PHILIP Augustus and PHILIP Caesar to Theopompus. pr.* If your son acting in your power has taken a loan of money contrary to the *SC Macedonianum*, an action on his *peculium* cannot at all be validly directed against you on that account. 1. This help from the decree of the Senate, although it mentions sons in their fathers' power, is extended (also) to grandsons and great-grandsons.

Posted March 2, in the consulship of Philip Augustus and Titianus (245).

[7] *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect. pr.* If a son in his father's power has received money on loan without his father's instruction, order, or wish, but afterwards the father has ratified the contract, in order to settle the ambiguity of the ancient authorities (*veterum*) We ordain that, in whatever way the father was made firmly liable, if from the beginning the son had received the money on loan by his father's wish or order, (or) in the same way even if the father afterwards ratified the contract, a contract of this type is valid, since it is quite unjust to scorn the father's testimony. For the father's ratification is by necessity not dissimilar from his original order or agreement, since in our recent law (*novella lege*)¹¹⁹ and generally every ratification is

¹¹⁸ = C. Greg. Visig. 10.1.

¹¹⁹ C. 5.16.25 (?).

lege et generaliter omnis ratihabitio prorsus^{vi} trahitur et confirmat ea ab initio quae subsecuta sunt. et haec quidem de privatis hominibus sancienda sunt.

1. Sin autem miles filius familias pecuniam creditam acceperit, sive sine mandato vel consensu vel voluntate vel ratihabitione patris, stare oportet contractum, nulla differentia introducenda, ob quam causam pecuniae creditae vel ubi consumptae sunt. in pluribus enim iuris articulis filii familias milites non absimiles videntur hominibus qui sui iuris sunt, et ex praesumptione omnis miles non credatur in aliud quicquam pecunias accipere et expendere nisi in causas castrenses.

D. XII k. Aug. Lampadio et Oresta vv. cc. cons.

XXVIII Ad Senatus Consultum Velleianum

[1] *Imp. Antoninus A. Lucillae.* Mulieribus, quae alienam obligationem suscipiunt aut in se transferunt, si id contrahentes non ignorant, senatus consulto subvenitur. sed si pro aliis, cum obligatae non essent, pecuniam exsolvunt, intercessione cessante repetitio nulla est.

PP. non. Dec. Carviti duobus Aspris cons.

[2] *Idem A. Nepotianae.* Frustra senatus consulti exceptione, quod de intercessionibus feminarum factum est, uti temptasti, quoniam principaliter ipsa debitor fuisti. eius enim senatus consulti exceptio tunc mulieri datur, cum principaliter ipsa nihil debet, sed pro alio debitore apud creditorem eius intercessit: sin autem pro creditore suo aliis se obligaverunt vel ab eo se vel debitorem suum delegari passae sunt, huiusmodi senatus consulti auxilium non habent.

PP. III id. Aug. Antonino A. IIII et Balbino cons.

[3] *Idem A. Servato.* Si, cum ipse mutuam pecuniam acciperes, mater tua contra amplissimi ordinis consultum fidem suam interposuit, exceptione tueri potest.

^{vi} retrorsus

applied retroactively¹²⁰ and confirms from the beginning what has ensued. And these provisions are to be established for private people.

1. If, however, a soldier who is a son in his father's power has received money on loan, whether without the father's order, agreement, wish, or ratification, the contract must stand, with no distinction being introduced as to the reason why the money was loaned or where it was used. For in many provisions of the law sons in their fathers' power are seen as not dissimilar from people who are *sui iuris*, and each soldier should be presumptively believed not to receive or spend money for any purpose other than military ones.

Given on July 21,¹²¹ in the consulship of viri clarissimi Lampadius and Orestes (530).

Twenty-Ninth Title The *Senatus Consultum Velleianum*¹²²

[1] *Emperor ANTONINUS Augustus to Lucilla.* Women who take up another person's obligation or transfer it to themselves, if the contracting parties are not unaware of this, are aided by the decree of the Senate. But if they pay money on behalf of others, when they were not obligated to do so, since their assumption of liability is (then) irrelevant, they have no right to claim the money back.

Posted December 7, at Carnuntum (?), in the consulship of the two Aspri (212).

[2] *The same Augustus to Nepotiana.* In vain have you tried to use the defense of the decree of the Senate that was made concerning the assumption of liability by women, since you yourself were the principal debtor. The defense of this decree of the Senate is given to a woman in this circumstance, when she herself does not owe anything as the principal debtor, but has assumed liability for another debtor with his creditor. If, however, they (the women) have obligated themselves to others instead of their own creditors or have allowed their own debt or that of their debtor to be delegated by him (i.e., the creditor orders the woman or her debtor to pay an obligation he owes), they do not have such protection from the decree of the Senate.

Posted August 11, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[3] *The same Augustus to Servatus.* If, when you were receiving a loan of money yourself, your mother interposed her credit (*fides*) contrary to the decree of the highest order (the Senate), she can protect herself with the defense.

¹²⁰ Based on Krüger's emendation of *retroarsus* for *priorus*.

¹²¹ Krüger: perhaps August 1; this date is also accepted by Lounghis *et al.*

¹²² See D. 16.1. This decree of 46 CE restricted the capacity of women to assume liability (*intercedere*) on behalf of others.

PP. III id. Aug. Antonino A. IIII et Balbino cons.

[4] *Imp. Alexander A. Alexandriae. pr.* Senatus consultum locum habet, sive eam obligationem, quae in alterius persona constitit, mulier in se transtulerit vel participaverit sive, cum alius pecuniam acciperet, ipsa se constituit ab initio ream, quod et in rerum earum pro aliis obligationibus admissum est. 1. Sed si praedia tua annis maior viginti quinque vendidisti et pro marito pecuniam solvisti, deficit auxilium senatus consulti.

PP. VI k. Ian. Maximo II et Aeliano cons.

[5] *Idem A. Popiliae.* Si sine voluntate tua res tuae a marito tuo pignori datae sunt, non tenentur. quod si consensisti obligationi sciente creditrice, auxilio senatus consulti uti potes. quod si patientiam praestitisti, ut quasi suas res maritus obligaret, decipere voluisti mutuam pecuniam dantem et ideo tibi non succurratur senatus consulto, quo infirmitati, non calliditati mulierum consultum est.

D. XV k. Iul. Iuliano et Crispino cons.

[6] *Idem A. Torquato. pr.* Si mater, cum filiorum suorum gereret patrimonium, tutoribus eorum securitatem promiserit et fideiussorem praestiterit vel pignora dederit, quoniam quodammodo suum negotium gessisse videtur, senatus consulti auxilio neque ipsa neque fideiussor ab ea praestitus neque res eius pigneratae adiuvantur. 1. Sin autem tutore se excusare volente ipsa se interposuit indemnitate ei repromittens, auxilio senatus consulti uti minime prohibetur. 2. Sin vero tutores petiit et sponte periculum suscepit, quominus teneatur, auctoritate iuris tuetur.

PP. VI id. Oct. Modesto et Probo cons.

[7] *Imp. Gordianus A. Viviano.* Si sciens creditor a marito propter proprium debitum fundum mulieris, licet ea consentiente, pignori accepit, propter senatus consulti auxilium vendendo eum dominium mulieri

Posted August 11, in the consulship of Antoninus Augustus, for the fourth time, Balbinus (213).

[4] *Emperor ALEXANDER Augustus to Alexandria. pr.* The decree of the Senate has a place if a woman has transferred to herself or participated in an obligation that exists in the person of another, or, when another person was receiving money, she established herself as a debtor from the beginning, (a rule) which has been allowed also in obligations of this property for other people. 1. But if, being over 25 years in age, you have sold your properties and paid money on behalf of your husband, aid from the decree of the Senate fails (to help you).

Posted December 27, in the consulship of Maximus, for the second time, and Aelianus (223).

[5] *The same Augustus to Popilia.* If without your consent your things have been pledged by your husband, they are not subject to a lien. But if you consented to the obligation with the knowledge of the woman who was the creditor, you can use the protection from the decree of the Senate. But if you tolerated the pretense that your husband was obligating his own property, you wished to deceive the woman giving the loan, and for that reason you will not be helped by the decree of the Senate through which provision was taken for the infirmity of women, not their craftiness.

Given June 17, in the consulship of Julian and Crispinus (224).

[6] *The same Augustus to Torquatus. pr.* If a mother, when she was managing the patrimony of her children, promised indemnity to their *tutores* or offered a surety or gave pledges, since she seems to have carried on her own business in a sense, neither she herself nor the surety provided by her nor her property that was pledged is assisted by the decree of the Senate's protection. 1. However, if, when the *tutor* wanted to excuse himself, she has promised him indemnity by assuming liability, she is not at all prohibited from using the protection of the decree of the Senate. 2. But if she has asked for the *tutores* and of her own volition undertook the risk, she protects herself through the authority of the law, so that she is not held liable.

Posted October 10, in the consulship of Modestus and Probus (228).

[7] *Emperor GORDIAN Augustus to Vivianus.* If a creditor knowingly received from a husband (as a pledge) for his own debt his wife's farm, on account of the decree of the Senate's protection he could not deprive the wife of

auferre nequivit, nec tibi necesse est praestito pretio emptori vindicare, si matri heres extitisti.

PP. XII k. Oct. Pio et Pontiano cons.

[8] *Idem A. Tryphoni. pr.* Si paternam obligationem non tantum masculini sexus, verum etiam filiae emancipatae in se receperunt, quamvis filiae virilibus obligationibus eximantur propter exceptionem, quae ex senatus consulto Velleiano descendit, tamen filios in id quod se obligaverunt teneri filiarumque subducta personam patrem in id conveniri posse, in quo conveniretur, si filiae non intercessissent, dubium non est. 1. Pignora tamen patris, etsi in posteriorem obligationem accepta sunt, sine dubio tenentur: sed et si in priore fuerunt, quatenus ad patrem per restitutoriam actionem redit, hactenus tenebuntur.

PP. non. Oct. Pio et Pontiano cons.

[9] *Idem A. Proculo.* Quamvis pro alio solvere possit mulier, tamen si praecedente obligatione, quam senatus consultum de intercessionibus efficacem esse non sinit, solutionem fecerit eius senatus consulti beneficio munitam se ignorans, locum habet repetitio.

PP. non. Iul. Gordiano A. et Aviola cons.

[10] *Imp. Philippus A. et Philippus C. Tryphaenae.* Si adversarius tuus non cum marito tuo, sed tecum negotium gessit, reliqua conductionis, quae dicis esse contracta, obtentu eiusmodi obligationum non potes recusare. enimvero si, cum eisdem fundos non tibi, sed marito tuo locaret, personam tuam ut idoneam secutus est, beneficio amplissimi ordinis, quod est factum de intercessionibus feminarum, te tueri potes.

PP. XVIII k. Sept. Peregrino et Aemiliano cons.

[11] *Idem A. Theodora.* Etiam constante matrimonio ius hypothecarum seu pignorum marito remitti posse explorati iuris est.

PP. VIII k. Oct. Peregrino et Aemiliano cons.

ownership by selling it, nor is it necessary for you, if you are the heir of your mother, to sue the purchaser over its ownership (*vindicare*) after offering the price paid for it.

Posted September 20, in the consulship of Pius and Pontianus (238).

[8] *The same Augustus to Trypho. pr.* If children, not just of the masculine sex, but also emancipated daughters, have taken their father's obligation upon themselves, although daughters are exempt from the men's obligation by the defense that accrues from the SC *Velleianum*, even so it is not doubtful that sons are held liable for what they obligated themselves to, and, with the removal of the daughters, the father can (also) be sued for what he would be sued for if the daughters had not assumed liability. 1. The father's pledges, however, even if they have been received for the later obligation, are without doubt held under a lien; but even if they were held under a lien in the prior obligation as well, they will be liable in so far as the obligation returns to the father through a restitutory action (*actio restitutoria*).¹²³

Posted October 7, in the consulship of Pius and Pontianus (238).

[9] *The same Augustus to Proculus.* Although a woman can pay on behalf of another, her right to reclaim still has a place if, because of a preceding obligation that the decree of the Senate on assumptions of liability does not allow to be valid, she has made the payment (while) unaware of her protection by the benefit of this decree of the Senate.

Posted July 7, in the consulship of Gordian Augustus and Aviola (239).

[10] *Emperors PHILIP Augustus and PHILIP Caesar to Tryphaena.* If your adversary conducted business not with your husband but with you, you cannot refuse (to pay) the arrears on the lease that you say were contracted to be paid (by you), under the pretext of obligations of this type (affected by the SC). But if indeed he leased the same farms not to you, but to your husband, and he has pursued your person as solvent, you can protect yourself through the benefit of the highest order, which has been made concerning the assumptions of liability by women.

Posted August 18, in the consulship of Peregrinus and Aemilianus (244).

[11] *The same Augustus to Theodora.* It is established law that even when the marriage is continuing the right of hypothecs or pledges can be remitted to the husband.

Posted September 24, in the consulship of Peregrinus and Aemilianus (244).

¹²³ The *actio quae restituit obligationem* gave the creditor a primary right of action when he lost his first action against a debtor because of an invalid novatory intercession by a woman.

[12] *Impp. Valerianus et Gallienus AA. Sepiducaae.* Si dotare filiam volens genero res tuas obligasti, pertinere ad te beneficium senatus consulti falso putas: hanc enim causam ab eo beneficio esse removendam prudentes viri putaverunt.

PP. viiii k. Mart. Tusco et Basso cons.

[13] *Impp. Diocletianus et Maximianus AA. Condianae.* Si fenebris pecunia iuxta fidem veri a creditore tibi data est, sive tota quantitas fenoris sive pars eius in usum mariti processisse proponatur, decreto patrum non adiuvaris, licet creditor causam contractus non ignoraverit.

D. iii k. Sept. ipsis iiii et iii AA. cons.

[14] *Idem AA. et CC. Basilissae.* Mulierem contra senatus consulti Velleiani auctoritatem non posse intercedere eademque exceptione fideiussorem eius uti posse iuris auctoritas probat. unde si mater tua marito quondam suo heres non extitit, satis idoneae exceptionis remedio tuta est.

PP. viii k. April. Byzantii CC. cons.

[15] *Idem AA. et CC. Agrippino.* Si uxor pro marito contra senatus consultum intercessura te rogavit mandatorio nomine pro ea tuam fidem adstringere, initio contractus per exceptionis auxilium obligationi tuae cohaesit securitas, qua conventus defendi potes.

PP. xviii k. Iun. Sirmi CC. cons.

[16] *Idem AA. et CC. Rufino.* Si mulier alienam suscepit obligationem, cum ei per exceptionem Velleiani senatus consulti succurratur, creditori contra priores debitores rescissoria actio datur.

PP. xvii k. Febr. Sirmi CC. cons.

[17] *Idem AA. et CC. Alexandro.* Si, cum pater vester a Callistrato mutuum sumpsisset pecuniam, velut hanc eius uxor accepisset, instrumentum conscriptum est, nec ad exceptionis tractatum ex senatus

[12] *Emperors VALERIAN and GALLIENUS Augusti to Sepiduca.* If, wishing to provide your daughter with a dowry, you have obligated your property to your son-in-law, you falsely think that the decree of the Senate's benefit applies to you; men learned (in the law, i.e., the jurists) have thought that this reason should be removed from the benefit.

Posted February 21, in the consulship of Tuscus and Bassus (258).

[13] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Condiana.* If a loan of money at interest has been given to you by a creditor in good faith, whether it should be stated that the entire amount of the loan or part of it has gone to the benefit of your husband, you are not aided by the decree of the Fathers (Senators), even though the creditor was not unaware of the reason for the contract.

Given August 30, in the consulship of (the Augusti) themselves, Consuls for the fourth and third time, respectively (290).

[14] *The same Augusti and the Caesars to Basilissa.* The authority of the law proves that a woman cannot assume liability in contravention of the authority of the SC *Velleianum* and that her surety can use the same defense. Therefore if your mother was not heir of her erstwhile husband, she is protected by the remedy of a sufficiently suitable defense.

Posted March 25, at Byzantium, in the consulship of the Caesars (294).¹²⁴

[15] *The same Augusti and Caesars to Agrippinus.* If a wife who is going to assume liability for her husband contrary to the decree of the Senate has asked you under the title of a mandate to bind your own faith (*fidem adstringere*, i.e., become a surety), the protection through the aid of the defense, with which you can be defended when sued, was attached to your obligation at the beginning of the contract.

Posted May 20, at Sirmium, in the consulship of the Caesars (294).¹²⁵

[16] *The same Augusti and Caesars to Rufinus.* If a woman has assumed another person's obligation, since she is aided by the defense of the SC *Velleianum*, an action to restore his previous right (*actio rescissoria*) is given to the creditor against the previous debtors.

Posted January 16, at Sirmium, in the consulship of the Caesars (294).

[17] *The same Augusti and Caesars to Alexander.* If, when your father took money on loan from Callistratus, a document was written as though his wife

¹²⁴ Mommsen dates to April 6, 293.

¹²⁵ Mommsen dates to December 15, 293.

consulto venientem pervenire necesse est, cum eam veritatis substantia, constituta potior quam simulata gesta, tueatur.

iii id. Mart. CC. cons.

[18] *Idem AA. et CC. Zotico.* Feminis alienas novas vel veteres obligationes aliqua ratione suscipientibus subvenitur, nisi creditor aliqua ratione per mulierem deceptus sit: nam tunc replicatione doli senatus consulti exceptionem removeri constitutum est.

S. vi id. Nov. Antiochiae CC. cons.

[19] *Idem AA. et CC. Faustinae.* Cum ad eas etiam obligationes, quae ex mulieris persona calliditate creditoris sumpserunt primordium, decretum patrum, quod de intercessione feminarum factum est, pertinere edicto perpetuo declaratur, si tamen creditor, qui contrahere cum alio proposuerat, mulieris personam elegit, exceptione contra petitores secundum ea quae adseveras defendi potes.

D. xviii k. Ian. Nicomediae CC. cons.

[20] *Idem AA. et CC. Theodotiano.* Heredes quoque mulieris adversus creditores eadem exceptione, quae ex senatus consulto introducta est, uti posse non dubium est.

D. viii k. Ian. ipsis CC. cons.

[21] *Imp. Anastasius A. Celeri magistro officiorum.* Iubemus licere mulieribus et pro uno contractu vel certis contractibus, seu pro una vel certis personis seu rebus iuri hypothecarum sibi competenti per consensum proprium renunciare, quodque ita gestum sit, hac auctoritate nostra firmum illibatumque custodiri: ita tamen, ut, si generaliter tali renuntiatione pro uno ut dictum est contractu seu certis contractibus vel ad unam vel certas res seu personas consensum proprium accommodantes usae sunt vel fuerint, eadem renuntiatio ad illos contractus et illas res seu personas quibus consensum proprium accommodaverunt vel accommodaverint coartetur, nec aliis quibusdam contractibus, quibus minime mulieres consenserunt vel consenserint, praetendentibus eam opponendi licentia praebetur: his scilicet omnibus, quae in praesenti per hanc consultissimam legem statuimus, ad praeteritos nihilo minus

had received it, when she comes to consider the defense from the decree of the Senate it is not necessary for her to employ this, since the substance of the truth, which is deemed stronger than pretended acts, protects her.

March 13, in the consulship of the Caesars (294).

[18] *The same Augusti and Caesars to Zoticus.* Women who in any manner take up either new or old obligations of others are protected unless the creditor has been deceived in some way by the woman; for in that situation it has been established that the decree of the Senate's defense is removed by the counter-defense of deceit.

Written November 8, at Antioch, in the consulship of the Caesars (294).¹²⁶

[19] *The same Augusti and Caesars to Faustina.* Since it is declared in the Perpetual Edict that the decree of the Fathers (Senators), which has been enacted concerning the assumption of liability by women, applies also to those obligations that have taken their origin from the person of a woman by the craftiness of the creditor, you can be protected by a defense against the claimants according to what you allege, as long as the creditor, who had intended to contract with another, chose the person of the woman (as debtor).

Given December 15, at Nicomedia, in the consulship of the Caesars (294).

[20] *The same Augusti and Caesars to Theodotianus.* There is no doubt that heir of a woman can also use against creditors the defense that has been introduced on the basis of the decree of the Senate.

Given December 24, in the consulship of the Caesars themselves (294).

[21] *Emperor ANASTASIUS Augustus to Celer, Master of the Offices.* We order that it be permitted to women to renounce through their own consent the right of hypothec accruing to themselves, either for a single contract or for specified contracts, whether for one person or for specified persons or things, and that what has thus been done be protected firmly and without compromise by this Our authority; provided that, if, giving their own consent, they have or will have generally had recourse to such a renunciation for one contract, as mentioned, or for specified contracts or for one or specified things or persons, the same renunciation should be restricted to those contracts or things or persons for which they have or will have provided their own consent. Women should not be offered the freedom (*licentia*) to oppose it when they bring it (the renunciation) forward as an excuse for any other contracts to which they have not or will have not consented. That is to say, all these provisions, which for the present We establish through this most considered law,

¹²⁶ Mommsen: "November 11, 294, at Pantichum."

contractus pro negotiis et controversiis necdum transactionibus vel definitivis sententiis seu alio legitimo modo sopitis locum habituris.

D. k. April. Anastasio et Agapito cons.

[22] *Imp. Iustinianus A. Iuliano pp. pr.* Si mulier perfectae aetatis post intercessionem vel cautionem conscripserit vel pignus aut intercessorem praestiterit, sancimus, antiqua legum varietate cessante, si quidem intra biennale iuge tempus post priorem cautionem numerandum pro eadem causa fecerit cautionem vel pignus aut intercessorem dederit, nihil sibi praeiudicare, quod adhuc ex consequentia suae fragilitatis in secundam iacturam inciderit.

1. Sin autem post biennium haec fecerit, sibi imputet, si, quod saepius cogitare poterat et evitare, non fecit, sed ultro firmavit: videtur etenim ex huiusmodi temporis prolixitate non pro aliena obligatione se illigare, sed pro sua causa aliquid agere et tam ex secunda cautione sese obnoxiam facere, in quantum hoc fecit, quam pignus aut intercessorem utiliter dare.

D. xv k. April. Lampadio et Oreste cons.

[23] *Idem A. Iuliano pp. pr.* Antiquae iurisdictionis retia et difficillimos nodos resolventes et supervacuas distinctiones exsulare cupientes sancimus mulierem, si intercesserit, sive ab initio sive postea aliquid accipiens, ut sese interponat, omnimodo teneri et non posse senatus consulti Velleiani uti auxilio, sive sine scriptis sive per scripturam sese interposuerit. 1. Sed si quidem in ipso instrumento intercessionis dixerit sese aliquid accepisse et sic ad intercessionem venisse et hoc instrumentum publice confectum inveniatur et a tribus testibus consignatum, omnimodo esse credendum eam pecuniam vel res accepisse et non esse ei ad senatus consulti Velleiani auxilium regressum.

1a. Sin autem sine scriptis intercesserit vel instrumento non sic confecto, tunc, si possit stipulator ostendere eam accepisse pecunias vel res et sic subisse obligationem, repelli eam a senatus consulti iuvamine. 1b. Sin vero hoc minime fuerit ab eo approbatum, tunc mulieri superesse auxilium et antiquam actionem adversus eum servari, pro quo mulier intercessit, vel ei actionem parari.

1c. Sed si minus idoneae mulieri constitutae aliquis pecunias vel res dedit, ut pro eo se obligaret, mulieri quidem, quae re vera haec accepit,

will apply no less to past contracts for transactions and controversies that have not yet been put to rest by settlements or judicial decisions or in another lawful manner.

Given April 1, in the consulship of Anastasius and Agapitus (517).

[22] *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect. pr.* If a woman of adult age, after assuming liability, writes a promise or offers a pledge or a surety (*intercessor*), We ordain, since the ancient variety of the laws is obsolete, that, if within a two-year time period after paying the prior promise she makes a promise for the same obligation or gives a pledge or a surety, what up to now has resulted as a consequence of her fragility in a second loss does not cause any prejudice to herself.

1. But if she does this after the two-year period, she should be accountable if she has not done what she could have contemplated quite often and avoided, but of her own accord affirmed it; for after such a long time she seems not to bind herself for another's obligation, but to do some business for her own sake and both to make herself liable on the basis of the second promise, to the extent she has done this, and to give a pledge or surety validly.

Given March 18, in the consulship of Lampadius and Orestes (530).

[23] *The same Augustus to Julian, Praetorian Prefect. pr.* To loosen the nets and the most difficult knots of ancient jurisdiction and desiring to drive out antiquated distinctions, We ordain that a woman, if she has assumed liability after receiving some consideration to do so, whether from the outset or later, is held completely responsible and cannot use the protection of the SC *Velleianum*, whether she has interposed herself without written documents or through writing. 1. But if in the very document concerning her assumption of liability she says that she has received something and in this way came to assuming liability, and this document should be found to have been prepared publicly and to have been signed by three witnesses, it must be completely believed that she received that money or the things and she has no recourse to the protection of the SC *Velleianum*.

1a. If, however, she has assumed liability without writing or in a document not prepared in this way, if the promisor (*stipulator*) should be able to show that she received money or things and thus to have entered into an obligation, she is repelled from the decree of the Senate's benefit. 1b. If in fact this has not at all been proved by him, then the woman has the protection and the old action is maintained against the person on whose behalf she assumed liability, or an action is prepared for her.

1c. But if someone has given money or things to a woman who is not solvent so that she obligate herself on his behalf, no access to the authority of the

nullus pateat aditus ad senatus consulti auctoritatem, creditori autem liceat adversus eam venire et quod potest ab ea exigere et in reliquum debitorem antiquum adgredi, vel in partem, si aliquid a muliere possit accipere, vel in totum, si ea penitus inopia fatigatur.

2. Ne autem mulieres perperam sese pro aliis interponant, sancimus non aliter eas in tali contractu posse se pro aliis obligare, nisi instrumento publice confecto et a tribus testibus subsignato accipiant homines a muliere pro aliis confessionem: tunc etenim tantummodo eas obligari et sic omnia tractari, quae de intercessionibus feminarum vel veteribus legibus cauta vel ab imperiali auctoritate introducta sunt.

3. Sin autem extra eandem observationem mulieres susceperint intercedentes, pro nihilo habeatur huiusmodi scriptura vel sine scriptis obligatio tamquam nec confecta nec penitus scripta, nec senatus consulti auxilium imploretur, sed sit libera et absoluta, quasi penitus nullo in eadem causa subsecuto.

[24] *Idem A. Iuliano pp. pr.* Veterum ambiguitatem decidentes sancimus, si quis, ut servo suo manumissionem imponat, mulierem acceperit obnoxiam sese pro certa quantitate facientem, si in libertatem servum perduxerit, sive principaliter mulier sese obligavit sive pro servo hoc fecit, teneri eam, recte omnimodo senatus consultum Velleianum in hoc casu tacere imperantes. 1. Satis etenim acerbum est et pietatis rationi contrarium dominum servi, qui credidit mulieri sive soli sive post servi promissionem, et libertatem servo imponere et suum famulum perdere et ea minime accipere, quibus fretus ad huiusmodi venit liberalitatem.

D. k. Aug. Lampadio et Oreste cons.

[25] *Idem A. ad populum urbis Constantinopolitanae et universos provinciales. pr.* Generaliter sancimus, ut, si quis maior viginti quinque annis sive masculus sive femina dotem vel pollicitus sit vel sponderit pro qualibet muliere, cum qua matrimonium licitum est, omnimodo compellatur suam confessionem adimplere. 1. Neque enim ferendum est quasi casu fortuito interveniente mulierem fieri indotatam et sic a viro forsitan repelli et distrahi matrimonium. cum enim scimus favore

decree of the Senate should be available to a woman who has in truth received these considerations, but the creditor should be allowed to proceed against her and to exact from her what he can and for the rest attack the original debtor, either for a part, if he should be able to receive something from the woman, or for the whole amount, if she is completely worn out by poverty.

2. Lest women improperly interpose themselves for others, We ordain that they cannot otherwise obligate themselves for others in such a contract unless, in a document publicly prepared and signed by three witnesses, people receive an acknowledgment from the woman (of their action) on behalf of others. Only then are they obligated and in this way everything is considered that has been provided for concerning the assumption of liability by women in the old laws or introduced by imperial authority. 3. If without observing these provisions women undertake obligations by assuming liability, a written document of this type or an obligation without written documents should be considered for naught as if it were not prepared or written at all, nor should the protection of the decree of the Senate be implored, but she should be free and absolved, as if no transaction at all had followed in this cause.

Given (530).¹²⁷

[24] *The same Augustus to Julian, Praetorian Prefect. pr.* To resolve the ambiguity of the old authorities, We ordain that, if anyone, to provide for the freeing of a slave, accepts a woman making herself liable for a certain amount of money, if he has given the slave freedom, whether the woman has obligated herself as the principal or has done this on behalf of the slave, she is held liable, and We properly order that the *SC Velleianum* be completely silent in this case. 1. For it is quite bitter and contrary to the principle of fidelity (*pietas*) that the owner of the slave, who relied on the woman, whether on her alone herself or after the slave gave a promise, give freedom to the slave and lose his servant and not receive those things in consideration of which he has come to such generosity.

Given August 1, in the consulship of Lampadius and Orestes (530).

[25]¹²⁸ *The same Augustus to the People of the City of Constantinople and all the people of the provinces. pr.* We ordain generally that, if someone older than 25 years, whether male or female, has promised or stood as surety to provide a dowry for any woman with whom marriage is permitted, such a person be compelled to fulfill the promise at all events. 1. For it is not to be tolerated that a woman, as if through an unavoidable accident, should be without a dowry and thus perhaps be repudiated by her husband and the marriage be dissolved. For since We know that out of favor for dowries even the ancient

¹²⁷ The date should probably either be March 15, March 27, or August 1, 530 (the date preferred by Lounghis *et al.*).

¹²⁸ Apparently to be combined with C. 5.13.1.

dotium et antiquos iuris conditores severitatem legis saepius mollire, merito et nos ad huiusmodi venimus sanctionem. 2. Nam si spontanea voluntate ab initio liberalitatem suam ostendit, necesse est eum vel eam suis promissionibus satisfacere, ut, quod ab initio sponte scriptum aut in pollicitationem deductum est, hoc et ab invitis postea compleatur, omni auctoritate Velleiani senatus consulti in hac causa cessante.

D. k. Nov. Constantinopoli post consulatum Lampadii et Orestis.

XXX De Non Numerata Pecunia

[1] *Impp. Severus et Antoninus AA. Hilario.* Si pecuniam tibi non esse numeratam atque ideo frustra cautionem emissam adseris et pignus datum probaturus es, in rem experiri potes: nam intentio dati pignoris neque numeratae pecuniae non aliter tenebit, quam si de fide debiti constiterit. eademque ratione veritas servetur, si te possidente pignus adversarius tuus agere coeperit.

PP. k. Sept. Laterano et Rufino cons.

[2] *Imp. Antoninus A. Maturio.* Minorem pecuniam te accepisse et maioris cautionem interposuisse si apud eum qui super ea re cogniturus est constiterit, nihil ultra quam accepisti cum usuris in stipulatum deductis restituere te iubebit.

D. id. April. Antonino A. IIII et Balbino cons.

[3] *Idem A. Demetriae.* Si ex cautione tua, licet hypotheca data, conveniri coeperis, exceptione opposita seu doli seu non numeratae pecuniae compelletur petitor probare pecuniam tibi esse numeratam: quo non impleto absolutio sequetur.

D. III k. Iul. Laeto et Cereale cons.

[4] *Idem A. Basso.* Cum fidem cautionis agnoscens etiam solutionem portionis debiti vel usurarum feceris, intellegis de non numerata pecunia nimium tarde querellam te deferre.

founders of the law quite often soften its severity, rightly do. We also come to an ordinance of this type. 2. For if someone shows his or her generosity in the first place by a spontaneous expression of will, he or she must satisfy the promise, so that what was at the beginning spontaneously written or formally promised must be fulfilled later even by the unwilling, and no authority of the *SC Velleianum* will have any application in this case.

Given November 1, at Constantinople, in the post-consulate of Lampadius and Orestes (530).

Thirtieth Title Money Not Paid

[1]¹²⁹ *Emperors SEVERUS and ANTONINUS Augusti to Hilarus.* If you assert that money has not been paid to you and for that reason you are going to prove that a promise (to repay it) was invalidly written and a pledge given, you can sue *in rem* (to recover the pledge); for the claim on a pledge given when the money has not been paid does not otherwise hold, unless it is based on the faith of the debt. For the same reason the truth should be maintained if your adversary begins to proceed against the pledge while you possess it.

Posted September 1, in the consulship of Lateranus and Rufinus (197).

[2] *Emperor ANTONINUS Augustus to Maturius.* If it is established with the person who is going to judge this matter that you received less money and provided a promise for a greater amount, he will order you to restore nothing more than what you received with a deduction for the (excess) interest provided for in the stipulation.

Given April 13 in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[3] *The same Augustus to Demetria.* If you are sued on the basis of your promise, although a hypothec was given (for its execution), when the defense is interposed either of deceit (*dolus*) or of money not paid, the claimant will be compelled to prove that the money was paid to you; if this is not fulfilled, your absolution will follow.

Given June 29, in the consulship of Laetus and Cerealis (215).

[4] *The same Augustus to Bassus.* Since, acknowledging the genuineness of your promise, you have also made a payment of a portion of your debt or the interest, you understand that you are too late in bringing the complaint about money not having been paid.

(No date).

¹²⁹ = C. 8.32.1, from which *adseris* is restored. For "when the money has not been paid," that constitution reads "when the money has not been paid back."

[5] *Imp. Alexander A. Augustiano.* Adversus petitiones adversarii si quid iuris habes, uti eo potes. ignorare autem non debes non numeratae pecuniae exceptionem ibi locum habere, ubi quasi credita pecunia petitur, cum autem ex praecedenti causa debiti in chirographum quantitas redigitur, non requiri, an tunc cum cavebatur numerata sit, sed an iusta causa debiti praecesserit.

[6] *Idem A. Iustino.* Frustra opinaris exceptione non numeratae pecuniae te esse munitum, quando, ut fateris, in eius vicem qui erat obligatus substitueris te debitorem.

PP.

[7] *Idem A. Iuliano et Ammoniano.* Si quasi accepturi mutuam pecuniam adversario cavistis, quae numerata non est, per conditionem obligationem repetere, etsi actor non petat, vel exceptione non numeratae pecuniae adversus agentem uti potestis.

PP. non. Nov. Maximo II et Aeliano cons.

[8] *Idem A. Materno. pr.* Si intra legibus definitum tempus qui cautionem exposuit nulla querimonia usus defunctus est, residuum tempus eius heres habebit tam adversus creditorem quam adversus heredes eius. 1. Sin autem questus est, exceptio non numeratae pecuniae heredi et adversus heredes perpetuo competit. 2. Sin vero legitimum tempus excessit in querimoniam creditore minime deducto, omnimodo heres eius, et si pupillus sit, debitum solvere compelletur.

PP. XII k. April. Modesto et Probo cons.

[9] *Imp. Diocletianus et Maximianus AA. et CC. Zoilo.* Cum ultra hoc quod accepit re obligari neminem posse constet et stipulatione interposita placita creditor non dederit, in factum dandam exceptionem convenit: si necdum tempus, intra quod huius rei querella deferri debet,

[5] *Emperor ALEXANDER Augustus to Augustianus.* If you have any basis in law against the claims of your adversary, you can use it. However, you should not ignore that the defense of money not paid is applicable when money is claimed as if for a loan; but when the amount is entered onto a promissory note (*chirographum*) from a preceding cause of a debt, it is not asked whether it was paid at the time when it was being promised, but (rather) whether a proper cause for the debt had preceded.

[6] *The same Augustus to Justinus.* Your opinion is invalid that you are protected by the defense of money not paid when, as you say, you have substituted yourself as debtor in place of the person who had been obligated.

Posted (no date).

[7] *The same Augustus to Julian and Ammonianus.* If, as if you were going to accept a loan of money, which has not been paid, you have made a formal promise to your adversary, you can seek back (the document proving) your obligation through a claim for restitution (*condictio*) even if the claimant (*actor*) should not sue for it (the debt), or you can use the defense of money not paid if he brings a suit.

Posted November 5, in the consulship of Maximus, for the second time, and Aelianus (223).

[8] *The same Augustus to Maternus. pr.* If within the time established by the laws the person who has set out a written promise has died without having raised a complaint, his heir will have the remaining time both against the creditor and against his heir. 1. If, however, he has raised a complaint, the defense of money not paid is available to the heir (of the debtor) even against the heirs (of the creditor) perpetually. 2. But if indeed the legally established time has passed without any complaint made against the creditor, his (the original debtor's) heir will by all means be compelled to pay the debt, even if he is a ward.

Posted March 21, in the consulship of Modestus and Probus (228).

[9]³⁰ *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Zollus.* Since it is established that no one can be obligated beyond what he has in fact received and, after a stipulation has been interposed, the creditor has not given what was agreed upon, it is proper to give an analogous (*in factum*) defense. If the time has not yet passed within which a complaint on this matter should be brought or within this time the law has (not yet) been

³⁰ A scholion on *Basilica* 23.1.71 indicates that the beginning of the constitution originally discussed the situation in which the debtor provided a *cautio* for the principal and interest as if the whole sum were principal; the compilers have omitted this on account of Justinian, *C.* 4.32.28.

transiit vel intra hoc in testando iuri paritum sit, nihil ultra hoc quod accepisti sortis a te nomine praeses provinciae exigere patietur.

D. III id. Dec. ipsis ... cons.

[10] *Idem AA. et CC. Mucazano.* Adseveratio debitum solutum contententis temporis diuturnitate non excluditur. nec huic obloquitur, quod exceptio non numeratae pecuniae certa die non delata querella prius evanescat, cum inter eum, qui factum adseverans onus subiit probationis, et negantem numerationem, cuius naturali ratione probatio nulla est, et ob hoc ad petitem eius rei necessitatem transferentem magna sit differentia.

[11] *Idem AA. et CC. Eutychiano.* Si transactionis causa dare Palladio pecuniam stipulanti spondidisti, exceptione non numeratae pecuniae defendi non potes.

D. III id. April.

[12] *Idem AA. et CC. Severiano.* Tam mandatori quam fideiussori non numeratae pecuniae exceptio exemplo rei principalis competit.

[13] *Imp. Iustinus A. Theodoto pu.* Generaliter sancimus, ut, si quid scriptis cautum fuerit pro quibuscumque pecuniis ex antecedente causa descendantibus eamque causam specialiter promissor edixerit, non iam ei licentia sit causae probationes stipulatorem exigere, cum suis adquiscere deceat, nisi certe ipse e contrario per apertissima rerum argumenta scriptis inserta religionem iudicis possit instruere, quod in alium quemquam modum et non in eum quem cautio perhibet negotium subsecutum sit. nimis enim indignum esse iudicamus, ut, quod sua quisque voce dilucide protestatus est, id in eundem casum infirmare testimonioque proprio resistere.

[14] *Imp. Iustinianus A. Menae pp. pr.* In contractibus, in quibus pecuniae vel aliae res numeratae vel datae esse conscribuntur, non intra

satisfied by a formal announcement (*in testando*), the provincial governor will not allow anything beyond that which you have received to be demanded from you as principal.

Given December 13, in the consulship (of the Augusti) themselves (293).¹³¹

[10] *The same Augusti and Caesars to Mucazanus.* The claim of one contending that a debt has been paid is not excluded by the length of time. Nor is he criticized because the defense of money not paid, when it has not been lodged on a certain day, becomes void beforehand, since there is a big difference between the one who by alleging a fact undergoes the burden of proof, and the one who denies payment, for which by natural reason there is no proof, and on account of this transfers the necessity of this matter to the claimant.

[11] *The same Augusti and Caesars to Eutychianus.* If by way of a settlement you have stipulated to give money to Palladius, you cannot be protected by the defense of money not paid.

Given April 10 (no year; 294?).

[12] *The same Augusti to Severianus.* The defense of money not paid is available both to a mandator as well as to a surety on the example of the principal defendant.

[13] *Emperor JUSTIN Augustus to Theodotus,¹³² City Prefect.* We ordain generally that, if any promise to pay has been given in writing for sums of money in whatever amount deriving from an antecedent consideration and the promisor has specifically mentioned this consideration, he should not have permission to demand from the promisee of the stipulation proof for the consideration, since it is appropriate for him to abide by his own proofs, unless he himself on the contrary should be able to satisfy the conscience of a judge, through the plainest proofs of matters made in writing, that the business has transpired in some other manner and not in that to which the written promise pertains. For We judge that it is too unworthy that what each person has affirmed very clearly in his own voice should for the same case weaken his argument and rebut his own testimony.

[14]¹³³ *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect. pr.* For contracts in which it is recorded in writing that sums of money or other things have been paid or given, the person who has been recorded as having received

¹³¹ The subscription applies either to this chapter or to the following one. *Augustis* is restored.

¹³² See C. 2.7.26, dated to 524, which refers to a City Prefect named Theodorus. Lounghis *et al.* date this constitution between 522 and 526.

¹³³ Combine with C. 4.2.17, 4.20.18, 4.21.17, 5.15.3.

quinquennium, quod antea constitutum erat, non numeratae pecuniae exceptionem obicere possit, qui acceperit pecunias vel alias res scriptus sit, vel successor eius, sed intra solum biennium continuum, ut eo lapso nullo modo querella non numeratae pecuniae introduci possit: his scilicet, qui propter aliquas causas specialiter legibus expressas etiam lapso quinquennio in praeteritis temporibus adiuvabantur, etiam in posterum, licet biennium pro quinquennio statutum est, eodem auxilio potituris.

1. Sed quoniam securitatibus et instrumentis depositarum rerum vel pecuniarum talem exceptionem opponere litigatores conantur, iustum esse prospicimus huiusmodi potestatem in certis quidem casibus prorsus amputare, in aliis vero brevi tempore concludere. ideoque sancimus instrumento quidem depositionis certarum rerum vel certae pecuniae securitatibusque publicarum functionum, sive in solidum sive ex parte solutae esse conscribantur, illis etiam securitatibus, quae post confectionem dotalium instrumentorum de soluta dote ex parte vel in solidum exponuntur, nullam exceptionem non numeratae pecuniae penitus opponi.

2. Super ceteris vero securitatibus, quae super privatis debitis a creditore conscribuntur partem debiti sortis vel usurarum nomine solutam esse significantes, vel adhuc feneraticia cautione apud creditorem manente, solidi tamen debiti solutionem factam esse demonstrantes, vel etiam futuram esse redhibitionem instrumenti feneraticii promittentes, vel si qua alterius cuiuscumque contractus gratia, in qua numeratio pecuniarum vel datio certarum specierum scripta est, securitas similiter data sit depensas esse pecunias vel alias res vel partem earum significans, intra triginta tantummodo dies post huiusmodi securitatis expositionem connumerandos exceptionem non numeratae pecuniae posse obici, ut, si hi transacti fuerint, eadem securitas ab iudicantibus omnibus modis admittatur, nec liceat ei qui securitatem exposuit post excessum memoratorum dierum non esse sibi solutas vel pecunias vel alias res dicere.

3. Illo videlicet observando, ut, in quibus non permittitur exceptionem non numeratae pecuniae opponere vel ab initio vel post taxatum tempus elapsum, in his nec iusiurandum offerri liceat.

4. In omni vero tempore, quod memoratae exceptioni taxatum est, licebit ei, cui talis exceptio competit, vel denuntiationibus scripto missis querellam non numeratae pecuniae manifestare ei, qui numerasse eam vel alias res dedisse instrumento scriptus est, vel, si abesse eum his locis in quibus contractus factus est contigerit, in hac quidem alma

the sums of money or other things, or his successor, should not be able to oppose the defense of money not paid within the five-year period that had been established previously, but only within an uninterrupted two-year period, so that, when that has lapsed, it might not be possible in any way to introduce the complaint about money not paid (*pecunia non numerata*); provided that these persons who on account of any causes specifically expressed in the laws were in past times helped even after the lapse of the five-year period, will also gain the same aid in the future, although a two-year period has been set instead of a five-year period.

1.³⁴ But because litigants try to oppose such a defense to receipts and documents for things or sums of money held on deposit, We see that it is just to cut off this type of power entirely in certain cases, and in some others to confine it to a short time. We therefore ordain that absolutely no defense of money not paid be opposed to a document recording the deposit of specified things or a specified sum of money and to receipts for public charges (*publicae functiones*), whether they are recorded as paid for the whole amount or in part, nor also to those receipts, which are produced after the execution of dowry documents for the payment of the dowry for the whole amount or in part.

2. But as to the remaining receipts, which are written by the creditor for private debts indicating that part of the debt, either as principal or interest, has been paid, or, when a written promise for the loan still remains with the creditor, demonstrating that a payment for the entire debt has been made, or promising that there will be a return of the loan document, or if for any other type of contract, in which the payment of sums of money or the giving of specified things has been written, a receipt has similarly been given indicating that sums of money or other things or part of them have been paid back, the defense of money not paid can only be opposed within thirty days to be counted after the issuing of a receipt of this type, so that, if the number of days has been completed, the same receipt be admitted in every way by those judging, nor should the person who issued the receipt be allowed after the expiration of the days mentioned to say that the sums of money or other things have not been paid to him. 3. That is, it should be observed that, in cases in which it is not permitted to oppose the defense of money not paid either from the outset or after the lapse of the established time, it not be permitted for a (decisory) oath to be tendered.

4. But during the whole time that has been established for the aforementioned defense, the person to whom such a defense is available will be permitted either to make known by written notice his complaint of money not paid to the person who is recorded in the document as having paid it or having given other things, or, if it happens that he is absent from the place in which the contract was made, he can make known the same complaint and in that way make

³⁴ = C. 10.22.5 (partial summary).

urbe apud quemlibet ordinarium iudicem, in provinciis vero apud viros clarissimos rectores earum vel defensores locorum eandem querellam manifestare eoque modo perpetuam sibi exceptionem efficere. 5. Sed si praesens quidem sit, qui pecunias numerasse vel alias res dedisse scriptus est, aliquam vero administrationem vel in hac alma urbe vel in provinciis gerat, ut difficile esse videatur denuntiationem ei mittere, licentiam damus ei, qui memorata exceptione uti velit, alios iudices adire vel in hac alma urbe vel in provinciis et per eos ei manifestare, cui exceptionem huiusmodi obicit, factam a se super non numerata pecunia querellam esse. 6. Quod si in provinciis vel non sit alius administrator civilis vel militaris, vel per aliquam causam difficile sit ei qui memoratam querellam opponit adire eum et ea quae dicta sunt facere, licentiam ei damus per virum reverentissimum episcopum eandem suam exceptionem creditori manifestare et ita tempus statutum interrompere. quae etiam in exceptione non numeratae dotis locum habere certum est.

D. k. Iul. Constantinopoli ipso A. II cons.

[15] *Idem A. Menae pp.* Si cui non numeratae pecuniae competere possit exceptio, etiam eo supersedente tali auxilio uti, vel praesente vel absente, creditores eius possint (sive ipsi conveniantur utpote res eius detinentes, ab his qui debita eius exigunt, cui competit huiusmodi exceptio vel dotis vel alterius causae nomine, sive contra alios possidentes aliquam actionem ipsi moveant) possint in examinando negotio suis adversariis eandem non numeratae pecuniae exceptionem opponere nec eo prohibeantur, quod principalis debitor ea numquam usus est: ita tamen, ut neque principali debitori neque fideiussori eius aliquid praeiudicium generetur, si is qui eam exceptionem opposuit victus fuit, sed possint illi postea, si conveniantur, intra statuta scilicet tempora eadem se exceptione tueri.

[16] *Idem A. Iohanni pp.* Indubitati iuris est non numeratae pecuniae exceptionem locum habere et in talibus nominibus vel feneraticiiis vel aliis cautionibus, quae etiam sacramenti habent mentionem. quae enim

the defense perpetual for himself, in this Fair City (Constantinople) before any ordinary judge, and in the provinces before their *virī clarissimi* governors or the defenders (*defensores*) of the place. 5.¹³⁵ But if someone who is recorded to have paid money or delivered other things is present but holds some administrative post either in this Fair City or in the provinces, so that it seems difficult to serve him with notice, We grant him who wishes to make use of this defense permission to go before other judges either in this Fair City or in the provinces and, through them, to make known to the person against whom he uses this defense that he has made a complaint of money not paid. 6. But if in the provinces there is no other civil or military administrator, or it is for some other reason difficult for him who objects with the aforementioned complaint to go before him and do what has been said, We give him permission to make known his defense to his creditor also through the most reverend bishop and thus interrupt the established period of time. It is accepted that this also applies to the defense of a dowry not paid (*exceptio non numeratae dotis*).¹³⁶

Given July 1,¹³⁷ in the consulship of the Augustus himself, for the second time (530).

[15] *The same Augustus to Menas, Praetorian Prefect.* If someone might have available the defense of money not paid but omits to use such an aid, whether he is present or absent, his creditors should be able – whether they themselves should be sued, for instance when they are holding his property, by those who are exacting the debts of a person to whom the defense of this type is available either for a dowry or for some other reason, or whether they themselves should bring some action against others who possess his property – they should be able,¹³⁸ in the trial of the matter, to oppose the same defense of money not paid to their opponents and not be prohibited for the reason that the principal debtor has never used it; provided, however, that no prejudice be engendered for the principal debtor or for his surety, if the person who has opposed this defense was defeated, but afterwards they should, if they should be sued, be able to protect themselves with the same defense, of course within the established time.

(528–529).¹³⁹

[16] *The same Augustus to John, Praetorian Prefect.* It is undoubted law that the defense of money not paid has a place also in such claims either for loans

¹³⁵ Sections 5–6 are repeated almost verbatim in C. 1.4.21.

¹³⁶ For the unpaid dowry see C. 5.15.3, and Nov. 100 (Blume).

¹³⁷ More probably June 1, the same date as C. 5.15.3 and 10.22.5; so also Lounghis *et al.*

¹³⁸ For the repeated *possint*; possibly *pro se in*, “they should be able to oppose the same defense on their own behalf...”

¹³⁹ For the date, see the previous chapter.

differentia est in huiusmodi exceptione, sive iusiurandum positum est sive non, tam in feneraticis cautionibus quam in aliis instrumentis, quae talem exceptionem recipiunt?

XXXI De Compensationibus

[1] *Imp. Antoninus A. Dianensi.* Et senatus censuit et saepe rescriptum est compensationi in causa fiscali ita demum locum esse, si eadem statio quid debeat quae petit. hoc iuris propter confusionem diversorum officiorum tenaciter servandum est. si quid autem tibi ex ea statione cuius mentionem fecisti deberi constiterit, quam primum recipies.

[2] *Idem A. Claudio et Asclepiadi.* Ex causa quidem iudicati solutum repeti non potest, eapropter nec compensatio eius admitti potest. eum vero, qui iudicati convenitur, compensationem pecuniae sibi debitae implorare posse nemini dubium est.

[3] *Imp. Alexander A. Aetrio Capitoni.* In ea, quae rei publicae te debere fateris, compensari ea, quae ab eadem tibi debentur, is cuius de ea re notio est iubebit, si neque ex kalendario neque ex vectigalibus neque ex frumenti vel olei publici pecunia neque tributorum neque alimentorum neque eius, quae statutis sumptibus servit, neque fideicommissi civitatis debitor sis.

PP. k. Oct. Maximo II et Aeliano cons.

[4] *Idem A. Flavio et Luciano.* Si constat pecuniam invicem deberi, ipso iure pro soluto compensationem haberi oportet ex eo tempore, ex quo ab utraque parte debetur, utique quoad concurrent quantitates, eiusque solius, quod amplius apud alterum est, usurae debentur, si modo petitio earum subsistit.

or for other promises that also contain the mention of an oath. For what is the difference, in a defense of this type, whether an oath has been included or not, both in promises to pay loans and in other documents that admit such a defense?

(531–532).

Thirty-First Title Offsets¹⁴⁰

[1] *Emperor ANTONINUS Augustus to Dianensis.* The Senate has decreed and rescripts have often been issued that in a fiscal case there is a place for an offset (*compensatio*) in this circumstance: if the same governmental office (*statio*) that is making a claim should owe something (to the defendant). This point of law is to be tenaciously maintained on account of the confusion (*confusio*) of diverse offices. If, however, it is established that something is owed you by the office that you have mentioned, you will regain it as soon as possible.¹⁴¹

[2] *The same Augustus to Claudius and Asclepiades.*¹⁴² A payment made on the basis of a judgment cannot be reclaimed, and for that reason an offset for it cannot be admitted. But is it not doubtful to anyone that a person who is sued for a judgment can ask for an offset for the money he is owed.

[3] *Emperor ALEXANDER Augustus to Aetrius Capito.* The person who is competent to examine this matter will order that what is owed to you by the municipality (*res publica*) will be set off against what you admit you owe it, provided you are not a debtor of the city on the basis of its debt-book (*kalendarium*), or impost duties (*vectigalia*), or on the basis of money for public grain or oil or for land taxes or alimentary foundations or for a purpose that serves public expenses, or for a trust (*fideicommissum*).

Posted October 1, in the consulship of Maximus, for the second time, and Aelianus (223).

[4] *The same Augustus to Flavius and Lucianus.*¹⁴³ If it is established that money is owed reciprocally, then by virtue of the law itself offsets must be considered for what has been paid from the time when there is a debt from either party, and accordingly, to the extent that there is a concurrence of amounts owed, interest is owed only for that amount which is greater for one of the two parties, as long as a claim for it subsists.

¹⁴⁰ *Compensatio*, offset, is a judicial device allowing a plaintiff's claim to be reduced by the amount that the plaintiff owes the defendant. See D. 16.2. Offset is encouraged in late Roman law.

¹⁴¹ That is, offset is possible only when the same office is involved.

¹⁴² Possibly "Claudius Asclepiades."

¹⁴³ Possibly "Flavius Lucianus."

D. xvii k. Oct. Alexandro A. III et Dione cons.

[5] *Idem A. Honoratae.* Etiam si fideicommissum tibi ex eius bonis deberi constat, cui debuisse te minorem quantitatem dicis, aequitas compensationis usurarum excludit computationem, petitio autem eius, quod amplius tibi deberi probaveris, sola relinquitur.

PP.

[6] *Idem A. Polydeucae.* Neque scriptura, qua cautum est accepta quae negas tradita, obligare te contra fidem veritatis potuit et compensationis aequitatem iure postulas. non enim prius exsolvi, quod debere te constiterit, aequum est, quam petitioni mutuae responsum fuerit, eo magis, quod ea te persequi dicis, quae a muliere divortii causa amota quereris.

PP. xvi k. Dec. Alexandro A. III et Dione cons.

[7] *Idem A. Flavio Ausonio.* Si ex venditione pretium venditori debetur, compensationis ratio opponitur. adversus fiscum enim solum emptores petitioni pretii compensationem obicere prohibentur.

[8] *Imp. Gordianus A. Aurelio Emerito militi.* Si propter fructus ex possessione tua perceptos vitricus tuus debitor tibi constitutus est, cum id, quod a matre tua legatum est, a te petere coeperit, mutuo debitae quantitatis apud eum qui super ea re iudicaturus est compensationem non immerito obicies.

[9] *Idem A. Liciniae Euctemonidi.* Eius, quod non ei debetur qui convenitur, sed alii, compensatio fieri non potest.

PP. id. Ian.

[10] *Impp. Diocletianus et Maximianus AA. et CC. Iulio Nicandro.* Quoniam liberum fundum distractum proponis, post vero, veluti praecedente emptionem obligatione, certum quid solvisse, si debitum a te apud praesidem provinciae petatur, compensationem eius quod indebite solvisti potes opponere.

Given September 15, in the consulship of Alexander Augustus, for the third time, and Dio (229).

[5] *The same Augustus to Honorata.* Even if it is established that a trust (*fideicommissum*) is owed to you from the property of a person to whom you say you owe a smaller amount, the fairness of the offset excludes a computation of interest, but only a claim is left for the excess that you have proved is owed you.

Posted (229).

[6]¹⁴⁴ *The same Augustus to Polydeuces.* A written document, in which it has been provided that what you deny to have been delivered has been received, could not obligate you contrary to the credibility of the truth, and you rightly demand the just solution of an offset (against your ex-wife). For it is not fair that you pay what it is established that you owe before your counterclaim has been satisfied, all the more so since you state that you are suing for that property which you complain has been removed by your wife on account of a divorce.

Posted November 16, in the consulship of Alexander Augustus, for the third time, and Dio (229).

[7] *The same Augustus to Flavius Ausonius.* If the price from a sale is owed to the seller, the principle of an offset is interposed (so as to lower the claim). Against the Treasury alone are the buyers prohibited from interposing an offset to a claim for the price.

[8] *Emperor GORDIAN to Aurelius Emeritus, a soldier.* If, on account of the fruits acquired (*fructus perceptos*) from your property, your stepfather has been established as your debtor, since he has begun to claim what has been bequeathed in a legacy (to him) by your mother, you will properly interpose, with the person who is going to judge on this matter, an offset for the reciprocal owed amount.¹⁴⁵

[9] *The same Augustus to Licinia Euctemonis.* There cannot be an offset for what is owed not to the person who is sued, but to another.

Posted January 15.

[10] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Julius Nicander.* Since you allege that you have been sold a farm free from encumbrance, but afterward you paid (to a third party) some fixed amount, e.g., on an obligation preceding the purchase, if the debt should be claimed from you before the provincial governor, you can oppose an offset for what you have paid without owing it.

¹⁴⁴ = C. 5.21.1 pr.

¹⁴⁵ Blume: "In this case the stepson was the heir of the mother. The latter had left a legacy to the stepfather, and it was the duty of the heir to pay legacies."

[11] *Idem AA. et CC. Claudio Iulio et Paulo.* Si tutores pupillis officio magistratus urgente nominastis ac pro his propter onus primipili pecuniam solvistis, superstitiosam geritis sollicitudinem, ne ab ipsis conventi hanc eis imputare minime possitis vel a vobis quicquam amplius exigatur, si tantum, quantum eis tutores debuerunt, vel vos nomine ipsorum maiorem quantitatem dedisse probetur.

[12] *Idem AA. et CC. Lucio Corneliano.* Invicem debiti compensatione habita, si quid amplius debeas, solvens vel accipere creditore nolente offerens et consignatum deponens de pignoribus agere potes.

PP. XVII k. Ian. Nicomediae CC. cons.

[13] *Idem AA. et CC. Aurelio Basso.* Si velut in id debitum, quod sollemnium publicarum pensitationum debueras nomine, compensaturo tibi nihil petiturum postea Muciano scripsisti, redditis quae venerant in compensationem non indebiti soluti repetitio, sed ante debiti competit exactio.

[14] *Imp. Iustinianus A. Iohanni pp. pr.* Compensationes ex omnibus actionibus ipso iure fieri sancimus nulla differentia in rem vel personalibus actionibus inter se observanda.

1. Ita tamen compensationes obici iubemus, si causa ex qua compensatur liquida sit et non multis ambagibus innodata, sed possit iudici facilem exitum sui praestare. satis enim miserabile est post multa forte variaque certamina, cum res iam fuerit approbata, tunc ex altera parte, quae iam paene convicta est, opponi compensationem iam certo et indubitato debito et moratoriis ambagibus spem condemnationis excludi. hoc itaque iudices observent et non procliviores in admittendas compensationes existant nec molli animo eas suscipiant, sed iure stricto utentes, si invenerint eas maiorem et ampliorem exposcere indaginem, eas quidem alii iudicio reservent, litem autem pristinam iam paene expeditam sententia terminali componant: excepta actione depositi

[11] *The same Augusti and Caesars to Claudius Julius and Paulus.*¹⁴⁶ If, at the urging of your duty as magistrates, you have nominated the *tutores* for wards and have paid money for them on account of the expense of being a first centurion, you are engaging in superstitious worry that if sued by them (the wards) you might not be able to charge this expense to them, or that anything more might be exacted from you if it should be proved that you have given as much as or a greater amount in their (sc. the wards') name than the *tutores* owed them.¹⁴⁷

[12] *The same Augusti and Caesars to Lucius Cornelianus.* After offsetting reciprocal debts, if you should owe something more, you can sue for the pledges (on the debt you owe) either by paying (the excess) or by tendering payment when the creditor is unwilling to accept payment and making a signed deposition.

Posted December 16, at Nicomedia, in the consulship of the Caesars (294).

[13] *The same Augusti and Caesars to Aurelius Bassus.* If you have written to Mucianus that you were not going to make any claim afterwards when he was going to pay an offset to you as if for that debt which you had owed for customary public taxes, when you have paid what had come into the offset, a claim for what was paid but not owed is not available, but (rather) an exaction for what had been owed before.

[14] *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* We ordain that offsets arise from all actions by virtue of the law itself, with no difference to be observed for actions *in rem* or *in personam*.

1. We order that offsets be interposed only if the case on whose basis an offset is made should be clear-cut and not knotted with many doubts, but can offer the judge a ready outcome for it. For it is deplorable enough after perhaps many and various contests, when the matter has already been proved, that then an offset be interposed by the other party, who has now almost been convicted, to an already certain and undoubted debt, and that the hope of condemnation be excluded by delaying traps. Therefore the judges should observe this and not be too ready to admit offsets nor take them up with a compliant mind, but relying on the strict law, if they find that claims for offsets require a greater and fuller investigation, they should reserve them for

¹⁴⁶ Possibly "Claudius" the Claudii.

¹⁴⁷ Blume: "Municipal magistrates were responsible if they did not take sufficient sureties from guardians. C. 5.75 ... In this case, the guardian was evidently not able to pay, and the magistrate who nominated him or took a bond from him was threatened to be sued. But he had a set-off. The father of the minors had been primipilus or primipilar, having charge of the food supply to soldiers ... As such he owed the fisc. The magistrates above mentioned had paid this amount for him, and [they], accordingly, had a claim against him and his heirs – the minors. This claim was a set-off to the claim of the minors against him."

secundum nostram sanctionem, in qua nec compensationi locum esse disposuimus. 2. Possessionem autem alienam perperam occupantibus compensatio non datur.

D. k. Nov. Constantinopoli post cons. Lampadii et Orestis vv. cc.

XXXII De Usuris

[1] *Imp. Pius A. Aurelio evocato.* Si interrogatione praecedente promissio usurarum recte facta probetur, licet instrumento conscripta non sit, tamen iure optimo debentur.

Sine die et consulibus.

[2] *Impp. Severus et Antoninus AA. Lucio.* Usuras emptor, cui possessio rei tradita est, si pretium venditori non obtulerit, quamvis pecuniam obsignatam in depositi causa habuerit, aequitatis ratione praestare cogitur.

[3] *Idem AA. Iuliano Serpio.* Quamvis usurae fenebris pecuniae citra vinculum stipulationis peti non possunt, tamen ex pacti conventionem solutae neque ut indebitae repetuntur neque in sortem accepto ferendae sunt.

PP. v k. Oct. Severo A. II et Victorino cons.

[4] *Idem AA. Aproniae Honoratae. pr.* Per retentionem pignoris usuras servari posse, de quibus praestandis convenit, licet stipulatio interposita non sit, merito constitutum est et rationem habet, cum pignora conditione pacti etiam usuris obstricta sint. 1. Sed enim in causa de qua agis haec ratio cessat, si quidem tempore contractus de minoribus usuris petendis convenit, postea autem, cum se debitor praestaturum maiores repromisit, non potest videri rata retentio pignoris, quando eo tempore, quo instrumenta emittebantur, non convenerit, ut pignus etiam ad hanc adiectionem teneatur.

another court but settle the original and almost completed suit with a final verdict, except in an action on deposit in accordance with Our ordinance, for which We have disposed that there is no place for an offset. 2. An offset, however, is not given to those seizing another person's property unlawfully.

Given November 1, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Thirty-Second Title Interest on Debts¹⁴⁸

[1] *Emperor PIUS Augustus to Aurelius, a reserve soldier (evocatus).* If, with the question preceding (in a stipulation), a promise of interest should be proved to have been made correctly, although it has not been written down in a document, nevertheless it is owed free from any legal restriction (*optimo iure*).

Without a day and consuls.

[2] *Emperors SEVERUS and ANTONINUS Augusti to Lucius.* A buyer, to whom possession of the thing has been delivered, if he has not offered the price to the seller, is compelled by reason of fairness to pay interest even if he has the (purchase) money sealed on deposit.

[3] *The same Augusti to Julian Serpius.* Although interest for money loaned cannot be claimed without the bond of a stipulation, nevertheless if it has been paid in accordance with an agreement of a pact it is not reclaimed as not owed, nor is it to be credited against the principal in an oral dissolution of the stipulation (*acceptum*).

Posted September 27, in the consulship of Severus Augustus, for the second time, and Victorinus (200).¹⁴⁹

[4] *The same Augusti to Apronia Honorata. pr.* It has rightly been established through an imperial constitution that by retaining a pledge the right to interest, for whose payment there is an agreement, can be asserted even though a stipulation has not been interposed; and with reason, since pledges are also subject to interest under the condition of a pact. 1. But in the case about which you are pleading this principle fails, if indeed at the time of the contract there was an agreement about claiming lower interest, but afterwards, when the debtor promised that he would pay higher interest, retention of the pledge cannot be seen as effective since at that time, when the documents were communicated, there was no agreement that the pledge be bound for such an addition.

¹⁴⁸ See D. 22.2.

¹⁴⁹ The consuls are restored from P; but the year should probably be restored as 202 (*Severo III et Antonino AA. cons.*), cf. Ulpian, D. 46.3.5.2 (probably citing the constitution as issued by Severus and Caracalla).

[5] *Idem AA. Ultumio Sabino et aliis.* Adversus creditorem usuras maiores ex stipulatu petentem, si probetur per certos annos minores postea consecutus, utilis est pacti exceptio. secundum quod tueri causam potestis etiam adversus defensores civitatis maiores petentes ex cautione, si probaveritis semper quincunces amitam pupillorum vestrorum, quae maiores caverat, rependisse.

D. non. Iul. Geta cons.

[6] *Imp. Antoninus A. Antigono militi.* Si creditrici, quae ex causa pignoris obligatam sibi rem tenet, pecuniam debitam cum usuris testibus praesentibus obtulisti eaque non accipiente obsignatam eam deposuisti, usuras ex eo tempore quo obtulisti praestare non cogeris. absente vero creditrice praesidem super hoc interpellare debueras.

PP. III id. Febr. duobus Aspris cons.

[7] *Idem A. Domitio Aristaeo.* Creditor instrumentis suis probare debet quae intendit et usuras se stipulatum, si potest. nec enim, si aliquando ex consensu praestitae sunt, obligationem constituunt.

PP. III non. Oct. Romae Laeto et Cereale cons.

[8] *Idem A. Claudio Doryphoro.* Quamvis Bassa, cum pecuniam mutuam acciperet, minores usuras Menophano spoponderit et, nisi intra certum tempus eas solvisset, ampliores (licitas tamen) promiserit, si post tempus cautioni praefinitum creditor easdem accepit nec maiores dari sibi postulavit ac per hoc non recessisse a minorum praestatione eum probari potest, eas usuras computari oportet, quarum in exactione creditor perseveravit.

[9] *Idem A. Canio Probo.* Si per te non stetit, quominus intra tempora praefinita pecuniam minorum usurarum solveres, sed per tutores filiorum creditoris, qui eam accipere noluerunt, idque apud iudicem datum probaveris, eius temporis, quo per te non stetisse apparuerit, usurae

[5] *The same Augusti to Ultimius Sabinus and others.* Against a creditor seeking higher interest on the basis of a stipulation, if he should be afterwards proved to have received a lower rate for a certain number of years, the defense of a pact is applicable. In accordance with this, you can protect your case even against the defenders of the city (*defensores civitatis*) who are seeking greater interest on the basis of a promise, if you prove that the aunt of your wards, who promised higher rates, always paid 5 percent.¹⁵⁰

Given July 7, in the consulship of Geta (205).

[6] *Emperor ANTONINUS Augustus to Antigonus, a soldier.* If you have offered to the creditor, who on the basis of a pledge holds the property obligated to herself, the money owed with interest in the presence of witnesses and, when she did not accept this, you deposited the money under seal, you will not be compelled to pay interest from the time that you offered payment. If the creditor was absent you should have pressed the governor on this matter.

Posted February 11, in the consulship of the two Aspri (212).

[7] *The same Augustus to Domitius Aristaeus.* If he can, the creditor should prove with his own documents what he claims and that he has taken a stipulation for interest. For if at any time interest has been paid on the basis of consent, this does not (in itself) create an obligation.

Posted October 4, at Rome, in the consulship of Laetus and Cerealis (215).¹⁵¹

[8] *The same Augustus to Claudius Doryphorus.* Although Bassa, when she received money on loan, promised lower interest to Menophanus,¹⁵² and, if she did not pay this within a certain time, she promised by stipulation to pay a higher rate but one that is (legally) permitted, if after the deadline established for the promise the creditor accepted the same interest rate and did not demand that a higher rate be given to him, and it can be proved that through this he did not retreat from the payment of the lower rate, the interest must be calculated (at the rate) in the exaction of which the creditor has persevered.

[9] *The same Augustus to Canius Probus.* If it was not because of you that within the time period established you did not pay the money at a lower interest rate, but (rather) because of the *tutores* of the creditor's children, who were unwilling to accept it, and you have proved this before the appointed judge, the higher interest will not be exacted for the time during which it appeared

¹⁵⁰ If a man agreed to pay a greater interest, but he afterwards paid a lesser rate and this was accepted, there was an implied pact that only the latter should be paid, and such a pact was binding.

¹⁵¹ This subscription could apply to 10 below.

¹⁵² Menophantus?

maiores non exigentur. quod si etiam sortem deposuisti, exinde ex quo id factum apparuerit, in usuras non convenieris.

[10] *Idem A. Crato et Donato militi.* Usurae per tempora solutae non proficiunt ad dupli computationem. tunc enim ultra sortis summam usurae non exiguntur, quotiens tempore solutionis summa usurarum excedit eam computationem.

[11] *Imp. Alexander A. Aurelio Tyranno.* Frumenti vel hordei mutuo dati accessio etiam ex nudo pacto praestanda est.

PP. k. Mai. Maximo II et Aeliano cons.

[12] *Idem A. Popilio.* Ex praedio pignori obligato creditor post oblatam iure sibi pecuniam, quam non suscepit, si fructum accepit, exonerari sortis debitum certum est.

[13] *Idem A. Eustathiae et aliis.* In bonae fidei iudiciis, quale est etiam negotiorum gestorum, usurarum rationem haberi certum est. sed si finitum est iudicium sententia, quamvis minoris condemnatio facta est non adiectis usuris, nec provocatio secuta est, finita retractanda non sunt: nec eius temporis, quod post rem iudicatam fluxit, usurae ullo iure postulantur nisi ex causa iudicati.

[14] *Idem A. Aurelio Arasiani.* Si ea pactione uxor tua mutuam pecuniam dedit, ut vice usurarum inhabitaret, pactoque ita ut convenit usa est, non etiam locando domum pensionem redegit, referri quaestionem, quasi plus domus redigeret, si locaretur, quam usurarum legitimarum ratio colligit, minime oportet. licet enim uberiore sorte potuerit contrahi locatio, non ideo tamen illicitum fenus esse contractum, sed vilius conducta habitatio videtur.

D. XI k. Mai. Maximo et Urbano cons.

that it was not because of you (sc. that the interest was not paid). But if you have also deposited the principal, you will not be sued for interest from the time that it appears that this was done.

[10] *The same Augustus to Cratus and Donatus, a soldier.*¹⁵³ Interest paid from time to time does not count in computing whether interest exceeds the principal. For interest is not exacted over the amount of the principal only whenever the sum of the interest exceeds this computation at the time of its payment.¹⁵⁴

[11] *Emperor ALEXANDER Augustus to Aurelius Tyrannus.* In a loan of grain or barley an additional amount must also be paid in accord with a naked pact. *Posted May 1, in the consulship of Maximus, for the second time, and Aelianus (223).*

[12] *The same Augustus to Popilius.* It is certain that, if the creditor has accepted the crop from a property obligated as a pledge, after the lawful tender of money that he did not accept, the amount owed on principal is relieved (to the extent of the payment).

[13] *The same Augustus to Eustathia and others.* In good faith trials (*bonae fidei iudicia*), such as even for the management of affairs (*negotiorum gestio*), it is certain that account is taken of interest (after default). But if the judgment has been ended through a verdict, although the condemnation has been made for a lesser amount without the addition of interest, and an appeal has not followed, there must be no reconsideration of what has been decided; nor is interest demanded by any right for the time which has passed after the judgment of the matter, except on the basis of the judgment (*ex causa iudicati*).

[14] *The same Augustus to Aurelius Arasianes.* If your wife gave you a loan of money under an agreement that instead of interest she have the right of habitation, and she has relied on the pact as it was agreed, and she did not receive any income by leasing the house, the question must not at all be considered as to whether the house would provide a greater amount if it were leased than consideration of lawful interest allows. For although a lease could have been contracted for a larger principal, nonetheless not for that reason does an unlawful interest rate seem to have been contracted, but the right of dwelling seems to have been rented for a cheaper price.

Given April 21, in the consulship of Maximus and Urbanus (234).

¹⁵³ Possibly "to Cratus Donatus, a soldier." On the rule, see D. 12.6.26.1.

¹⁵⁴ See note to 7 above. It was not permissible to exact interest that exceeded the principal of the loan when the loan was paid off. Justinian (27 below) extended this rule to include "all interest previously paid."

[15] *Imp. Gordianus A. Claudio Portorio.* Cum adleges uxorem tuam ea condicione mille aureorum numero quantitatem sumpsisse, ut, si intra diem certum debito satis non fecisset, cum poena quadrupli redderet quod accepit, iuris forma non patitur legem contractus istius ultra poenam legitimarum usurarum posse procedere.

D. non. M. Attico et Praetextato cons.

[16] *Idem A. Flavio Sulpicio.* Cum non frumentum, sed pecuniam fenori te accepisse adleges, ut certa modiatio tritici praestaretur, ac, nisi is modus sua die fuisset oblatus, mensurarum additamentis in fraudem usurarum legitimarum gravatum te esse contendis, potes adversus improbam petitionem competente uti defensione.

PP.

[17] *Imp. Philippus A. et Philippus C. Aurelio Euxeno.* Si ea lege possessionem mater tua apud creditorem tuum obligavit, ut fructus in vicem usurarum consequeretur, obtentu maioris percepti emolumenti propter incertum fructuum eventum rescindi placita non possunt.

[18] *Impp. Diocletianus et Maximianus AA. et CC. Aurelio Castori.* Indebitas usuras, etiam si ante sortem solutae non fuerint ac propterea minuere eam non potuerint, licet post sortem redditam creditori fuerint datae, exclusa iuris varietate repeti posse pensa ratione firmatum est.

[19] *Idem AA. et CC. Aureliae Irenaeae. pr.* Acceptam mutuo sortem cum usuris licitis creditori post testationem offer ac, si non suscipiat, consignatam in publico deponere, ut cursus usurarum legitimarum inhibeat. 1. In hoc autem casu publicum intellegi oportet vel sacratissimas aedes vel ubi competens iudex super ea re aditus deponi eas disposuerit. 2. Quo subsecuto etiam periculo debitor liberabitur et ius pignorum tollitur, cum Serviana etiam actio manifeste declarat pignoris inhiberi persecutionem vel solutis pecuniis vel si per creditorem steterit, quominus solvatur. 3. Quod etiam in traiectionibus servari oportet. 4. Creditori scilicet actione utili ad exactionem earum non adversus debitorem, nisi

[15] *Emperor GORDIAN Augustus to Claudius Portorius.* Since you allege that your wife has borrowed the amount of 1,000 aurei under the condition that, if by a certain day she has not satisfied the debt, she return what she has received with a quadruple penalty, the rule of law does not allow the terms (*legem*) of that contract to be able to proceed beyond a penalty of lawful interest.

Given May 7, in the consulship of Atticus and Praetextatus (242).¹⁵⁵

[16] *The same Augustus to Flavius Sulpicius.* Since you allege that you have not received grain, but money as a loan at interest under the condition that a certain measure of wheat be paid back, and, unless that amount has been offered on the appointed day, you contend that you have been burdened by additions to the measures in fraud of (the limit on) legitimate interest, you can use the appropriate defense against the dishonest claim.

Posted.

[17] *Emperor PHILIP Augustus and PHILIP Caesar to Aurelius Euxenus.* If your mother obligated a property with your creditor under the condition that he gain the fruits instead of interest, what has been agreed cannot be rescinded on the pretext of his receiving a larger emolument (than allowed) because of the uncertain outcome of the harvest (*propter incertum fructuum eventum*).

[18] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Aurelius Castor.* It has been confirmed, that, to exclude variation in the law and after due deliberation, interest not owed, even if it was not paid before the principal and on that account could not reduce it, can be reclaimed despite its being given to the creditor after return of the principal.

[19] *The same Augusti and Caesars to Aurelia Irenaea. pr.* Offer the principal received as a loan with the permitted interest to the creditor after a declaration before witnesses, and, if he should not take it, place it sealed in a public place, so that the accumulation of lawful interest may be inhibited. 1. In this case a public place must be understood as a most sacred temple or where a competent judge who has been approached on this matter has arranged for the money to be deposited. 2. When this has happened the debtor will also be freed from risk and the right of the pledges is removed, since the Servian action¹⁵⁶ also clearly declares that the pursuit of the pledge is prevented either when the money is paid or when it is because of the creditor that payment not be made. 3. This should also be maintained for nautical (bottomry) loans. 4. Still, the creditor has an analogous action (*actio utilis*) to recover the

¹⁵⁵ The subscription belongs either here or in 16 below.

¹⁵⁶ A creditor can use an *actio Serviana* to claim property pledged as security.

forte eas receperit, sed vel contra depositarium vel ipsas competente pecunias.

[20] *Idem AA. et CC. Aelio Nicopolitano.* Constitutionibus sacris, quae ultra certum modum usuras fenebris exigere pecuniae prohibent, mandatoribus etiam vel fideiussoribus subventum est; quibus quasi mandator vel fideiussor conventus uti potes.

Sub die ...

[21] *Idem AA. et CC. Chresimoni.* Si usuras praestari pignore dato convenerat et in continenti, numeratione facta, postea vel ante, propter quod debitum solutionem feceras, non designasti, habuit creditor in usuras tibi accepto ferendae solutae quantitatis facultatem.

[22] *Idem AA. et CC. Cominio Carino.* Pignoribus quidem intervenientibus usurae, quae sine stipulatione peti non poterant, pacto retineri possunt. verum hoc iure constituto, cum huiusmodi nullo interposito pacto tantum certae summae poenam praestari convenisse proponas, nec peti nec retineri quicquam amplius et ad pignoris solutionem argueri te disciplina iuris perspicis.

PP. id. Iul. ipsis ... cons.

[23] *Idem AA. et CC. Iasoni.* Oleo quidem vel quibuscumque fructibus mutuo datis incerti pretii ratio additamenta usurarum eiusdem materiae suasit admitti.

D. III k. Oct. Viminaci CC. cons.

[24] *Idem AA. et CC. Culciae.* Si mater tua maior annis constituta negotia quae ad te pertinent gesserit, cum omnem diligentiam praestare debeat, usuras pecuniae tuae, quam administrasse fuerit comprobata, praestare compelli potest.

D. XIII k. Dec. ipsis CC. cons.

[25] *Imp. Constantinus A. ad populum.* Pro auro et argento et veste facto chirographo licitas solvi vel promitti usuras iussimus.

deposit, not against the debtor, unless he has by chance taken the money back, but either against the depositary or against the money itself by a civil action.

[20] *The same Augusti and Caesars to Aelius Nicopolitanus.* Mandators and sureties have been aided by the sacred constitutions that prohibit the exaction of interest on money loaned over a certain measure; you can use these if you are sued as a mandator or surety.

On the day ...

[21] *The same Augusti and Caesars to Chresimon.* If, when a pledge was given, it had been agreed that interest be paid and, when payment was made immediately, you did not, either before or afterwards, designate the debt on account of which you had made the payment, the creditor had the right (*facultas*) to credit the amount paid toward the interest for what you have received.¹⁵⁷

[22] *The same Augusti and Caesars to Cominius Carinus.* When there are pledges involved, interest, which could not be claimed without a stipulation, can be retained in accordance with a pact. But although this law is established, since you (as the creditor) state that, without the conclusion of any pact of this type, it had been agreed only that a penalty of a certain sum be paid, you see by the teaching of the law that nothing further can be claimed or retained and that you are (correctly) pressed to release the pledge.

Posted July 15, in the consulship of ... themselves.

[23] *The same Augusti and Caesars to Iason.* When oil or any types of fruits have been given as a loan, consideration of the uncertain price for them has been persuasive that additional amounts of the same substance be admitted as interest.

Given September 29, at Viminacium, in the consulship of the Caesars (294).¹⁵⁸

[24] *The same Augusti and Caesars to Culcia.* If your aged mother conducted business that pertains to you, since she should display all diligence, she can be compelled to pay interest for money of yours that she has been proved to have administered.

Given November 18, in the consulship of the Caesars themselves (294).

[25]¹⁵⁹ *Emperor CONSTANTINE Augustus to the People.* We have ordered that lawful interest be paid or promised for gold, silver, and clothing when a promissory note has been made.

¹⁵⁷ As Blume points out, the creditor can assign the payment to interest rather than to the principal.

¹⁵⁸ Mommsen restores the consulship of the Caesars as the date.

¹⁵⁹ Possibly to be combined with C. 2.27.2, 5.37.22, and 5.72.4, which in the subscript are described as given at Sirmium in 326. Seeck dates this constitution to March 15, 329.

[26] *Imp. Iustinianus A. Menae pp. pr.* Eos, qui principali actione per exceptionem triginta vel quadraginta annorum, sive personali sive hypothecaria, ceciderunt, non posse super usuris vel fructibus praeteriti temporis aliquam movere quaestionem dicendo ex his temporibus eas velle sibi persolvi, quae non ad triginta vel quadraginta praeteritos annos referuntur, et adserendo singulis annis earum actiones nasci: principali enim actione non subsistente satis supervacuum est super usuris vel fructibus adhuc iudicem cognoscere.

1. Super usurarum vero quantitate etiam generalem sanctionem facere necessarium esse duximus, veterem duram et gravissimam earum molem ad mediocritatem deducentes. 2. Ideoque iubemus illustribus quidem personis sive eas praecedentibus minime licere ultra tertiam partem centesimae usurarum in quocumque contractu vili vel maximo stipulari: illos vero, qui ergasteriis praesunt vel aliquam licitam negotiationem gerunt, usque ad bessem centesimae suam stipulationem moderari: in traiecticiis autem contractibus vel specierum fenori dationibus usque ad centesimam tantummodo licere stipulari nec eam excedere, licet veteribus legibus hoc erat concessum: ceteros autem omnes homines dimidiam tantummodo centesimae usurarum posse stipulari et eam quantitatem usurarum etiam in aliis omnibus casibus nullo modo ampliari, in quibus citra stipulationem usurae exigi solent. 3. Nec liceat iudici memoratam augere taxationem occasione consuetudinis in regione obtinentis.

4. Si quis autem aliquid contra modum huius fecerit constitutionis, nullam penitus de superfluo habeat actionem, sed et si acceperit, in sortem hoc imputare compelletur, interdicta licentia creditoribus ex pecuniis fenori dandis aliquid detrahere vel retinere siliquarum vel sportularum vel alterius cuiuscumque causae gratia. nam si quid huiusmodi factum fuerit, principale debitum ab initio ea quantitate minuetur, ut tam ipsa minuenda pars quam usurae eius exigere prohibeantur. 5. Machinationes etiam creditorum, qui ex hac lege prohibiti maiores usuras stipulari alios medios subiciunt, quibus hoc non ita interdictum est, resecantes iubemus, si quid tale fuerit attemptatum, ita computari usuras, ut necesse esset, si ipse qui alium interposuit fuisset stipulatus: in quo casu sacramenti etiam illationem locum habere sancimus.

D. id. Dec. Constantinopoli Iustiniano pp A. II cons.

[26]¹⁶⁰ *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect. pr.* Those persons who have fallen in an action on the principal through the defense of (the statute of limitations of) thirty or forty years, whether in an action *in personam* or on a hypothec, cannot bring an action on the interest or the fruits for the time past by saying that they wanted these things to be paid to them from these times that are not considered in reference to the thirty or forty years past, and by asserting that their actions for the interest arise in individual years; when the action for the principal does not exist it is quite useless for a judge still to investigate questions of interest or fruits.

1. But concerning the amount of interest We have considered it necessary to make a general ordinance, to reduce the old harsh and very heavy burden of interest to a moderate level. 2. For that reason We order that it not be permitted for persons of illustrious or higher rank (*illustres personae*) to stipulate an interest rate higher than 4 percent in any contract whether modest or very large. Those who are in charge of workshops or practice some lawful business should limit their stipulation for interest to 8 percent.¹⁶¹ In maritime loans, however, or in loans in kind, it should be permitted to stipulate interest only up to 12 percent and not to exceed this, although this had been allowed by the old laws. All other people should be able to stipulate only 6 percent interest and not to increase this amount of interest in any way in all other cases in which interest is customarily exacted without a stipulation. 3. Nor should a judge be allowed to increase the above-mentioned rates on the occasion of the custom obtaining in the region.

4. If, however, anyone does something against the limit in this constitution, he should have absolutely no action on the excess interest, but if he has received any, he should be compelled to count it against the principal, and permission is denied to creditors to subtract or retain anything from the money to be given as a loan for the sales tax (*siliquae*) or judicial fees (*sportulae*) or for any other reason. For if something of this type has been done, the principal owed will be lowered from the beginning by that amount, so that it be prohibited to exact the part itself that is to be lessened as well as the interest on it. 5. And to cut off the machinations of the creditors who, prohibited on the basis of this law to stipulate higher interest rates, substitute other middle men for whom this has not been forbidden in this way, We order that, if some such thing should be attempted, the interest be calculated in such a way as it must be if the person himself who has interposed another had taken the stipulation; in this case We ordain that the tendering of an oath also have a place.

Given December 13,¹⁶² at Constantinople, in the consulship of Justinian Ever Augustus, for the second time (528).

¹⁶⁰ Combine with C. 7.39.8.

¹⁶¹ Here Bas. 23.3.74 (cf. scholia on 25.1.11) indicates that the original text further restricted the interest payable by respectable families; see also Nov. 110.4 (Krtiger).

¹⁶² C. 7.39.8 has December 11, which Lounghis *et al.* adopt for this constitution.

[27] *Idem A. Menae pp. pr.* De usuris, quarum modum iam statuimus, pravam quorundam interpretationem penitus removeantes iubemus etiam eos, qui ante eandem sanctionem ampliores quam statutae sunt usuras stipulati sunt, ad modum eadem sanctione taxatum ex tempore lationis eius suas moderari actiones, illius scilicet temporis, quod ante eandem fluxit legem, pro tenore stipulationis usuras exacturos.

1. Cursum insuper usurarum ultra duplum minime procedere concedimus, nec si pignora quaedam pro debito creditori data sint, quorum occasione quaedam veteres leges et ultra duplum usuras exigi permittebant. 2. Quod et in bonae fidei iudiciis ceterisque omnibus in quibus usurae exiguntur servari censemus.

D. k. April. Constantinopoli Decio vc. cons.

[28] *Idem A. Demostheni pp. pr.* Ut nullo modo usurae usurarum a debitoribus exigantur, et veteribus quidem legibus constitutum fuerat, sed non perfectissime cautum. si enim usuras in sortem redigere fuerat concessum et totius summae usuras stipulari, quae differentia erat debitoribus, qui re vera usurarum usuras exigebantur? hoc certe erat non rebus sed verbis tantummodo leges ponere. 1. Quapropter hac apertissima lege definimus nullo modo licere cuidam usuras praeteriti vel futuri temporis in sortem redigere et earum iterum usuras stipulari, sed, si hoc fuerit subsecutum, usuras quidem semper usuras manere et nullum aliarum usurarum incrementum sentire, sorti autem antiquae tantummodo incrementum usurarum accedere.

PP. k. Oct. Chalcedone Decio vc. cons.

XXXIII De Nautico Fenore

[1] ...

[2] *Imp. Diocletianus et Maximianus AA. Scribonio Honorato.* Traiecticiam pecuniam, quae periculo creditoris datur, tamdiu liberam esse ab observatione communium usurarum, quamdiu navis ad portum appulerit, manifestum est.

[27] *The same Augustus to Menas, Praetorian Prefect. pr.* To remove completely some people's perverse interpretation of interest, whose limit We have already established,¹⁶³ We order that those people, who before the same ordinance stipulated interest higher than what has (now) been established, also to restrain their actions as from the time of its passing to the limit established in the same ordinance, although they will exact interest for that time that has elapsed before the same law in keeping with the terms of the stipulation.

1. In addition, We do not allow the total of the interest to exceed double (i.e., it cannot be greater than the amount of the principal), not even if any pledges have been given to the creditor for the debt, on the occasion of which some old laws allowed interest to be exacted even beyond the double amount. 2. And We decree that this be observed in good faith judgments and in all other cases in which interest is exacted.

Given April 1, at Constantinople, in the consulship of the vir clarissimus Decius (529).

[28] *The same Augustus to Demosthenes, Praetorian Prefect. pr.* It had been established even in the old laws, but not most perfectly provided for, that interest on interest not in any way be exacted from debtors. For if it had been allowed for interest to be reduced to principal and to stipulate interest for the whole sum, what was the difference for debtors who were in fact being pressed for interest on interest? This was certainly to apply the laws not to facts but only through words (i.e., to interpret overliterally). 1. On account of this We define by this plainest law that no one be allowed in any way to reduce interest to principal for time past or future and again to stipulate interest for it, but if this has transpired, that interest always remain interest and receive no increase of other interest, but that the increase in interest only be added to the old principal.

Posted October 1,¹⁶⁴ at Chalcedon, in the consulship of the vir clarissimus Decius (529).

Thirty-Third Title Maritime Loans¹⁶⁵

[1] [A Greek constitution has fallen out of the Codex.]¹⁶⁶

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Scribonius Honoratus.* It is clear that a maritime loan (*traiecticia pecunia*), which is given at the risk of the creditor, is exempt from the observance of common interest rates until the ship has pulled into harbor.

¹⁶³ In 26 above.

¹⁶⁴ Perhaps September 17; so also Lounghis *et al.*

¹⁶⁵ *Fenus nauticum* or *traiecticia pecunia* (bottomry loans); see D. 22.2.

¹⁶⁶ Krüger, Addendum to 9th edition (515), restores the likely content.

PP. IIII id. Mart. Maximo II et Aquilino cons.

[3] *Idem AA. Aureliae Cosmianae.* Cum dicas pecuniam te ea lege dedisse, ut in sacra urbe tibi restitueretur, nec incertum periculum, quod ex navigatione maris metui solet, ad te pertinuisse profitearis, non dubium est pecuniae creditae ultra licitum te usuras exigere non posse.

PP. prid. id. Mart. Maximo II et Aquilino cons.

[4] *Idem AA. Aureliae Iulianae.* Cum proponas te nauticum fenus ea condicione dedisse, ut post navigium, quod in Africam dirigi debitor adseverabat, in Salonitanorum portum nave delata fenebris pecunia tibi redderetur, ita ut navigii dumtaxat quod in Africam destinabatur periculum susceperis, perque vitium debitoris, nec loco quidem navigii servato, illicitis comparatis mercibus quae navis continebat fiscum occupasse: amissarum mercium detrimentum, quod non ex marinae tempestatis discrimine, sed ex praecipiti avaritia et incivili debitoris audacia accidisse adseveratur, adscribi tibi iuris publici ratio non permittit.

[5] *Idem AA. et CC. Pullio Iuliano Eucharisto.* Traiecticiae quidem pecuniae, quae periculo creditoris mutuo datur, casus, antequam ad destinatum locum navis perveniat, ad debitorem non pertinet, sine huiusmodi vero conventionem infortunio naufragii non liberabitur.

D. VIII id. Oct. Retiariae CC. cons.

XXXIII Depositi

[1] *Imp. Alexander A. Mestrio militi.* Si incursu latronum vel alio fortuito casu ornamenta deposita apud interfectum perierunt, detrimentum ad heredem eius qui depositum accepit, qui dolum solum et latam culpam, si non aliud specialiter convenit, praestare debuit, non pertinet. quod si praetextu latrocinii commissi vel alterius fortuiti casus res,

Posted March 12, in the consulship of Maximus, for the second time, and Aquilinus (286).

[3] *The same Augusti to Aurelia Cosmiana.* Since you say that you gave money under the condition that it be paid back to you in the Sacred City (Rome), and you acknowledge that the uncertain danger that is customarily feared from sailing on the sea did not affect you, there is no doubt that you cannot demand interest for the money lent beyond the permitted rate.

Posted March 14, in the consulship of Maximus, for the second time, and Aquilinus (286).¹⁶⁷

[4] *The same Augusti to Aurelia Juliana.* Since you state that you have given a maritime loan on the condition that, after the voyage, which the debtor admitted was directed at Africa, the money loaned should be returned to you when the ship was brought to the port of Salona (in Dalmatia), such that you bore the risk only for the voyage which was directed to Africa, and (you further state) that through the fault of the debtor, not observing the place of the voyage, the Treasury seized the ship after he purchased illicit merchandise that the ship was holding; the principle of the public law does not permit the loss for the lost merchandise, which is admitted to have happened not as a result of the danger of a storm at sea, but of the debtor's reckless avarice and inequitable audacity, to be ascribed to you.

[5] *The same Augusti and the Caesars to Pullius Julian Eucharistus.* The loss of a maritime funds, which are given as a loan at the risk of the creditor, does not fall on the debtor before the ship reaches its destined place. But without an agreement of this type he (the debtor) will not be freed from the disaster of a shipwreck.

Given October 8, at Ratiaria, in the consulship of the Caesars (294).

Thirty-Fourth Title Deposit¹⁶⁸

[1]¹⁶⁹ *Emperor ALEXANDER Augustus to Mestrius, a soldier.* If, because of an incursion of brigands or another unavoidable accident (*casus fortuitus*), ornaments have been destroyed that were deposited with someone killed, the loss does not fall on the heir of the person who received the deposit, who ought to have been responsible only for malicious intent (*dolus*) and serious fault (*lata culpa*), provided nothing else was specifically agreed upon. But if items that

¹⁶⁷ This subscription may rather apply to the following constitution.

¹⁶⁸ See D. 16.3.

¹⁶⁹ = *Collatio* 10.8, where the date is June 26.

quae in potestate heredis sunt vel quas dolo desiit possidere, non restituantur, tam depositi quam ad exhibendum actio, sed etiam in rem vindicatio competit.

PP. IIII id. Iul. Maximo II et Urbano cons.

[2] *Imp. Gordianus A. Celsino militi.* Usurae in depositi actione sicut in ceteris bonae fidei iudiciis ex mora venire solent.

D. k. Nov. Pio et Pontiano cons.

[3] *Idem A. Austronio militi.* Si depositi experiris, non immerito etiam usuras tibi restitui flagitabis, cum tibi debeat gratulari, quod furti eum actione non facias obnoxium, si quidem qui rem depositam invito domino sciens prudensque in usus suos converterit, etiam furti delicto succedit.

D. id. Iul. Gordiano A. et Aviola cons.

[4] *Idem A. Timocrati militi.* Si deposita pecunia is qui eam susceperit usus est, non dubium est etiam usuras debere praestare. sed si, cum depositi actione expertus es, tantummodo sortis facta condemnatio est, ultra non potes propter usuras experiri: non enim duae sunt actiones alia sortis alia usurarum, sed una, ex qua condemnatione facta iterata actio rei iudicatae exceptione repellitur.

[5] *Impp. Valerianus et Gallienus AA. et Valerianus C. Claudio.* Propter instrumenta quidem, quae te deposuisse cum adversario tuo dicis, ut residua pecunia quae ex conductione debebatur dissoluta ea reciperes, si id quod placuerat implesti, sequestrem potes convenire. quamvis autem haec reddita non fuerint, tamen adversus eum a quo fundum conduxeras, si omne quod ex hoc contractu debebatur reddidisti, ipsis solutionibus tutus es.

D. id. Iul. Aemiliano et Basso cons.

[6] *Impp. Diocletianus et Maximianus AA. et CC. Antonio Alexandro et Ulpiano Antipatri.* Is, penes quem utrasque partes iransactiones vel alia

are in the power of the heir or that he has ceased to possess by malicious intent are not returned under the pretext of the commission of brigandage or other fortuitous accident, an action lies both on deposit and on producing the property (*exhibendum*), as well as a suit *in rem* on ownership (*vindicatio*).

Posted July 12, in the consulship of Maximus, for the second time, and Urbanus (234).

[2] *Emperor GORDIAN Augustus to Celsinus, a soldier.* Interest is customarily recoverable as a result of delay in an action on deposit, just as in other good faith trials.

Given November 1, in the consulship of Pius and Pontianus (238).

[3]¹⁷⁰ *The same Augustus to Austronius, a soldier.* If you are suing on a deposit, not without merit will you ask that interest be restored to you, since he ought to thank you for not making him liable on an action on theft, provided indeed the person who knowingly and advisedly has turned a thing held on deposit to his own uses against the will of the owner has (also) gone on to (commit) the delict of theft.

Given July 15, in the consulship of Gordian Augustus and Aviola (239).

[4] *The same Augustus to Timocrates, a soldier.* If the person who has taken money on deposit has used it, there is no doubt that he ought to pay interest as well. But if, when you sued on an action on deposit, the condemnation was made only for the principal, you cannot sue further for interest; for there are not two actions, one for the principal and the other for the interest, but one, from which, when a condemnation has been made, a repeated action is repelled on the basis of the defense that the matter was adjudged (*exceptio rei iudicatae*).

[5] *Emperors VALERIAN and GALLIENUS Augusti and VALERIAN Caesar to Claudius.* On account of documents, which you say you along with your opponent have deposited (with a stakeholder) so that you might recover them after the remaining money that was owed from a lease was paid, if you have fulfilled what had been agreed upon, you can sue the stakeholder (*sequester*). Although these (documents) have not been returned, nevertheless you are protected by the payments themselves against the person from whom you had leased the farm if you have paid everything that was owed from this contract.

Given July 15, in the consulship of Aemilianus and Bassus (259).

[6] *Emperors DIOCLETIAN and MAXIMIAN and the Caesars to Antonius Alexander and Ulpianus Antipater.*¹⁷¹ The person (a stakeholder) with whom

¹⁷⁰ Combine with C. 3.32.6, dated to July 11.

¹⁷¹ "You say" however, is singular, not plural.

instrumenta commendasse dicis, legem qua haec suscepit servare necesse habet.

[7] *Idem AA. et CC. Antiocho Attico Calpurniano Democrati.* Desiderium tuum cum rationibus iuris non congruit. nam si custodiam pecuniae suscepisti, quam aliis a te datam instrumentum, quo hanc tibi reddi conscriptum profiteris, arguit, solutionem eius competentem improbe recusas.

[8] *Idem AA. et CC. Aurelio Alexandro.* Si is, qui depositam a te pecuniam accepit, eam suo nomine vel cuiuslibet alterius mutuo dedit, tam ipsum de implenda suscepta fide quam eius successores teneri tibi certissimum est. adversus eum autem qui accepit nulla actio tibi competit, nisi nummi extant: tunc enim contra possidentem uti vindicatione potes.

D. IIII k. Mart. Sirmi AA. cons.

[9] *Idem AA. et CC. Aurelio Menophilo et ceteris.* Cum hereditas personam dominae sustineat, ab hereditario servo, priusquam patri vestro successeritis, res commendatas secundum bonam fidem ab eius qui suscepit successoribus apud rectorem provinciae petere potestis.

PP. VII id. Nov. Sirmi AA. cons.

[10] *Idem AA. et CC. Septimiae Quadratillae.* Qui depositum non restituit, suo nomine conventus et condemnatus ad eius restitutionem cum infamiae periculo arguetur.

Subscripta pridie Idus Decembres Nicomedia CC. cons.

[11] *Imp. Iustinianus A. Demostheni pp. pr.* Si quis vel pecunias vel res quasdam per depositionis accepit titulum, eas volenti ei qui deposuerit

you say both parties have entrusted settlements and other documents must observe the condition (*lex*) under which he has taken them.

[7] *The same Augusti and Caesars to Antiochus Atticus Calpurnianus Democrates.* Your desire is not consistent with the principles of the law. For if you have undertaken the safekeeping (*custodia*) of money, and a document, in which you acknowledge its repayment to you has been written, argues that it was loaned by you to others, you improperly refuse the legally required payment of it (to the depositor).

[8] *The same Augusti and Caesars to Aurelius Alexander.* If a person who has received money on deposit from you has given it as a loan in his own name or that of any other, it is quite certain that both he himself and his successors are bound to you to fulfill the faith undertaken. However, you have no right of action against the person who received the money unless the coins (still) exist (as a distinct entity); for then you can use a suit on ownership (*vindicatio*) against the possessor.

Given February 26, at Sirmium, in the consulship of the Augusti (293).¹⁷²

[9] *The same Augusti and Caesars to Menophilus and others.* Since an inheritance represents the person of the (female) owner, before the provincial governor you can seek things that have, in accordance with good faith, been entrusted by an inheritance slave (*servus hereditarius*) before you succeeded your father, from the successors of the person who had received them.¹⁷³

Posted November 7, at Sirmium, in the consulship of the Augusti (293).

[10]¹⁷⁴ *The same Augusti and Caesars to Septimia Quadratilla.* A person who does not restore a deposit will be compelled, after being sued and condemned, to restore it at the risk of infamy (*infamia*).

Subscribed December 12, at Nicomedia, in the consulship of the Caesars (294).

[11] *Emperor JUSTINIAN Augustus to Demosthenes, Praetorian Prefect. pr.* If someone has received monies or certain things under the title of deposit, he

¹⁷² The *Augusti* are restored as consuls in this and the following constitution.

¹⁷³ Blume: "A slave of an inheritance was a slave whose master was dead, and when the inheritance of the master had not been entered upon. Such a slave had deposited some property. The slave, as part of the inheritance, represented the person of the deceased; though he had no living master, his transaction was not void, but the right acquired was for the deceased and his estate. Hence, a deposit made by such slave could be recovered by the heir after accepting the inheritance."

¹⁷⁴ = *Collatio* 10.6. Quadratilla is restored from the *Collatio*.

reddere ilico modis omnibus compellatur nullamque compensationem vel deductionem vel doli exceptionem opponat, quasi et ipse quasdam contra eum qui deposuit actiones personales vel in rem vel hypothecarias praetendens, cum non sub hoc modo depositum accepit, ut non concessa ei retentio generetur, et contractus qui ex bona fide oritur ad perfidiam retrahatur. 1. Sed et si ex utraque parte aliquid fuerit depositum, nec in hoc casu compensationis praepeditio oriatur, sed depositae quidem res vel pecuniae ab utraque parte quam celerrime sine aliquo obstaculo restituantur, ei videlicet primum, qui primus hoc voluerit, et postea legitimae actiones integrae ei reserventur. 2. Quod obtinere sicut iam dictum est oportet et si ex una parte depositio celebrata est, ex altera autem compensatio fuerit opposita, ut integra omni legitima ratione servata depositae res vel pecuniae prima fronte restituantur. 3. Quod si in scriptis attestatio non per dolum vel fraudem fuerit ei qui depositum suscepit ab alio transmissa, ut minime depositum restituat, hocque per iusiurandum adfirmaverit, liceat ei qui deposuit sub defensionis cautela idonea praestita res depositas quantocius recuperare.

Recitata septimo miliario in novo consistorio palatii Iustiniani. d. xii k. Nov. Decio cons.

[12] *Idem A. Iohanni pp.* Supervacuum veterum differentiam e medio tollentes, si quis certum pondus auri vel confecti vel in massa constituti deposuerit et plures scripsit heredes et unus ex his contingentem sibi portionem a depositario accepit, alter supersederit vel alias fortuito casu impeditus hoc facere non potuerit, et postea depositarius in adversam inciderit fortunam vel sine dolo depositum perdiderit, sancimus non esse coheredi eius licentiam venire contra coheredem suum et ex eius parte avellere, quod ipse ex sua parte consequi minime potuerit, quasi eo quod coheres accepit communi constituto, cum, ubi certae pecuniae depositae fuerant et suam partem unus ex heredibus accepit, nemini veniret in dubium bene eum accepisse partem suam et non debere aliam partem attingere. nobis etenim non videtur esse homo obnoxius neque in massa neque in specie neque in pecunia numerata qui suam partem suscepit, ne industria poenas desidia solvat. si enim et alius heres tempora opportuna quemadmodum coheres eius observasset, et suum uterque recipiebat et sequentibus altercationibus minime locus relinquebatur.

should in every way be compelled to restore them promptly to the person who deposited them when the latter wants, and he should interpose no claim for an offset or a deduction or a defense of deceit, as if he himself were bringing certain actions against the person who made the deposit, either *in personam*, or *in rem*, or on hypothecs, since he did not receive the deposit under this condition, that an ungranted right of retention be created for him, and that a contract that arises out of good faith be turned into perfidy. 1. But if something should have been deposited by each party (with the other), the complication of an offset should not arise in this case, but the things or money deposited should be restored by either party as soon as possible without any obstacle, that is to say, first to the one who first wants this, and afterwards lawful actions should be reserved for him intact. 2. This must apply as has been described even if the deposit has been recorded (*celebrata*) by one party, but a claim for an offset has been interposed by the other, such that the deposited things or money be restored immediately with every lawful claim intact. 3. But if a protest in writing has been sent by the other party, not through deceit or fraud, to the person who undertook the deposit, so that he not restore it, and he (the other party) has affirmed this through an oath, the person who made the deposit should be allowed to recover quickly the things deposited by offering a suitable guarantee (*cautela*) for his (the depositary's) protection.

Recited at the seventh milestone in the New Consistory of the Palace of Justinian, October 30, in the consulship of Decius (529).

[12] *The same Augustus to John, Praetorian Prefect.* To remove the unnecessary difference of the ancients from our midst, if someone has deposited a certain weight of gold, either wrought (*confectum*) or in bullion, and has designated several heirs and one of these has received the portion allotted to him from the depositary, but the other has omitted doing this or, otherwise impeded by an accident, has not been able to do this, and afterwards the depositary has fallen into adverse fortune and has lost the deposit without malicious intent, We ordain that it not be permitted for the one co-heir to proceed against the other and to snatch from his share what he was not able to gain from his own share, as if the co-heir received it as jointly owned property. For, when definite sums of money had been deposited and one of the heirs has received his share, it would not be doubted by anyone that he has received his share in good order and should not touch another share. The person who has taken up his share does not seem to Us to be liable either for the bullion or for wrought gold (*species*) or for money counted, lest by his energy he pay the penalty for laziness. For if the other heir had also observed the most opportune time in the same way as his co-heir, each one would have recovered his own property and no place would have been left for subsequent disputes.

(531-532).

XXXV Mandati

[1] *Imp. Severus et Antoninus AA. Leonidae.* Adversus eum cuius negotia gesta sunt de pecunia, quam de propriis opibus vel ab aliis mutuo acceptam erogasti, mandati actione pro sorte et usuris potes experiri: de salario quod promisit a praeside provinciae cognitio praebebitur.

[2] *Imp. Antoninus A. Statio Marcellino.* Cum ex causa fideiussionis pecuniam patrem tuum exsolvisse proponas, habes mandati actionem, qua non solum pecuniam, sed etiam pignora in obligationem eam deducta potes consequi.

PP. VIII.

[3] *Idem A. Germano.* Si pater tuus tibi sui iuris constituto actionem adversus debitores suos mandavit, potuit ipse praesens adversus eos re integra experiri. si quid itaque ab eo apud iudicem actum est, rescindi nulla ratio patitur.

PP. VI k. Nov. Sabino II et Anullino cons.

[4] *Imp. Alexander A. Aurelio Vulnerato.* Etiam si contrariam sententiam reportaverunt, qui te ad exercendas causas appellationis procuratorem constituerunt, si tamen nihil culpa tua factum est, sumptus, quos in lite probabili ratione feceras, contraria mandati actione petere potes.

S. VIII id. Ian.

[5] *Idem A. Iuliano.* Si maritus sororis tuae tibi procurans petere bonorum possessionem noluit, cum ipso tibi congregiendum est. quam querellam ita cum effectu habes, si mandasse te, ut peteretur bonorum possessio, eumque neglexisse arguas.

[6] *Imp. Gordianus A. Aelio Sosibio militi.* Si fideiussor pro reo patiente fidem suam adstrinxit, mandati cum eo post exsolutam pecuniam vel factam condemnationem potest exercere actionem.

PP. III non. Sept. Pio et Pontiano cons.

Thirty-Fifth Title Mandate¹⁷⁵

[1] *Emperors SEVERUS and ANTONINUS Augusti to Leonidas.* You can sue a person whose affairs have been managed (by you) for the money you spent from your own resources or received on loan from others, in an action on mandate both for the principal and interest; a hearing will be provided by the provincial governor concerning the honorarium (*salarium*) that he promised.

[2] *Emperor ANTONINUS Augustus to Statius Marcellinus.* Since you state that your father paid money in connection with a suretyship (*fideiussio*), you have an action on mandate by which you can pursue not only the money, but also the pledges brought into this obligation.¹⁷⁶

Posted the eighth day before ...

[3] *The same Augustus to Germanus.* If your father gave you, (at a time) when you were established as *sui iuris* (i.e., emancipated),¹⁷⁷ a mandate for an action against his debtors, he could have when present sued them with the legal situation unchanged (despite the mandate). Thus if anything was done by him before the judge, no reason allows for it to be rescinded.

Posted October 27, in the consulship Sabinus, for the second time, and Anullinus (216).

[4] *Emperor ALEXANDER Augustus to Aurelius Vulneratus.* Even if the people who appointed you as procurator to pursue cases on appeal have received an adverse verdict, nevertheless if nothing was done by your fault, you can seek the expenses that you reasonably incurred in the suit through a contrary action on mandate (*actio contraria mandati*, against the mandators).

Written January 6.

[5] *The same Augustus to Julian.* If your sister's husband serving as procurator for you was unwilling to seek possession of an estate (*possessio bonorum*), you must sue him. You have a complaint effective in this way if you argue that you gave a mandate that possession of the estate be sought and he neglected this.

[6] *Emperor GORDIAN Augustus to Aelius Sosibius, a soldier.* If a surety, with the permission of the defendant, has bound his faith, he can bring an action for mandate against him after payment of the money or a condemnation has occurred.

Posted September 3, in the consulship of Pius and Pontianus (238).

¹⁷⁵ See D. 17.1; Inst. 7.26. Mandate, a gratuitous contract, may nonetheless involve an honorarium.

¹⁷⁶ Blume: "A request ... to become surety was treated as a mandate. C. 8.40.14. When the surety paid, he had the right of regress against the principal debtor by an action on ... the mandate. In this case, the surety – the father – was evidently dead, and his son succeeded to his rights, as heir."

¹⁷⁷ See Paul, D. 46.2.20 pr.

[7] *Idem A. Aureliano militi.* Si litteras eius secutus, qui pecuniae^{vii} auctor fuerat, ei qui tibi litteras tradidit pecunias credidisti, tam adversus eum, qui a te mutuam sumpsit, quam adversus eum, cuius mandatum secutus es, mandati actio tibi competit.

[8] *Impp. Valerianus et Gallienus AA. et Valerianus nob. C. Aurelio Lucio.* Si tibi pupillorum pater, ut pecuniam in rem suam servis eius crederes, mandavit et in hanc rem aequo ipso praecipiente pignora sunt obligata, et mandati actione pupillos post mortem patris convenire et exsequi ius obligationis pignorum poteris, si in solutione cessabitur.

D. IIII k. Ian. Aemiliano et Basso cons.

[9] *Impp. Diocletianus et Maximianus AA. Marcello.* Cum per procuratorem causam tuam laesam esse dicas, mandati actio adversus eum tibi competit.

[10] *Idem AA. et CC. Aurelio Papio.* Si pro ea contra quam supplicas fideiussor seu mandator intercessisti et neque condemnatus es neque bona eam dilapidare postea coepisse comprobare possis, ut iustam metuendi causam praebeat, neque ab initio ita te obligationem suscepisse, ut eam possis et ante solutionem convenire, nulla iuris ratione, antequam satis creditori pro ea feceris, eam ad solutionem urgere certum est. fideiussorem vero seu mandatorem exceptione munitum et iniuria iudicis damnatum et appellatione contra bonam fidem minime usum non posse mandati agere manifestum est.

[11] *Idem AA. et CC. Aurelio Gaio.* Procuratorem non tantum pro his quae gessit, sed etiam pro his quae gerenda suscepit, et tam propter exactam ex mandato pecuniam quam non exactam, tam dolum quam culpam, sumptuum ratione bona fide habita, praestare necesse est.

D. ... k. Iun. Sirni AA. cons.

^{vii} [pecuniae]

[7] *The same Augustus to Aurelianus, a soldier.* If, following the instructions in a letter of the person who was its author, you lent funds to the person who handed the letter over to you, an action on mandate is available to you both against the person who received money on loan from you¹⁷⁸ and against the person whose mandate you followed.

[8] *Emperors VALERIAN and GALLIENUS Augusti and VALERIAN most noble Caesar to Aurelius Lucius.* If (before his death) the father of the wards gave a mandate to you to lend money to his slaves for his benefit and pledges were given also for this purpose at his own instruction, you will be able both to sue the wards on an action on mandate after the death of their father and, if they fail to pay, to enforce your right from the obligation of the pledges.

Given December 29, in the consulship of Aemilianus and Bassus (259).

[9]¹⁷⁹ *Emperors DIOCLETIAN and MAXIMIAN Augusti to Marcellus.* Since you say that damage was done to your case by your procurator (for a lawsuit), an action on mandate against him is available to you.

[10] *The same Augusti and the Caesars to Aurelius Papius.* If you assumed liability as a surety or mandator for the woman against whom you are pleading, and you have not been condemned (to her creditor), and you cannot prove (either) that she began to dissipate her property afterwards so as to offer a just cause for fearing (her inability to pay) or that you took up the obligation from the beginning so that you could sue her even before payment, it is certain that by no principle of the law is she compelled to pay (you) before you satisfied the creditor on her behalf. It is manifest that a surety or mandator, though protected with a defense, when he has both been condemned through wrongdoing (*iniuria*) on the part of the judge and, contrary to good faith, has not had recourse to an appeal, cannot sue on mandate.

(293).

[11] *The same Augusti and Caesars to Aurelius Gaius.* A procurator must be responsible not only for those things that he has managed, but also for those things that he has undertaken to manage, both for the money exacted on the basis of his mandate as well as money not exacted, and also for deliberate misconduct as well as fault, with account taken for his expenses in accordance with good faith.

Given June 1, at Sirmium, in the consulship of the Augusti (293).¹⁸⁰

¹⁷⁸ Possibly delete *mandati*: the creditor would have no action on mandate against the debtor.

¹⁷⁹ Perhaps to be combined with C. 4.27.1, dated July 1, 290.

¹⁸⁰ January 1 is more likely

[12] *Idem AA. et CC. Firmo Marcellino.* Cum mandati negotii contractum certam accepisse legem adseveres, eam integram secundum bonam fidem custodiri convenit. unde si contra mandati tenorem procurator tuus ad te pertinentem fundum vendidit nec venditionem postea ratam habuisti, dominium tibi auferre non potuit.

PP. xvii k. Iun. Sirmi AA. cons.

[13] *Idem AA. et CC. Zosimo.* A procuratore dolum et omnem culpam, non etiam improvisum casum praestandum esse iuris auctoritate manifeste declaratur.

D. k. Febr. Sirmi CC. cons.

[14] *Idem AA. et CC. Hermiano.* Si secundum mandatum Tryphonis ac Felicis equos tua pecunia comparatos vel in solutum a proprio debitore tibi traditos uni de his utriusque voluntate dedisti, ad parendum placitis eos mandati iudicio conventos bona fides arguet.

D. vi k. April. Sirmi CC. cons.

[15] *Idem AA. et CC. Aurelio Precario Athenaeo.* Mandatum re integra domini morte finitur.

D. xvii k. Mai. CC. cons.

[16] *Idem AA. et CC. Uzando.* Ad comparandas merces data pecunia, qui mandatum suscepit, fide rupta quanti interest mandatoris tenetur.

iii k. Oct.

[17] *Idem AA. et CC. Aurelio Gorgonio.* Salarium incertae pollicitationis peti non potest.

[18] *Idem AA. et CC. Tusciano.* Post solutionem a se factam, qui dari mutuo mandavit, ab eo, pro quo intercessit, vel successoribus eius quod solutum est etiam cum usuris post moram recte reddi postulat.

[12] *The same Augusti and Caesars to Firmus Marcellinus.* Since you assert the contract for the mandate of a business involved specific terms (*certain legem*), it is accepted that these terms be observed fully in accordance with good faith. Therefore if, contrary to the tenor of the mandate, the procurator sold a farm belonging to you and afterwards you did not ratify the sale, he could not take ownership away from you.

Posted May 16, at Sirmium, in the consulship of the Augusti (293).¹⁸¹

[13] *The same Augusti and Caesars to Zosimus.* It is clearly declared by the authority of the law that a procurator is responsible for deliberate misconduct (*dolus*) as well as all fault (*culpa*), but not for an unforeseen accident.

Given February 1, at Sirmium, in the consulship of the Caesars (294).

[14] *The same Augusti and Caesars to Hermianus.* If, in accordance with the mandate of Trypho and Felix, you have given to one of these, with the consent of both, horses purchased with your money or delivered to you as payment by your debtor, good faith compels them, when sued in a judgment on the mandate, to comply with their agreement.

Given March 27, at Sirmium, in the consulship of the Caesars (294).

[15] *The same Augusti and Caesars to Aurelius Precarius Athenaeus.* A mandate, if the legal situation is unchanged (*re integra*), is ended at the death of the owner (the mandator).

Given April 15 in the consulship of the Caesars (294).

[16] *The same Augusti and Caesars to Uzandus.* A person who has undertaken a mandate to purchase goods with money he has been given, if he breaks his faith, is liable for the mandator's interest.

September 29 (294?).

[17] *The same Augusti and Caesars to Aurelius Gorgontius.* An honorarium (*salarium*) cannot be claimed for an indefinite promise (by a mandatary).

(294?).

[18] *The same Augusti and Caesars to Tuscianus.* A person who has mandated that a loan be given, after he has made the payment (to the mandatary), rightly demands what has been paid, along with interest after delay (*mora*, default in payment), from the person for whom he assumed liability (*pro quo intercessit*) or from his successors.¹⁸²

¹⁸¹ Mommsen dates to December 16, 293.

¹⁸² Person A gave a mandate to B to make a loan to C, and B executed the mandate; A then repaid the loan to B. Now A can claim the amount of the loan (plus interest after default) from C, for whom A is said to have assumed liability.

D. VII k. Oct. Sirmi ... cons.

[19] *Idem AA. et CC. Aurelio Eugenio.* Pretii rerum distractarum, quas venales mandato praecedente acceperas, ultra licitum usuras ex stipulatione vel mora praestare, licet pignora data probentur, compelli non potes.
S. XIII k. Nov. Sirmi ... cons.

[20] *Idem AA. et CC. Aurelio Epagatho. pr.* Si contra licitum litis incertum redemisti, interdictae conventionis tibi fidem impleri frustra petis.
1. Quod si gratuitum mandatum suscepisti, secundum bonam fidem sumptus recte postulas.

[21] *Imp. Constantinus A. Volusiano pp.* In re mandata non pecuniae solum, cuius est certissimum mandati iudicium, verum etiam existimationis periculum est. nam suae quidem quisque rei moderator atque arbiter non omnia negotia, sed pleraque ex proprio animo facit: aliena vero negotia exacto officio geruntur nec quicquam in eorum administratione neglectum ac declinatum culpa vacuum est.

[22] *Imp. Anastasius A. Eustathio pp. pr.* Per diversas interpellationes ad nos factas comperimus quosdam alienis rebus fortunisque inhiantes cessiones aliis competentium actionum in semet exponi properare hocque modo diversas personas litigiorum vexationibus adficere, cum certum sit pro indubitatis obligationibus eos magis, quibus antea suppetebant, sua vindicare quam ad alios ea transferre velle.

1. Per hanc itaque legem iubemus in posterum huiusmodi conamen inhiberi (nec enim dubium est redemptores litium alienarum videri eos esse, qui tales cessiones in se confici cupiunt), ita tamen, ut, si quis datis pecuniis huiusmodi subierit cessionem, usque ad ipsam tantummodo solutarum pecuniarum quantitatem et usurarum eius actiones exercere permittatur, licet instrumento cessionis venditionis nomen insertum sit:

2. Exceptis scilicet cessionibus, quas inter coheredes pro actionibus hereditariis fieri contingit, et his, quascumque vel creditor vel is qui res aliquas possidet pro debito seu rerum apud se constitutarum

Given September 25, at Sirmium, in the consulship (of the Caesars, 294?).

[19] *The same Augusti and Caesars to Aurelius Eugenius.* For the price of property that you received to sell pursuant to a preceding mandate, you cannot be compelled to pay interest beyond the permitted rate on the basis of a stipulation or delay, even should it be proved that pledges have been given.

Written October 18, at Sirmium, in the consulship (of the Caesars, 294?).

[20] *The same Augusti and Caesars to Aurelius Epagathus. pr.* If, contrary to what is allowed, you have purchased (from a litigant) the uncertain outcome of a lawsuit, you seek in vain the fulfillment of the terms (*fides*) of the forbidden agreement. 1. But if you have taken up a gratuitous mandate (to pursue the lawsuit), you correctly claim your expenses in accordance with good faith.

[21] *Emperor CONSTANTINE Augustus to Volusianus, Praetorian Prefect.*¹⁸³ In a mandated matter there is risk not only for money – for which there is a most certain judgment on mandate – but also for a person's esteem. For each person, as a manager and judge of his own affairs, conducts, not all business, but much of it by his own intention. But the affairs of other people are managed after a duty to do so has been imposed (through a mandate), and nothing in their administration, if neglected or declined, is free of fault.

(313–315?).

[22] *Emperor ANASTASIUS Augustus to Eustathius, Praetorian Prefect. pr.* We have learned through diverse appeals (*interpellationes*) made to Us that some people, coveting the property and fortunes of others, hasten the cessions of actions available to others to be transferred to themselves, and in this way afflict various persons with the vexations of litigation, since it is certain that, for undisputed obligations, those people to whom they previously were available want to claim their own rights (*sua vindicare*) from them rather than transfer these to others.

1. Thus through this law We order that this type of attempt be inhibited for the future – for it is not doubtful that the purchasers of other people's lawsuits seem to be those who desire such cessions to be made towards themselves – under this condition, that, if someone gives money and enters into a cession of this type, he be permitted to pursue actions only for the amount of money paid and the interest on it, although the notice (*nomen*) of the sale has been inserted in the document of cession.

2. But cessions are excepted that happen to arise among co-heirs in inherited causes of action, as are ones that a creditor or a person who possesses certain

¹⁸³ More probably, City Prefect. Seeck dates to c. 321.

munimine ac tuitione acceperit, nec non his, quas in legatarios seu fideicommissarios, quibus debita vel actiones seu res aliae relictæ sunt, pro his fieri necesse sit: nulla etenim tali ratione intercedente redemptor, sicuti superius declaratum est, magis existit, qui alienas pecuniis praestitis subiit actiones. 3. Sin autem per donationem cessio facta est, sciant omnes huiusmodi legi locum non esse, sed antiqua iura esse servanda, ut cessiones tam pro exceptis et specialiter enumeratis quam aliis causis factae seu faciendae secundum actionum, quaecumque cessae sunt vel fuerint, tenorem sine quadam imminutione obtineant.

D. x k. Aug. Areovinda et Messala cons.

[23] *Imp. Iustinianus A. Iohanni pp. pr.* Anastasio divae memoriae principi iustissima constitutio conscripta est tam humanitatis quam benivolentiae plena, ut ne quis alienum subeat debitum cessione in eum facta et amplius consequatur a debitore his, quae praestavit cessionis auctori, exceptis quibusdam casibus, qui specialiter illi sanctioni continentur. sed cum hi, qui circa lites morantur, eandem piam dispositionem in sua natura remanere minime concesserunt, inventientes machinationem, ut partem quidem debiti venditionis titulo transferant in alium creditores, reliquam autem partem per coloratam cedant donationem, generaliter Anastasiana constitutioni subvenientes sancimus nulli licere partem quidem debiti cedere pecuniis acceptis et venditione actionum habita, partem autem donationis titulo videri transferre, sed, si voluerit, pure totum debitum donare et per donationem actiones transferre, non occulte nec per artes clandestinas pecunias suscipere, publice autem simulatam donationem celebrare, sed undique puram et non dissimulatam facere donationem: huiusmodi enim cessionibus non adversamur.

1. Si quis autem occulte aliud quidem agere conatur et pecunias pro parte accepit et vendidit particulatim actiones, partem autem donare simulat vel ipsi, qui emptionem actionis subiit, vel forsitan alii per suppositam personam (quia et hoc saepius perpetratum esse didicimus), huiusmodi machinationem penitus amputamus, ut nihil amplius accipiat, quam ipse vero contractu re ipsa persolvit: sed omne, quod superfluum est et per figuratam donationem translatum, inutile esse ex utraque parte censemus, ut neque ei qui cedit actiones neque ei qui eas

property for a debt has accepted for property placed in his possession under his own protection and watchfulness; and also ones that have to be made toward legatees and trustees, to whom debts or actions or other property have been bequeathed. Without such a reason intervening, as discussed above, someone who has entered into another person's actions after paying money is rather a champertor (*redemptor*, the purchaser of a lawsuit). 3. But if a cession has been made as a gift, everyone should know that there is no place for a law of this type, but that the ancient laws are to be maintained, so that cessions made or to be made for causes excepted and specially enumerated and for other causes in accordance with the terms (*tenor*) of the actions, which have been or will have been ceded, shall be valid without any diminution.

Given July 23, in the consulship of Areovinda and Messala (506).

[23] *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* A most just constitution,¹⁸⁴ full of both kindness and benevolence, has been written by the Emperor Anastasius of blessed memory, that no one should enter upon someone else's debt after he has been ceded the lawsuit, and that he should not gain more from the debtor than what he has paid to the author of the cession, except in certain cases, which are specifically included in that ordinance. But since these persons who spend their time around lawsuits have not allowed this same pious disposition to remain in its nature (i.e., to observe the spirit of the law), finding a device so that the creditors transfer one part of the debt under the title of a sale, but cede the remaining part through a fictive gift. We, in order to provide general support for the constitution of Anastasius, ordain that no one be allowed to receive money and cede part of a debt and, after holding a sale of lawsuits, to be seen to transfer part as a gift. But, if he wants, he can unconditionally make a gift of the entire debt and through the gift transfer rights of action, not to take up funds secretly or by clandestine devices only to celebrate publicly a faked donation, but everywhere to make a donation unrestricted and unconcealed; for We are not opposed to cessions of this type.

1. However, if someone secretly tries to do something else and has received money for a part (of an action) and has sold actions part by part, but feigns making a gift of a part either to the very person who has undergone a purchase of an action, or perhaps to another through an intermediary – for We have learned that even this has often been perpetrated – We cut off scheming of this type completely, so that he receive no more than he himself has actually paid in a true contract. But everything that is left over and transferred through a specious gift, We decree to be legally ineffective for both parties, so

¹⁸⁴ Above, 22.

suscipere curavit aliquid lucri vel fieri vel remanere vel aliquam contra debitorem vel res ad eum pertinentes esse utrique eorum actionem. 2. Sed et si quis donationem quidem omnis debiti facere adsimulaverit, ut videatur esse tota donatio, aliquid autem occulte susceperit, et in hoc casu hoc tantummodo exactionem sortiri, quod datum esse comprobetur, et si hoc a debitore persolvatur, nulla contra eum vel substantiam eius ex dissimulata donatione oriatur molestia.

3. Et iustum quidem fuerat hoc remedium debitoribus ab Anastasianis temporibus impertiri, ex quibus etiam lex lata est, quam homines astute lacerandam esse existimaverunt. sed ne videamur in tanta temporum nostrorum benivolentia aliquid acerbius admittere, in futuris post praesentem legem casibus haec observari censemus, ut omne, quod contra legem Anastasianam excogitatum est, hoc in posterum nostro perfruatur remedio.

[24] [Ὁ αὐτὸς βασιλεὺς.] Ἡ παροῦσα διάταξις μένεται μὲν τῆς Ἀναστασίου τοῦ τῆς θείας λήξεως διατάξεως τῆς γενομένης περὶ τῶν ἐκχωρήσεων, ἥτις βούλεται τὸν χρήματα δεδωκότα καὶ ἀγωγὰς ἐκχωρηθῆναι μὴδὲν πλέον ἀπαιτεῖν ἐκ τῶν ἐκχωρηθεισῶν ἀγωγῶν, εἰ μὴ μόνον ἅπερ δέδωκεν ὑπὲρ αὐτῶν· εὐροῦσα δὲ ἐν ἐκείνῃ τῇ διατάξει πρόσωπά τινα ὑπεξηρημένα κελεύει καὶ ἐπὶ τούτων τῶν προσώπων τὸ αὐτὸ νόμιμον κρατεῖν καὶ μηκέτι φυλάττεσθαι τὴν ἐν ἐκείνῃ τῇ διατάξει γενομένην ὑπεξαίρεσιν, ἀλλὰ τὸν δεδωκότα χρήματα μόνον αὐτὰ λαμβάνειν μετὰ τῶν τόκων καὶ πλέον οὐδέν. εἰ δὲ δωρεὰ τις καθαρὰ γένοιτο ἀγωγῶν, τὴν ἐπὶ ταῖς δωρεαῖς ἐκχώρησιν ἰσχύειν βούλεται, εἰ μὴ ἄρα κατὰ περιγραφὴν ἐγένετο.

XXXVI Si Servus Se Emi Mandaverit

[1] *Impp. Diocletianus et Maximianus AA. et CC. Aureliae Dionysiae.*
pr. Si extero servus se mandaverit emendum, quamvis nec ex persona servi (quia hoc liber mandare non potest) nec ex domini (quoniam qui

that no profit accrue to or remain for either the person who ceded the actions or for the one who has taken care to assume them, or that neither of them have any action against the debtor or property belonging to him. 2. But if someone pretends to make a gift of a whole debt, so that the gift seem to be total, but has secretly taken something, (We decree) both that in this case he only gain the claim which is proved to have been given, and that, if this should be paid by the debtor, no trouble should arise against him or his property from a fake gift.

3. And it was just that this remedy be created for debtors from the times of Anastasius, when the law was passed, which men have cunningly figured out how to tear apart. But lest We seem, in the great benevolence of Our times, to introduce anything very harsh, in future cases after the present law We decree that these measures be observed, so that everything that has been contemplated against the law of Anastasius should benefit from Our remedy in posterity.

(531–532).¹⁸⁵

[24]¹⁸⁶ (*The same Augustus*) The present constitution recalls the measure that Anastasius of divine memory made concerning the cession of actions (*ekchoreseis*),¹⁸⁷ which provides that the person who has given money for ceded actions claim no more from the ceded actions than precisely what he gave for them; finding in that constitution that some persons are excepted, it orders that the same law prevail also with these persons, and that the exception provided for in that constitution no longer be maintained, but that the one who has given money take that alone with interest and nothing more. If there should be some unconditional gift of actions, it provides that the cession for the sake of gifts should have force, if it has not occurred to circumvent the law.

(531–534).

Thirty-Sixth Title If a Slave Has Mandated That He Be Purchased¹⁸⁸

[1]¹⁸⁹ *Emperors DIOCLETIAN and MAXIMIANUS Augusti and the Caesars to Aurelia Dionysia. pr.* If a slave has given a mandate to an outside party to purchase him, although the action was not believed to exist on the basis of the

¹⁸⁵ Lounghis *et al.* give between February 20, 531 and January 13, 532, or between October 18 and November, 534.

¹⁸⁶ = Bas. 14.1.86.

¹⁸⁷ Above, 22.

¹⁸⁸ Blume compares "Papinian in D. 17.1.54 pr., where it is said: "When a slave gives a stranger a commission for his own purchase, this is no mandate. But if the mandate was given for the further purpose of the slave being manumitted, and he is not manumitted, the owner can either as vendor recover the price, or on the score of affection proceed upon the mandate, supposing the slave to be a natural son or brother."

¹⁸⁹ Bas. 14.1.87.

mandat, ut a se res comparetur, inutiliter mandat) consistere credebatur actio, tamen optima ratione, quia non id agitur, ut ex ipso mandato, sed propter mandatum ex alio contractu nascatur actio, domino quaeri placuit obligationem. 1. Si itaque domino ignorante emi te mandasti ac te nummos subministrante peculiares soluti sunt, emptori minime liberatio per huiusmodi factum potuit pervenire. nec tamen si tradita nec manumissa es, etiam mandati de ancilla et empti de pretio consequendo tam contrarias actiones ei exercere concedi placuit. 2. Sane in illius arbitrio relictum est, utrumne mancipium an pretium consequi velit, cum ex peculio quod eius fuit solutio celebrata obligationis vinculo emptorem liberare non potuit.

Subdita k. Oct. Sirmi ipsis AA. cons.

XXXVII Pro Socio

[1] *Impp. Diocletianus et Maximianus AA. et CC. Aurelio.* Societatem uno pecuniam conferente alio operam posse contrahi magis obtinuit.

D. III non. Mai. AA. cons.

[2] *Idem AA. et CC. Pannonio.* Cum proponas te praedium coniuncto dominio cum patruo tuo comparasse in possessionemque tam te quam ipsum inductum, iuris ratio efficit, ut dominium fundi ad utrumque pertineat. sane quia pretium a te solo numeratum et sollemnibus pensionationibus cessante socio satisfactum esse dicis, iudicio societatis id quod eo nomine praestari oportuerit consequeris.

[3] *Idem AA. et CC. Aurelio Victorino militi.* Cum in societatis contractibus fides exuberet conveniatque aequitatis rationibus etiam compendia aequaliter inter socios dividi, praeses provinciae, si patrem tuum salinarum societatem participasse et non recepta communis compendii portione rebus humanis exemptum esse repperit,

person of a slave – since a free person cannot mandate this – or of the owner – since a person who mandates that a thing be purchased from himself gives an ineffective mandate – still, on the best reasoning, it was decided that the owner has a right to the obligation, since it is not a question of the action arising from the mandate itself, but on account of a mandate from another contract. 1. Thus if, without your owner's knowing, you have given a mandate that you be purchased, and money from your *peculium* that you supplied was paid, freedom (from the obligation) could not come to the purchaser through a fact of this type. Nor, however, was it decided that, if you were delivered but not manumitted, he be allowed to bring such contrary actions on mandate concerning the slave woman and on sale to gain the price. 2. Certainly it is left in his judgment whether he might wish to seek the slave or the price, since the payment made (to the slave's owner) from the *peculium*, which was (already) his, could not free the purchaser from the bond of his obligation.

Given October 1, at Sirmium, in the consulship of the Augusti themselves (293).

Thirty-Seventh Title (Action on) Partnership¹⁹⁰

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Aurelius.* The opinion has prevailed that a partnership can be contracted when one person provides money and another work.

Given May 5, in the consulship of the Augusti (293).

[2] *The same Augusti and Caesars to Pannonius.* Since you state that you have purchased a property under joint ownership with your paternal uncle and that both you and he have been placed in possession, the logic of law establishes that the ownership of the farm belongs to both. Certainly, because you say that the price was paid by yourself alone and that the lawful payments were met without a contribution by your partner, you will gain in a judgment on partnership (*iudicium societatis*) what should have been provided on this account.¹⁹¹

[3] *The same Augusti and Caesars to Aurelius Victorinus, a soldier.* Since, in contracts for partnership, (good) faith is preeminent and it is consistent with considerations of fairness that profits also be divided fairly among the partners, the provincial governor, if he finds that your father participated in a partnership for salt beds and passed away without receiving his portion of

¹⁹⁰ See D. 17.2; Inst. 3.25.

¹⁹¹ That is, the petitioner can sue his uncle for a contribution, but is not sole owner. Possibly dated to 294, in connection with C. 4.35.16.

commodum societatis, quod deberi iuxta fidem veri constiterit, restitui tibi praecipiet.

PP. VI k. Sept. ... cons.

[4] *Idem AA. et CC. Aurelio Celeri.* Si societatis iure vel transactioni stipulatione subdita bonorum omnium aequis partibus inter te et Fabiam divisionem recte fieri placuit, quo minus haec rata servantur, nihil interest, utrumne testatus, qui fuerit obligatus, an intestatus rebus sit humanis exemptus.

[5] *Idem AA. et CC. Aurelio Theodoro.* Tamdiu societas durat, quamdiu consensus partium integer perseverat. proinde si iam tibi pro socio nata est actio, eam inferre apud eum, cuius super ea re notio est, non prohiberis.

D. XII k. Ian. Nicomediae CC. cons.

[6] *Imp. Iustinianus A. Iohanni pp.* De societate apud veteres dubitatum est, si sub condicione contrahi potest: puta 'si ille consul fuerit' societatem esse contractam. sed ne simili modo apud posteritatem sicut apud antiquitatem huiusmodi causa ventiletur, sancimus societatem contrahi posse non solum pure, sed etiam sub condicione: voluntates etenim legitime contrahentium omnimodo conservandae sunt.

D. prid.

[7] *Idem A. Iohanni pp.* Sancimus veterum dubitatione semota licentiam habere furiosi curatorem dissolvere, si maluerit, societatem furiosi, et sociis licere ei renuntiare. et quemadmodum in omnibus aliis contractibus legitimam auctoritatem ei dedimus, ita et in hac parte eum permittimus competenter commodis furiosi providere.

D. ... Constantinopoli post consulatum Lampadii et Orestis.

the common profit, will instruct that the benefit of the partnership, which will have been established to be owed in accordance with the facts (*iuxta fidem veri*), be restored to you.

*Posted August 27, in the consulship of ...*¹⁹²

[4] *The same Augusti and Caesars to Aurelius Celer.* If it was decided rightly that a division of all property be made in equal shares between you and Fabia on the basis of a partnership or a stipulation made for a settlement, it does not make any difference for observing these provisions as valid whether the person who had been obligated passed away with or without a will.

[5] *The same Augusti and Caesars to Aurelius Theodorus.* A partnership endures as long as the consensus of the parties remains intact. Accordingly, if an action on partnership has already arisen for you, you are not prohibited from bringing this before the person who is competent to investigate this matter (i.e., the judge).

Given December 21, at Nicomedia, in the consulship of the Caesars (294).

[6] *Emperor JUSTINIAN Augustus to John, Praetorian Prefect.* There was doubt among the ancients whether a partnership can be contracted under a condition: say, the partnership has been contracted "if he is consul." But lest a legal situation of this type be debated (*ventiletur*) in a similar manner among later generations (*apud posteritatem*) as in ancient times (*apud antiquitatem*), We ordain that a partnership can be contracted not only without restriction, but under a condition; for the wishes of those lawfully entering into a contract are to be observed.

*Given April 30, at Constantinople, in the post-consulate of viri clarissimi Lampadius and Orestes (531).*¹⁹³

[7] *The same Augustus to John, Praetorian Prefect.* We ordain, in order to remove the doubt of the ancients, that the *curator* of an insane person (*furiosi*) have permission to dissolve, if he prefers, the partnership of the insane person, and that it be permitted for the partners to renounce the partnership. And just as We have given him lawful authority in all other contracts, so too do We permit him in this area to provide appropriately for the interests of the insane person.

*Given ... at Constantinople, in the post-consulate of Lampadius and Orestes (531).*¹⁹⁴

¹⁹² This subscription may rather apply to ch. 4.

¹⁹³ The subscription is entirely restored, but accepted by Lounghis *et al.*

¹⁹⁴ Lounghis *et al.* date to between April 30 and December 31, 531.

XXXVIII De Contrahenda Emptione

[1] *Impp. Valerianus et Gallienus AA. Aurelio Paulo.* Venditiones, etsi in alio loco quam in quo possessiones constitutae sunt fiant, non ideo irritae esse creduntur.

D. XII k. Mai.

[2] *Impp. Diocletianus et Maximianus AA. Aurelio Avito.* Emptionem et venditionem consensum desiderare nec furiosi ullum esse consensum manifestum est. intermissionis autem tempore furiosos maiores viginti quinque annis venditiones et alios quoslibet contractus posse facere non ambigitur.

D. VIII id. Mai. Maximo II et Aquilino cons.

[3] *Idem AA. et CC. Valeriae Viacrae.* Si donationis causa venditionis simulatus contractus est, emptio sui deficit substantia. sane si in possessionem rei sub specie venditionis causa donationis, ut te aleret, induxisti, sicut donatio perfecta facile rescindi non potest, ita legi, quam tuis rebus donans dixisti, parere convenit.

[4] *Idem AA. et CC. Aurelio Luciano.* Cum res tibi donatas ab herede donatricis distractas esse proponas, intellegere debueras duplicari tibi titulum possessionis non potuisse, sed ex donatione et traditione dominum factum frustra emisse, cum rei propriae emptio non possit consistere, ac tunc demum tibi profuit, si ex donatione te non fuisse dominum demonstretur. sane quoniam omnia bona tibi ab ea donata et tradita dicis, ad hoc a filio facta venditio rerum maternas adferre perfecta etiam donatione poterit defensionem, ne vel exemplo inofficiosi testamenti possit haec avocare.

PP. III k. Iun. AA. cons.

[5] *Idem AA. et CC. Umbigae Gratiae.* Cum ipse tutor nihil ex bonis pupilli quae distrahi possunt comparare palam et bona fide prohibetur, multo magis uxor eius hoc facere potest.

D. VIII k. Dec. AA. cons.

Thirty-Eighth Title Contracting a Purchase¹⁹⁵

[1] *Emperors VALERIAN and GALLIENUS Augusti to Aurelius Paulus.* Sales, even if they should occur in a place different from the one in which the properties are located, are not believed to be invalid for that reason.

Given April 20.

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Aurelius Avitus.* It is manifest that a purchase and a sale require agreement (*consensus*) and that there is no agreement with an insane person. However, it is not doubted that during an interval of remission insane people older than 25 years can make sales and any other contracts.

Given May 6, in the consulship of Maximus, for the second time, and Aquilinus (286).

[3] *The same Augusti and the Caesars to Valeria Viacra.* If a contract of sale has been feigned in order to make a gift, the purchase is deficient in its essential nature. Certainly if you have put a person in possession of the thing under the pretext of a sale but for the purpose of making a gift under the condition that he might support you, then just as a gift completed cannot easily be rescinded, so it is held that he comply with the terms (*lex*) that you pronounced for your property as you were making the gift.

[4]¹⁹⁶ *The same Augusti and Caesars to Aurelius Lucianus.* Since you state that the property (previously) given to you has been sold (to you) by the heir of the woman who gave it to you, you should have understood that the title of possession cannot be (thereby) strengthened for you, but that having become owner after gift and delivery, you have purchased invalidly, since there cannot be a purchase of one's own property; but only at that time did the sale benefit you if it could be shown that you were not owner as a result of the gift. Of course, since you say that you were given and delivered all her property, a sale made by the son of his mother's property will be able to provide (you) a defense in addition to this even when the donation is complete, so that he, for example, could not claim these things on the analogy of an undutiful will.

Posted May 29, in the consulship of the Augusti (293).

[5] *The same Augusti and Caesars to Umbiga Gratia.* Since the tutor himself is not prohibited to purchase openly and in good faith anything from the property of the ward that can be sold, all the more so can his wife do this.

Given November 24, in the consulship of the Augusti (293).

¹⁹⁵ See D. 18.1; Inst. Inst. 3.23.

¹⁹⁶ = *Frag. Vat.* 293, with a longer text and a fuller dating formula.

[6] *Idem AA. et CC. Aurelio Lucretio.* Si Gaudentius in matrem tuam titulo venditionis sine quadam fraude dominium Mancipii transtulit, non idcirco, quod post inter eos matrimonium et divortium secutum dicitur, iuri eius quicquam derogatum est: quod vindicare, te matri tuae successisse probans, minime prohiberis.

[7] *Idem AA. et CC. Aurelio Istoni.* Si ancillam ex emptione sibi quaesitam mater tua donatione a secundo marito postea se simulavit accepisse, tituli falsi figmentum dominium ei duplicare vel auferre non potuit.

S. non. Mart. Sirmi CC. conss.

[8] *Idem AA. et CC. Herodi et Diogeni.* Si non donationis causa, sed vere vineas distraxisti nec pretium numeratum est, actio tibi pretii, non eorum quae dedisti repetitio competit.

D. XVII k. April. CC. conss.

[9] *Idem AA. et CC. Severo militi.* Empti fides ac venditi sine quantitate nulla est. placito autem pretio non numerato, sed solum tradita possessione istiusmodi contractus non habetur irritus, nec idcirco is qui comparavit minus recte possidet, quod soluta summa quam dari convenerat negatur. sed et donationis gratia praedii facta venditione si traditio sequatur, actione pretii nulla competente perficitur donatio.

D. VIII k. April. Sirmi CC. conss.

[10] *Idem AA. et CC. Aureliae Gordianae.* Si mater tua velut ex bonis patris praedium suum comparavit, cum rei propriae non consistat emptio et hanc simulatam proponas, huiusmodi placitum mutare substantiam veritatis et ei nocere non potuit.

D. VII id. April. CC. conss.

[11] *Idem AA. et CC. Aurelio Paterno.* Invitum comparare vel distrahere postulantis causam iustam non continet desiderium.

PP. III non. Dec. CC. conss.

[6] *The same Augusti and Caesars to Aurelius Lucretius.* If Gaudentius transferred the ownership of a slave to your mother under the title of a sale without any fraud, nothing has been removed from her right because afterwards a marriage and a divorce are said to have followed between them; you are not at all prohibited from claiming ownership (*vindicare*) of it (the slave) if you prove that you are heir to your mother.

[7] *The same Augusti and Caesars to Aurelius Isio.* If your mother acquired a slave woman by purchase and later pretended that she received the slave as a gift from her second husband, the faking of a false contract could not strengthen or take away ownership from her.

Written March 7, at Sirmium, in the consulship of the Caesars (294).

[8] *The same Augusti and Caesars to Herodes and Diogenes.*¹⁹⁷ If you have in fact sold vineyards, not (intending) to make a gift, and the price has not been paid, an action is available to you for the price, not one for reclaiming what you have given.

Given March 16, in the consulship of the Caesars (294).

[9]¹⁹⁸ *The same Augusti and the Caesars to Severus, a soldier.* There is no faith in a purchase and sale without a quantity (fixed for the price). But when a price has been agreed upon and not paid, but there has only been delivery of the possession (of the object of sale), a contract of this type is not considered invalid, nor for that reason does the person who has purchased possess less rightfully because it is denied that payment was made of the sum that had been agreed upon to give. But when a sale of property has been made for the sake of a gift, if delivery should follow, the gift is complete but with no action available for the price.

Given March 25, at Sirmium, in the consulship of the Caesars (294).

[10] *The same Augusti and Caesars to Aurelia Gordiana.* If your mother purchased her own farm (*praedium*) as if from the property of her husband, since there is no purchase of one's own property and you allege that this purchase was faked, an agreement of this type could not change the truth of the situation and could not harm her.

Given April 7, at Sirmium, in the consulship of the Caesars (294).

[11] *The same Augusti and Caesars to Aurelius Paternus.* The desire of someone demanding that a person purchase or sell unwillingly does not provide a just cause.

Posted December 3, in the consulship of the Caesars (294).

¹⁹⁷ Since the subject in the rescript is singular, more likely "Herodes Diogenes."

¹⁹⁸ Perhaps to be combined with C. 7.26.8.

[12] *Idem AA. et CC. Aurelio Paciano. pr.* Non idcirco minus emptio perfecta est, quod emptor fideiussorem non accepit vel instrumentum testationis vacuae possessionis omisum est: nam secundum consensum auctoris in possessionem ingressus recte possidet. 1. Pretium sane, si eo nomine satisfactum non probetur, peti potest: nec enim licet in continenti facta paenitentiae contestatio consensu finita rescindit.

[13] *Idem AA. et CC. Aurelio Decio Lolliano.* In vendentis vel ementis voluntatem collata condicione comparandi, quia non adstringit necessitate contrahentes, obligatio nulla est. idcirco dominus invitus ex huiusmodi conventionem rem propriam vel quilibet alius distrahere non compellitur.

[14] *Imppp. Gratianus Valentinianus et Theodosius AAA. Flaviano pp. Illyrici.* Dudum proximis consortibusque concessum erat, ut extraneos ab emptione removerent neque homines suo arbitratu vendenda distraherent. sed quia gravis haec videtur iniuria, quae inani honestatis colore velatur, ut homines de rebus suis facere aliquid cogantur inviti, superiore lege cassata unusquisque suo arbitratu quaerere vel probare possit emptorem, nisi lex specialiter quasdam personas hoc facere prohibuerit.

D. VI k. Iun. Vincentiae Tatiano et Symmacho cons.

[15] *Imp. Iustinianus A. Iuliano pp. pr.* Super rebus venundandis, si quis ita rem comparavit, ut res vendita esset, quanti Titius aestimaverit, magna dubitatio exorta est multis antiquae prudentiae cultoribus.

1. Quam decedentes censemus, cum huiusmodi conventio super venditione procedat 'quanti ille aestimaverit', sub hac condicione stare venditionem, ut, si quidem ipse qui nominatus est pretium definierit, omnimodo secundum eius aestimationem et pretia persolvi et venditionem ad effectum pervenire, sive in scriptis sive sine scriptis contractus celebretur, scilicet si huiusmodi pactum, cum in scriptis

[12] *The same Augusti and Caesars to Aurelius Paclianus. pr.* A purchase is no less complete for the reason that the purchaser did not accept a surety or that the document attesting quiet possession has been omitted; for someone entering into possession in accordance with the wishes of the seller (*auctor*) rightly possesses. 1. Certainly the price, if it should be proved that satisfaction has not been made on that account, can be claimed; nor does a declaration before witnesses (*contestatio*) of a change of heart, even if made right away, rescind what has been defined by agreement.

[13] *The same Augusti and Caesars to Aurelius Decius Lollianus.* When a condition for purchasing has been made dependent upon the will of the seller or the purchaser, because it does not bind the parties to the contract with necessity, there is no obligation. Therefore neither an owner nor anyone else is compelled to sell his own property unwillingly on the basis of this type of an agreement.

[14]¹⁹⁹ *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS Augusti to Flaviaus, Praetorian Prefect for Illyricum.* For a long time it was granted to near relatives and to spouses (*consortes*) that they could prevent outsiders from purchasing and that people could not sell property for sale at their own discretion. But because this injustice, which is cloaked in the empty appearance of honesty, seems burdensome, that people be compelled to do anything unwillingly concerning their own property, the earlier law is annulled and each person should be able to seek or approve a purchaser on his own judgment, unless a law has specifically prohibited certain persons from doing this.

Given May 27, at Vincentia (Vicenza), in the consulship of Tatianus and Symmachus (391).

[15] *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect. pr.* Concerning things to be sold, if someone has purchased a thing on the condition that the thing should have been sold for the value that Titius has estimated, a great doubt has arisen among many practitioners of the ancient wisdom (*antiquae prudentiae cultores*).

1. To decide this We ordain that when this type of agreement on a sale occurs "for the value that that person has estimated," the sale stands under this condition if indeed the very person who has been named has defined the price, (and) by all means both the price is paid and the sale is effective in accordance with his estimate, whether the contract is concluded in a written document or without one, provided that a pact of this type, when it has been redacted in written form, has been completed and executed in accordance with the definition of

¹⁹⁹ = C.Th. 3.1.6; combine with C. 1.18.12, which has the more correct listing of the emperors as Valentinian, Theodosius, and Arcadius. C.Th. 3.1.6 adds "and Italy" to the Prefect's title.

fuerit redactum, secundum nostrae legis definitionem per omnia completum et absolutum sit. 2. Sin autem ille vel noluerit vel non potuerit pretium definire, tunc pro nihilo esse venditionem quasi nullo pretio statuto: nulla coniectura, immo magis divinatione in posterum servanda, utrum in personam certam an in viri boni arbitrium respicientes contrahentes ad haec pacta venerunt, quia hoc penitus impossibile esse credentes per huiusmodi sanctionem expellimus. 3. Quod et in huiusmodi locatione locum habere censemus.

D. k. Aug. Lampadio et Oreste cons.

XXXVIII De Hereditate vel Actione Vendita

[1] *Imp. Severus et Antoninus AA. Geminio.* Aes alienum hereditate nomine fisci vendita ad onus emptoris bonorum pertinere nec fiscum creditoribus hereditariis respondere certum et absolutum est.

D. III non. Nov.

[2] *Imp. Antoninus A. Titio Floriano.* Ratio iuris postulat, ut creditoribus hereditariis et legatariis seu fideicommissariis te convenire volentibus tu respondeas et cum eo, cui hereditatem venumdedisti, tu experiaris suo ordine. nam ut satis tibi detur, sero desideras, quoniam eo tempore, quo venumdabatur hereditas, hoc non est comprehensum. quamvis enim ea lege emerit, ut creditoribus hereditariis satisfaciat, excipere actiones hereditarias invitus cogi non potest.

[3] *Imp. Alexander A. Quintiano et Timotheo.* Nominis venditio et ignorante vel invito eo, adversus quem actiones mandantur, contrahi solet.

D. VIII id. Febr. Maximo II et Aeliano cons.

[4] *Idem A. Aurelio Diogeni militi.* Qui nondum certus de quantitate hereditatis, persuadente emptore quasi exiguum quantitatem, eam

Our law²⁰⁰ in all respects. 2. But if that person either is unwilling or unable to define the price, then the sale is nullified as if no price had been established; no conjecture, or rather guessing, is to be maintained for the future, whether the parties to a contract were taking into consideration either a certain person or the standards of an upright man when they came to these pacts, because, believing the latter (an estimate by the standards of an upright man) to be impossible, We are removing it through this ordinance. 3. We decree that this also apply also in leases of this type.²⁰¹

Given August 1, in the consulship of Lampadius and Orestes (530).

Thirty-Ninth Title The Sale of an Inheritance or a Right of Action²⁰²

[1] *Emperors SEVERUS and ANTONINUS Augusti to Geminus.* It is certain and absolute that, when an inheritance is sold in the name of the Treasury, a debt (on the estate) is part of the burden of the purchaser of the property and the Treasury is not responsible to the creditors of the estate.

*Given November 3.*²⁰³

[2] *Emperor ANTONINUS Augustus to Titius Florianus.* The logic of the law (*ratio iuris*) demands that you be responsible to creditors of an inheritance or to legatees or beneficiaries of a trust wishing to sue you, and that in the proper order you should sue the person to whom you have sold the inheritance. For you are late in desiring that security be provided you, because, at the time when the inheritance was being sold, this was not included. For although he bought on condition that he satisfy the creditors of the estate, he cannot be compelled to answer unwillingly to actions relating to the estate.

[3]²⁰⁴ *Emperor ALEXANDER Augustus to Quintianus and Timotheus.* The sale of an account commonly occurs even when the person against whom the actions are mandated (i.e., the debtor) is unaware or unwilling.

Given February 6, in the consulship of Maximus, for the second time, and Aelianus (223).

[4] *The same Augustus to Aurelius Diogenes, a soldier.* A person who, uncertain about its size, has sold an inheritance, when the purchaser was persuading him that it was small, is not compelled in a good faith trial to hand over property or

²⁰⁰ C. 4.21.17.

²⁰¹ This constitution is similar to the wording in Gaius, D. 19.2.25 pr. for *locatio conductio*.

²⁰² See D. 18.4.

²⁰³ The subscription may apply to this chapter or the following one.

²⁰⁴ Combine with C. 8.41.1 (posted on February 9).

vendidit, bonae fidei iudicio conveniri,^{viii} ut res tradat vel actiones mandet, non compellitur suoque iure eorum persecutionem habet.

D. xvii k. Oct. Maximo ii et Aeliano cons.

[5] *Idem A. Nonario Onesimo.* Emptor hereditatis actionibus mandatis eo iure uti debet, quo is cuius persona fungitur, quamvis utiles etiam adversus debitores hereditarios actiones emptori tribui placuerit.

PP. k. Mart. Iuliano et Crispino cons.

[6] *Idem A. Pomponio militi.* Qui tibi hereditatem vendidit, antequam res hereditarias traderet, dominus earum perseveravit et ideo vendendo eas aliis dominium transferre potuit, sed quoniam contractus fidem fregit, ex empto actione conventus quod tua interest praestare cogitur.

PP. viii k. Iul. Agricola et Clemente cons.

[7] *Imp. Diocletianus et Maximianus AA. Manaseae.* Postquam eo decursum est, ut cautiones quoque debitorum pignori darentur, ordinarium visum est, ut post nominis venditionem utiles emptori, sic (ut responsum est) vel ipsi creditori postulanti dandas actiones.

[8] *Idem AA. et CC. Aurelio Vigilano.* Ex nominis emptione dominium rerum obligatarum ad emptorem non transit, sed vel in rem suam procuratori facto vel utilis secundum ea, quae pridem constituta sunt, exemplo creditoris persecutio tribuitur.

S. xv.

[9] *Imp. Iustinianus A. Iohanni pp.* Certi et indubitati iuris est ad similitudinem eius, qui personalem redemerit actionem et utiliter eam movere suo nomine conceditur, et eum, qui in rem actionem comparaverit, eadem uti posse facultate. cum enim actionis nomen generale est omnium sive in rem sive in personam actionum et apud omnes veteres

^{viii} conventus

to assign rights of action by mandate, and he has the action to claim (*persecutio*) these things in his own right.

Given September 15, in the consulship of Maximus, for the second time, and Aelianus (223).

[5] *The same Augustus to Nonarius Onesimus.* The purchaser of an inheritance, when actions are assigned, should enjoy the same rights as the person whose place he took, although it has been decided that analogous actions are offered to the purchaser also against the estate's debtors.

Posted March 1, in the consulship of Julian and Crispinus (224).

[6]²⁰⁵ *The same Augustus to Pomponius, a soldier.* The man who sold you an inheritance remained its owner until he delivered it to you, and accordingly he could transfer ownership by selling them to others. But because he has broken the faith of contract, he is compelled, when sued on an action on purchase, to provide you your interest.

Posted June 24, in the consulship of Agricola and Clemens (230).

[7] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Manasea.*²⁰⁶ After it has come to the point that written promises be given for a pledge for debts, it has seemed normal that after the sale of a claim (*nomen*) analogous actions should be given to the purchaser – as has been provided for in a response – like the ones given to the creditor himself when he demands repayment.

[8] *The same Augusti and the Caesars to Aurelius Vigilianus.* The ownership of obligated property does not pass to the purchaser as the result of a sale of a claim (*nomen*), but, in accordance with what has long been decided, the right to claim it is granted to him as if he were made a procurator for his own case (*procurator in rem suam*) or as an analogous action on the example of a creditor.

Written on the fifteenth day before (...).

[9] *Emperor JUSTINIAN to John, Praetorian Prefect.* It is certain and undisputed law that, just as the person who has purchased an action *in personam* is allowed to bring it as an analogous action in his own name, so too can the person who has purchased an action *in rem* use the same recourse. For when there is a general name for all actions whether *in rem* or *in personam* and among the ancient

²⁰⁵ = C. 7.10.3 (which names the soldier Pompeius and is dated to July 7). That constitution concerns manumission.

²⁰⁶ Perhaps Mnasea, the same name in a constitution from the same Emperors in C. 4.5.6.

iuris conditores hoc nomen in omnibus pateat, nihil est tale, quod differentiam in huiusmodi utilibus actionibus possit introducere.

D. k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

**XXXX Quae Res Venire Non Possunt et Qui Vendere
vel Emere Vetantur**

[1] *Imppp. Valentinianus Theodosius et Arcadius AAA. Fausto comiti sacrarum largitionum.* Fucandae atque distrahendae purpurae vel in serico vel in lana, quae blatta vel oxyblatta atque hyacinthina dicitur, facultatem nullus possit habere privatus. sin autem aliquis supra dicti muricis vellus vendiderit, fortunarum se suarum et capitis sciat subitum esse discrimen.

[2] *Imppp. Valentinianus Theodosius et Arcadius AAA. Cariobaudi duci Mesopotamiae.* Comparandi serici a barbaris facultatem omnibus, sicut iam praeceptum est, praeter comitem commerciorum etiam nunc iubemus auferri.

[3] *Impp. Arcadius et Honorius AA. ad senatum et populum.* Quia nonnunquam in diversis litoribus distrahi publici canonis frumenta dicuntur, vendentes et ementes sciant capitali poenae se esse subdendos et in fraudem publicam commercia contracta damnari.

D. xvii k. Mart. Caesario et Attico cons.

[4] *Impp. Honorius et Theodosius AA. Faustino pp.* Ne frumentum, quod devotissimo exercitui mittitur, in praedam lucrumque vertatur, hac sanctione decernimus, ut, quicumque hoc fuerint forte mercati, honestiores quidem stilum proscriptionis incurrant, inferiores autem vilioresque personae capitali supplicio subiaceant.

founders of the law this name is evident in all actions, there is nothing of the sort that can introduce a difference in analogous actions of this type.

Given November 1, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Fortieth Title Property That Cannot Be Sold and Those Who Are Forbidden to Purchase

[1] *Emperors VALENTINIAN, THEODOSIUS, and ARCADIUS Augusti to Faustus, Count of Imperial Finances.* No private person should be able to have the right (*facultas*) to dye and sell the purple cloth, either in silk or in wool, which is called purple (*blatta*), or bright purple (*oxyblatta*), and hyacinth. However, if someone sells a cloth with the aforementioned purple dye, he should know that he will undergo a trial for his property and his head.²⁰⁷

[2] *The same Augusti to Cariobaudes, Duke of Mesopotamia.* As has already been ordered, We order also now that the privilege of purchasing silk from the barbarians be taken away from everyone, except for a Count of External Trade (*comes commerciorum*).

[3]²⁰⁸ *Emperors ARCADIUS and HONORIUS Augusti to the Senate and People.* Because sometimes public tax grain is said to be sold on different shores, people selling and buying it should know that they are subject to capital punishment and that commercial contracts in fraud of the public are condemned.

Given February 13, in the consulship of Caesarius and Atticus (397).

[4] *Emperors HONORIUS and THEODOSIUS Augusti to Faustinus, Praetorian Prefect.* Lest grain that is being sent to the most devoted army be turned to booty and profit, We ordain by this law that, whoever has by chance purchased this, people of more honorable rank (*honestiores*) incur the mark of exile, but people of lower rank and dishonorable people (*inferiores vilioresque*) be subject to capital punishment.

(410 or 413?).²⁰⁹

²⁰⁷ Blume: "Purple was the imperial color and was largely reserved for the use of the imperial family. See further C. 11.8.9." Seeck dates this and the following constitution to 383-392.

²⁰⁸ Combine with C. 11.23.2, as well as C.Th. 6.2.17-18, 6.4.31, 12.6.24, 13.5.27, 13.9.5. In the other texts with this same law, the place of promulgation is Milan. Seeck dates this constitution to April 15, 397.

²⁰⁹ Seeck dates to August 15, 410.

XXXXI Quae Res Exportari Non Debeant

[1] *Imppp. Valentinianus Valens et Gratianus AAA. ad Theodotum magistrum militum.* Ad barbaricum transferendi vini et olei et liquaminis nullam quisquam habeat facultatem ne gustus quidem causa aut usus commerciorum.

[2] *Imp. Marcianus A. Constantino pp. pr.* Nemo alienigenis barbaris cuiuscumque gentis ad hanc urbem sacratissimam sub legationis specie vel sub quocumque alio colore venientibus aut in diversis aliis civitatibus vel locis loricas et scuta et arcus sagittas et spathas et gladios vel alterius cuiuscumque generis arma audeat venundare, nulla prorsus isdem tela, nihil penitus ferri vel facti iam vel adhuc infecti ab aliquo distrahatur, perniciosum namque Romano imperio et proditioni proximum est barbaros, quos indigere convenit, telis eos, ut validiores reddantur, instruere. 1. Si quis autem aliquid armorum genus quarumcumque nationum barbaris alienigenis contra pietatis nostrae interdicta ubicumque vendiderit, bona eius universa proscribi protinus ac fisco addici, ipsum quoque capitalem poenam subire decernimus.

XXXXII De Eunuchis

[1] *Imp. Constantinus A. Ursino duci Mesopotamiae.* Si quis post hanc sanctionem in orbe Romano eunuchos fecerit, capite puniatur: mancipio tali nec non etiam loco, ubi hoc commissum fuerit domino sciente et dissimulante, confiscando.

D. VI k. Mart.

[2] *Imp. Leo A. Viviano pp. pr.* Romanae gentis homines sive in barbaro sive in Romano solo eunuchos factos nullatenus quolibet modo ad dominium cuiusdam transferri iubemus: poena gravissima statuenda adversus eos, qui hoc perpetrare ausi fuerint, tabellione videlicet, qui huiusmodi emptionis sive cuiuslibet alterius alienationis instrumenta conscripserit, et eo, qui octavam vel aliquod vectigalis causa pro his

Forty-First Title Items That Should Not Be Exported

[1] *Emperors VALENTINIAN, VALENS, and GRATIAN Augusti to Theodotus, Master of Soldiers.* No one should have the right (*facultas*) to transfer wine, oil, and fish sauce to barbarian territory, not for his own refreshment or for the purpose of commerce.

(370–375).²¹⁰

[2] *Emperor MARCIAN Augustus to Constantinus, Praetorian Prefect. pr.* To foreign-born barbarians of any nation who come to this Most Sacred City under the guise of an embassy or under any other pretext or in other diverse cities or places, no one should dare to sell breastplates, shields, bows and arrows, long swords, and short swords, or arms of any other type; accordingly, no spears (*tela*) should be sold to the same people by anyone, nor any iron wrought or still unwrought. For it is dangerous to the Roman Empire, and very close to treason, to equip barbarians, who it is generally accepted are lacking these things, with weapons so that they are rendered stronger. 1. If, however, anyone sells any type of weapons to foreign-born barbarians of any nations in any place against the interdicts made by Our Piety, We decree that all his property be confiscated immediately and assigned to the Treasury, and that he himself undergo capital punishment.

(455–457).

Forty-Second Title Eunuchs

[1] *Emperor CONSTANTINE Augustus to Ursinus, Duke of Mesopotamia.* If anyone after this enactment makes eunuchs in the Roman world, he should undergo capital punishment; and such a slave and also the place where this has been committed, if the owner knows and conceals it, are to be confiscated.

Given February 24 (307–337).²¹¹

[2]²¹² *Emperor LEO Augustus to Vivianus, Praetorian Prefect. pr.* We order that men of the Roman nation who were made eunuchs, whether on barbarian or on Roman soil, are not at all in any way to be transferred to anyone's ownership (as slaves). The most serious punishment is to be established against those who have dared to perpetrate this: certainly the notary (*tabellio*) who has signed the documents for this type of purchase or for any other type of alienation, as well as the person who has received one-eighth (of the price as a tax) or anything as

²¹⁰ Seeck dates to May 28, 368; *PLRE* I p. 903 Flavius Theodosius 3: "370 or 373 May 28." Schmidt-Hofner: 369–375.

²¹¹ Seeck dates to c. 337.

²¹² Bas. 19.1.85.

susceperit, eidem poenae subiciendo. 1. Barbarae autem gentis eunuchos extra loca nostro imperio subiecta factos cunctis negotiatoribus vel quibuscumque aliis emendi in commerciis et vendendi ubi voluerint tribuimus facultatem.

XXXXIII De Patribus Qui Filios Distraxerunt

[1] *Imp. Diocletianus et Maximianus AA. et CC. Aureliae Papinianae.* Liberos a parentibus neque venditionis neque donationis titulo neque pignoris iure aut quolibet alio modo, nec sub praetextu ignorantiae accipientis in alium transferri posse manifesti iuris est.

D. XVI k. Dec. Nicomediae CC. cons.

[2] *Imp. Constantinus A. provincialibus suis. pr.* Si quis propter nimiam paupertatem egestatemque victus causa filium filiamve sanguinolentos vendiderit, venditione in hoc tantummodo casu valente emptor obtinendi eius servitii habeat facultatem. 1. Liceat autem ipsi qui vendidit vel qui alienatus est aut cuilibet alii ad ingenuitatem propriam eum repetere, modo si aut pretium offerat quod potest valere, aut mancipium pro huiusmodi^{ix} praestet.

D. XV k. Sept. Serdicae Constantino A. VIII et Constantio C. IIII cons.

XXXXIII De Rescindenda Venditione

[1] *Imp. Alexander A. Aurelio Maroni militi.* Si pater tuus per vim coactus domum vendidit, ratum non habebitur, quod non bona fide gestum est: mala fide enim emptio irrita est. aditus itaque nomine tuo praeses

^{ix} pro hoc eiusmodi

an impost (*vectigal*) for these are to be subject to the same punishment. 1. We grant, however, all merchants and any other people the right (*facultas*) to purchase in commerce and to sell where they want eunuchs of a barbarian nation who have been made so outside of places subject to Our power.

(457-465).²¹³

Forty-Third Title Fathers Who Have Sold Children

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Aurelia Papiniana*. It is plain law that children cannot be transferred to another by their parents under the title of sale or donation, or the right of pledge, or in any other way, or under the pretext of the ignorance of the person receiving them.

Given November 16, at Nicomedia, in the consulship of the Caesars (294).

[2]²¹⁴ *Emperor CONSTANTINE Augustus to his Provincials*. *pr.* If anyone on account of excessive poverty and lack of the means of support (*victus*) sells a newborn (*sanguinolentus*) son or daughter, as the sale is valid only in this circumstance, the buyer shall have the right to obtain the child as a slave. 1. However, the very person who²¹⁵ has sold (the child) or the one who has been alienated or anyone else shall be permitted to reclaim him (the child) to his own free-born status (*ingenuitas*), as long as he should either offer the price that he can be worth or furnish a slave of this type for him.

Given August 18, at Serdica, in the consulship of Constantine Augustus, for the eighth time, and Constantius Caesar, for the fourth time (329).

Forty-Fourth Title Rescinding a Sale²¹⁶

[1] *Emperor ALEXANDER Augustus to Aurelius Maro, a soldier*. If your father, compelled by force, sold his house, it will not be held to be valid because it was not done in good faith; for a sale based on bad faith is void. Therefore

²¹³ According to Krüger, the constitutions addressed to Vivianus in which the day of promulgation is mentioned belong to the years 459 and 460. Seeck gives 459-465.

²¹⁴ = C.Th. 5.10 (8).1 (but addressed "to his Italians"). Seeck dates to August 18, 319.

²¹⁵ Krüger suggests emending to: "the buyer shall have the right to obtain the child as a slave, the sale being valid only in this circumstance, that the very person who ... shall be permitted ..." (*emptor obtinendi eius servituti habeat facultatem, venditione in hoc tantummodo valente, ut liceat ipsi qui ...*).

²¹⁶ See D. 18.5.

provinciae auctoritatem suam interponet, maxime cum paratum te proponas id quod pretii nomine illatum est emptori refundere.

D. xi k. Mart. Antonino et Alexandro cons.

[2] *Impp. Diocletianus et Maximianus AA. Aurelio Lupo.* Rem maioris pretii si tu vel pater tuus minoris pretii distraxit, humanum est, ut vel pretium te restituente emptoribus fundum venditum recipias auctoritate intercedente iudicis, vel, si emptor elegerit, quod deest iusto pretio recipies. minus autem pretium esse videtur, si nec dimidia pars veri pretii soluta sit.

PP. v k. Nov. Diocletiano A. ii et Aristobulo cons.

[3] *Idem AA. et CC. Titiae et Marcianae.* De contractu venditionis et emptionis iure perfecto alterutro invito nullo recedi tempore bona fides patitur, nec ex rescripto nostro. quo iure fiscum nostrum uti saepe constitutum est.

D. viii id. Febr. AA. cons.

[4] *Idem AA. et CC. Sempronio Eudoxio.* Ad rescindendam venditionem et malae fidei probationem hoc solum non sufficit, quod magno pretio fundum comparatum minoris distractum esse commemoras.

D. non. April. Byzantio AA. cons.

[5] *Idem AA. et CC. Claudio Rufo. pr.* Si dolo adversarii deceptum venditionem praedii te fecisse praeses provinciae aditus animadverterit, sciens contrarium esse dolum bonae fidei, quae in huiusmodi maxime contractibus exigitur, rescindi venditionem iubebit. 1. Quod si iure perfecta venditio est a maiore viginti quinque annis, intellegere debes consensu mutuo perfectam venditionem resolvi non posse.

D. xv k. Nov. Sirmi AA. cons.

[6] *Idem AA. et CC. Novisio Gaiano veterano.* Non est probabilis causa, propter quam rescindi consensu factam venditionem desideras. quamvis

the provincial governor, when approached in your name, will interpose his authority, especially since you submit that you are ready to refund to the buyer what was paid as the price.

Given February 19, in the consulship of Antoninus and Alexander (222).

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Aurelius Lupus.* If you or your father sold a thing worth more for a smaller price, it is humane (*humanum*) that either, after you restore the price to the buyers, you receive back the farm that has been sold, under the authority of a judge, or, if the buyer chooses, you will receive what was lacking from a just price (*pretium iustum*). However, the price is seen as too little if half of the true price (*pretium verum*) has not been paid.²¹⁷

Posted October 28, in the consulship of Diocletian Augustus, for the second time, and Aristobulus (285).

[3] *The same Augusti and the Caesars to Titia and Marciana.* Good faith does not allow retreating at any time from a contract of lawfully concluded sale and purchase if one party or the other is unwilling (to uphold the contract), not even on the basis of Our rescript. It has often been decided that our Treasury uses this law.

Given February 6, in the consulship of the Augusti (293).

[4] *The same Augusti and the Caesars to Sempronius Eudoxius.* This alone does not suffice for rescinding a sale and proving bad faith, that you mention that a farm purchased for a high price has been sold for a lower one.

Given April 5, at Byzantium, in the consulship of the Augusti (293).

[5] *The same Augusti and the Caesars to Claudius Rufus, pr.* If the provincial governor when approached takes note that you made the sale of a property after you were tricked by the deceit (*dolus*) of your adversary, knowing that deceit is contrary to good faith, which is absolutely required in contracts of this type, he will order the sale to be rescinded. 1. But if the sale has been completed lawfully by someone older than 25 years, you ought to understand that a sale completed by a mutual agreement cannot be undone.

Given October 18, at Sirmium, in the consulship of the Augusti (293).

[6] *The same Augusti and Caesars to Novisius Gaianus, a veteran.* Your reason for desiring that a sale made by agreement be rescinded is not convincing

²¹⁷ This constitution, along with 8 below, establishes the rule that became known as *laesio enormis*, for rescinding sales that involve gross inequality of exchange.

enim duplum offeras pretium emptori, tamen invitus ad rescindendam venditionem urgueri non debet.

[7] *Idem AA. et CC. Mucatraulo militi.* Ratas manere semper perfectas iure venditiones vestra etiam interest. nam si oblato pretio rescindere venditionem facile permittatur, eveniet, ut et si quid vos laboribus vestris a fisco nostro vel a privato comparaveritis, eadem lege conveniamini, quam vobis tribui postulatis.

[8] *Idem AA. et CC. Aureliae Euodiae.* Si voluntate tua fundum tuum filius tuus venundedit, dolus ex calliditate atque insidiis emptoris argui debet vel metus mortis vel cruciatus corporis imminens detegi, ne habeatur rata venditio. hoc enim solum, quod paulo minori pretio fundum venundatum significas, ad rescindendam emptionem invalidum est. quod videlicet si contractus emptionis atque venditionis cogitasses substantiam et quod emptor viliori comparandi, venditor cariori distrahendi votum gerentes ad hunc contractum accedant vixque post multas contentiones, paulatim venditore de eo quod petierat detrahente, emptore autem huic quod obtulerat addente, ad certum consentiant pretium, profecto perspiceres neque bonam fidem, quae emptionis atque venditionis conventionem tuetur, pati neque ullam rationem concedere rescindi propter hoc consensu finitum contractum vel statim vel post pretii quantitatis disceptationem: nisi minus dimidia iusti pretii, quod fuerat tempore venditionis, datum est, electione iam emptori praestita servanda.

D. k. Dec. AA. cons.

[9] *Idem AA. et CC. Domitio Civalensi.* Pretii causa non pecunia numerata, sed pro eo pecoribus in solutum consentienti datis contractus non constituitur irritus.

D. xv k. Ian. Sirmi AA. cons.

[10] *Idem AA. et CC. Aemilio Severo.* Dolus emptoris qualitate facti, non quantitate pretii aestimatur. quem si fuerit intercessisse probatum,

(*probabilis*). For although you should offer double the price to the buyer, even so he ought not to be compelled unwillingly to rescind the sale.

(293).

[7] *The same Augusti and Caesars to Mucatraulus, a soldier.* It is in your (plural) interest that sales lawfully completed always remain valid. For if it should be readily permitted to rescind a sale on the offer of the price, it will happen that, if you (plural) have purchased something by your labors from Our Treasury or from a private person, you may be sued on the same law that you are asking be granted to you.

(293).

[8]²¹⁸ *The same Augusti and the Caesars to Aurelia Euodia.* If your son has sold your farm in accordance with your wish, deceit (*dolus*) arising from the cleverness and plotting of the buyer must be proved, or imminent fear of death or of bodily torture must be detected for the sale not to be considered valid. This sole reason, (namely) that you indicate that you have sold the farm for a somewhat lower price, is invalid for rescinding a purchase. But apparently if you had thought about the substance of a contract of sale and purchase, and the fact that the buyer and the seller approach this contract bringing their wishes, the one to buy at a cheaper price, and the other to sell at a higher price, and scarcely after much contention reach agreement on a certain price, with the seller withdrawing from what he had sought, and the buyer adding to what he had offered, you would certainly see that neither good faith, which protects the agreement of purchase and sale, allows, nor does any reason concede, that a contract completed with this agreement, either immediately or after negotiation on the amount of the price, be rescinded on this account; unless less than half of the just price that had obtained at the time of the sale has been given, although the choice already provided the buyer (i.e., to pay the rest of the just price) is to be maintained.²¹⁹

Given December 1, in the consulship of the Augusti (293).

[9] *The same Augusti and the Caesars to Domitius Civalensis.* A contract is not established as void when money is not paid toward the price, but instead livestock have been given as payment with the consent (of the seller).

Given December 18, at Sirmium, in the consulship of the Augusti (293).

[10] *The same Augusti and the Caesars to Aemilius Severus.* Deceit (*dolus*) by the buyer is judged on the basis on the nature of his act, not on the amount

²¹⁸ Combine with C. 2.19.9, 2.20.6, and 2.31.2. In these texts the addressee is Hymnoda.

²¹⁹ On the choice, see 2 above.

non adversus eum, in quem emptor dominium transtulit, rei vindicatio venditori, sed contra illum cum quo contraxerat in integrum restitutio competit.

[11] *Idem AA. et CC. Aureliae Magnae. pr.* Venditor factum emptoris, quod eum tempore contractus latuit, post arguendo, non qui eo tempore scierit, quo id ageretur, et consensit, de dolo queri potest. 1. Igitur cum patrem tuum, ut maius comprehenderetur instrumento pretium, quam rei quae distrahebatur esse convenerat, consensisse profitearis, propter hoc solum de circumscriptione frustra queritur. 2. Sane si placitum pretium non probetur solutum vel in quantitatem debiti per errorem facti compensari cautum fuit, hoc reddi recte postulatur.

[12] *Idem AA. et CC. Antiocho.* Non idcirco minus venditio fundi, quod hunc ad munus sumptibus necessariis urgentibus non vilioris pretii vel urgente debito te distraxisse contendis, rata manere debet. illicitis itaque petitionibus abstinendo ac pretium, si non integrum solutum est, petendo facies consultius.

[13] *Idem AA. et CC. Aurelio Nicae Decaria.* Si maior annis viginti quinque fundum distraxisti, propter hoc solum, quod ementi, ne compararet, socer tuus denunciavit, emptionem a te rescindi bona fides non patitur.

[14] *Idem AA. et CC. Aurelio Basilidae militi.* Ea condicione distractis praediis, ut quod rei publicae debebatur qui comparavit restitueret, venditor a se celebrata solutione quanti interest experiri potest, non ex eo, quod emptor non satis conventioni fecit, contractus irritus constituitur.

S. xv k. Ian. Nicomediae CC. cons.

[15] *Imppp. Gratianus et Valentinianus et Theodosius AAA. ad Hypatium pp.* Quisquis maior aetate praedia etiam procul posita distraxerit, paulo

of the price. If it has been proved that this has transpired, a suit on ownership (*vindicatio*) for the item is not available to the seller against the person to whom the buyer has transferred ownership, but (rather) a restoration of rights (*restitutio in integrum*) against that person with whom he had made his contract.

[11] *The same Augusti and the Caesars to Aurelia Magna. pr.* The seller can complain about deceit by showing afterwards an act of the buyer that was hidden from him at the time of the contract, but not when he knew at the time when it was done and (nonetheless) agreed. 1. Therefore, since you acknowledge that your father had agreed that a higher price be included in the document of sale than had been agreed upon for the item that was being sold, he (your father) complains in vain about being deceived on this account alone. 2. Of course, if it should be proved that the agreed upon price has not been paid, or there was a provision that there be compensation for the amount of the debt made in error, it is rightly asked that this be recovered.

[12] *The same Augusti and the Caesars to Antiochus.* Not for that reason should the sale of a farm remain any less valid, because you contend that you sold it because of necessary expenses for a compulsory public service (*munus*) pressing you (to sell) at not too low a price, or (because you were) under pressure from an (ordinary) debt. Therefore, you will be better advised to stay away from illicit petitions and (instead) seek the price, if it has not been paid in full.

[13] *The same Augusti and the Caesars to Aurelius Nica Decaria.* If, being older than 25 years of age, you have sold a farm, good faith does not allow the purchase to be rescinded by you for the sole reason that you father-in-law warned the buyer not to buy it.

[14] *The same Augusti and the Caesars to Aurelius Basilides, a soldier.* When properties are sold under the condition that the person who has purchased them restore what was owed to the municipality (*res publica*), the seller can sue for his interest when he has made the payment himself, and the contract is not considered void for the reason that the buyer has not satisfied the agreement.

Written December 18, at Nicomedia, in the consulship of the Caesars (294).

[15]²²⁰ *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS Augusti to Hypatius, Praetorian Prefect.* Whoever being of mature age has sold properties,

²²⁰ = C.Th., 3.1.4, with a somewhat extended text.

vilioris pretii nomine repetitionis rei venditae copiam minime consequatur. neque inanibus immorari sinatur obiectis, ut vires sibimet locorum causetur incognitas, qui familiaris rei scire vires vel merita atque emolumenta debuerat.

D. VI non. Mai. Mediolani Merobaude II et Saturnino cons.

[16] *Imppp. Valentinianus Theodosius et Arcadius AAA. ad Magnillum vicarium Africae. pr.* Si quos debitorum mole depressos necessitas publicae rationis adstringat proprias distrahere facultates, rei qualitas et redituum quantitas aestimetur nec sub nomine subhastationis publicae locus fraudibus relinquatur et possessionibus viliori distractis plus exactor ex gratia quam debitor ex pretio consequatur. 1. Hi postremo sub empti titulo perpetuo dominii iure potiantur, qui tantum adnumeraverint fisco, quantum exegerit utilitas privatorum. etenim periniquum est, ut alienis bonis sub gratiosa auctione distractis parum accedat publico nomini, cum totum pereat debitori.

D. XIII k. Iul. Aquileiae. acc. id. Ian. Hadrumeti post consulatum Tatiani et Symmachi vv. cc.

[17] *Impp. Arcadius et Honorius AA. Messalae pp.* Hi, qui imposita munera civitatum fuga destituunt et ineundos furtim existimant esse contractus, intellegant sibi nihil haec profutura esse commenta et pretio emptorem fugae conscium multandum esse, quod dederit.

D. XII k. Sept. Theodoro cons.

[18] *Imppp. Arcadius Honorius et Theodosius AAA. Nestorio comiti rerum privatarum.* Vestium et argenti seu mancipiorum coemendorum, si quando a privatis nostris ea contigerit venumdari, palatini scient sibi copiam denegatam: poena in eos amissionis pretii exercenda.

D. III k. Ian. R. Arcadio ...

even if situated far away, should not at all gain the right (*copia*) to reclaim the property sold on account of somewhat too low a price. Nor should he be allowed to wallow in empty objections, complaining that the qualities (*vires*) of the place are unknown to him; he should have known about the qualities of his own property or its merits and income.

Given May 2, at Milan, in the consulship of Merobaudes, for the second time, and Saturninus (383).

[16]²²¹ *Emperors VALENTINIAN, THEODOSIUS, and ARCADIUS Augusti to Magnillus, Vicar of Africa. pr.* If necessity imposed by a public account (*ratio publica*) should compel any people burdened by the mass of their debts to sell their own property, the quality of the property and the amount of its revenues should be appraised, nor should a place be left for fraud resulting from the public auction; and, if the properties have been sold for a low price, the collector should not gain more as a result of influence than the debtor gains from the price. 1. On the basis of their purchase, in the end these persons should gain the perpetual right of ownership who have paid as much to the Treasury as the interest of private persons has exacted. For it is quite unjust that, when another person's property has been sold under a rigged auction, little should accede to the public account, since the whole property is lost for the debtor.

Given June 20, at Aquileia, and received January 15, at Hadrumetum, in the post-consulate of viri clarissimi Tatianus and Symmachus (392).

[17]²²² *Emperors ARCADIUS and HONORIUS Augusti to Messala, Praetorian Prefect.* Those who avoid compulsory public services (*munera civitatum*) by flight and think that contracts can be entered into by stealth (to sell their property) should understand that these tricks will not benefit them and that a buyer aware of their flight is to be fined in the amount of the price that he has paid.

Given August 21, in the consulship of Theodorus (399).

[18] *Emperors ARCADIUS, HONORIUS, and THEODOSIUS Augusti to Nestorius, Count of the Privy Purse.* Those serving in the imperial palace (*palatini*) should know that the right to purchase clothing and silver or slaves, if ever they happen to be sold from Our private property, is denied to them; the penalty of the loss of the purchase price is to be exercised against them.

Given December 30 (402 or 406).²²³

²²¹ = C.Th. 10.17.3. Seeck dates to June 19, 391.

²²² = C.Th. 3.1.8; combine with C. 1.54.6, 9.41.17, 10.32.51.

²²³ Seeck gives December 30, 402.

XXXXV Quando Liceat Ab Emptione Discedere

[1] *Imp. Gordianus A. Licinio Rufino.* Re quidem integra ab emptione et venditione utriusque partis consensu recedi potest: etenim quod consensu contractum est, contrariae voluntatis adminiculo dissolvitur. at enim post traditionem interpositam nuda voluntas non resolvit emptionem, si non actus quoque priori similis retro agens venditionem intercesserit.

[2] *Impp. Diocletianus et Maximianus AA. et CC. Aurelio Felici. pr.* Perfectam emptionem atque venditionem re integra tantum pacto et consensu posse dissolvi constat. 1. Ergo si quidem arrae nomine aurum datum sit, potes hoc solum secundum fidem pacti recuperare. 2. Si vero partem pretii persolvisti, ad ea, quae venditorem oportet ex venditione praestare, magis actionem quam ad pretii quantitatem, quam te dedisse significas, habes.

D. non. April. Byzantii AA. cons.

XXXXVI Si Propter Publicas Pensitationes Venditio Fuerit Celebrata

[1] *Imp. Antoninus A. Geminio Materno.* Venditionem ob tributorum cessationem factam revocari non oportet neque priore domino pretium offerente neque creditore eius iure hypothecae sive pignoris. potior est enim causa tributorum, quibus priore loco omnia cessantis obligata sunt.

[2] *Impp. Diocletianus et Maximianus AA. Atiniae Plotianae. pr.* Si deserta praedia ob cessationem collationum vel reliqua tributorum ex permissu praesidis ab his, quibus periculum exactionis tributorum imminet, distracta sincera fide iusto pretio sollemniter comparasti, venditio ob sollemnes praestationes necessitate facta convelli non debet. 1. Sin autem venditio nulla iusta auctoritate praesidis praecedente facta est, hanc ratam haberi iura non concedunt, idque quod frustra gestum est revocari oportet, ita ut indemnitati tributorum omnibus modis consulatur. 2. Quae omnia tractari convenit praesente eo, quem emptorem extitisse proponis.

**Forty-Fifth Title When It Is Permitted to Withdraw
from a Purchase**

[1] *Emperor GORDIAN Augustus to Licinius Rufinus.* It is possible, while the legal situation is unchanged (*re integra*), to withdraw from a purchase or sale with the agreement of both parties; for what has been contracted by consensus is dissolved on the basis of a contrary will. But after delivery has occurred, a mere expression of will (*nuda voluntas*) does not undo a purchase, unless an act similar to the prior one, putting an end to the sale, has intervened.

[2] *Emperors DIOCLETIAN and MAXIMIAN and Caesars to Aurelius Felix. pr.* It is plain that a completed purchase and sale can be dissolved by a pact and agreement only when the legal situation is unchanged. 1. Therefore if gold has been given as earnest money (*arra*), you can recover this alone in accordance with the terms of the pact. 2. But if you have paid part of the purchase price, you have an action for what the seller must provide from the sale, rather than for the amount of the price that you indicate you have paid.

Given April 5, at Byzantium, in the consulship of the Augusti (293).

**Forty-Sixth Title If a Sale Has Been Made because
of Public Payments**

[1] *Emperor ANTONINUS Augustus to Geminus Maternus.* A sale made on account of a failure to pay taxes (*tributa*) must not be revoked, either when the previous owner offers (to repay) the price or when his creditor does so using the right of a hypothec or a pledge. For the claim for the tribute, for which all the property of the person in default has been obligated with priority, takes precedence.

[2]²²⁴ *Emperors DIOCLETIAN and MAXIMIAN Augusti to Atinia Plotiana. pr.* If you have in good faith (*sincera fide*) purchased lawfully and for a just price (*pretium iustum*) deserted properties that were sold, with the permission of the governor, because of a failure to pay contributions or arrears of taxes by the people over whom the risk for the exaction of the taxes looms, the sale made by necessity because of lawful payments should not be set aside. 1. But if the sale occurred without any previous proper authority of the governor, the laws do not allow this to be considered valid, and what was done in vain must be revoked in such a way that consideration be taken in every way for the protection (*indemnitas*) of tax revenue. 2. All these matters are to be handled in the presence of the person who you state was the buyer.

²²⁴ Pr. = *Frag. Vat.* 22.

[3] *Imp. Constantinus A. ad Egnatium Faustinum praesidem Baeticae.* Si quis fundum vel mancipia aliamve rem ob cessationem tributorum vel etiam ob vestium auri argentique debitum, quae annua exactione solvuntur, occupata convento debitore et apud iudicem interpellatione celebrata, cum solutio cessaverit, sub hasta distracta comparaverit, perpetuam emptionis accipiat firmitatem. sin autem minoris forte persona fuerit inserta, necesse sit legitimae defensionis adesse venditioni personam, nihilque intersit, utrumne officium summae rei procuratoris an certe rectoris provinciae id quod debitum fuerit proposuerit.

D. prid. id. Dec. Feliciano et Titiano cons.

XXXXVII Sine Censu vel Reliquis Fundum Comparari Non Posse

[1] *Imp. Alexander A. Capitori.* Ex conventionem quidem, qua pactam novercam tuam cum patre tuo dicis, cum fundum in dotem daret, ut tributa ipsa agnosceret, actio tibi adversus eam competere non potest, et si pactum in stipulationem deductum probetur. sed et si fundus aestimatus ita, ut pars instrumenti significat, in dotem datus est, ex vendito actio, ut placitis stetur, non competit.

PP. non. Dec. ipso A. III et Dione II cons.

[2] *Imp. Constantinus A. ad Antonium Marcellinum praesidem. pr.* Rei annonariae emolumenta tractantes cognovimus hanc esse causam maxime reliquorum, quod nonnulli captantes aliquorum momentarias necessitates sub hac condicione fundos comparant, ut nec reliqua eorum fisco inferant et immunes eos possideant. 1. Ideoque placuit, ut, si quem constiterit huiusmodi habuisse contractum atque hac lege possessionem esse mercatum, tam pro solidis censibus fundi comparati quam pro reliquis universis eiusdem possessionis obnoxius teneatur, cum necesse sit eum qui comparat censum rei comparatae agnoscere, nec licere cuidam rem sine censu comparare vel vendere.

[3]²²⁵ *Emperor CONSTANTINE Augustus to Egnatius Faustinus, Governor of Baetica.* If someone has purchased a farm or slaves or other property after they have been sold under an auction (*sub hasta*) on account of failure to pay taxes (*tributa*), or for a debt of clothing, gold, and silver, which are paid in an annual exaction, when they have been seized after the debtor has been sued and payment has been enjoined before a judge, when the payment has failed, he should receive the perpetual assurance of a (valid) purchase. If, however, by chance a person of minor age has been involved, the person legally representing him (*legitimae defensionis persona*) must be present at the sale, and it should not make any difference whether the office of the procurator of the fiscal administration (*summa res*) or certainly that of the provincial governor has given notice as to what was owed.

Given December 12, in the consulship of Felicianus and Titianus (337).

Forty-Seventh Title A Farm Cannot Be Purchased Without Its Tax Assessment or Arrears

[1]²²⁶ *Emperor ALEXANDER Augustus to Capito.* You say that when your step-mother gave a farm as her dowry, it was agreed between her and your father that she would herself pay the taxes. You cannot have an action against her even if you prove the pact was reduced to a stipulation. But if the farm that was given as dowry was appraised in the manner indicated by a portion of the document, an action on sale to force compliance with the agreement does not lie.

Posted December 5, in the consulship of the Augustus himself, for the third time, and Dio, for the second time (229).

[2]²²⁷ *Emperor CONSTANTINE Augustus to Antontus Marcellinus, Governor. pr.* Investigating the payments to the *annona*, We have learned that it is especially a cause for arrears that some people, taking advantage of the momentary necessity of others, purchase farms under this condition that they not pay their arrears to the Treasury and that they possess them immune from taxation. 1. For that reason it has been decided that, if it is established that someone had such a contract and has purchased a property under this condition, he should be held liable both for the entire tax liability of the purchased farm and for the entire arrears for the same property, since it is necessary that the person who purchases assume the tax liability for the purchased property; nor is anyone permitted to purchase or sell property without its tax liability.

²²⁵ = C.Th. 11.9.2; perhaps to be combined with C. 11.59.2.

²²⁶ = C. 2.3.11, which adds, after "pay the taxes," "and the interest due to the creditors to whom the estates were obligated (as security for debt)"; but the ruling in the last sentence is reversed.

²²⁷ = C.Th. 11.3.1, which gives the province as Lugdunensis Prima. Seeck dates to July 1, 313.

D. k. Iul. Agrippinae Constantino A. v et Licinio C. cons.

[3] *Imp. Iulianus A. ad Secundum pp.* Omnes pro his agris quos possident publicas pensitationes agnoscant nec pactionibus contrariis adiuvantur, si venditor aut donator apud se collationis sarcinam pactione illicita voluerit retinere, etsi necdum translata sit professio censualis, sed apud priorem fundi dominum forte permaneat, dissimulantibus ipsis, ut non possidentes pro possidentibus exigantur.

D. XIII k. Mart. Antiochiae Iuliano A. IIII et Sallustio cons.

XXXXVIII De Periculo et Commodo Rei Venditae

[1] *Imp. Alexander A. Iuliae Secundinae.* Post perfectam venditionem omne commodum et incommodum, quod rei venditae contingit, ad emptorem pertinet. auctor enim ex his tantum causis suo ordine tenetur, quae ex praecedente tempore causam evictionis parant, et ita, si ei denuntiatur, ut causae agenda adesset, et non absente emptore contra eum pronuntiatur.

D. k. Sept. Maximo II et Aeliano cons.

[2] *Idem A. Gargilio Iuliano. pr.* Cum convenit, ut singulae amphorae vini certo pretio veneant, antequam tradantur, imperfecta etiam tunc venditione periculum vini mutati emptoris, qui moram mensurae faciendae non interposuit, non fuit. 1. Cum autem universum quod in horreis erat postea venisse sine mensura et claves emptoribus traditas adlegas, perfecta venditione quod vino mutato damnum accidit, ad emptorem pertinet. 2. Haec omnia locum habent non solum si vinum,

Given July 1, at Agrippina (Colonia), in the consulship of Constantine Augustus, for the fifth time, and Licinius Caesar (319).

[3]²²⁸ *Emperor JULIAN Augustus to Secundus, Praetorian Prefect.* Everyone should assume responsibility for public payments for those lands that they possess, and they should not be helped by agreements to the contrary, (for instance,) if the seller or donor wants to retain for himself the burden for taxes by an illicit agreement; (and this rule holds) even if the tax declaration (*professio censualis*) has not been transferred, but by chance should remain with the prior owner of the farm, since the parties themselves conceal the facts, so that non-possessors are pressed for payment instead of the possessors.

Given February 16, at Antioch, in the consulship of Julian Augustus, for the fourth time, and Sallustius (363).

Forty-Eighth Title The Risk and Advantage of Property Sold²²⁹

[1] *Emperor ALEXANDER Augustus to Julia Secundina.* After the completion of a sale, every advantage and disadvantage that accrues to the property sold belongs to the buyer. For the seller (*auctor*) for his part is held liable only for those causes that create a basis for eviction as of the time preceding (the completion of the sale), and under the following condition: if he has been given notice so that he be present for pleading the case, and there has not been a judgment against him when the buyer was absent.

Given September 1,²³⁰ in the consulship of Maximus, for the second time, and Aelianus (223).

[2] *The same Augustus to Gargilius Julian. pr.* When it was agreed that individual amphoras of wine be sold at a certain price (per amphora), before they are delivered, since the sale is even then incomplete, the risk for the wine changing did not belong to the buyer, provided he did not create a delay in making the measurement.²³¹ 1. Since, however, you allege that the entire amount that was placed in storehouses was sold without measurement (as a unit) and the keys had been delivered to the buyers, whatever damage occurred from the wine changing, since the sale was complete, belongs to the buyer. 2. These considerations apply

²²⁸ = C.Th. 11.3.3.

²²⁹ See D. 18.6. Risk (*periculum*) concerns the legal consequence if the object of sale is destroyed after the sale is concluded, but before delivery to the buyer.

²³⁰ Possibly February 1.

²³¹ The wording is ambiguous, but evidently a large amount of wine was sold at a price per amphora (as a measure) and the parties were unsure about the ultimate quantity prior to measurement.

sed etiam si oleum vel frumentum vel his similia venierint et ea aut deteriora aut penitus corrupta fuerint.

PP. v k. April. Maximo II et Aeliano cons.

[3] *Idem A. Daphenae.* Dolum auctoris bona fide emptori non nocere certi iuris est.

PP. IIII k. Oct. Maximo II et Aeliano cons.

[4] *Imp. Gordianus A. Silvestro militi.* Cum inter emptorem et venditorem contractu sine scriptis inito de pretio convenit moraque venditoris in traditione non intercessit, periculo emptoris rem distractam esse in dubium non venit.

PP. xv k. Ian. Gordiano A. et Aviola cons.

[5] *Imp. Diocletianus et Maximianus AA. Aurelio Leontio.* Cum speciem venditam per violentiam ignis absumptam dicas, si venditionem nulla condicio suspenderit, amissae rei periculum te non adstringit.

PP. III non. Nov. Atubino Diocletiano A. II et Aristobulo cons.

[6] *Idem AA. et CC. Aurelio Cyrillo.* Mortis casus ancillae distractae etiam ante traditionem sine mora venditoris dilatam non ad venditorem, sed ad emptorem pertinet, et hac non ex praeterito vitio rebus humanis exempta solutionem emptor pretii non recte recusat.

S. xv k. Ian. Nicomediae CC. cons.

XXXXVIII De Actionibus Empti et Venditi

[1] *Imp. Antoninus A. Aelianae.* Adversus eum, cui agrum vendidisti, venditi iudicio consiste: nec enim tibi in rem actio cum emptore, qui personaliter tibi sit obligatus, competit.

PP. IIII id. Iun. Laeto iterum et Cereale cons.

not only if wine but also oil or grain or things similar to these have been sold and they have become worse or been completely ruined.

Posted March 28, in the consulship of Maximus, for the second time, and Aelianus (223).

[3]²³² *The same Augustus to Daphena.* It is certain law that deliberate misconduct (*dolus*) of the seller (*auctor*) does not harm a good-faith buyer.

Posted September 28, in the consulship of Maximus, for the second time, and Aelianus (223).

[4] *Emperor GORDIAN Augustus to Silvester, a soldier.* Since, in a contract entered into without writing, the buyer and seller have agreed about the price and a delay in delivery caused by the seller has not intervened, it does not come into doubt that the property has been sold at the risk of the buyer.

Posted December 18, in the consulship of Gordian Augustus and Aviola (239).

[5]²³³ *Emperors DIOCLETIAN and MAXIMIAN Augusti to Aurelius Leontius.* Since you say that goods that you sold were consumed by the violence of a fire, if no condition had suspended the sale, the risk for the loss of the property does not bind you.

Posted November 3, at Atubinum (?), in the consulship of Diocletian Augustus, for the second time, and Aristobulus (285).

[6]²³⁴ *The same Augusti and the Caesars to Aurelius Cyrillus.* The accident of the death of a slave woman who has been sold, even before delivery that was postponed without a delay on the seller's part, does not fall on the seller, but on the buyer, and if she has passed away not as a result of undisclosed flaw (*vitium*), the buyer will not rightly refuse payment of the price.

Written December 18, at Nitcomedta, in the consulship of the Caesars (294).

Forty-Ninth Title Actions on Purchase and Sale²³⁵

[1] *Emperor ANTONINUS Augustus to Aeliana.* Continue in a trial on sale against the person to whom you have sold land; for you do not have an action *in rem* with the buyer, who is obligated to you (only) *in personam*.

Posted June 10, in the consulship of Laetus, for the second time, and Cerealis (215).

²³² Combine with C. 8.56.1.

²³³ = *Frag. Vat.* 23.

²³⁴ Apparently combine with C. 4.49.16 (slightly different date).

²³⁵ See D. 19.1.

[2] *Impp. Valerianus et Gallienus AA. et Valerianus C. Flavio Domitiano. pr.* Venditi actionem ad recipiendum residuum pretium intendere adversario tuo poteris. 1. Nec quod in compensationem venerit, quasi et tu invicem deberes, id obesse tibi poterit, si in bonae fidei contractu, in quo maiores etiam viginti quinque annis officio iudicis in iis quae dolo commissa sunt adiuvantur, iusto errore te ductum vel fraude adversarii captum, quasi debitum id esset, quod re vera non debebatur, pepigisse monstraveris. 2. Fructus quoque perceptos ante venditionem contractam, quos, cum venditioni non accessissent, eundem emptorem invasisse proponis, eodem iudicio reposces.

PP. id. Mart. Aemiliano et Basso cons.

[3] *Impp. Diocletianus et Maximianus AA. Serapodoro.* Ex arrali pacto personalis dumtaxat paciscentibus actio praeparatur.

PP. IIII id. Iul. ipsis IIII et III AA. cons.

[4] *Idem AA. Muciano.* Si traditio rei venditae iuxta emptionis contractum procacia venditoris non fiat, quanti interesse compleri emptionem fuerit arbitratus praeses provinciae, tantum in condemnationis taxationem deducere curabit.

PP. VIII id. Sept. ipsis IIII et III AA. cons.

[5] *Idem AA. et CC. Decimo Caplusio.* Curabit praeses provinciae compellere emptorem, qui nactus possessionem fructus percepit, partem pretii quam penes se habet cum usuris restituere, quas et perceptorum fructuum ratio et minoris aetatis favor, licet nulla mora intercesserit, generavit.

PP. XII k. Oct. ipsis IIII et III AA. cons.

[6] *Idem AA. et CC. Neratio.* Venditi actio, si non ab initio aliud convenit, non facile ad rescindendam perfectam venditionem, sed ad pretium exigendum competit.

[2] *Emperors VALERIAN and GALLIENUS Augusti and VALERIAN Caesar to Flavius Domitianus. pr.* You will be able to bring an action on sale against your adversary to recover the remaining price. 1. Nor can what has arisen as a counterclaim be prejudicial to you, on the theory that you too were in debt, if you show, in a good-faith contract for which people older than 25 years are also aided by the office of the judge in those matters committed with deliberate misconduct (*dolus*), that you agreed (to pay) believing something had been owed that in fact was not owed, having been influenced by honest mistake (*iusto errore*) or taken in by the fraud of your adversary. 2. You also allege that the buyer has appropriated (*invasisse*) the fruits taken before the contracting of the sale, although they were not included in it; you will ask for them back in the same judgment (*iudicium*).

Posted March 15, in the consulship of Aemilianus and Bassus (259).

[3] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Serapodorus.* Only an action *in personam* is created for the parties making a pact over earnest money.

Posted July 12, in the consulship of the Augusti themselves, Diocletian, for the fourth time, and Maximian, for the third time (290).

[4] *The same Augusti to Mucianus.* If the delivery of the property sold should not take place in accord with the purchase contract because of the effrontery of the seller, the provincial governor will take care to add to the limit on damages (*in condemnationis taxationem deducere*) how much he judges it to be in the (buyer's) interest that the purchase be completed.

Posted September 6, in the consulship of Augusti themselves, Diocletian, for the fourth time, and Maximian, for the third time (290).

[5]²³⁶ *The same Augusti and the Caesars to Decimus Caplusius.* The provincial governor will take care to compel the buyer, who has taken possession (*nactus possessionem*) and received the fruits, to restore the part of the price that he has in his own possession, with the interest that an accounting of the fruits taken and the favor for a minor have indicated (are due), even though no delay has intervened.

Posted September 21, in the consulship of Augusti themselves, Diocletian, for the fourth time, and Maximian, for the third time (290).

[6] *The same Augusti and Caesars to Neratius.* The action on sale, if something else has not been agreed upon at the outset, is not readily available for rescinding a completed sale, but (only) for exacting the price.

²³⁶ Combine with C. 2.40.3.

S. vi id. April. Byzantii AA. cons.

[7] *Idem AA. et CC. Diodoro.* Si servos distraxisti ac pretium de peculio eorum, quod ad te pertinebat, nesciens unde solveretur accepisti, consequens est integram te pretii actionem habere, cum proprii venditoris nummi soluti non praestant emptori liberationem.

S. xvii k. Mai. Melanthiade AA. cons.

[8] *Idem AA. et CC. Aurelio Eusebio. pr.* Si pater tuus venum portionem suam dedit nec induxit in vacuum possessionem praedii, ius omne penes se eum retinuisse certum est. neque enim velut traditionis factae vectigal exsolutum, si simulatum factum intercessit, veritatem mutare potuit. 1. Quapropter aditus praeses provinciae, si animadverterit in vacuum possessionem neque patrem tuum neque successores eius emptorem vel heredes ipsius quocumque loco factos induxisse, non dubitabit nihil esse translatum pronuntiare. et si te ex empto ad inducendum in vacuum possessionem perspexerit conveniri, aestimabit, an pretium sit exsolutum: ac si reppererit non esse satis pretio factum, hoc restitui tibi providebit.

S. v k. Mai. AA. cons.

[9] *Idem AA. et CC. Aureliae Zaniae Antipatrae.* Si minor a venditore sive sciente sive ignorante dicebatur capitatio praedii venditi et maior inventa sit, in tantum convenitur, quanto, si scisset emptor ab initio, minus daret pretii. sin vero huiusmodi onus et gravamen functionis cognovisset, nullam adversus venditorem habet actionem.

S. xv k. Iun. Philippopoli AA. cons.

[10] *Idem AA. et CC. Titio Attalo.* Cum venditorem carnis fide conventionis rupta tempore placito hanc non exhibuisse proponas, empti actione eum quanti interest tua tunc tibi praestitam fuisse apud praesidem provinciae convenire potes.

S. xvii k. Ian. AA. cons.

Written April 8, at Byzantium, in the consulship of the Augusti (293).

[7] *The same Augusti and Caesars to Diodorus.* If you have sold slaves and, not knowing from where payment was being made, received their purchase price out of their *peculium* which belonged to you, it follows that you have an action for the entire price, since payment of money belonging to the seller does not provide grounds to release the buyer (from the duty to pay).

Written April 15, at Melantias, in the consulship of the Augusti (293).

[8]²³⁷ *The same Augusti and Caesars to Aurelius Eusebius, pr.* If your father has sold his portion of the property and has not placed (the buyer) into quiet possession (*vacua possessio*), it is certain that he has retained every right for himself.²³⁸ Nor could (the buyer's) payment of an impost (*vectigal*), as if delivery had taken place, change the truth, if it has emerged that this was a feigned act. 1. Therefore the provincial governor, when approached, if he takes note that neither your father nor his successors have placed the buyer or his heirs in any degree into quiet possession, will not hesitate to pronounce that nothing has been transferred. And if he notes that you are being sued on purchase to place the buyer into quiet possession, he will judge whether the purchase price has been paid; and if he finds that the price has not been satisfied, he will provide that this price be restored to you.

Written April 27, in the consulship of the Augusti (293).

[9] *The same Augusti and Caesars to Aurelia Zania Antipatra.* If the capitation (the fiscal obligation) of a property sold was said by the seller to be less, whether knowingly or unknowingly, and it has been found to be greater, he (the seller) is liable for the difference in what the buyer would have paid if he had known (the capitation) from the beginning. But if he had been aware of the burden and charge of the public obligation (*functio*), he has no action against the seller.

Written May 18, at Philippopolis, in the consulship of the Augusti (293).²³⁹

[10] *The same Augusti and Caesars to Titius Attalus.* Since you state that the seller of meat, having broken the terms of the agreement, did not provide it at the time agreed upon, you can sue him before the provincial governor in an action on purchase for what it was worth to you that it be provided to you at that time.

Written December 16, in the consulship of the Augusti (293).

²³⁷ Perhaps combine with C. 4.52.3.

²³⁸ Blume: "Despite the fact that a contract of sale was made, that of itself did not transfer title or ownership. Delivery (or mancipation) was necessary."

²³⁹ Possibly June 17, 293, based on the movements of the Court: Mommsen.

[11] *Idem AA. et CC. Flaviae Eucarpiae.* Si ancillam tibi ex causa venditionis traditam venditor manumisit, libertatem alienae factae praestare non potuit. quod si post venditionem ante traditionem manumisit, pleno iure dominus constitutus civem Romanam facere non prohibebatur: tibi personali propter ruptam fidem contra venditorem actione competente.

S. x k. Ian. AA. cons.

[12] *Idem AA. et CC. Egi Crispino.* Sicut periculum vini mutati, quod certum fuerat comparatum, ad emptorem, ita commodum aucti pretii pertinet. utque hoc verum est, sic certae qualitatis ac mensurae distracto vino fidem placitis servandam convenit: quo non restituto non pretii quantitatis, sed quanti interest empti competit actio.

S. prid. non. Febr. Sirni CC. cons.

[13] *Idem AA. et CC. Flavio Alexandro.* Fructus post perfectum iure contractum emptoris spectare personam convenit, ad quem et functionum gravamen pertinet: venditorque pretium tantum ac, si moram intercessisse probetur, usuras officio iudicis exigere potest.

S. III non. Dec. CC. cons.

[14] *Idem AA. et CC. Aurelio Rusoni.* Emptor servorum recte de his tradendis et de eorum fuga itemque sanitate erroneaque non esse aut noxa solutos repromitti sibi recte postulat.

S. v k. Dec. CC. cons.

[15] *Idem AA. et CC. Aurelio Antonino Aeliano.* Ultra modum tritici distracti citra pactum in solutione mora non facta nihil emptor exigere potest.

S. xv k. Ian. Nicomediae CC. cons.

[11] *The same Augusti and Caesars to Flavia Eucarpia.* If the seller has manumitted a slave woman (already) delivered to you in a sale, he could not offer liberty to someone made the property of another. But if he manumitted her after the sale but before delivery, since he was positioned as owner in the full sense of the law, he was not prohibited from making a Roman citizen; but you have an action *in personam* against the seller for breaking the terms of the contract.

Written December 23, in the consulship of the Augusti (293).

[12]²⁴⁰ *The same Augusti and Caesars to Egis Crispinus.* Just as the risk belongs to the seller for the changing (i.e., acidification) of the specific wine that had been purchased, so too does the benefit of an increased price. And as this is true, so it is generally accepted that the (buyer's) reliance (*fides*) on a certain quality and measure of the wine, when it is sold, should be observed in accordance with the terms agreed upon. When this has not been provided, an action on purchase is available, not for the amount of the price, but for the buyer's interest.

Written February 4, at Sirmium, in the consulship of the Caesars (294).

[13] *The same Augusti and Caesars to Flavius Alexander.* It is generally accepted that, after a contract is lawfully completed, the fruits belong to the person of the buyer, to whom also the burden for public taxes (*functionum gravamen*) also belongs; the seller can only exact the purchase price through the office of a judge and, if it should be proved that a delay intervened, interest (as well).

Written December 2, in the consulship of the Caesars (294).

[14] *The same Augusti and Caesars to Aurelius Ruso.* A buyer of slaves rightly demands a stipulation (*sibi repromitti*) about delivering them and about their fleeing, as well as about their health and that they are not wanderers or liable for damage.

November 27, in the consulship of the Caesars (294).²⁴¹

[15] *The same Augusti and Caesars to Aurelius Antoninus Aelianus.* Without a pact, if no delay is made in payment, the buyer can exact nothing beyond the amount of wheat sold.

Written December 18, at Nicomedia, in the consulship of the Caesars (294).

²⁴⁰ Combine with C. 4.2.10, which lacks the name *Egis*.

²⁴¹ Mommsen dates to December 9, 294.

[16] *Idem AA. et CC. Aurelio Cyrillo.* Post perfectam venditionem fetus quidem pecorum emptori, venditori vero sumptus, si quos bona fide fecerit, restitui debere notissimum est.

S. VIII k. Ian. CC. cons.

[17] *Idem AA. et CC. Hermiano et Hermippo.* Expulsos vos de fundo per violentiam a Nerone, quem habere ius in eo negatis, profitentes nullam vobis adversus eum, ex cuius venditione fundum possidetis, actionem competere probatis. igitur ad instar interdicti seu actionis promissae experiendum esse perspicitis.

L Si Quis Alteri vel Sibi sub Alterius Nomine vel Aliena Pecunia Emerit

[1] *Imp. Antoninus A. Mercatori Secundo.* Si pecunia patris fundus mancipiaque comparata sunt, tamen cum emptiones matris tuae nomine factas esse proponis, ignorare non debes traditione matrem tuam dominam fuisse constitutam. plane si pecuniae petitionem competere tibi propter numerationem pretii existimas, civiliter consiste.

PP. III k. Aug. Antonino A. IIII et Balbino cons.

[2] *Imp. Alexander A. Septimiae.* Si emancipatis vobis fundos, quos nomine vestro, cum in potestate ageritis, pater emerat, tradidit vel in possessione eorum voluntate patris fuistis, dominium adquisistis.

D. XIII k. April. Antonino et Alexandro cons.

[3] *Idem A. Fabio Paterno.* Mancipia quorum meministi si, ut proponis, nomine tuo itemque fratris tui cui successisti empta vobis tradita sunt, licet instrumento emptionis matrem tuam pecuniam numerasse contineatur, persequi ea more iudiciorum non prohiberis.

D. xv k. Iul. Modesto et Probo cons.

[16]²⁴² *The same Augusti and Caesars to Aurelius Cyrillus.* It is very well known that, after the completion of a sale, the offspring of the livestock should be restored to the buyer and the expenses to the seller, if he has made any in good faith.

Written December 25, in the consulship of the Caesars (294).

[17] *The same Augusti and Caesars to Hermianus and Hermippus.* In acknowledging that you have been forcibly expelled from a farm by Nero, who you say has no right in it, you prove that you have no action against the person from whose sale you possess the farm. Therefore you see that you must sue (Nero) on the analogy of the interdict (*unde vi*, for forcible expulsion from property lawfully possessed) or an action promised (for this situation).

Fiftieth Title If Someone Buys for Another Person or for Himself Under Another Person's Name or with Another Person's Money

[1] *Emperor ANTONINUS Augustus to Mercator Secundus.* If a farm and slaves have been purchased with your father's money, nevertheless, when you state that the purchases were made in your mother's name, you should not ignore that your mother became owner upon delivery (to her). Clearly, if you think that you (as your father's heir) have a right to seek the money on account of his payment of the price, sue her in a civil action.

Posted July 30, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2] *Emperor ALEXANDER Augustus to Septimia.* If your father, after emancipating you (plural), has delivered to you farms that he had bought in your name when you were in his power, or you have been in possession of them in accordance with your father's wishes, you have acquired ownership.

Given March 20, in the consulship of Antoninus and Alexander (222).

[3] *The same Augustus to Fabius Paternus.* If, as you state, the slaves whom you have mentioned were bought and delivered to you in your name and again in that of your brother whom you have succeeded (as heir), although it is contained in the purchase document that your mother paid the money, you are not prohibited from pursuing them by normal procedure in the courts (*more iudiciorum*).

Given June 17, in the consulship of Modestus and Probus (228).

²⁴² Combine with, apparently, C. 4.48.6 (December 18). This version has the addressee as Aurelius Hermianus Cyrillus, but Hermianus has probably intruded from the next constitution.

[4] *Impp. Valerianus et Gallienus AA. et Valerianus C. Aurelio Cyrillo.* Quamvis instrumento emptionis socrus nomen inscripseris, tamen si possessionem tenes, dominus effectus es. ob eam rem frustra calumniam mulieris, quamvis ipsa contractus tabulas habeat, formidas.

D. III non. Mai.

[5] *Impp. Diocletianus et Maximianus AA. Vero.* Cum propria pecunia tua te comparante possessionem quondam uxoris tuae nomen tantummodo accommodasse dicas eandemque occasione custodiae suae commissorum instrumentorum contra bonam fidem proprietatem eiusdem fundi usurpasse, rector provinciae, pro sua exercitatione cognitum habens donationem a non domina uxore tua in filiam suam collatam nullum praeiudicium dominio tuo attulisse, docenti tibi veritatem precibus tuis adistere restituere eandem possessionem habita etiam fructuum taxatione curabit.

D. prid. id. Sept. ipsis III et III AA. cons.

[6] *Idem AA. et CC. Aurelio Dionysio. pr.* Multum interest, utrumne uxore tua comparante pecuniam numerasti eique possessio tradita est, an contractu emptionis a te nomine tuo habito tantum uxoris nomen post instrumentis scribi feceris. 1. Nam si quidem uxor tua nomine suo emit eique res traditae sunt nec in te quicquam de his processit, non nisi de pretio adversus eam, in quantum tu pauperior et illa locupletior facta est, habes actionem. 2. Quod si emisti quidem tu et tibi tradita possessio est, tantum autem nomen instrumento uxoris quondam tuae scriptum est, res gesta potior quam scriptura habetur. 3. Sin vero ab initio negotium uxoris gerens comparasti nomine ipsius, empti actionem nec illi nec tibi adquisisti, dum tibi non vis nec illi potes: quare in domini quaestione ille potior habetur, cui possessio tradita est.

D. XIII k. Sept. Viminacio AA. cons.

[7] *Idem AA. et CC. Aurelio Gerontio.* Cum per eos qui negotia tua gerebant olei materiam te comparasse contractusque fidem pretio

[4] *Emperors VALERIAN and GALLIENUS Augusti and VALERIAN Caesar to Aurelius Cyrillus.* Although you have written the name of your mother-in-law in the purchase document, nevertheless, if you hold possession, you have become owner. For that reason you needlessly fear the woman's vexatious claim (*calumnia*), even though she herself holds the contract.

Given May 5.

[5] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Verus.* Since you say that when you were buying a property with your own money you only provided the name of your former wife, and that she, taking advantage of her keeping the documents entrusted to her, usurped the ownership of the same farm contrary to good faith, the provincial governor, determining in accordance with his powers that a gift given by your wife when she was not owner to her daughter has not prejudiced your ownership, will take care that she restore the property to you after also taking account of its fruits, provided you show that the truth supports your petition.

Given September 12, in the consulship of the Augusti themselves, for the fourth and third time, respectively (290).

[6] *The same Augusti and the Caesars to Aurelius Dionysius. pr.* It makes a great deal of difference whether you have paid the money when your wife was the purchaser and possession has been delivered to her, or, when the contract of purchase was made by you in your name, you have only afterwards had your wife's name written in the documents. 1. For if indeed your wife has bought properties in her name and they have been delivered to her and none of these has come to you, you do not have an action against her except on the price to the extent that you have become poorer and she richer. 2. But if you have purchased and possession has been delivered to you, but only the name of your former wife has been written in the document, the actual facts (*res gesta*) are considered to prevail (*potior habetur*) over writing. 3. But if, from the beginning, you have purchased in her name while managing her affairs, you have acquired the right to an action on purchase neither for her nor for yourself, granted that you do not wish to do so for yourself and cannot for her; therefore, in a question of ownership, the person to whom possession has been conveyed is considered to prevail.

Given August 19, at Viminactum, in the consulship of the Augusti (293).²⁴³

[7]²⁴⁴ *The same Augusti and Caesars to Aurelius Gerontius.* Since you state that you have bought timber from olive trees (*olei materiam*) through those people

²⁴³ The subscription may belong with ch. 7.

²⁴⁴ Combine with C. 3.21.1 (same date), 7.72.9 (299).

suscepto rupisse venditorem proponas, si quidem ex empto his qui iuri tuo subiecti fuerint contrahentibus tibi quaesita est actio, per te vel cui mandaveris, si vero sui iuris constituti secundum mandatum tuum hunc contractum habuerunt ac sibi empti quaesierunt actionem, per eos vel quibus illi dederint mandatum adi competentem iudicem, qui secundum bonam fidem, quae in huiusmodi contractibus observari solet, satisfieri providebit.

S. XIII k. Sept. AA. cons.

[8] *Idem AA. et CC. Maximae Valentinae.* Qui aliena pecunia comparat, non ei cuius nummi fuerunt, sed sibi tam actionem empti quam dominium, si tamen ei fuerit tradita possessio, quaerit. cum itaque de rebus communibus fratrem patruelem tuum quaedam comparasse contendas, de tua pecunia hunc conveniendo facies consultius. nam in rem de rebus ab eo comparatis tibi contra eum petitio non competit.

D. prid. non. Febr. Sirmi CC. cons.

[9] *Idem AA. et CC. Emino Rufiniano.* Nihil prohibet altero pecuniam numerante in alium vel utriusque contrahentis consensu vel certe venditore tantummodo volente dominium transferri: eo etiam manifeste constituto, ut inter absentes per mediam personam vel per nuntium vel per epistulam talis contractus perfici possit.

D. v non. ... Sirmi CC. cons.

LI De Rebus Alienis Non Alienandis et de Prohibita Rerum Alienatione vel Hypotheca

[1] *Imp. Alexander A. Cattiano militi.* Si praesidi provinciae probatum fuerit Iulianum nullo iure munitum servos tuos scientibus vendidisse, restituere tibi emptores servos iubebit. quod si ignoraverint et eorum facti sunt, pretium horum tibi solvere Iulianum iubebit.

who were managing your affairs, and that the seller, after receiving the purchase price, has broken the terms of the contract, approach a competent judge either personally or through the person to whom you have mandated this, if indeed an action on purchase has been acquired for those who were subject to your authority (*ius*) when they were contracting on your behalf; but if persons established as *sui iuris* made this contract in accordance with your mandate and acquired the action on purchase for themselves, approach the judge either through them or through the ones to whom they have given the mandate. The judge will see to it that the contract be fulfilled in accordance with good faith, which is customarily observed in contracts of this type.

Written August 19, in the consulship of the Augusti (293).

[8] *The same Augusti and Caesars to Maxima Valentina.* Whoever purchases with someone else's money, acquires both a right of action on purchase and ownership not for the person whose money it was but for himself, as long as possession has been delivered (to him). Thus since you contend that your cousin (*frater patruelis*) has purchased some properties out of common resources, you will act more wisely by suing him concerning your money; for you do not have a claim *in rem* against him for things that he has purchased.

Given February 4, at Sirmium, in the consulship of the Caesars (294).

[9] *The same Augusti and Caesars to Eminius Rufinianus.* Nothing prevents ownership from being transferred to one person when another pays the money, either with the consent of each party to the contract or certainly with that of the seller alone. The principle is clearly established that such a contract can be completed between absent parties through an intermediary or through a messenger or a letter.

Given on the fifth day before the nones ... , at Sirmium, in the consulship of the Caesars (294).²⁴⁵

Fifty-First Title Property Belonging to Others That Is Not to Be Alienated, and the Prohibited Alienation or Hypothecation of Property

[1] *Emperor ALEXANDER Augustus to Cattianus, a soldier.* If it is proved to the provincial governor that Julian, supported by no right, has sold your slaves to knowing buyers, he will order them to restore the slaves to you. But if they were not aware (of Julian's lack of authority) and the slaves have become their property, he will order Julian to pay you their price.

²⁴⁵ Mommsen dates to March 3, 294.

D. viii id. Iul. Iuliano et Crispino cons.

[2] *Imp. Gordianus A. Grattiae Aeliae.* Distrahente marito rem iuris tui, si consensum non accommodasti, licet sigillo tuo venditionis instrumentum fraude conquisita signaveris, eiusmodi tamen commentum emptori usucapione non subsecuta vel longi temporis praescriptione non munito nullam praestitisse potest securitatem.

[3] *Imp. Diocletianus et Maximianus AA. et CC. Aurelio Valeriano.* Venditrici succedenti hereditario iure perfectam recte venditionem rescindere ac dominium revocare non licet: sed et si hoc ex persona sua vindicet, vel exceptione te doli mali, si hanc viam elegeris, tueri vel evicta re, etsi defensione monstrata nolueris uti, quanti tua interest poteris experiri.

S. xvi k. Nov. Sirmi AA. cons.

[4] *Idem AA. et CC. Domitio Aphobio.* Mancipia patris, qui fundum a Philippo conduxerat, successione tibi quaesita domino fundi pro debitis in solutum mater tua dando nihil tibi auferre potuit. et ideo si tu maior viginti quinque annis effectus ab ea negotium gestum non fecisti ratum, oblato debito, si non haec locator iure pignoris obligata sibi vendidit, petere poteris.

D. iii id. Febr. CC. cons.

[5] *Idem AA. et CC. Aurelio Aegro.* Si fundum tuum pater post emancipationem te non consentiente venundedit neque ei successisti neque possidens longi temporis praescriptione munitus est, eum tibi agenti rector provinciae reddi efficiet.

viii id. M. Sirmi CC. cons.

[6] *Idem AA. et CC. Aurelio Rufo.* Nemo res ad te pertinentes non obligatas sibi nec ex officio vendendi potestatem habens distrahendo quicquam tibi nocere potuit.

D. k. Nov.

Given July 9, in the consulship of Julian and Crispinus (224).²⁴⁶

[2] *Emperor GORDIAN Augustus to Grattia Aelia.* When your husband sells property that belongs to you, if you have not given consent although through purposeful fraud you have signed the document of sale with your seal, nonetheless this type of trickery cannot have provided any security to a buyer since usucapion has not ensued or since he is not protected by long-time prescription.²⁴⁷

[3] *Emperors DIOCLETIAN and MAXIMIAN and the Caesars to Aurelius Valerianus.* It is not permitted to a person succeeding a (female) seller by hereditary right to rescind a sale correctly completed (by the decedent) and reassume ownership; but if he should sue to recover ownership of this in his own name, either protect yourself with the defense of deceit (*exceptio doli mali*), if you choose this way, or, if you are evicted from the property, even if you are unwilling to use the indicated defense, you will be able to sue for your interest.

Written October 17, at Sirmium, in the consulship of the Augusti (293).

[4]²⁴⁸ *The same Augusti and Caesars to Domitius Aphobius.* Your father had leased a farm from Philippus. Your mother, by giving these slaves, which had been acquired by you through succession, to the farm's owner as payment for debt, could not take away anything from you. And for that reason if, being older than 25 years, you have not ratified her management of affairs, upon offering to pay off the debt you will be able to claim them if the lessor has not sold them as obligated to himself by a right of pledge.

Given February 11, in the consulship of the Caesars (294).

[5] *The same Augusti and Caesars to Aurelius Aegrus.* If your father has sold your farm after your emancipation without your consent and you have not succeeded him (as heir), and the possessor has not been protected by a long-time prescription, the provincial governor will order it to be returned to you when you sue.

May 8, at Sirmium, in the consulship of the Caesars (294).

[6] *The same Augusti and Caesars to Aurelius Rufus.* No one could injure you at all by selling properties belonging to you that have not been obligated to himself or over which he does not have the power to sell by virtue of his office.

Given November 1.

²⁴⁶ Possibly July 8.

²⁴⁷ As Blume dryly observes: "It is apparent that a purchaser under Roman law was required to exercise caution."

²⁴⁸ Combine with C. 2.25.1 (August 11), 8.42.18.

[7] *Imp. Iustinianus A. Iohanni pp.* Sancimus, sive lex alienationem inhibuerit sive testator hoc fecerit sive pactio contrahentium hoc admiserit, non solum domini alienationem vel mancipiorum manumissionem esse prohibendam, sed etiam usus fructus dationem vel hypothecam vel pignoris nexum penitus prohiberi: similique modo et servitutes minime imponi nec emphyteuseos contractum, nisi in his tantummodo casibus, in quibus constitutionum auctoritas vel testatoris voluntas vel pactionum tenor qui alienationem interdixit aliquid tale fieri permiserit.

D. k. Nov. Constantinopoli.

LII De Communium Rerum Alienatione

[1] *Imp. Gordianus A. Apollodoro evocato.* Si nulla usucapionis praerogativa vel diuturni silentii praescriptio emptorem possessionis, quam a coheredibus patrum tui distractam suggeris, pro portione tua munit, in rem actio incolumis perseverat; aut si receptum ius securitatem emptori praestitit, est arbitrium tibi liberum conveniendi eos, qui pro portione satis illicitam venditionem celebraverunt.

[2] *Idem A. Herenniano militi.* Multum interest, utrum coheredes tui possessionem communem distraxerunt, an vero fiscus, cum partis dominus esset, soliditatem iuxta proprium privilegium vendidit. etenim si a fisco facta est venditio, fidem eius infringi minime rationis est. si vero coheredes soliditatem vendiderunt, licet emptor ab his delegatus partem pretii fisco solverit alteramque in cautionem deduxit, tamen portioni tuae ea venditio non potest obsistere.

[3] *Imp. Diocletianus et Maximianus AA. et CC. Aurelio Eusebio.* Falso tibi persuasum est communis praedii portionem pro indiviso, antequam communi dividundo iudicium dictetur, tantum socio, non etiam extraneo posse distrahi.

PP. id. Febr. ... cons.

[7]²⁴⁹ *Emperor JUSTINIAN Augustus to John, Praetorian Prefect.* We ordain, whether a law has prohibited alienation or a testator has done this or a pact made by parties to a contract has included this, not only that the alienation of ownership or the manumission of slaves must be prohibited, but also that the gift of a usufruct or a hypothec or the bond of pledge be completely prohibited. In a similar manner (We ordain that) neither servitudes nor an emphyteutic contract (for perpetual lease) be imposed, except in these cases alone in which the authority of constitutions or the wishes of the testator or the terms of the pact that forbade alienation have allowed something of this sort to take place.

Given November 1, at Constantinople.

Fifty-Second Title Alienation of Property held in Common

[1] *Emperor GORDIAN Augustus to Apollodorus, a reserve soldier (evocatus).* If no prerogative of usucapion or prescription of a long silence (long-term prescription) protects the buyer of a property which you allege was sold by the co-heirs of your paternal uncle, an action *in rem* for your share remains unaffected (i.e., is available to you); or if terms agreed upon in the sale (*receptum ius*) have provided security to the buyer, you have the free choice of suing those people who have transacted a sale that was illicit as it concerned your share.

[2] *The same Augustus to Herennianus, a soldier.* It makes a great deal of difference whether your co-heirs have sold a common property or whether the Treasury (*fiscus*), since it was part owner, sold the whole property in accordance with its own privilege. For if the sale was done by the Treasury, it makes no sense to infringe upon its terms (*fides*). But if the co-heirs have sold the entire property, although the buyer, having been delegated by them, has paid part of the price to the Treasury and has made a formal promise concerning the other, even so that sale does not stand in the way of (you claiming) your portion.

[3]²⁵⁰ *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Aurelius Eusebius.* You have been falsely persuaded that a portion of a common property can only be sold to a partner, and not also to an outsider, before a judgment about dividing common property should be announced.

*Posted February 13.*²⁵¹

²⁴⁹ Perhaps to be combined with C. 4.54.9 (531). Lounghis *et al.* date to October 18, 531.

²⁵⁰ Perhaps to be combined with C. 4.49.8 (April 27, 293).

²⁵¹ This subscription goes with the next constitution, where it is restored.

[4] *Idem AA. et CC. Ulpiano militi.* Portionem quidem tuam militantis alienare frater tuus non potuit, eius autem partem pretio soluto tibi restitui postulare nec militari gravitati convenit.

<PP. *id. Febr. CC. cons.*>

[5] *Idem AA. et CC. Olympiano.* Si maior annis viginti quinque velut propria nesciens communia cum fratribus tuis praedia distraxisti, licet nullum instrumentum intercesserit nec quicquam specialiter convenit, alienae portionis evictione secuta quanti interest emptoris solves.

LIII Rem Alienam Gerentibus Non Interdici Rerum Suarum Alienatione

[1] *Imp. Severus et Antoninus AA. Publiciae Capriolae.* Non est interdictum tutoribus vel curatoribus, etsi ex eo titulo iudicati debitores sunt constituti, cum sua causa res suas alienare. potuit ergo curator tuus fundum suum cum suo onere obligare fisco nostro: nam et privato potuisset.

D. non. Iun. Antonino et Geta cons.

LIII De Pactis inter Emptorem et Venditorem Compositis

[1] *Imp. Antoninus A. Claudiae Diotimae.* Si ea lege praedium vendidisti, ut, nisi intra certum tempus pretium fuisset exsolutum, emptrix arras perderet et dominium ad te pertineret, fides contractus servanda est.

D. v id. ... Sabino II et Anullino cons.

[2] *Imp. Alexander A. Charisio militi.* Si fundum parentes tui ea lege vendiderunt, ut, sive ipsi sive heredes eorum emptori pretium quandoque vel intra certa tempora obtulissent, restitueretur, teque parato satisfacere conditioni dictae heres emptoris non paret, ut contractus

[4] *The same Augusti and Caesars to Ulpianus, a soldier.* Your brother could not alienate your portion (of the property) while you were on military service. However, it is not consistent with military seriousness for you to demand that his share be restored to you upon (your) payment of the price.

Posted February 13, in the consulship of the Caesars (294).

[5] *The same Augusti and Caesars to Olympianus.* If, being older than 25 years you have unknowingly sold, as if they were your own, properties owned in common with your brothers, although no document has been involved and nothing has been specifically agreed upon, you will pay the buyer's interest when he is evicted from the other persons' portion of the property.

Fifty-Third Title Persons Managing Another's Business Are Not Forbidden the Alienation of Their Own Property

[1] *Emperors SEVERUS and ANTONINUS Augusti to Publicia Capriola.* It is not forbidden for *tutores* and *curatores* to alienate their own property with its furnishings (*cum sua causa*) if they have been made debtors as the result of a judgment. Therefore, your *curator* could obligate his farm to Our Treasury with its burden; for he could (also) have done so with a private person.

Given June 5, in the consulship of Antoninus and Geta (205).

Fifty-Fourth Title Pacts Made Between the Buyer and Seller

[1] *Emperor ANTONINUS Augustus to Claudia Diotima.* If you have sold a property under the condition that, if the price had not been paid within a certain time, the (female) buyer would lose her earnest money (*arrae*) and ownership would belong to you, the terms (*fides*) of the contract must be observed.

Given on the fifth day before the Ides ... in the consulship of Sabinus, for the second time, and Anullinus (216).²⁵²

[2] *Emperor ALEXANDER Augustus to Charisius, a soldier.* If your parents sold a farm under the condition that, if either they themselves or their heirs at any time or within a certain time offered the price to the buyer, the farm would

²⁵² Either August 9 or October 11. This text and several of those below concern a *lex commissoria*, an agreement that if the price were not paid within a fixed period, the vendor might declare the sale void. Usually in the meantime the property is granted to the provisional buyer on "sufferance" (*precarium*), meaning that the seller retains title. Otherwise, the suit is on the obligation (*in personam*).

fides servetur, actio praescriptis verbis vel ex vendito tibi dabitur, habita ratione eorum, quae post oblatam ex pacto quantitatem ex eo fundo ad adversarium pervenerunt.

D. k. Sept. Alexandro A. cons.

[3] *Idem A. Felici militi.* Qui ea lege praedium vendidit, ut, nisi reliquum pretium intra certum tempus restitutum esset, ad se reverteretur, si non precariam possessionem tradidit, rei vindicationem non habet, sed actionem ex vendito.

D. iii id. Iul.

[4] *Idem A. Claudio Iuliano et Proculiano.* Commissoriae venditionis legem exercere non potest, qui post praestitutum pretii solvendi diem non vindicationem rei eligere, sed usurarum pretii petitionem sequi maluit.

[5] *Imp. Gordianus A. Aurelio Longino evocato.* Initio venditionis si pactus es, ut is cui vendidisti possessionem pretii tardius exsoluti tibi usuras pensitaret, non immerito existimas etiam eas tibi adito praeside ab emptore praestari debere. nam si initio contractus non es pactus, si coeperis experiri, ex mora dumtaxat usuras tam ab ipso debitore quam ab eo, qui in omnem causam empti suam fidem adstrinxit, de iure postulabis.

[6] *Imppp. Carus Carinus et Numerianus AAA. Olybrio Romulo.* Cum te fundum tuum certae rei contemplatione inter vos habita exiguo pretio in alium transtulisse commemoras, poterit ea res tibi non esse fraudi, quando non impleta promissi fide dominii tui ius in suam causam reverti conveniat. et ideo aditus competens iudex fundum cuius mentionem facis restitui tibi cum fructibus suis sine ulla ludificatione sua auctoritate perficiet, praecipue cum diversa pars receptis nummis suis nullam passa videri possit iniuriam.

be returned, and when you are ready to fulfill the aforesaid condition the (buyer's) heir does not comply, you will be given an action with special terms (*actio praescriptis verbis*) or on sale so that the terms (*fides*) of the contract be observed, with account taken of what has come to your adversary from that farm after your offer of the price in accordance with the pact.

Given September 1, in the consulship of Alexander Augustus (222).

[3] *The same Augustus to Felix, a soldier.* A person who has sold a property under the condition that, unless the remainder of the price should be paid within a certain time, it would revert to him, (then,) if he has not delivered possession on sufferance (*precaria possessio*), he does not have a suit on ownership for the property, but on sale.

Given July 13.²⁵³

[4] *The same Augustus to Claudius Julian and Proculianus.* A person who, after the appointed day for paying the price, has preferred not to choose a suit on ownership of the property, but to pursue a claim for interest on the price, cannot (then) exercise a clause to rescind the sale (*commissoriae venditionis lex*).

[5] *Emperor GORDIAN Augustus to Aurelius Longinus, a reserve soldier (evocatus).* If, at the beginning of the sale, you have made a pact that the person to whom you have sold the property pay interest on the purchase price not paid when due, you do not without merit think that, when you approach the governor, it should be provided to you by the buyer. For if you did not make the pact at the beginning of the contract, if you bring a suit, you will justly demand interest for the delay, but only for that, both from the debtor himself and from the person who bound his faith for all aspects of the purchase (i.e., the surety).

[6] *Emperors CARUS, CARINUS, and NUMERIAN Augusti to Olybrius Romulus.* When you mention that, after jointly considering a certain matter, you have transferred your farm to another for a small price, this matter cannot be a disadvantage (*fraus*) for you, since it is proper that the right of your ownership should revert to its former status (*in suam causam*) if the terms of the promise are not fulfilled. And for that reason, a competent judge, when approached, will bring about by his authority that the farm that you mention, along with its fruits, be restored to you without any trickery, especially since the other party, after receiving his money back, cannot be seen to have suffered an injury.

²⁵³ This subscription may belong to 7 below.

[7] *Impp. Diocletianus et Maximianus AA. et CC. Fabiano Musco.* Si a te comparavit is cuius meministi et convenit, ut, si intra certum tempus soluta fuerit data quantitas, sit res inempta, remitti hanc conventionem rescripto nostro non iure petis. sed si se subtrahat, ut iure domini eandem rem retineat, denuntiationis et obsignationis depositionisque remedio contra fraudem potes iuri tuo consulere.

[8] *Idem AA. et CC. Auxanoni.* Tempore contractus inter emptorem et venditorem habitam conventionem integram servari, si ab ea posteriore non recedatur pacto, certum est.

[9] *Imp. Iustinianus A. Iohanni pp. pr.* Si quis ita paciscatur in venditionis vel alienationis contractu, ut novo domino nullo modo liceat in loco vendito vel alio modo sibi concesso monumentum extruere vel alio modo humani iuris eum eximere, sancimus, licet hoc apud veteres dubitabatur, tale pactum ex nostra lege esse fovendum et immutatum permanere. 1. Forsitan enim multum eius intererat, ne ei vicinus non solum quem nollet adgregetur, sed et pro quo specialiter interdictum est. cum etenim venditor vel aliter alienator non alia lege suum ius transferre passus est nisi tali fretus conventionem, quomodo ferendum est aliquam captionem ex varia pati eum interpretatione?

D. xv k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

LV Si Servus Exportandus Veneat

[1] *Impp. Severus et Antoninus AA. Petroniae Flavillae. pr.* Lege venditionis exportata mancipia sub denuntiatione manus iniciendae libertatem

[7] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Fabianus Muscus.* If the person whom you mention has purchased from you and there is an agreement that, if the amount given has been restored within a certain time, the property should be considered as not purchased, you do not lawfully seek that this agreement be set aside by Our rescript. But if he should conceal himself, so that he retain the same property under right of ownership, you can protect your rights against fraud (*fraus*) by the remedy of giving formal notice, sealing, and depositing the money.

[8] *The same Augusti and Caesars to Auxanon.* It is certain that an agreement made between the buyer and seller at the time of the contract should be observed intact, except if it should be withdrawn from by a later pact.

[9]²⁵⁴ *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* If anyone should make a pact in a contract of sale or alienation that the new owner in no way be permitted to build a (funeral) monument in the place that has been sold or otherwise conceded to him, or to consecrate it by other means (*humani iuris eximere*), We ordain, although this was doubted among the old authorities, that such a pact should be supported in accordance with Our law and remain unchanged. 1. For perhaps it made a great deal of difference to him that he not have as a neighbor not only someone whom he does not want but also one for whom the prohibition was specifically made. For since the seller or a person otherwise alienating the property in another way did not allow his right to be transferred under any other terms except when he was protected with this agreement, how is it to be endured that he should suffer some deception by a different interpretation?²⁵⁵

Given October 18, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Fifty-Fifth Title If a Slave Should Be Sold to Be Exported²⁵⁶

[1] *Emperors SEVERUS and ANTONINUS Augusti to Petronia Flavilla. pr.* Slaves exported in accordance with a term of the sale and subject to being seized (*sub*

²⁵⁴ Apparently to be combined with C. 4.51.7.

²⁵⁵ Blume: "The law here translated was evidently made to correct D. 2.14.61 which states: 'No man can by means of a pact deprive himself of the right to consecrate his own ground, or to bury a dead body on his own land, or to dispose of his estate without his neighbor's consent.'"

²⁵⁶ See D. 18.7. Blume: "Slaves ... were often sold subject to certain conditions, some of which were for the benefit of the vendor, some for the benefit of the slave, and some as a mere punishment. If a slave was sold on condition to be exported, the condition was entirely for the benefit of the vendor, or regarded as a condition for his protection, and could be waived by him." The seller's right to seize the slave if the condition is not observed is frequently *in rem*, i.e., title revives.

ab emptore, vel qui successit in locum eius, antequam fides rumpatur, accipere possunt. 1. Quae tamen fisco post manumissionem vindicantur et in perpetuam servitutem eadem lege veneunt, cum in his civitatibus conversantur, quas contrahentes exceperant. 2. Ante manumissionem iniciendae manus facultas non denegatur atque ideo non petuntur in publicum.

PP. xv k. Oct. Severo A. II et Victorino cons.

[2] *Idem AA. Sezo Nedymo.* Si, ut manus iniunctionem haberes, cavisti tibi, iure tuo uti potes. quod si hoc omisisti et poenam stipulatus es, homo quidem fisco commissus est, tu vero nactus ex stipulatu actionem. in omnibus tamen quaeritur, an domini voluntate in locum prohibitum venerit.

PP. VII k. Nov. Severo A. II et Victorino cons.

[3] *Imp. Alexander A. Novio liberto.* Ancilla, quae exportanda venit nec exportata est, sed ab emptore in eadem civitate morante empta et^x manumissa est, adversus legem venditionis libera fieri non potuit: et ideo aditus a te procurator meus partibus suis fungetur.

PP. XIII id. Mart. Maximo II et Aeliano cons.

[4] *Idem A. Aurelio Papiae. pr.* Moveor, quod te a servis tuis dominum eorum venisse adfirmas sub ea lege, ne in patria moreris, et ab eo, cui te prior emptor vendiderat, manumissum esse dicis. 1. Quare competens iudex adversus eum, quem praesentem esse dicis, cognitionem suam praebebit et, si veritas accusationi aderit, execrabile delictum in exemplum capitali poena vindicabit. 2. Sed quoad usque probaveris quae intendis, status tuus esse videtur, qui in te post manumissionem deprehenditur.

PP. XI k. Iul. Iuliano et Crispino cons.

^x [empta et]

denuntiatione manus iniciendae; if they are not exported) can, before the terms of the contract have been broken, receive liberty from the buyer or the person who has succeeded into his place. 1. However, they are claimed by the Treasury after their manumission, and are (then) sold into perpetual servitude by the same provision, when they are present in those cities that the parties to the contract had excepted. 2. Before manumission the right to seize them (*iniciendae manus facultas*) should not be denied (to the seller) and for that reason they are not claimed for the public.

Posted September 17, in the consulship of Severus, for the second time, and Victorinus (200).

[2] *The same Augusti to Sezus Nedymos.* If you had made a provision (through a stipulation) that you have the right to seize (*manus iniectio*, of a slave sold under a condition of export), you can exercise your right. But if you have omitted this and have a stipulation for a penalty, the person (i.e., the slave) is forfeited to the Treasury, but you have acquired the right of action on the stipulation. In all cases, however, the question is whether the slave has come into a prohibited place with the consent of the owner (the buyer).

Posted October 26, in the consulship of Severus, for the second time, and Victorinus (200).

[3] *Emperor ALEXANDER Augustus to Novius, a freedman.* A slave woman who has been sold to be exported and has not been exported, but has been manumitted by a buyer living in the same city, could not become free contrary to the terms of the sale; and for that reason My procurator, when approached by you, will perform his role.

Posted March 12, in the consulship of Maximus, for the second time, and Aelianus (223).

[4] *The same Augustus to Aurelius Papia. pr.* I am moved because you affirm that, although you were their owner, you were sold by your slaves under the condition that you not live in the city, and you say you were manumitted by the person to whom the first buyer sold you. 1. Therefore a competent judge will offer his jurisdiction against the person who you say is present and, if there is truth to the accusation, will make an example of the execrable crime with capital punishment. 2. But until you prove what you charge, your status seems to be what is indicated to be for you after your manumission.

Posted June 21, in the consulship of Julian and Crispinus (224).

[5] *Idem A. Sextiano Serapioni.* Qui exportandus a domino de civitate sua venit, nec in urbe Roma morari debet: qui autem de provincia certa, nec in Italia. si itaque contra legem constitutam factum probare potes, utere iure, quod propterea tibi competit.

PP. VII k. Febr. Fusco II et Dextro cons.

LVI Si Mancipium Ita Venierit, Ne Prostituat

[1] *Imp. Alexander A. Socrati.* Praefectus urbis amicus noster eam, quae ita venit, ut, si prostituta fuisset, abducendi potestas esset ei, cui secundum constitutionem divi Hadriani id competit, abducendi faciet facultatem: quod si eum patientiam accommodasse contra legem quam ipse dixerat, ut in turpi quaestu mulier haberetur, animadverterit, libertate competente secundum interpretationem eiusdem principis perducere eam ad praetorem, cuius de liberali causa iurisdictio est, ut lis ordinetur, iubebit, nec enim tenor legis, quam semel comprehendit, intermittitur, quod dominium per plures emptorum personas ad Primum^{xi} qui prostituit sine lege simili pervenit.

PP. III k. Nov. Maximo II et Aeliano cons.

[2] *Idem A. Severo.* Mulierem, quam ita venisse adlegas, ne prostituere aut, si prostituta fuerit, libera esset, per officium militare exhiberi apud tribunale oportet, ut, si controversia referatur pacto (quod tamen si verum est, libertas mulieri existente condicione competit), agatur causa apud eum cuius de ea re notio est, haec autem lex et nisi in tabulas venditionis inserta sit, quamvis epistula vel sine scriptis facta ostenditur, valet.

PP. k. Dec. Maximo II et Aeliano cons.

^{xi} primum

[5] *The same Augustus to Sextianus Serapio.* Whoever is sold by his owner to be exported from his city should not live in the city of Rome: and whoever is sold to be exported from a certain province should not live in Italy. So if you can prove a violation of the agreed upon condition, use the right that is available to you on that account.

Posted January 26, in the consulship of Fuscus, for the second time, and Dexter (225).

Fifty-Sixth Title If a Slave Is Sold upon Condition Not to Be Prostituted

[1] *Emperor ALEXANDER Augustus to Socrates.* The City Prefect, Our friend, will provide the power to take away a female slave who has been sold under the condition that, if she had been prostituted (after the sale), the person to whom this is available in accordance with the constitution of the divine Hadrian would have the power to take her away. However, if he (the Prefect) learns that he allowed the woman to be kept in the disgraceful trade against the term that he himself had pronounced, since she is entitled to liberty according to the interpretation of the same Emperor, he will order her to be brought to the Praetor who has jurisdiction over cases involving liberty, so that a lawsuit might be begun. Nor are the terms of the condition that he himself previously embraced interrupted because ownership has passed through the persons of several buyers without a similar condition to the person who first (*primus*) prostituted her.

Posted October 30, in the consulship of Maximus, for the second time, and Aelianus (223).

[2] *The same Augustus to Severus.* A woman who you allege was sold under the condition that she not be prostituted, or, if she were prostituted, that she be free, must be exhibited at the tribunal through the military staff (*officium militare*), so that, if a controversy should be reported concerning the pact – under the condition of which, if it is genuine, the woman is entitled to liberty – the case may be tried before the judge who has jurisdiction for this matter. However, this condition is valid even if it has not been included in the sale documents, to the extent that it is shown to have been arranged by a letter or (even) without writing.

Posted December 1, in the consulship of Maximus, for the second time, and Aelianus (223).

[3] *Idem A. Aurelio Aelio.* Eam, quae ita venit, ne corpore quaestum faceret, nec in caupona sub specie ministrandi prostitui, ne fraus legi dictae fiat, oportet.

PP. id. Ian. Fusco II et Dextro cons.

LVII Si Mancipium Ita Fuerit Alienatum, Ut Manumittatur vel Contra

[1] *Imp. Alexander A. Patricensi.* Si^{xii} Patrocius, posteaquam te Hermiae donationis causa dedit lege dicta, ut, si quindecim annis continuis servisses, ad libertatem perducereris ita, ut civis Romanus esses, tempore peracto, si modo Patrocius non contrariae voluntatis fuerit aut si iam decesserit, ad libertatem pervenisti, quoniam placuit non solum ad venditos, sed etiam ad donatos eam legem, ut manumitterentur, pertinere, nec te potuit semel translato dominio in Hermiam postea alii Patrocius vendere: et ideo non de praestanda tibi libertate, quam ex constitutione iam fueras adeptus, litigare debuisti, sed libertatem quam obtinueras defendere.

PP. VI id. Nov. Alexandro A. cons.

[2] *Idem A. Eutychiano.* Si ea lege Chreste^{xiii} servum, sed naturalem filium venumdedit, ut emptor eum manumitteret, quamvis non est manumissus, ex constitutione divorum Marci et Commodi ad Aufidium Victorinum liber est.

PP. non. Dec. Alexandro A. cons.

[3] *Idem A. Fulcinio Maximo. pr.* Si Iusta Saturnino puellam nomine Firmam agentem tunc annos septem hac lege vendiderit, ut, cum haberet annos viginti quinque, libera esset, quamvis factum ab emptore praestandae libertatis pacto non sit insertum, sed ut libera esset expressum, tamen constitutioni divorum Marci et Commodi locus est. 1. Ideoque impleto vicensimo quinto anno Firma libera facta est nec obest ei, quod vicensimo septimo anno manumissa est, quae iam ex

^{xii} [Si]

^{xiii} Chrestes

[3] *The same Augustus to Aurelius Aellus.* A woman who was sold under the condition that she not earn a profit with her body should not be prostituted in an inn (*caupona*) under the guise of providing service (to customers), lest the stated condition be evaded through fraud.

Posted January 13, in the consulship of Puscus, for the second time, and Dexter (225).

Fifty-Seventh Title If a Slave Has Been Alienated under the Condition That He Be Manumitted, or the Contrary²⁵⁷

[1] *Emperor ALEXANDER Augustus to Patricensis.* Patrocius, after he gave you to Hermia as a gift with the stated condition that, if you should have served for fifteen consecutive years, you would be brought to liberty in such a way that you would be a Roman citizen; when the time has passed, as long as Patrocius has not changed his mind or if he has already died, you have arrived at liberty, since it is agreed that the condition that slaves be manumitted applies not just to those who have been sold, but also to those who have been given as gifts;²⁵⁸ nor could Patrocius afterwards sell you to another once ownership had been transferred to Hermia; and for that reason you did not need to litigate about being provided liberty, which you had already gained from the constitution, but (rather) to defend the liberty that you had obtained.

Posted November 8, in the consulship of Alexander Augustus (222).

[2] *The same Augustus to Eutythianus.*²⁵⁹ If Chrestes has sold his slave who is also his natural son under the condition that the buyer manumit him, although he has not been manumitted, he is free as a result of the constitution of the deified Marcus and Commodus to Aufidius Victorinus.

Posted December 5, in the consulship of Alexander Augustus (222).

[3] *The same Augustus to Fulcinius Maximus, pr.* If Justa has sold to Saturninus a girl going by the name of Firma, at that time 7 years old, under the condition that she should be free when she reached the age of 25, although the fact of the buyer providing liberty was not included in the pact, but it was expressed that she be free, nevertheless there is a place for the constitution of the deified Marcus and Commodus.²⁶⁰ 1. For that reason Firma became free upon completing her twenty-fifth year, and the fact that she was manumitted in her twenty-seventh year is not an obstacle to her, since she was already free in

²⁵⁷ See D. 18.7.

²⁵⁸ As Krüger notes, the Basilika favors reading *donatos ea lege, ut manumitterentur, constitutionem pertinere* ("the constitution applies to ... those given on terms that they be freed").

²⁵⁹ Some manuscripts name Eutythianus a freedman.

²⁶⁰ A manuscript adds "in semestribus scriptae," apparently based on D. 18.7.10.

constitutione libera erat: et is, quem post vicensimum quintum annum ex te conceptum enixa est, ingenuus est.

PP. x k. Febr. Iuliano et Crispino cons.

[4] *Imp. Gordianus A. Corneliae Iucundae.* Si is, qui pretium pro te acceperat, ut statuto tempore te libertate donaret, moram repromissae libertati praestitit, ex eo te liberam esse factam manifestum est, ex quo, cum posset dari libertas, non est praestita. et ideo ex te natos ingenuos videri procreatos non est incertae opinionis.

PP. vi k. Mai. Sabino et Venusto cons.

[5] *Idem A. Aurelio Marino. pr.* Ea quidem mancipia, quorum venditio eam legem accepit, ne ad libertatem perducantur, etiamsi manumittantur, nancisci libertatem non possunt. neque enim condicio, quae personae eius cohaesit, immutari facto eius qui ea lege comparavit potest. 1. Nec tamen, poenae exactio si qua addita est conditioni non servatae, iustam exigendi tribuit causam. 2. Qua igitur ratione te poterit vocare ad officium procuratoris, qui eam legem venditioni dedit, perspicere non potest, cum nec in privatorum contractibus fiscus se interponere debeat et litterae ad te missae personae factum, si non ipse manumiseris, non contineant.

PP. xvi k. Sept. Sabino et Venusto cons.

[6] *Impp. Diocletianus et Maximianus AA. et CC. Helvidiae Rufinae.* Si puellam ea lege vendidisti, ut manumitteretur et, si manumissa non esset, centum aurei praestarentur, non servata fide nihilo minus eam raptam e vestigio servitutis ad libertatem, quae praestari potuit, constitit nec pecunia quasi rupta fide suscepta recte petetur, cum non mutata venditoris voluntate conditionis potestate post^{xiv} manumittentis factum repraesentari optima ratione placuit.

S. xvi k. Iun. ipsis AA. cons.

^{xiv} <manumittendo moram factam>

accordance with the constitution; and (so) the son whom she bore when he was conceived from you after her twenty-fifth year is free.

Posted January 23, in the consulship of Julian and Crispinus (224).

[4] *Emperor GORDIAN Augustus to Cornelia Iucunda.* If the person who received a price for you under the condition that at an appointed time he would give you liberty caused a delay in the promised liberty, it is clear that you have become free from the time freedom was not provided but it could be given. And for that reason there is no uncertainty that the children borne by you are seen as free-born.

Posted April 26, in the consulship of Sabinus and Venustus (240).

[5] *The same Augustus to Aurelius Marinus. pr.* Those slaves whose sale included the clause that they not be brought to liberty, even if they should (thereafter) be manumitted, cannot acquire liberty. For a condition that has attached to a person cannot be changed by the action of the person who has purchased under those terms. 1. However, the exaction of a penalty, if any has been added for not maintaining the condition, does not provide a just cause for its exaction. 2. It is not possible to see for what reason the one who added this clause to the sale will be able to summon you to the office of the procurator, since the Treasury should not interpose itself in the contracts of private people and the letter sent to you does not refer to an act done to the slave (*personae factum*), if you yourself have not manumitted him (or her).

Posted August 17, on the consulship of Sabinus and Venustus (240).

[6] *Emperors DIOCLETIAN and MAXIMIAN Augusti and Caesars to Helvidia Rufina.* If you have sold a slave girl under the condition that she be manumitted and, if she should not have been manumitted, 100 aurei would be paid, it is established that, when the terms (*fides*) of the contract have not been observed, she has nonetheless been seized from the last traces of slavery to the liberty which could have been provided, and the money will not be rightly sought as if taken for breaking the faith (of the contract), since it has been decided by the best reasoning that, without a change of intention by the seller, the act of the manumittor is, after delay occurs in the manumission, given immediate effect by the legal force of the condition.

Given May 17, in the consulship of the Augusti themselves (293).

LVIII De Aediliciis Actionibus

[1] *Imp. Antoninus A. Decentio Veromilio.* Si non simpliciter, sed consilio fraudis servum tibi nescienti fugitivum vel alio modo vitiosum quis vendidit isque fugitivus abest, non solum in pretium servi venditorem conveniri, sed etiam damnum quod per eum tibi accidit competens iudex, ut iam pridem placuit, praestari iubebit.

PP. IIII k. Iun. Messala et Sabino cons.

[2] *Imp. Gordianus A. Petilio Maximo.* Cum proponas servum, quem pridem comparasti, post anni tempus fugisse, qua ratione eo nomine cum venditore eiusdem congruere quaeras, non possum animadvertere: etenim redhibitoriam actionem sex mensum temporibus vel quanto minoris anno concludi manifesti iuris est.

PP. k. Dec. Gordiano A. et Aviola cons.

[3] *Impp. Diocletianus et Maximianus AA. Aurelio Muciano. pr.* Si apud priorem dominum fugisse mancipium non doceatur, fuga post venditionem interveniens ad damnum emptoris pertinet. 1. Sin autem venditor non vitiosum etiam in posterum fieri servum temere promiserit, quamvis hoc impossibile esse videtur, secundum fidem tamen antecedentis vel in continenti secuti pacti experiri posse non ambigitur: posteriores enim casus non venditoris, sed emptoris periculum spectant. 2. Verum cum servum quem comparaveras ad eum qui distraxerat redisse contendis, iudex competens perspectis omnibus pro repertae rei qualitate proferre curabit sententiam.

PP. xv k. Mai. Maximo II et Aquilino cons.

[4] *Idem AA. pr.* Si praedium quis sub ea lege comparaverit, ut, si displicuerit, inemptum erit, id utpote sub condicione venditum resolvi et redhibitoriam adversus venditorem competere palam est. 1. Idem observatur et si pestibilis fundus, id est pestibulas vel herbas letiferas habens, ignorante emptore distractus sit: nam in hoc etiam casu per eandem actionem eum quoque redhibendum esse.

... k. Mart.

Fifty-Eighth Title Aedilician Actions²⁶¹

[1] *Emperor ANTONINUS Augustus to Decentius Veromilius.* If someone has sold a runaway or otherwise flawed slave to you when you were unaware, not innocently but with the intention of fraud, and the runaway slave is missing, a competent judge will order not only that the seller be sued for the price of the slave, but also, as was decided long ago, that you be paid the loss that you incurred because of him.

Posted May 29, in the consulship of Messala and Sabinus (214).

[2] *Emperor GORDIAN Augustus to Petilius Maximus.* Since you state that a slave whom you purchased a while ago has fled after a year's time, I cannot figure out by what reasoning you seek to litigate with his seller on that account; for it is clearly the law that an action to rescind the sale (*redhibitoria actio*) is limited to a period of six months whereas an action for the reduction in the price (*actio quanti minoris*) is limited to a year.

Posted December 1, in the consulship of Gordian Augustus and Aviola (239).

[3] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Aurelius Mucianus. pr.* If it should not be shown (at trial) that a slave fled from his former owner, a flight occurring after the sale is the buyer's loss. 1. If, however, the seller has rashly promised that the slave is not flawed even for the future, although this seems to be impossible (to promise), even so there is no doubt that one can sue in accordance with the terms (*fides*) of a pact preceding or immediately following (the sale); for later misfortunes concern the risk not of the seller, but of the buyer. 2. But when you contend that the slave whom you had purchased has returned to the one who sold him, a competent judge will take care to issue his opinion after examining everything in terms of the nature of the situation that is discovered.

Posted April 17, in the consulship of Maximus, Consul for the second time, and Aquilinus (286).

[4] *The same Augusti. pr.* If someone has purchased a property under the condition that, if he does not like it, it will be considered as though not bought, it is clear that a sale that is certainly made under the condition is negated and the action of rescission of the sale is available. 1. The same is observed also if a noxious farm, i.e., one having pests (*pestibulae*) or deadly grass, has been sold without the buyer's knowledge; for also in this case the farm is to be restored through the same action.

(February?).

²⁶¹ See D. 21.1.

[5] *Imppp. Gratianus Valentinianus et Theodosius AAA. Nebridio pu.* Habito semel bonae fidei contractu mancipioque suscepto et pretio soluto ita demum repetendi pretii potestas est ei qui mancipium comparaverit largienda, si illud, quod dixerit fugitivum, poterit exhibere. hoc enim non solum in barbaris, sed etiam in provincialibus servis iure praescriptum est.

D. III k. Iul. Constantinopoli Honorio np. et Euodio cons.

**LVIII De Monopoliis et de Conventu Negotiatorum Illicito
Vel Artificum Ergolaborumque Nec Non Balneatorum Prohibitis
Illicitisque Pactionibus**

[1] [Αὐτοκράτωρ Λέων Α.] *pr.* ... <μονο>πωλίοις ἐν οἰωδήποτε τόπῳ ἢ πόλει οὖσιν μηδεμιᾶς ὕλης ἢ πράγματος κεχρήσθω, μηδ' ἂν θεῖον πορίσῃται τύπον, ὑπεξηρημένων τῶν ἁλῶν, μήτε δεήσεις ὑπαγορευέτω ἢ ἐπιδοῦναι τολμάτω. 1. Ὅπως γὰρ πανταχόθεν βέβαια μένοι τὰ καλῶς οὕτως καὶ εὐσεβῶς βεβουλευμένα καὶ νομοθετηθέντα, οὐδὲ τὸν κατὰ καιρὸν μεγαλοπρεπέστατον κυαίστορα ἢ τοὺς ἄλλους ἐνδοξοτάτους ἄρχοντας τοῦ θεοῦ παλατίου ἢ τοὺς περιβλέπτους ἀντιγραφείας ἢ τὸν περιβλέπτον σεκουνδοκῆριον ἢ τερτιακῆριον τῶν λαμπροτάτων τριβούνων ἢ τοὺς κατὰ καιρὸν περιβλέπτους ῥεφερενδαρίους ἀπειράτους βασιλικῆς κινήσεως καταλείψομεν, εἰ τοῦ λοιποῦ τοιαύτας τινὰς προσδέξωνται δεήσεις ἢ τοιοῦτω τινὶ σπουδῇ συνεισενέγκοιεν ἢ ὑπαγορεύοντες ἢ ὑποσημαινόμενοι ἢ σουγγεστίοσιν κεχρημένοι ἢ ἄλλην τινὰ ῥοπὴν ἢ χρεῖαν συνεισφέροντες. 2. Οἱ δὲ τούτοις προσεδρεύοντες, εἴτε μεμοριαῖοι εἴτε παλατῖνοι εἴτε ἄλλης στρατείας εἶεν, οἰωδήποτε τρόπῳ τοιοῦτο γράφοντες ἢ διδάσκοντες ἢ ἄλλως γίνεσθαι σπουδάζοντες ἀφαίρεσιν ζώνης καὶ οὐσίας δυστυχίσουσιν. 3. Ταῦτα τοίνυν εἰδὼς ἕκαστος τῶν ὑπηκόων ἐκ ταύτης ἡμῶν τῆς νομοθεσίας τὴν παρρησίαν ἔχων ἐπ' ἀδείας κεχρήσθω τοῖς περὶ τούτων συναλλάγμασιν, ὧν οὐκέτι κώλυσις ἐστίν.

PP. III id. Febr. Leone A. v cons.

[2] *Imp. Zeno A. Constantino pu. pr.* Iubemus, ne quis cuiuscumque vestis aut piscis vel pectinum forte aut echini vel cuiuslibet alterius ad uictum vel ad quemcumque usum pertinentis speciei vel cuiuslibet materiae pro sua auctoritate, vel sacro iam elicto aut in posterum eliciendo rescripto aut pragmatica sanctione vel sacra nostrae pietatis adnotatione, monopolium audeat exercere, neve quis illicitis habitis conventionibus coniuraret aut pacisceretur, ut species diversorum corporum

[5]²⁶² *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS Augusti to Nebridius, City Prefect.* When once a good faith contract has been made, the slave received, and the price paid, the power to seek back the price is to be given to the one who purchased the slave only under this condition, if he can produce the slave who he said was a runaway. This has been rightly ordered not only in the case of barbarian slaves, but also of ones from the provinces.

Given June 29, at Constantinople, in the consulship of Honorius, Most Noble Boy, and Euodius (386).

**Fifty-Ninth Title Monopolies and Illicit Gatherings of
Merchants, Artisans, or Contractors, As Well As Prohibited and
Illicit Pacts of Bath-keepers**

[1] (*Emperor Leo Augustus.*) **pr.** ... With the exception of salt, no one should enjoy monopolies of any material or thing in any place or city, not even if he has obtained a sacred rescript; and he should not hint about petitions or dare to present them. **1.** So that what has been well and piously planned and legislated should remain firm everywhere, We will not allow to be exempt from the imperial decision the illustrious (*illustris*) temporary quaestor, or the other most illustrious (*gloriosissimi*) magistrates of the sacred palace, or the noteworthy (*spectabilis*) scribes, or the noteworthy deputy (*secundocarius*), or sub-deputy (*tertiocarius*) of the most splendid tribunes, or the noteworthy temporary auxiliary officials (*refendarii*), if in the future they should receive some such petitions or provide help to any such person, either by providing information or signing petitions or resorting to suggestions or providing any other type of decisive influence or need. **2.** Those who assist them, whether they are chancery officials (*memoriales*) or palace functionaries (*palatini*) or of another branch (*militia*), if they should write something of this sort or suggest anything or otherwise provide help, will suffer the loss of their rank (*cingulum*) and their property. **3.** Thus each of the subjects knowing these things and having the freedom from Our legislation should without fear make use of contracts concerning these things for which there is no longer any prohibition.

Posted February 11, in the consulship of Leo Augustus, for the fifth time (473).

[2] *Emperor ZENO Augustus to Constantinus, City Prefect.* **pr.** We order that no one dare to exercise a monopoly over any type of clothing, fish, shellfish, or sea urchin, or over any other type of commodity (*species*) or material that pertains to sustenance or to any other use, not on his own authority, (or) after eliciting a sacred rescript, (or) by eliciting one in the future, (or) by a general sanction

²⁶² = C.Th. 3.4.1 (Valentinian, Theodosius, and Arcadius).

negotiationis non minoris, quam inter se statuerint, venundentur. 1. Aedificiorum quoque artifices vel ergolabi aliorumque diversorum operum professores et balneatores penitus arceantur pacta inter se componere, ut ne quis quod alteri commissum sit opus impleat aut iniunctam alteri sollicitudinem alter intercapiat: data licentia unicuique ab altero inchoatum et derelictum opus per alterum sine aliquo timore dispendii implere omnique huiusmodi facinora denuntiandi sine ulla formidine et sine iudicialiis sumptibus. 2. Si quis autem monopolium ausus fuerit exercere, bonis propriis spoliatus perpetuitate damnetur exilii. 3. Ceterarum praeterea professionum primates si in posterum aut super taxandis rerum pretiis aut super quibuslibet illicitis placitis ausi fuerint convenientes huiusmodi sese pactis constringere, quinquaginta librarum auri solutione percelli decernimus: officio tuae sedis quadraginta librarum auri condemnatione multando, si in prohibitis monopolis et interdictis corporum pactionibus commissas forte, si hoc evenierit, saluberrimae nostrae dispositionis condemnationes venalitate interdum aut dissimulatione vel quolibet vitio minus fuerit executum.

D. XVII k. Ian. post consulatum Trocondae.

LX De Nundinis

[1] *Impp. Valentinianus et Valens AA. ad Probum pp.* Qui exercendorum mercatum aut nundinarum licentiam vel veterum indulto vel nostra auctoritate meruerunt, ita beneficio rescripti potiantur, ut nullum in mercatibus atque nundinis ex negotiatorum mercibus conveniant, vel in venaliciis aut locorum temporali quaestu et commodo privata exactione sectentur, vel sub praetextu privati debiti aliquam ibidem concurrentibus molestiam possint inferre.

LXI De Vectigalibus et Commissis

[1] *Impp. Severus et Antoninus AA. Victorino.* Si iure manumissus es ante quaestionem commissi motam, statum tuum vectigalis nomine convelli non est aequum.

(*pragmatica*), or by the sacred decision (in answer to a petition) of Our Piety, and that no one, after holding illicit meetings, swear or make a pact that the commodities of diverse associations (*corpora*) not be sold for a lower price than what they have agreed among themselves. 1. Constructors of buildings or contractors (*ergolaboi*) or members of other diverse professions and bath-keepers are utterly blocked from making pacts among themselves that no one complete a work that has been entrusted to another, or interfere in a task that has been imposed on another; but everyone is given permission to complete a job begun by another but abandoned, without fear of payment, and everyone may denounce crimes of this type without any fear and without judicial expenses. 2. If, however, someone has dared to exercise a monopoly, he shall be condemned to perpetual exile after having been deprived of his property. 3. In addition, if the leaders of the other professions dare in the future to bind themselves after making deals over setting prices for things or for any such illicit agreements, We determine that they be punished with the payment of 50 pounds of gold. The office of your seat (*sedes*) is to be fined with a penalty of 40 pounds of gold if, because of venality or dissembling or any other vice, it has not pursued the condemnations prescribed by Our most beneficial disposition for violations in prohibited monopolies and forbidden pacts within associations (*corpora*), if this by chance has happened.

Given December 16, in the post-consulate of Trocondas (483).

Sixtieth Title Periodic Markets

[1] *Emperors VALENTINIAN and VALENS Augusti to Probus, Praetorian Prefect.* Those who have merited permission to hold fairs (*mercatus*) or periodic markets (*nundinae*) by an indulgence of former emperors or by Our authority should exercise the benefit of the rescript in such a way that they not sue anyone in the fairs and periodic markets on the profits of merchants (from sale of goods), or that they not pursue anyone with a private claim in slave markets or in the places for temporary business and convenience, or that, under the pretext of a private debt, they be able to cause any trouble to their competitors there.²⁶³

Sixty-First Title Imposts and Confiscations²⁶⁴

[1] *Emperors SEVERUS and ANTONINUS Augusti to Victorinus.* If you have been lawfully manumitted before the question of confiscation (*commisum*)

²⁶³ Seeck dates to 367; Schmidt-Hofner, to 374–375.

²⁶⁴ See D. 39.4. Blume: "If slaves were imported or exported, customs duties or tolls of 12½ percent were payable. If the duties were not paid, the property was confiscated. In case of slaves, however, for which the duty was not paid, the rule was at times relaxed ..."

[2] *Idem AA. Iunio.* Neque commissum, quod ante quinquennium factum dicitur, si lis anticipata non est, vindicari potest, neque pro re, quae in commissi causam cecidit, si ipsa non extat nec dolo supprimatur, pretium peti potest.

[3] *Idem AA. Ingenuo militi.* Omnibus militibus nostris prospeximus, ne ob omissas professiones poena commissi tenerentur. proinde deposito hoc metu, si qua portoria debere te apparuerit, exsolve.

[4] *Imp. Constantinus A. ad Iunium Rufum.* Penes illum vectigalia manere oportet, qui superior in licitatione extiterit, ita ut non minus quam triennii fine locatio concludatur nec ullo modo interrumpatur tempus exigendis vectigalibus praestitutum. quo peracto tempore licitationum iura conductionumque recreari oportet ac simili modo aliis collocari.

D. k. Iul. Crispo C. II et Constantino C. II cons.

[5] *Idem A. Menandro. pr.* Universi provinciales pro his rebus, quas ad usum proprium vel ad fiscum inferunt vel exercendi ruris gratia revehunt, nullum vectigal a stationariis exigantur. 1. Ea vero, quae extra praedictas causas vel negotiationis gratia portantur, solitae praestationi subiugamus: capitali poena proposita stationariis et urbanis militibus et ceteris personis, quorum avaritia id temptari firmatur.

D. XII id. Iul. Crispo II et Constantino II cons.

[6] *Impp. Valentinianus et Valens AA. ad Florentium comitem sacrarum largitionum. pr.* Omnium rerum ac personarum, quae privatam degunt vitam, in publicis functionibus aequa debet esse inspectio. 1. Hoc ideo dicimus, quia nonnulli privatorum elicita suffragio proferunt

was raised, it is not just that your status can be compromised by reason of an impost (*vectigalis*).

[2] *The same Augusti to Junius*. Property, which is said to have been confiscated five years previously, if a lawsuit has not (yet) begun, cannot be claimed, nor can the price be sought for an item which has been subject to confiscation if it does not exist and is not concealed by deceit.

[3] *The same Augusti to Ingenuus, a soldier*. We have provided for all Our soldiers that they not be bound by the punishment of confiscation for omitting declarations of property. Accordingly, set aside this fear and, if it appears that you owe any import duties (*portoria*), pay them.

[4]²⁶⁵ *Emperor CONSTANTINE Augustus to Junius Rufus*. The (right to collect) imposts should remain with the person who has emerged as superior in the auction, such that the lease be concluded for a period of not less than three years and the time established for collecting imposts not be interrupted in any way. When this time is completed the rights of auctions and leases should be renewed and allocated to others in a similar manner.

Given July 1, in the consulship of Crispus Caesar, for the second time, and Constantine Caesar, for the second time (321).

[5]²⁶⁶ *The same Augustus to Menander. pr.* All the residents of the provinces should be exempt from having imposts exacted by the military police (*stationarii*) for those things that they bring in for their own use or for the Treasury, or that they take back for cultivating their land. 1. But those things which are carried for reasons other than the aforesaid ones or for business, We subject to the customary payment. Capital punishment is established for military police, urban soldiers, and other persons by whose avarice it is established that this is attempted.

Given July 13, in the consulship of Crispus (Caesar), for the second time, and Constantine (Caesar), for the second time (321).

[6]²⁶⁷ *Emperors VALENTINIAN and VALENS Augusti to Florentius, Count of the Imperial Finances. pr.* In public payments, there should be a fair inspection of all things and persons who lead a private life. 1. We say this for the reason that some

²⁶⁵ = C.Th. 4.13.1 (where addressee is "consular governor of Aemilia").

²⁶⁶ = C.Th. 4.13.2. The last sentence is added from C.Th. 4.13.3, where "other persons" is *tertiis Augustan(is)*.

²⁶⁷ = C.Th. 11.12.3. The last sentence is taken from C.Th. 13.5.24.

sanctiones, quibus vectigalia vel cetera eiusmodi, quae inferri fisco moris est, sibi adserant esse concessa. 2. Si quis ergo privatorum eiusmodi rescriptione nitatur, cassa eadem sit. vectigalium enim non parva functio est, quae debet ab omnibus, qui negotiationis seu transferendarum mercium habent curam, aequa ratione dependi: exceptis naviculariis, cum sibi rem gerere probabuntur.

D. x k. Mart. Mediolani Valentiniano et Valente AA. cons.

[7] *Imppp. Valentinianus Valens et Gratianus AAA. ad Archelaum comitem Orientis.* Ex praestatione vectigalium nullius omnino nomine quicquam minuatur, quin octavas more solito constitutas omne hominum genus, quod commerciis voluerit interesse, dependat, nulla super hoc militarium personarum exceptione facienda.

PP. Beryto IIII k. Febr. post consulatum Valentiniani et Valentis AA.

[8] *Imppp. Gratianus Valentinianus et Theodosius AAA. Palladio comiti sacrarum largitionum.* A legatis gentium devotarum ex his tantum speciebus, quas de locis propriis, unde conveniunt, huc deportant, octavarum vectigal accipiant: quas vero ex Romano solo, quae sunt tamen lege concessae, ad propria deferunt, has habeant a praestatione immunes ac liberas.

D. prid. non. Iul. Constantinopoli. acc. XII k. Aug. Syagrio et Eucherio cons.

[9] *Idem AAA. Palladio comiti sacrarum largitionum.* Usurpationem totius licentiae submovemus circa vectigal alabarchiae per Aegyptum atque Augustamnica constitutum, nihilque super transductione animalium, quae sine praebitione solita minime permittenda est, temeritate per licentiam vindicari concedimus.

[10] *Impp. Arcadius et Honorius AA. Anthemio pp.* Vectigalia, quaecumque quaelibet civitates sibi ac suis curiis ad angustiarum suarum solacia quaesierunt, sive illa functionibus curialium ordinum profutura sunt seu quibuscumque aliis earundem civitatum usibus designantur,

private people produce ordinances elicited by patronage (*suffragium*), in which they claim that imposts or other charges of this type, which are customarily paid to the Treasury, have been conceded to them. 2. Therefore if any private person should rely on a rescript of this type, this should be null and void. For the payment of imposts is not a small matter, and ought to be paid in an equal manner by everyone who has charge of business or transporting merchandise. Shipowners are excepted when they will be proved to conduct business for themselves.

Given February 20, at Milan, in the consulship of Valentinian and Valens Augusti (365).

[7]²⁶⁸ *Emperors VALENTINIAN, VALENS, and GRATIAN Augusti to Archelaus, Count of the East.* No reduction shall be made from the payment of imposts under any pretext whatsoever, but every type of person who wants to be involved in commerce shall pay the one-eighth charges established by custom; no exception is to be made on this for persons of military status.

Posted, at Beirut, January 29, in the post-consulate of Valentinian and Valens Augusti (366?).

[8]²⁶⁹ *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS Augusti to Palladius, Count of the Imperial Finances.* The collectors of the one-eighth tax (*octavarit*) should receive the impost from ambassadors of friendly (*devotae*) nations only for those products that they bring here from their own places from which they come; but the products that they bring from Roman soil to their own places, as long as they have been allowed by law, they shall have immune and free from payment.

Given July 6, at Constantinople, and received July 21, in the consulship of Syagrius and Eucherius (381).

[9]²⁷⁰ *The same Augusti to Palladius, Count of the Imperial Finances.* We eliminate the usurpation of all presumption concerning the transit impost (*vectigal alabarchiae*) established for Egypt and Augustamnica (a division of Egypt), and We concede that no exemption be impudently claimed for the transportation of animals, which is not to be permitted without the customary payment.

[10] *Emperors ARCADIUS and HONORIUS Augusti to Anthemius, Praetorian Prefect.* We instruct that whatever imposts any cities have acquired for themselves or for their councils (*curiae*) to relieve their financial difficulties, whether they are to help the payments of the curial orders or are designated for any other

²⁶⁸ = C.Th. 4.13.6. Seeck gives January 29, 369.

²⁶⁹ = C.Th. 4.13.8; combine with C. 10.6.2.

²⁷⁰ = C.Th. 4.13.9. Seeck dates to July 6, 381.

firma his atque ad habendum perpetua manere praecipimus neque ullam contrariam supplicantium super his molestiam formidari.

[11] *Idem AA. Lampadio pp.* Si quis sine persona mancipum, id est salinarum conductorum, sales emerit vendereve temptaverit, sive propria audacia sive nostro munitus oraculo, sales ipsi una cum eorum pretio mancipibus addicantur.

[12] *Impp. Honorius et Theodosius AA. Gaisoni comiti sacrarum largitionum.* Quidquid contra vectigales largitionalium titulorum vel pragmaticis sacris vel adnotationibus fuerit elicatum, effectu et viribus carere censemus.

D. VIII k. Oct. Ravennae.

[13] *Impp. Theodosius et Valentinianus AA. Flaviano pp. pr.* Exceptis his vectigalibus, quae ad sacrum patrimonium nostrum quocumque tempore pervenerunt, cetera rei publicae civitatum atque ordinum aestimatis dispendiis, quae pro publicis necessitatibus tolerare non desinunt, reserventur, cum duas portiones aerario nostro conferri prisca institutio disposuerat: atque hanc tertiam iubemus adeo in ditione urbium municipumque consistere, ut proprii compendii curam non in alieno potius quam in suo arbitrio noverint constitutam. 1. Designatae igitur consortium portionis eatenus iuri ordinum civitatumque obnoxium maneat, ut etiam locandi quanti sua interest licentiam sibi noverint contributam.

LXII Vectigalia Nova Institui Non Posse

[1] *Impp. Severus et Antoninus AA. Gavio Victorino.* Non quidem temere permittenda est novorum vectigalium exactio: sed si adeo tenuis est patria tua, ut extraordinario auxilio iuvare debeat, adlega praesidi provinciae quae in libellum contulisti: qui re diligenter inspecta utilitatem communem intuitus scribes nobis quae compererit, et an habenda sit ratio vestri et quatenus, aestimabimus.

uses of the same cities, remain firm for these cities and be kept perpetual and that no opposition be feared from people petitioning on these matters.²⁷¹

[11] *The same Augusti to Lampadius, Praetorian Prefect.* If anyone purchases salt or attempts to sell it without involving the bidders at the public auction (*sine persona mancipum*), i.e., the lessees of salt beds (*salinarum conductores*), whether by his own audacity or equipped with Our enactment, the salt itself along with its price shall be forfeit to the bidders.²⁷²

[12] *Emperors HONORIUS and THEODOSIUS Augusti to Gaiso, Count of the Imperial Finances.* We decree that whatever has been elicited by sacred enactments or by responses to petitions against the collectors of imposts (*contra vectigales*) belonging to the Imperial Treasury be without effect and strength.

Given September 23, at Ravenna (408–412).²⁷³

[13]²⁷⁴ *Emperors THEODOSIUS and VALENTINIAN Augusti to Flavianus, Praetorian Prefect. pr.* Except for these imposts that have come at all times to Our sacred patrimony, the rest should be reserved for the government of the cities and the orders when an estimate has been made of expenditures that they do not cease enduring for public needs, since the ancient practice had disposed that a two-thirds portion be paid to Our treasury. And for this reason, We order that this third part remain at the disposal of the cities and townspeople, so that they know that the responsibility for their own expenses has been established in no authority other than their own. 1. The share of the designated portion to that extent should remain subject to the right of the orders of the cities, so that they know that the right of leasing them has been provided to them as far as their interest extends.

Sixty-Second Title New Imposts Cannot Be Established²⁷⁵

[1] *Emperors SEVERUS and ANTONINUS Augusti to Gavius Victorinus.* The exaction of new imposts is certainly not to be permitted rashly; but if your hometown (*patria*) is so poor that it ought to be aided by extraordinary help, present to the provincial governor what you have included in your petition. Having inspected the matter diligently and (after) considering the common utility, he will write to Us what he has discovered, and We will judge whether and to what extent your request should be honored.

²⁷¹ Seeck dates to 400–403.

²⁷² Seeck dates to early 398.

²⁷³ Possibly 410 (see C.Th. 9.38.11) or 412 (C.Th. 8.4.24). Seeck dates to September 23, 409.

²⁷⁴ Perhaps combine with C. 11.75.5 (dated April 29, 431, at Ravenna); so Seeck.

²⁷⁵ See D. 39.4.

PP. XII k. Aug.

[2] *Idem AA. Ventilio Callistiano. Vectigalia nova nec decreto civitatum institui possunt.*

[3] *Impp. Valerianus et Gallienus AA. Aurelio Tusco et aliis. Non solent nova vectigalia inconsultis principibus institui. ergo et exigere aliquid, quod illicite poscatur, competens iudex vetabit et id quod exactum videtur, si contra rationem iuris extortum est, restitui iubebit.*

[4] *Imp. Constantinus A. ad Felicem pp. Si provincialium nostrorum querella de conductorum aviditate extiterit et probatum fuerit ultra vetustam consuetudinem et nostrae terminos iussionis aliquid eos profligasse, rei tanti criminis perpetuo exilio puniantur. sub conspectibus autem tuis vel eorum, qui tuae gravitati succedunt, licitationis cura servetur.*

PP. VII id. Mart. Carthagine.

LXIII De Commerciis et Mercatoribus

[1] *Impp. Valentinianus et Valens AA. ad Iulianum comitem Orientis. Negotiatores, si qui ad domum nostram pertinent, potiorum quoque homines necessitatem debitam pensionum, ut honestas postulat, agnoscere moneantur, ut per cunctos, qui emolumenta negotiationibus captant, tolerabiles fiant agnoscendae devotionis effectus.*

D. xv k. Mai. Constantinopoli divo Ioviano et Varroniano cons.

[2] *Idem AA. et Gratianus A. Tatiano comiti sacrarum largitionum. Non solum aurum barbaris minime praebeatur, sed etiam si apud eos inventum fuerit, subtili auferatur ingenio. si ulterius aurum pro mancipiis vel quibuscumque speciebus ad barbaricum fuerit translatum a mercatoribus, non iam damnis, sed suppliciis subiugentur, et si id iudex repertum non vindicat, tegere ut conscius criminosa festinat.*

Posted July 21.

[2] *The same Augusti to Ventilius*²⁷⁶ *Callistianus*. New imposts cannot be established by a decree of cities.

[3] *Emperors VALERIAN and GALLIENUS Augusti to Aurelius Tuscus and others*. New imposts are not customarily established without consulting the Emperors. Therefore a competent judge will forbid the levying of anything that is illicitly demanded and, if anything seems to have been exacted, he will order its restoration, if it was extorted against the legal principle.

[4] *Emperor CONSTANTINE Augustus to Felix, Praetorian Prefect*. If a complaint of Our provincial residents arises about the greed of the contractors and it is proved that they have caused any ruin exceeding the ancient custom and the limits of Our order, they should be punished with perpetual exile if convicted of so great a crime. The management of the auction, however, should be maintained under your scrutiny or under that of those who succeed Your Eminence.

Posted March 9, at Carthage (333–336).²⁷⁷

Sixty-Third Title Commerce and Merchants

[1]²⁷⁸ *Emperors VALENTINIAN and VALENS Augusti to Julian, Count of the East*. Businessmen, if any belong to Our House, as well as people in the employ of the privileged (*potiorum homines*) should be admonished to acknowledge the necessity associated with (making) payments, as honesty demands, so that the performances of acknowledging their devotion (i.e., paying tax obligations) become tolerable for all those who gain profits from business.

Given April 17, at Constantinople, in the consulship of the deified Jovian and Varronianus (364).

[2] *The same Augusti and GRATIAN Augustus to Tatianus, Count of the Imperial Finances*. Not only should gold not be offered to barbarians, but also, if it has been discovered among them, it should be removed by careful ingenuity. If hereafter gold has been transferred by merchants to barbarians for slaves or any other products, they (the merchants) should no longer be subject to fines, but to capital punishment, and if a judge does not avenge this when it is discovered, he is striving to conceal criminal activity as though he were involved in it.

(374?).²⁷⁹

²⁷⁶ Perhaps "Ventidius."

²⁷⁷ Seeck dates to March 9, 336.

²⁷⁸ = C.Th. 13.1.5; combine with C. 1.4.1.

²⁷⁹ Seeck dates to May 21, 374.

[3] *Impp. Honorius et Theodosius AA. Theodoro pp.* Nobiliores natalibus et honorum luce conspicuos et patrimonio ditiores perniciosum urbibus mercimonium exercere prohibemus, ut inter plebeium et negotiatorem facilius sit emendi vendendique commercium.

D.

[4] *Idem AA. Anthemio pp. pr.* Mercatores tam imperio nostro quam Persarum regi subiectos ultra ea loca, in quibus foederis tempore cum memorata natione nobis convenit, nundinas exercere minime oportet, ne alieni regni, quod non convenit, scrutentur arcana. 1. Nullus igitur posthac imperio nostro subiectus ultra Nisibin Callinicum et Artaxata emendi sive vendendi species causa proficisci audeat nec praeter memoratas civitates cum Persa merces existimet commutandas: sciente utroque qui contrahit et species, quae praeter haec loca fuerint venundatae vel comparatae, sacro aerario nostro vindicandas et praeter earum ac pretii amissionem, quod fuerit numeratum vel commutatum, exilii se poenae sempiternae subdendum.

2. Non defutura contra iudices eorumque apparitiones per singulos contractus, qui extra memorata loca fuerint agitati, triginta librarum auri condemnatione, per quorum limitem ad inhibita loca mercandi gratia Romanus vel Persa commeaverit.

3. Exceptis videlicet his, qui legatorum Persarum quolibet tempore ad nostram clementiam mittendorum iter comitati merces duxerint commutandas, quibus humanitatis et legationis intuitu extra praefinita etiam loca mercandi copiam non negamus, nisi sub specie legationis diutius in qualibet provincia residentes nec legati reditum ad propria comitentur. hos enim mercaturae insistentes non immerito una cum his, cum quibus contraxerint, cum resederint, poena huius sanctionis persequetur.

[3] *Emperors HONORIUS and THEODOSIUS Augusti to Theodorus, Praetorian Prefect.* We prohibit those who are noble by birth, conspicuous by the splendor of their offices, and very wealthy by their patrimony from engaging in commerce pernicious to the cities, so that the market for buying and selling between the plebeian and the businessman be easier.

Given (408 or 409).²⁸⁰

[4] *The same Augusti to Anthemius, Praetorian Prefect.* pr. Merchants subject both to Our empire as well as to the king of the Persians should not hold periodic markets (*nundinae*) beyond those places in which it was agreed upon by Us (to do so) at the time of the treaty with the aforesaid nation,²⁸¹ lest the secrets of a foreign kingdom be found out, which is inappropriate. 1. Therefore no one hereafter subject to Our empire should dare to set out beyond Nisibis, Callinicum, and Artaxata for the sake of buying and selling merchandise (*species*), nor should he think of exchanging merchandise with a Persian except in the cities mentioned. Each of the parties to the contract should be aware both that products that were sold or purchased in places other than these are to be claimed for Our Sacred Treasury, and that, in addition to the loss of the goods or the price for which they were paid or, they are to undergo the eternal punishment of exile.

2. The condemnation of 30 pounds of gold for individual contracts that have been executed outside of the places mentioned will not be lacking against judges and their subordinates (*apparitiones*) through whose territory a Roman or Persian has gone to prohibited places to conduct commerce.

3. However, these people are exempted, who, accompanying the journey of Persian ambassadors to be sent to Our Clemency at any time, will have brought merchandise to exchange. To these, out of respect for kindness and the embassy, We do not deny the opportunity of trading even outside of the prescribed places, except if, under the pretext of an embassy, they should remain too long in any province and not accompany the return journey of the ambassador to his own territory. For the punishment of this sanction will not undeservedly fall on those insisting on commerce when they have stayed behind, along with those with whom they have contracted.

(408 or 409).²⁸²

²⁸⁰ Seeck dates to October 16, 408.

²⁸¹ The terms of this treaty resemble one concluded between Diocletian and the Sassanian king Narseh in 298 (see Petrus Patricius, fr. 14); but it is probably later, connected to a thaw in relations at the time that the Persian king Yazdgerd was the guardian of Theodosius II.

²⁸² Seeck dates to March 23, 409.

[5] *Idem AA. Aetio pu.* Cessante omni ambitione, omni licentia quingentorum sexaginta trium collegiatorum numerus maneat nullique his addendi mutandive vel in defuncti locum substituendi pateat copia, ita ut iudicio tuae sedis sub ipsorum praesentia corporatorum in eorum locum, quos humani subtraxerint casus, ex eodem quo illi fuerant corpore subrogentur: nulli alii corporatorum praeter praedictum numerum per patrocinia immunitate concessa.

D. XII k. Sept. Eudoxiopoli Honorio VIII et Theodosio III AA. cons.

[6] *Idem AA. Maximino comiti sacrarum largitionum. pr.* Si qui inditas nominatim vetustis legibus civitates transgredientes ipsi vel peregrinos negotiatores sine comite commerciorum suscipientes fuerint deprehensi, nec proscriptionem bonorum nec poenam perennis exilii ulterius evadent. *1.* Ergo omnes pariter, sive privati seu cuiuspiam dignitatis sive in militia constituti, sciant sibi aut ab huiusmodi temeritate penitus abstinendum aut supra dicta supplicia subeunda.

LXIII De Rerum Permutatione et de Praescriptis Verbis Actione

[1] *Imp. Gordianus A. Thraseae militi.* Si, cum patruus tuus venalem possessionem haberet, pater tuus pretii nomine, licet non taxata quantitate, aliam possessionem dedit idque quod comparavit non iniuria iudicis nec patris tui culpa evictum est, ad exemplum ex empto actionis non immerito id quod tua interest, si in patris iura successisti, consequi desideras. at enim si, cum venalis possessio non esset, permutatio facta est idque, quod ab adversario praestitum est, evictum est, quod datum est (si hoc elegeris) cum ratione restitui postulabis.

D. VIII id. Nov. Pio et Pontiano cons.

[5]²⁸³ *The same Augusti to Aetius, City Prefect.* Let all ambition and license cease: the number of the 563 members of the guild²⁸⁴ should remain fixed, and and no one shall have power to add to or to change this number or to substitute others for those who have died, so that, in accordance with the judgment of Your Seat and in the presence of the members of the corporation (*corporatores*) themselves, replacements be supplied, in the place of those whom human circumstances have taken away, from the same corporation in which they had been members. No other guild member beyond the prescribed number shall be granted exemption from liturgies through patronage.

Given August 21, at Eudoxiopolis, in the consulship of Honorius, for the eighth time, and Theodosius, for the third time, Augusti (409).

[6] *The same Augusti to Maximus, Count of the Imperial Finances.* **pr.** If any people have been caught themselves crossing through the cities mentioned by name in the ancient laws or receiving foreign businessmen without (the consent of) the Count of External Trade, they will no longer evade proscription of their goods and the punishment of perpetual exile. **1.** Therefore everyone equally, whether of private station or established in any rank (*dignitas*) or in the military, should know that they must abstain completely from such temerity or undergo the aforementioned punishments.²⁸⁵

Sixty-Fourth Title Exchange of Property and the Action with Special Terms²⁸⁶

[1] *Emperor GORDIAN Augustus to Thrasesa, a soldier.* If, when your paternal uncle had a property for sale, your father gave a different property as the price even though the (monetary) amount was not calculated, and he (the buyer) was evicted from what he purchased through no injustice on the part of a judge or the fault of your father, if you have succeeded to the rights of your father, you desire not without merit to pursue your interest in an action analogous to that on purchase (*ad exemplum ex empto actionis*). For if, when the property was not for sale, an exchange took place and there was an eviction from what was furnished by your adversary, you will reasonably demand that what was given be restored, if you choose this.

Given October 25, in the consulship of Pius and Pontianus (238).

²⁸³ = C. 1.2.4, in part. Seeck dates to August 21, 420.

²⁸⁴ Blume: "The collegiate here mentioned were the firemen of Constantinople, as shown by the register of the city of Constantinople (*Notitia Dignitatum* ...)."

²⁸⁵ Seeck dates to March 7, 423.

²⁸⁶ *Permutatio* and the *actio praescriptis verbis*; see D. 19.4–5.

[2] *Impp. Diocletianus et Maximianus AA. Primitivae.* Permutationem re ipsa utpote bonae fidei constitutam, sicut commemoras, vicem emptionis obtinere non incogniti iuris est.

[3] *Idem AA. et CC. Barcio Leontio.* Ex placito permutationis re nulla secuta constat nemini actionem competere, nisi stipulatio subiecta ex verborum obligatione quaesierit partibus actionem.

[4] *Idem AA. et CC. Leontio. pr.* Cum precibus tuis expresseris placitum inter te et alium permutationis intercessisse eumque fundum a te datum vendidisse, contra emptorem quidem te nullam habere actionem perspicis, cum ab eo susceperit dominium, cui te tradidisse titulo permutationis non negasti. 1. Secundum fidem autem placiti, si stipulatio subsecuta est, successores eius, cum quo contractum habuisti, convenire non prohiberis: si vero nulla stipulatio intercessit, praescriptis verbis actione, ut vel fides placiti servetur tibi vel, quod alterius accipiendi fundi gratia dedisti, causa non secuta restituatur.

[5] *Idem AA. et CC. Theodolanae.* Quoniam adseris patrem tuum ei contra quem preces fundis ea condicione dedisse fundum, ut invicem domum certam acciperet, aditus praeses provinciae placitis eum parere vel, si causam, propter quam fundus datus est, sequi non perspexerit, conditionis ratione datum restituere, sicut postulas, iubebit.

[6] *Idem AA. et CC. Protogeni.* Rebus certa lege traditis, si huic non pareatur, praescriptis verbis incertam civilem dandam actionem iuris auctoritas demonstrat.

[7] *Idem AA. et CC. Timotheo.* Emptionem rebus fieri non posse pridem placuit. igitur cum frumenti certam modiationem Callimacho et Acamato te dedisse, ut tibi repraesentent olei designatum pondus adseveres, si placitis citra stipulationis sollemnitatem non exhibeant fidem, quantum dedisti, causa non secuta condicere pro desiderio tuo potes.

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Primitiva*. It is not unknown law that by its very nature an exchange of property, since, as you mention, it is based on good faith, has the same legal force as a purchase (*vicem emptionis*).

[3] *The same Augusti and the Caesars to Barcius Leontius*. It is clear that no action is available to anyone when an agreement for exchange is entirely executory, unless an additional stipulation has resulted in an action for the parties on the basis of the obligations arising out of its words.

[4] *The same Augusti and Caesars to Leontius. pr.* Since you have expressed in your petition that an agreement for an exchange arose between yourself and another person and that he sold the farm given by you, you see that you have no action against the purchaser, since he has taken ownership from the person to whom you have not denied that you delivered the farm on the basis of an exchange. 1. However, in accordance with the terms (*fides*) of the agreement, if a stipulation followed, you are not prohibited from suing the successors of the person with whom you had a contract. But if no stipulation was added, (you can sue) in an action on agreements with special terms (*praescriptis verbis actio*), so that either the terms of the agreement be observed for you, or that the farm that you gave in order to receive another one be restored to you since the condition failed.

[5] *The same Augusti and Caesars to Theodolana*. Since you allege that your father gave a farm to the person against whom you are pouring forth your prayers so that in return he receive a certain house, the provincial governor, when approached, will order him to comply with the agreement, or, if he sees that the reason for which the farm was given cannot be fulfilled, to restore what was given on the basis of a claim for restitution (*ratione condictionis*), as you demand.

[6] *The same Augusti and Caesars to Protogenes*. The authority of the law demonstrates that when things have been delivered under a certain condition, if this is not complied with, an indefinite civil law action with special terms (*actio incerta civilis praescriptis verbis*) should be given.

[7] *The same Augusti and Caesars to Timotheus*. It has long ago been decided that a purchase cannot be made with things. Therefore since you allege that you have given a certain amount of grain to Callimachus and Acamatus so that they furnish you in return with a specified weight of oil, if they should not demonstrate faith to an agreement that lacked the formality of a stipulation, you can, in accordance with your desire, make a claim for restitution (*condicere*) of what you have given if the consideration has not ensued.

S. XIII k. Nov. CC. cons.

[8] *Idem AA. et CC. Paulinae.* Ea lege rebus donatis Candido, ut quod placuerat menstruum seu annuum tibi praestaret, cum huiusmodi conventio non nudi pacti nomine censeatur, sed rebus propriis dictae legis substantia muniatur, ad implendum placitum, sicut postulas, praescriptis verbis tibi competit actio.

S. non. Dec. Nicomediae CC. cons.

LXV De Locato et Conducto

[1] *Imp. Antoninus A. Iulio Agrippino.* Dominus horreorum periculum vis maioris vel effracturam latronum conductori praestare non cogitur. his cessantibus si quid extrinsecus ex depositis rebus inlaesis horreis perierit, damnum depositarum rerum sarciri debet.

PP. prid. non. Ian. Antonino A. IIII et Balbino cons.

[2] *Idem A. Epidio Epicteto.* Adversus eos, a quibus extruenda aedificia conduxisti, ex conducto actione consistens eo iudicio quod est bonae fidei debitum cum usuris solitis consequeris.

PP. k. Iul. Romae Antonino A. IIII et Balbino cons.

[3] *Idem A. Flavio Callimorpho.* Diaetae, quam te conductam habere dicis, si pensionem domino insulae solvis, invitum te expelli non oportet, nisi propriis usibus dominus esse necessariam eam probaverit aut corrigere domum maluerit aut tu male in re locata versatus es.

PP. VIII id. Ian. Messala et Sabino cons.

Written October 20, in the consulship of the Caesars (294).

[8]²⁸⁷ *The same Augusti and Caesars to Paulina.* When things have been given to Candidus on the condition that he provide to you what had been agreed upon on a monthly or yearly basis, since an agreement of this type is not counted under the category of a naked pact (*nudum pactum*, a bare agreement unenforceable as a contract) but the substance of the stated condition is supported by (your having delivered) your own property, an action on agreements with special terms is available to you for fulfilling the agreement, as you demand.

Given December 5, at Nicomedia, in the consulship of the Caesars (294).

Sixty-Fifth Title Lease and Hire²⁸⁸

[1]²⁸⁹ *Emperor ANTONINUS Augustus to Julius Agrippinus.* The owner of storehouses is not compelled to be responsible to the lessee for the risk of greater force (*vis maior*) or a break-in by brigands. Absent these conditions, if something from the deposited property has perished from an external cause when the storehouses were not damaged, the loss of the deposited things should be made good.

Posted January 4, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2] *The same Augustus to Epidius Epictetus.* Relying on an action on hire (of a job) against those people from whom you leased the job of constructing buildings, in this trial which is based on good faith you will gain what is owed along with the customary interest.

Posted July 1, at Rome, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[3] *The same Augustus to Flavius Callimorphus.* If you are making the (rental) payment to the owner of the apartment block (*insula*) for the chamber (*diaeta*) that you say you hold under lease, you must not be expelled unwillingly, unless the owner proves that the room is necessary for his own uses or prefers to repair the house, or you have acted badly in the leased property.

Posted January 6, in the consulship of Messala and Sabinus (214).

²⁸⁷ See C. 8.39, where some manuscripts include a rescript from Diocletian to Paulina.

²⁸⁸ *Locatio conductio*; see D. 19.2; Inst. 3.25. This contract includes most exchanges of performance for money, including leases of real and personal property, construction contracts, employment contracts, and so on.

²⁸⁹ = *Collatio* 10.9 where the date is November 2.

[4] *Imp. Alexander A. Arrio Sabino. pr.* Et divi Pii et Antonini^{xv} litteris certa forma est, ut domini horreorum effractorum eiusmodi querelas deferentibus custodes exhibere necesse habeant nec ultra periculo subiecti sint. 1. Quod vos quoque adito praeside provinciae impetra- bitis, qui si maiorem animadversionem exigere rem deprehenderit, ad Domitium Ulpianum praefectum praetorio et parentem meum reos remittere curabit. 2. Sed qui domini horreorum nominatim etiam cus- todiam repromiserunt, fidem exhibere debent.

PP. k. Dec. Alexandro A. cons.

[5] *Idem A. Aurelio Petronio.* Certi iuris est ea, quae voluntate domino- rum coloni in fundum conductum induxerint, pignoris iure dominis praediorum teneri, quando autem domus locatur, non est necessaria in rebus inductis vel illatis scientia domini: nam ea quoque pignoris iure tenentur.

PP. k. Mart. Maximo II et Aeliano cons.

[6] *Idem A. Lucilio Victorino.* Nemo prohibetur rem quam conduxit fruendam alii locare, si nihil aliud convenit.

PP. v k. Mart. Iuliano et Crispino cons.

[7] *Idem A. Septimio Terentiano militi.* Si, cum Hermes vectigal octa- varum in quinquennium conducere, fidem tuam obligasti posteaque spatio eius temporis expleto, cum idem Hermes in conductionem ut idoneus detineretur, non consensisti, sed cautionem tibi reddi postu- lasti, non oportere te posterioris temporis periculo adstringi competens iudex non ignorabit.

PP. v id. Ian. Albino et Maximo cons.

[8] *Idem A. Sabiniano Hygino.* Licet certis annuis quantitibus fundum conduxeris, si tamen expressum non est in locatione aut mos regionis postulat, ut, si qua labe tempestatis vel alio caeli vitio damna accidis- sent, ad onus tuum pertinerent, et quae evenerunt sterilitates ubertate aliorum annorum repensatae non probabuntur, rationem tui iuxta

^{xv} ex divi Pii Antonini

[4] *Emperor ALEXANDER Augustus to Arrius Sabinus. pr.* It is a certain rule in a letter of the deified Antoninus Pius that the owners of storehouses that have been broken into must provide guards to those reporting complaints of this type and are not subject to risk (*periculum*) beyond this. 1. You (plural) too will gain this when you approach the provincial governor. If he notices that the matter requires greater punishment, he will take care to send the criminals to Domitius Ulpianus (Ulpian), the Praetorian Prefect and My parent. 2. But if the owners of the storehouses have expressly promised to provide custody, they ought to show their faith.

Posted December 1, in the consulship of Alexander Augustus (222).

[5] *The same Augustus to Aurelius Petronius.* The law is that what tenants (*coloni*) have brought onto a leased farm with the consent of the owners is held under the right of pledge to the owners of the properties. When, however, a house is leased, the owner's knowledge is not necessary as to the property brought in or carried in (*inducta vel illata*); for they are also held under the right of (tacit) pledge.

Posted March 1, in the consulship of Maximus, for the second time, and Aelianus (223).

[6] *The same Augustus to Lucilius Victorinus.* Concerning property that he has rented, no one is prohibited from leasing it to another person to use (*fruedam*), if nothing else has been agreed upon (in the original contract).

Posted February 26, in the consulship of Julian and Crispinus (224).

[7] *The same Augustus to Septimius Terentianus, a soldier.* If, when Hermes was leasing (collection of) the one-eighth impost (*vectigal octavarum*) for five years, you obligated your faith (as a surety), and afterwards, at the expiration of this period, when the same Hermes was kept in the lease as suitable (i.e., able to meet the financial obligations), you did not agree but demanded that your written promise (*cautio*) be returned to you, a competent judge will not be unaware that you must not be held liable for the risk of the later period.

Posted January 9, in the consulship of Albinus and Maximus (227).

[8] *The same Augustus to Sabinianus Hyginus.* Although you have leased a farm for fixed annual payments, if, however, it has not been expressed in the lease or if the custom of the region does not require that, if any losses had occurred because of the destruction of a storm or another weather problem, they should be your burden, and if the poor crops that have happened will be proved not to

bonam fidem haberi recte postulabis, eamque formam qui ex appellatione cognoscet sequetur.

PP. k. Aug. Pompeiano et Peligno cons.

[9] *Idem A. Aurelio Fusco militi.* Emptori quidem fundi necesse non est stare^{xvi} colonum, cui prior dominus locavit, nisi ea lege emit. verum si probetur aliquo pacto consensisse, ut in eadem conductione maneat, quamvis sine scripto, bonae fidei iudicio ei quod placuit parere cogitur.

PP. vii id. Sept. Maximo II et Urbano cons.

[10] *Imp. Gordianus A. Pomponio Sabino.* Viam veritatis ignoras in conductionibus non succedere heredes conductoris existimans, cum, sive perpetua conductio est, etiam ad heredes transmittatur, sive temporalis, intra tempora locationis heredi quoque onus contractus incumbat.

D. viii k. Mart. Gordiano et Aviola cons.

[11] *Imp. Philippus A. Aurelio Theodoro.* Invitos conductores seu heredes eorum post tempora locationis impleta non esse retinendos saepe rescriptum est.

PP. vi id. Aug. Peregrino et Aemiliano cons.

[12] *Idem A. et Philippus C. Aurelio Nicae.* Damnum, quod per adgressuram latronum in possessionibus locatis rei tuae illatum esse proponis, a domina earundem possessionum, quam nullius criminis ream facere te dicis, sarciri nulla ratione desideras.

PP. iiii k. Nov. Philippo A. et Titiano cons.

[13] *Imp. Valerianus et Gallienus AA. et Valerianus C. Aurelio Heraclidae. pr.* Si divisa conductio fuit et in singulis pro partibus facta, alieno nomine conveniri vos non oportet. si autem omnes qui conducebant in solidum locatori sunt obligati, ius ei competens conveniendi quem velit non debeat auferri. 1. Habetis sane vos facultatem locatori offerendi debitum et, ut transferantur in vos ea, quae ob hanc

^{xvi} <sinere>

have been balanced by the abundant crops of the other years (of the lease), you will rightly demand that your plea (*ratio*) be considered in accordance with good faith, and the judge who will hear the case on appeal will follow this rule.

Posted August 1, in the consulship of Pompeianus and Pelignus (231).

[9] *The same Augustus to Aurelius Fuscus, a soldier.* The purchaser of a farm is indeed not required to allow the tenant to whom a previous owner has leased to remain, unless he buys under this condition. But if he should be proved to have given his consent under some sort of pact that he (the tenant) should remain in the same lease, even without this being in writing, he is compelled in a good-faith judgment to comply with what has been agreed upon.

Posted September 7, in the consulship of Maximus, for the second time, and Urbanus (234).

[10] *Emperor GORDIAN Augustus to Pomponius Sabinus.* You are ignoring the path of truth in thinking that the heirs of a lessee do not succeed him in leases, since, if the lease is perpetual, it is also transmitted to the heirs, or if it is for a fixed period, during the time of the lease the burden of the contract also falls on the heir.

Given February 22, in the consulship of Gordian and Aviola (239).

[11] *Emperor PHILIP Augustus to Aurelius Theodorus.* It has often been stated in rescripts that lessees or their heirs, after the periods of the leases have been completed, are not to be retained against their will.

Posted August 8, in the consulship of Peregrinus and Aemilianus (241).

[12] *The same Augustus and PHILIP Caesar to Aurelius Nica.* You desire without reason that the loss that you state was caused to your goods by an attack of brigands (*latrones*) on properties held under lease be made good by the (female) owner of the same properties, whom you say you are not accusing of any crime.

Posted October 29, in the consulship of Philip Augustus and Titianus (245).

[13] *Emperors VALERIAN and GALLIENUS Augusti and VALERIAN Caesar to Aurelius Heraclides. pr.* If the lease was divided and was made for individuals in accordance with their shares, you (plural) must not be sued in another person's name. If, however, all who were leasing were obligated to the lessor for the whole amount, the right allotted to him (the lessor) to sue whom he wants should not be taken away. 1. You certainly have the opportunity to offer the debt to the lessor and to demand that (a security interest in) the property,

conductionem ab his quorum nomine inquietamini obligata sunt, postulandi.

PP. VIII id. Mart. Aemiliano et Basso cons.

[14] *Idem AA. et C. Aurelio Iulio.* Si hi, qui a vobis redemerant frumentum et hordeum annonae inferendum, accepta pecunia fidem fefellerunt, ex locato agere cum his potestis.

PP. VIII k. Ian. Aemiliano et Basso cons.

[15] *Idem AA. et C. Aureliae Euphrosynae.* Si fundo a locatore expulsa es, agere ex conducto potes poenamque, quam praestari rupta conventionis fide placuit, exigere ac retinere potes.

PP. id. Aug. Aemiliano et Basso cons.

[16] *Idem AA. et C. Aurelio Timotheo.* Legem quidem conductionis servari oportet nec pensionum nomine amplius quam convenit reposci. sin autem tempus, in quo locatus fundus fuerat, sit exactum et in eadem locatione conductor permanserit, tacito consensu eandem locationem una cum vinculo pignoris renovare videtur.

PP. IIII k. Aug. Saeculare II et Donato cons.

[17] *Impp. Diocletianus et Maximianus AA. Hostilio Hectario.* Praeses provinciae ea quae ex locatione debentur exsolvi sine mora curabit, non ignarus ex locato et conducto actionem, cum sit bonae fidei, post moram usuras legitimas admittere.

PP. xv k. April. Diocletiano IIII et Maximiano III AA. cons.

[18] *Idem AA. Annio Ursino.* Excepto tempore, quo edaci lucustarum pernicie sterilitatis vitium incessit, sequentis temporis fructus, quos tibi iuxta praeteritam consuetudinem deberi constiterit, reddi tibi praeses provinciae iubebit.

PP. XI k. Oct. ipsis IIII et III AA. cons.

which was obligated on account of this lease by these people in whose name you are troubled, be transferred to you.

Posted March 8, in the consulship of Aemilianus and Bassus (259).

[14] *The same Augusti and Caesar to Aurelius Julius.* If these people have undertaken by contract (*redemerant*) with you (plural) (the job of) delivering grain and barley to the *annona* (food supply), and they have failed to keep faith after receiving the money, you can sue them on lease.

Posted December 25, in the consulship of Aemilianus and Bassus (259).²⁹⁰

[15] *The same Augusti and Caesar to Aurelia Euphrosyna.* If you have been expelled from the farm by the lessor, you can sue on hire, and you can exact and keep the penalty (*poena*) that was agreed to be provided on breaking the terms of the agreement.

Posted August 13, in the consulship of Aemilianus and Bassus (259).

[16] *The same Augusti and Caesar to Aurelius Timotheus.* The terms of the lease must be observed and nothing more should be demanded as rent than what has been agreed upon. But if the time in which the farm had been leased should be completed and the tenant has remained in the same lease, he is seen to renew the same lease, along with his pledge bond, by his tacit agreement (*tacito consensu*).

Posted July 29, in the consulship of Saecularis, for the second time, and Donatus (260).

[17] *Emperors DIOCLETIAN and MAXIMIAN to Hostilius Hectarius.* The provincial governor will take care that what is owed from the lease be paid without delay, and he will not be unaware that the action on lease and hire, since it is one of good faith, allows legal interest after delay (*mora*).

Posted March 18, in the consulship of Diocletian, for the fourth time, and Maximian, for the third time, Augusti (290).

[18] *The same Augusti to Annius Ursinus.* Except for the time in which the defect of a poor harvest (*vitium sterilitatis*) occurred because of a devouring plague of locusts, the provincial governor will order that there be given to you the crops of the following period that have been established as owed to you in accordance with past custom.

Posted September 21, in the consulship of (the Augusti) themselves, Consuls for the fourth and third time, respectively (290).

²⁹⁰ Or possibly May 25 (favored by Krüger).

[19] *Idem AA. et CC. Iulio Valentino.* Circa locationes atque conductiones maxime fides contractus servanda est, si nihil specialiter exprimatur contra consuetudinem regionis, quod si alii remiserunt contra legem contractus atque regionis consuetudinem pensiones, hoc aliis praeludicium non possit adferre.

S. v k. Mai. Heracleae AA. cons.

[20] *Idem AA. et CC. Aurelio Carpophoro.* Qui rem propriam conduxit existimans alienam, dominium non transfert, sed inefficacem conductionis contractum facit.

S. III k. Mart. Heracleae AA. cons.

[21] *Idem AA. et CC. Antoniae.* Si olei certa ponderatione fructus anni locasti, de contractu bonae fidei habito propter hoc solum, quod alter maiorem obtulit ponderationem, recedi non oportet.

D. VIII id. Oct. Sirmi AA. cons.

[22] *Idem AA. et CC. Papiniano.* Si hi, contra quos supplicas, facta locatione temporis certi suas tibi locaverint operas, quatenus bona fides patitur, causa cognita competens iudex conventionem servari iubebit.

[23] *Idem AA. et CC. Aurelio Prisco.* Ad probationem rei propriae sive defensionem non sufficit locatio ei facta, qui post de dominio coeperit contendere, cum nescientia domini proprii et errantis nullum habeat consensum: sed ex eventu, si victus fuerit, contractus locationis non constituisse magis declaratur. nemo enim sibi iure possessionem mutare potest.

[24] *Idem AA. et CC. Aurelio Antonino.* Contractus locationis conductionisque non intervenientibus etiam instrumentis ratus habeatur:

[19] *The same Augusti and Caesars to Julius Valentinus.* In leasing and hiring (*circa locationes atque conductiones*) the terms of the contract (*fides contractus*) are especially to be observed, if nothing specific should be expressed against the custom of the region. But if some persons have remitted rent payments contrary to the terms of the contract and the custom of the region, this should not be able to prejudice the claims of others.

Written April 27, at Heraclea, in the consulship of the Augusti (293).

[20] *The same Augusti and Caesars to Aurelius Carpophorus.* Whoever has leased his own property thinking it belongs to another does not transfer ownership, but makes the contract for hire ineffectual.

Written February 27, at Heraclea, in the consulship of the Augusti (293).

[21] *The same Augusti and Caesars to Antonia.* If you have leased out the year's harvest in exchange for a certain weight of oil, one must not withdraw from a contract made in good faith for the sole reason that another has offered a greater weight.

Given October 8, at Sirmium, in the consulship of the Augusti (293).²⁹¹

[22] *The same Augusti and Caesars to Papinianus.* If these people against whom you are petitioning have leased their labor services (*operae*) to you under a lease made for a certain period, a competent judge, on hearing the case, will order that the agreement be maintained to the extent that good faith allows.

(293).

[23] *The same Augusti and Caesars to Aurelius Priscus.* For proving or defending that property is one's own a lease made with a person (a tenant) who afterwards has begun to contest its ownership does not suffice, since the lack of knowledge over one's ownership and of a person in error does not produce a consensus. But, in accordance with the outcome, if he (the lessor) has been defeated (in the suit on ownership), the contract for lease is rather declared not to have existed. For no one can lawfully change possession for himself.²⁹²

(293).

[24] *The same Augusti and Caesars to Aurelius Antoninus.* A contract for lease and hire, even without prepared documents, should be considered valid. In

²⁹¹ Mommsen dates to April 28, 293.

²⁹² Blume: "Here a lessee first gave up possession in accordance with law 25 h.t. and then brought a real action to recover. Proof of the lease was itself not sufficient to show that the former lessee was not owner or that the former lessor was owner."

secundum quod heredes conductoris, etsi non intervenerint instrumenta, non uxorem convenire debes. sane de posteriore tempore, quo conductricem ipsam proponis fuisse, adesse fidem precibus tuis probans pensiones integras ab ea pete.

PP. VIII k. Ian. AA. cons.

[25] *Idem AA. et CC. Aurelio Epagatho.* Si quis conductionis titulo agrum vel aliam quamcumque rem accepit, possessionem debet prius restituere et tunc de proprietate litigare.

III k. Ian. Sirmi AA. cons.

[26] *Idem AA. et CC. Aurelio Opilioni et Hermio.* Si conductionis implestis fidem, eius rei gratia factum instrumentum evanuit. quod si quid vestrum in fundo fuit vel vi direptum est, hoc restitui vobis praeses provinciae iubebit.

D. III k. Mai. CC. cons.

[27] *Idem AA. et CC. Maximiano Agopodi.* Si tibi quae pro colonis conducti praedii prorogasti dominus fundi stipulanti dare spondit, competens iudex reddi tibi iubebit. nam si conventio placiti fine stetit, ex nudo pacto perspicis actionem iure nostro nasci non potuisse.

[28] *Idem AA. et CC. Tusciano Neoni.* In iudicio tam locati quam conducti dolum et custodiam, non etiam casum, cui resisti non potest, venire constat.

D. XV k. Oct. CC. cons.

[29] *Idem AA. et CC. Aurelio Iuliano.* Cum conductorem aedificia, quae suscepit integra, destruxisse proponas, haec heredes etiam eius praeses provinciae instaurare aedificiorum inter vos habita ratione iubebit.

[30] *Impp. Theodosius et Valentinianus AA. Florentio pp.* Curialis neque procurator neque conductor alienarum rerum nec fideiussor

accordance with this, even if there have not been documents prepared, you ought to sue the heirs of the lessee, and not his wife. Certainly if you prove that there is truth in your petition for the latter period in which you state that she herself was the lessee, seek payment in full from her.

Posted December 25, in the consulship of the Augusti (293).

[25] *The same Augusti and Caesars to Aurelius Epagathus.* If anyone has received land or anything else under a lease, he should first restore possession and then litigate about ownership.

December 30, at Sirmium, in the consulship of the Augusti (293).

[26] *The same Augusti and Caesars to Aurelius Opilio and Hermius.* If you have fulfilled the terms (*fides*) of the lease, the document made for that purpose has become void. But if something of yours was on the farm or has been carried off by force, the provincial governor will order that it be restored to you.

Given April 29 in the consulship of the Caesars (294).

[27] *The same Augusti and Caesars to Maximianus Agopodes.* If the owner of the farm has promised by stipulation to give to you what you have advanced on behalf of the tenants of a property held under lease, a competent judge will order it to be returned to you. For (on the other hand) if the agreement stood at the end of an informal agreement (*placitum*),²⁹³ you see that an action on a naked pact could not have arisen by Our law.

(294).

[28] *The same Augusti and Caesars to Tuscianus Neo.* It is agreed that in a judgment for both lease and hire, deceit (*dolus*) and safekeeping (*custodia*) are taken into account (in evaluating a party's performance), but not an accident (*casus*) that cannot be resisted.

Given September 17, in the consulship of the Caesars (294).

[29] *The same Augusti and Caesars to Aurelius Julian.* Since you state that the lessee has demolished the buildings which he took in good condition, the provincial governor will order his heirs as well to restore these after making an accounting between you for the buildings.

[30]²⁹⁴ *Emperors THEODOSIUS and VALENTINIAN Augusti to Florentius, Praetorian Prefect.* A decurion (*curialis*) should not be a procurator or a lessee

²⁹³ Blume translates: "But if the contract consists of an informal agreement only (*placitum*)."

²⁹⁴ = Nov. Theod. 9; combine with C. 1.14.5.

aut mandator conductoris existat. alioquin nullam obligationem neque locatori neque conductori ex huiusmodi contractu competere sancimus.

D. vii id. April. Constantinopoli Theodosio A. xvii et Festo cons.

[31] *Imp. Leo A. Aspari magistro militum.* Milites nostros alienarum rerum conductores seu procuratores aut fideiussores vel mandatores conductorum fieri prohibemus, ne omisso armorum usu ad opus rurestre se conferant et vicinis graves praesumptione cinguli militaris existant. armis autem, non privatis negotiis occupentur, ut numeris et signis suis iugiter inhaerentes rem publicam, a qua aluntur, ab omni bellorum necessitate defendant.

D. prid. non. Iul. Constantinopoli Leone A. cons.

[32] *Imp. Zeno A. Adamantio pu. pr.* Ne cui liceat, qui aliquam domum alienam vel locum aut ergasterium nomine conductionis accepit, alteri, qui post eum domini voluntate ad eandem conductionem accessit, litem inferre, quasi rem illicitam aut agenti damnosam temptaverit, sed patere facultatem dominis domos suas vel ergasteria vel loca cui voluerint locandi, ipsis nihilo minus qui conduxerint ab omni super hoc molestia liberis conservandis: nisi forte pacta per scripturam specialiter inita cum dominis vel cum his qui postea conduxerunt, legibus videlicet cognita, agentis intentionibus suffragantur. 1. Quod si quis huiusmodi controversiam sacris iussionibus interdictam crediderit commovendam, si privatus est, acriter caesus exilii subeat poenam, si militat, decem librarum auri dispendio feriat.

[33] *Imp. Zeno A. Sebastiano pp.* Conductores rerum alienarum seu alienam cuiuslibet rei possessionem precario detinentes seu heredes eorum, si non eam dominis recuperare volentibus restituerint, sed litem usque ad definitivam sententiam expectaverint, non solum rem locatam, sed etiam aestimationem eius victrici parti ad similitudinem invasoris alienae possessionis praebere compellantur.

D. v k. April. Constantinopoli Theoderico cons.

(conductor) of someone else's property, or a surety or a mandator of a lessee. Indeed, We ordain that no obligation arise either to a lessor or a lessee from a contract of this type.

Given April 7, at Constantinople, in the consulship of Theodosius Augustus, for the seventeenth time, and Festus (439).

[31]²⁹⁵ *Emperor LEO Augustus to Asparis, Master of Soldiers.* We forbid Our soldiers from becoming lessees of other people's property, procurators, sureties, or mandators of lessees, lest, neglecting the use of their weapons, they turn to rural work and become oppressive to their neighbors on the presumption of their military rank (*cingulum*). They should rather be occupied with their weapons, not with private business, so that, remaining with their units (*numeri*) and standards, together they might defend the State, by which they are nourished, from all necessity of wars.

Given July 6, at Constantinople, in the consulship of Leo Augustus (458).

[32] *Emperor ZENO Augustus to Adamantius, City Prefect. pr.* No one who has received another's house, plot of land (*locus*), or workshop in a lease should be able to bring a lawsuit against another who has come to the same lease after him at the wish of the owner, as if he has attempted something illegal or harmful to the person bringing the suit; but the capacity should be open to owners to lease their houses, workshops, or plots of land to whom they wish. Those people who have leased are no less to be kept free from any trouble on this account; unless perchance agreements, that is, ones recognized by the laws, specifically entered into in writing with the owners or with those who have leased afterwards, should support the claims of the plaintiff. 1. But if someone believes that a controversy of this type, (although) forbidden by sacred orders, must be raised, (then) if he is a private person, after having been severely beaten he shall undergo the penalty of exile; if he is in service, he shall be struck with the expenditure of 10 pounds of gold.²⁹⁶

[33]²⁹⁷ *The same Augustus to Sebastianus, Praetorian Prefect.* The lessees of other people's property, or those holding on sufferance (*precario*) the possession belonging to another of any type of thing, or their heirs, if they have not restored it to the owners wishing to take it back, but have waited on a lawsuit up to a final verdict (*definitiva sententia*), shall be compelled to provide not just the property leased, but also its appraised value to the victorious party, as in a case in which someone invades another's property.

Given March 28, at Constantinople, in the consulship of Theoderic (484).

²⁹⁵ Combine with C. 12.35.25.

²⁹⁶ Lounghis *et al.* date to between 476 and 479.

²⁹⁷ = C. 8.4.10 *pr.*, entirely reworded.

[34] Ἐκατέρῳ ἡ διάταξις ἐπιτρέπει καὶ τῷ μισθώσαντι καὶ τῷ μισθωσαμένῳ ἐξεῖναι ἐντὸς ἐνιαυτοῦ λύειν τὴν μίσθωσιν καὶ ἐν Ἰταλίᾳ καὶ ἐν πάσαις ταῖς ἐπαρχίαις, καὶ μὴ διδόναι πρόστιμον ὥς ἐκ παραβασίας, εἰ μὴ ἄρα ἐν ἀρχῇ τοῦ συναλλάγματος ἀπετόξαντο ἰδικῶς τῷ τοιοῦτῳ συμφώνῳ ἢ ἀγράφως ἀπεῖπον.

[35] *Imp. Iustinianus A. ad senatum. pr.* Licet retro principes multa de militibus, qui alienas possessiones vel domus conductionis titulo procurandas suscipiunt, sanxisse manifestum est, tamen quia res sic est contempta, ut neque interminationis sacratissimae constitutionis milites memores ad huiusmodi sordida audeant venire ministeria et relictis studiis publicis signisque victricibus ad conductiones alienarum rerum prosilire et armorum atrocitatem non in hostes ostendere, sed contra vicinos et forsitan adversus ipsos miseros colonos, quos procurandos susceperunt, convertere, necessarium duximus ad hanc sacratissimam venire constitutionem altius et plenius huiusmodi causam corrigentes.

1. Iubemus itaque omnes omnino, qui sub armis militant, sive maiores sive minores (milites autem appellamus eos, qui tam sub excelsis magistris militum tolerare noscuntur militiam quam in undecim devotissimis scholis taxati sunt, nec non eos, qui sub diversis optionibus foederatorum nomine sunt decorati) saltem in posterum ab omni conductione alienarum rerum temperare scituros, quod ex ipso contractus initio sine aliquo facto vel aliqua sententia cadant militia et non sit regressus eis ad pristinum gradum neque a beneficio imperiali neque a consensu vel permissu iudicis, sub quo tolerandam sortiti sunt militiam: ne, dum alienas res conductionis titulo esse gubernandas existimant, suas militias suamque opinionem amittant, ex militibus pagani, ex decoratis infames constituti: et quod post huiusmodi conductionem, quam penitus interdiximus, a publico susceperint, et hoc sine aliqua mora vel procrastinatione reddere compellantur.

2. Scituris et ipsis, qui suas facultates post hanc legem eis ad conductionem permiserint nostra lege eorum conamine violata, quod nulla eis exactio contra eos concedatur, ut, qui alieni appetens constitutus militem procuratorem elegerit, et suis cadat redditibus.

[34]²⁹⁸ The constitution grants permission to both the lessor and the lessee to cancel within a year the lease both in Italy and in all the provinces, and not to pay a penalty as if for non-observance of the lease, unless at the beginning of the contract they have specifically bargained this away with such a pact or refused this without writing.

[35] *Emperor JUSTINIAN Augustus to the Senate. pr.* Although it is clear that emperors in the past have made many ordinances about soldiers who have taken up the management of other people's properties or houses under a lease, nevertheless because the matter has been so scorned that soldiers, not mindful of the threat of punishment in the most sacred constitution, dare to come to such sordid jobs and, abandoning their public pursuits and their victorious standards, to jump into leases of other people's property and not to show the ferocity of their weapons against the enemy, but to turn them against their neighbors and perhaps the very wretched bound tenants (*coloni*) whose management they have undertaken, We have considered it necessary to come to this most sacred constitution to correct this type of case rather deeply and fully.

1. Therefore We order that all those who serve under arms, whether of greater or lesser rank – We call soldiers both those who are known to tolerate service under the high Masters of Soldiers (*excelsi magistri*) and those who are counted in the eleven most devoted corps (*scholae*), as well as those who have been decorated as allies under diverse officials (*optiones*) – in the future to refrain completely from every lease of property belonging to another. They will know that, from the very outset of a contract, without an act or a verdict, they shall fall from military service and have no return to their old rank, either by an imperial benefit or by the agreement or permission of the judge under whom they have gained the toleration of military service, lest, while they think that they should manage the affairs of others under a lease, they lose their own military service and their assessment (*opinio*), having become civilians instead of soldiers, infamous instead of decorated. And, after a lease of this type, which We have utterly forbidden, they should be compelled to return without any delay or procrastination what they have taken from the public treasury.

2. They themselves, who have permitted their wealth to these people for a lease after Our law, when they have violated it by their effort, will know that no right of exaction is conceded to them against them (the lessees), so that a person who, in the role of someone of seeking another's property, has chosen a soldier as a procurator, should also lose his own income.

²⁹⁸ Bas. 20.1.95; a shorter version exists in Epit. 7.21.

3. Pateat autem omnibus huiusmodi copia apud competentes iudices accusationis, ut, qui in hac causa delator existat, laudandus magis quam vituperandus intellegatur: poena, quam contra milites nostrorum praeceptorum contemptores et ipsos, qui eis conductionem rerum ad se pertinentium permiserint, statuimus, in futuris causis obtinente.

LXVI De Emphyteutico Iure

[1] *Imp. Zeno A. Sebastiano pp.* Ius emphyteuticarium neque conductionis neque alienationis esse titulis addicendum, sed hoc ius tertium sit constitutum ab utriusque memoratorum contractuum societate seu similitudine separatum, conceptionem definitionemque habere propriam et iustum esse validumque contractum, in quo cuncta, quae inter utrasque contrahentium partes super omnibus vel etiam fortuitis casibus pactionibus scriptura interveniente habitis placuerint, firma illibataque perpetua stabilitate modis omnibus debeant custodiri: ita ut, si interdum ea, quae fortuitis casibus sicut eveniunt, pactorum non fuerint conventionem concepta, si quidem tanta emergerit clades, quae prorsus ipsius etiam rei quae per emphyteusin data est facit interitum, hoc non emphyteuticario, cui nihil reliquum mansit, sed rei domino, qui quod fatalitate ingruerat, etiam nullo intercedente contractu habiturus fuerat, imputetur: sin vero particulare vel aliud leve damnum contigerit, ex quo non ipsa rei penitus laedatur substantia, hoc emphyteuticarius suis partibus non dubitet adscribendum.

[2] *Imp. Iustinianus A. Demostheni pp. pr.* In emphyteuticariis contractibus sancimus, si quidem aliae pactiones in emphyteuticis instrumentis fuerint conscriptae, easdem et in aliis omnibus capitulis observari et de reiectione eius qui emphyteusin suscepit, si solitam pensionem vel publicarum functionum apochas non praestiterit.

1. Sin autem nihil super hoc capitulo fuerit pactum, sed per totum triennium neque pecunias solverit neque apochas domino tributorum reddiderit, volenti ei licere eum a praediis emphyteuticariis repellere:

3. The opportunity to make an accusation of this type should be open to everyone before competent judges, so that the person who is an informer in this case should be understood as worthy of praise rather than vituperation. The punishment that We have established against soldiers scorning Our precepts and against those very people who have allowed them a lease for property belonging to themselves will apply in future cases.²⁹⁹

Sixty-Sixth Title Emphyteutic Right³⁰⁰

[1] *Emperor ZENO Augustus to Sebastianus, Praetorian Prefect.* The emphyteutic right should not be added to the categories of leasing and alienation, but this should be established as a third legal right (*ius*) and be separated from a relationship with or a similarity to either of the contracts mentioned. It has its own conception and definition and is a lawful and valid contract, in which everything that has been agreed upon in writing between both contracting parties over all contingencies including even unavoidable accidents should be maintained in all ways firm and unchanged with perpetual stability, so that, if at some time those things that happen as a result of unavoidable accidents have not been provided for in the terms of the pacts, if indeed such a catastrophe arises that it causes the loss of the very property which has been given through an emphyteutic lease (*emphyteusis*), they be charged not to the holder of an *emphyteusis* (*emphyteuticarius*), for whom nothing has remained, but to the owner of the property, who would have incurred what happened as a result of the disaster even without any contract intervening. But if a particular or other moderate loss happens, as a result of which the very substance of the property is not completely damaged, the emphyteuticary might not hesitate to have this reckoned to his account.

(476-484).³⁰¹

[2] *Emperor JUSTINIAN Augustus to Demosthenes, Praetorian Prefect. pr.* In emphyteutic contracts We ordain that, if other agreements have been included in emphyteutic documents, these same ones (agreements) be observed both in all other provisions and especially with regard to ejecting the person who has undertaken the emphyteutic lease (*emphyteusis*) if he has not provided the customary rent or the receipts for public dues.

1. If, however, no agreement has been made for this provision, but he has not paid the money for an entire three-year period and has not returned receipts to the owner for taxes, if the latter wishes he may eject him from the emphyteutic

²⁹⁹ Possibly dated to July 22, 530; so also Lounghis *et al.*

³⁰⁰ *Emphyteusis* is a long-term lease of land, in which the tenant has some property rights less than ownership.

³⁰¹ Lounghis *et al.* date to between 476 and 480 or 484.

nulla ei adlegatione nomine meliorationis vel eorum quae empone-mata dicuntur vel poenae opponenda, sed omnimodo eo, si dominus voluerit, repellendo neque praetendente, quod non est super hac causa inquietatus, cum neminem oportet conventionem vel admonitionem expectare, sed ultro sese offerre et debitum spontanea voluntate persolvere, secundum quod et anteriore lege nostri numinis generaliter cautum est.

2. Ne autem ex hac causa dominis facultas oriatur emphyteutas suos repellere et redditum minime velle suscipere, ut ex huiusmodi machinatione triennio elapso suo iure is qui emphyteusin suscepit cadat, licentiam ei concedimus attestatione praemissa pecunias offerre hisque obsignatis et secundum legem depositis minime deiectionis timere periculum.

D. xv k. Oct. Chalcedone Decio vc. cons.

[3] *Idem A. Iuliano pp. pr.* Cum dubitabatur, utrum emphyteuta debeat cum domini voluntate suas meliorationes, quae Graeco vocabulo emponemata dicuntur, alienare vel ius emphyteuticum in alium transferre, an eius^{xvii} expectare consensum, sancimus, si quidem emphyteuticum instrumentum super hoc casu aliquas pactiones habeat, eas observari: sin autem nullo modo huiusmodi pactio posita est vel forte instrumentum emphyteuseos perditum est, minime licere emphyteutae sine consensu domini suas meliorationes aliis vendere vel ius emphyteuticum transferre.

1. Sed ne hac occasione accepta domini minime concedant emphyteutas suos accipere pretia meliorationum quae invenerint, sed eos deludant et ex hoc commodum emphyteutae depereat, disponimus attestationem domino transmitti et praedicere, quantum pretium ab alio re vera accipit. 2. Et si quidem dominus hoc dare maluerit et tantam praestare quantitatem, quantam ipsa veritate emphyteuta ab alio accipere potest, ipsum dominum omnimodo haec comparare.

3. Sin autem duorum mensuum spatium fuerit emensum et dominus hoc facere noluerit, licentia emphyteutae detur, ubi voluerit, et sine consensu domini suas meliorationes vendere, his tamen personis, quae non solent in emphyteuticis contractibus vetari ad huiusmodi venire

^{xvii} <non>

property; and he (the holder of an *emphyteusis*) is not to oppose any claim over improvements or what are called *emponemata* (agricultural improvements) or over a penalty. Rather, he is to be utterly rebuffed, if the owner wishes, and he has no claim that he has not been warned over this matter, since no one should await a lawsuit or a warning, but should offer himself of his own accord and pay his debt with his spontaneous will in accordance with what has been generally provided for in a previous law of Our Divine Majesty.³⁰²

2. Lest, however, it become easier for owners on this account to repel their emphyteutic leaseholders (*emphyteuta*) and be unwilling to receive the income, so that, as a result of such scheming, after the lapse of a three-year period the person who has undertaken an emphyteutic lease (*emphyteusis*) lose his right, We grant him permission, having provided testimony before witnesses, to tender the money and, after it is sealed and deposited in accordance with the law, not to fear the danger of expulsion.

Given September 17, at Chalcedon, in the consulship of the vir clarissimus Decius (529).

[3] *The same Augustus to Julian, Praetorian Prefect. pr.* Since there was a question whether an emphyteutic leaseholder (*emphyteutes*) should, with the consent of the owner, alienate his own improvements, which are called by their Greek term *emponemata* (agricultural improvements), or transfer the emphyteutic right to another, or whether he should not await (the owner's) consent, We ordain that, if the emphyteutic document should include any provisions for this contingency, they be observed. If, however, a provision of this type has in no way been included, or by chance the document of the emphyteutic lease has been lost, the emphyteutic leaseholder should not be permitted to sell his own improvements to others without the owner's consent or to transfer the emphyteutic right.

1. But lest owners take this opportunity and not allow their emphyteutic leaseholders to receive the prices for improvements that they have made, but cheat them so that, as a result, the benefit for the emphyteutic leaseholder be lost, We dispose that that a sworn attestation be transmitted to the owner and that he (the emphyteutic leaseholder) declare how great a price he is truthfully receiving from another person. 2. And if the owner prefers to give this and to offer the amount that the emphyteutic leaseholder is in fact able to receive from another, the owner himself should purchase these by all means.

3. If, however, the period of two months has passed and the owner has been unwilling to do this, permission shall be given to the emphyteutic leaseholder to sell his improvements when he wants and without the consent of the

³⁰² C. 8.37.12.

emptionem: necessitatem autem habere dominos, si aliis melioratio secundum praefatum modum vendita sit, accipere emphyteutam vel, ius emphyteuticum ad personas non prohibitas sed concessas et idoneas ad solvendum emphyteuticum canonem transponere si emphyteuta maluerit, non contradicere, sed novum emphyteutam in possessionem suscipere, non per conductorem nec per procuratorem, sed ipsos dominos per se vel per litteras suas vel, si hoc non potuerint vel noluerint, per depositionem in hac quidem civitate apud virum clarissimum magistrum censuum vel praesentibus tabulariis per attestationem, in provinciis autem per praesides vel defensores celebrandam. 4. Et ne avaritia tenti domini magnam molem pecuniarum propter hoc efflagitent, quod usque ad praesens tempus perpetrari cognovimus, non amplius eis liceat pro subscriptione vel depositione nisi quinquagesimam partem pretii vel aestimationis loci, qui ad aliam personam transfertur, accipere.

5. Sin autem novum emphyteutam vel emptorem meliorationis suscipere minime dominus maluerit et attestatione facta intra duos menses hoc facere supersederit, licere emphyteutae et non consentientibus dominis ad alios ius suum vel emponemata transferre. 6. Sin autem aliter fuerit versatus, quam nostra constitutio disposuit, iure emphyteutico cadat.

D. xv k. April. Constantinopoli Lampadio et Oreste vv. cc. cons.

[4] [Ὁ αὐτὸς βασιλεὺς.] **pr.** Ἐάν ἐπὶ τρεῖς ἑαυτοὺς ὁ μὲν ἐμφυτευτῆς προσφέρῃ τῷ δεσπότη τὸν τῆς ἐμφυτεύσεως κανόνα, ὁ δὲ δεσπότης ἀναβάλληται δέξασθαι αὐτὸν ἢ ἐν τῇ βασιλίδι πόλει διάγων ἢ ἐν ἐπαρχίαις, ἐξεῖναι τῷ ἐμφυτευτῇ προσάγειν αὐτῷ τὸ ἐμφύτευμα καὶ μελλούσης περαιοῦσθαι τῆς τριετίας, εἰ μὴ ἀνάσχοιτο λαβεῖν, σφραγίζειν αὐτό καὶ ἐπιμαρτύρεσθαι περὶ τούτου ἢ τὸν ἐνδοξότατον ἑπαρχον τῆς πόλεως ἢ τοὺς ἐνδοξοτάτους ἐπάρχους τῶν ἱερῶν πραιτωρίων ἢ τὸν πρόσφορον ἄρχοντα, ᾧ τινι ὑπόκειται ὁ τοῦ χωρίου δεσπότης· ἐν δὲ ταῖς ἐπαρχίαις ἢ παρὰ τῷ ἄρχοντι ἢ ἐν ἀπουσίᾳ τοῦ ἄρχοντος παρὰ τῷ ἐκδίκῳ τῶν τόπων ἢ παρὰ τῷ ἐπισκόπῳ τῆς πόλεως, καθ' ἣν ὁ δεσπότης τοῦ κτήματος διάγει, πράττειν περὶ τούτου, ὥστε καὶ τὴν ἐξ ἐνὸς τῶν

owner, provided it be to these persons who are not customarily forbidden in emphyteutic contracts to make this kind of purchase. However, owners must, if the improvement has been sold to others in accordance with the aforesaid method, accept the (new) emphyteutic leaseholder, or not refuse if the (old) emphyteutic leaseholder prefers to transfer the emphyteutic right to persons not prohibited but allowed and suitable for paying the emphyteutic charge, but admit the new emphyteutic leaseholder into possession, not through a lessee or a procurator, but (through action of) the very owners by themselves or through a letter, or, if they are unable or unwilling to do this, through a deposition in this city before the *vir clarissimus* Master of the Censuses, or through a sworn declaration made in the presence of the tax officials (*tabularii*), but in the provinces through their governors or defenders (*defensores*). 4. And lest owners be gripped by avarice and demand a great amount of money on account of this, something We have learned is perpetrated up to the present time, they should not be permitted to receive, for a written agreement (*scriptio*) or declaration, more than a fiftieth part of the price or the appraised value of the place that is being transferred to another person.

5. However, if the owner does not prefer to accept the new emphyteutic leaseholder or the buyer of the improvement and has failed to do this within two months after notice has been given, We order that it be permitted for the emphyteutic leaseholder to transfer his right or the agricultural improvements to others even without the consent of the owners. 6. But if he (the emphyteutic leaseholder) has acted in a manner other than as Our constitution has disposed, he shall lose his emphyteutic right.

Given March 18, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[4]³⁰³ (*The same Augustus.*) *pr.* If for three years the emphyteutic leaseholder should offer the owner the payment (*canon*) for the emphyteutic lease (*emphyteusis*), and the owner, residing in the Imperial City or in the provinces, delays in accepting it, the emphyteuticary is permitted to offer him the payment, and, when the three-year period is about to end, if he should be unwilling to take it, he may seal it and make an attestation concerning it either before the most glorious (*endoxotatos*) City Prefect or the most glorious Praetorian Prefects, or the appropriate magistrate (*archon*) to whom the owner of the farm is subject,³⁰⁴ in the provinces, he may take action concerning this either before the governor, or, in the absence of the governor before the defender of the place (*ekdikos, defensor*) or before the bishop of the city in which the owner of the

³⁰³ = C. 1.4.32.

³⁰⁴ A version of this constitution in the *Ecclesiasticarum Constitutionum Collectio* indicates that a phrase like "or before the Patriarch, if he is powerful" has fallen out.

εἰρημένων προσώπων προστεθῆναι τῷ πράγματι μαρτυρίαν. 1. Καὶ εἰ μὴδὲ οὕτως ἔλοιτο λαβεῖν προσαγόμενον τὸ ἐμφύτευμα ὁ δεσπότης, κερδαινέτω μὲν αὐτὸ ὁ ἐμφυτευτής, μηδεμίαν ἀγωγὴν ἔχοντος εἰς ἀπαίτησιν αὐτοῦ τοῦ δεσπότη.

2. Μήτε δὲ ἡ ἐμφύτευσις λυέσθω παρατρεχούσης τῆς τριετίας μήτε τῶν ἐφεξῆς ἐνιαυτῶν ἀπαιτεῖτω τὸν εἰωθότα κανόνα ὁ δεσπότης, ἕως ἂν αὐτὸς ἄνωθεν ὀχλήσας τῷ ἐμφυτευτῇ καὶ διαμαρτυρίαν αὐτῷ στείλας ἄρξηται αἰτεῖν τὸν ἐμφυτευτικὸν κανόνα· τότε γὰρ οὐ μὴν τοῦ προλαβόντος χρόνου παντὸς ἀπαιτεῖτω τὸν κανόνα ὁ δεσπότης, ὥς αὐτὸς αἴτιος τοῦ μὴ λαβεῖν αὐτὸν γεγονώς, τοῦ δὲ τρέχοντος χρόνου μετὰ τὴν διαμαρτυρίαν αὐτοῦ ἀπαιτεῖτω τὸ ἐμφύτευμα. 3. Ἐάν δὲ ἐπὶ τριετίαν μετὰ τὴν διαμαρτυρίαν τοῦ δεσπότη τοῦ μὴ καταβάλλῃ ὁ ἐμφυτευτής εὐγνωμόνως τὸν κανόνα, ἀκολούθως ἐξωθείτω αὐτὸν ὁ δεσπότης τῆς ἐμφυτεύσεως κατὰ τὴν δευτέραν τούτου τοῦ τίτλου διάταξιν.

property dwells, so that the attestation from one of the aforesaid persons be offered for the matter. 1. And if the owner thus should not choose to accept the emphyteutic payment offered, the emphyteutic leaseholder may profit from it, with the owner having no right of action to demand the payment from him.

2. The emphyteutic lease (*emphyteusis*) should not be dissolved when the three-year period has expired, nor should the owner seek the customary payment for the following years, until he himself, pressing the emphyteutic leaseholder and sending him a written declaration, should begin to seek the emphyteutic payment. For then the owner should not seek the rent payment for all the previous time, since he is responsible for not taking it, but he should seek the emphyteutic payment for the time lapsed since his declaration. 3. If for three years after the owner's declaration the emphyteutic leaseholder should not willingly pay the payment, the owner should immediately expel him from the emphyteutic lease in accordance with the second constitution of this title.

(531-534).

Liber Quintus

I De Sponsalibus et Arris Sponsaliciis et Proxeneticis

[1] *Impp. Diocletianus et Maximianus AA. et CC. Bianori.* Alii desponsata renuntiare conditioni ac nubere alii non prohibetur.

D. xviii k. Mai. AA. cons.

[2] *Imp. Constantinus A. et Constantius C. ad Pacatianum pp.* Si is, qui puellam suis nuptiis pactus est, intra biennium exsequi nuptias in eadem provincia degens supersederit, eiusque spatii fine decurso in alterius postea coniunctionem puella pervenerit, nihil fraudis ei sit, quae nuptias maturando vota sua diutius ludi non passa est.

D. prid. id. April. Marcianopoli Pacatiano et Hilariano cons.

[3] *Imppp. Gratianus Valentinianus et Theodosius AAA. Eutropio pp.* Arris sponsaliorum nomine datis, si interea sponsus vel sponsa decesserit, quae data sunt iubemus restitui, nisi causam, ut nuptiae non celebrentur, defuncta persona iam praebuit.

D. xv k. Iul. Thessalonicae Gratiano v et Theodosio AA. cons.

Fifth Book

edited by Thomas A. J. McGinn

First Title Engagement (*Sponsalia*), Payments of Earnest Money for Engagement, and Payments for Engagement Negotiations¹

[1]² *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Bianor.* A woman formally engaged to one man is not forbidden from repudiating the match and marrying another.

Given April 14,³ in the consulship of the Augusti (293).

[2]⁴ *Emperor CONSTANTINE Augustus and the Caesar Constantius to Pacatianus, Praetorian Prefect.* If a man engaged to a girl neglects to marry her within two years while living in the same province where she lives, and she marries another after that time has elapsed, she is not guilty of any wrongdoing. By concluding her marriage in good time, she did not allow her solemn promises to be mocked any longer.

Given April 12, at Marcianopolis, in the consulship of Pacatianus and Hilarianus (332).

[3]⁵ *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS Augusti to Eutropius, Praetorian Prefect (of Illyricum).* If, after earnest money (*arrae*) for an engagement is given, either one of the engaged couple should die, We hold that the money shall be restored, unless the deceased person was responsible for the marriage not being concluded.

Given June 17, at Thessalonica, in the consulship of Gratian, for the fifth time, and Theodosius, Augusti (380).

¹ See D. 23.1. A *proxeneta* is a broker, in this case a marriage broker.

² Combine with C. 9.12.3.

³ The precise day is uncertain; Mommsen gives April 24, 293.

⁴ = (with minor changes) C.Th. 3.5.4. Combine with C.Th. 3.5.5. In both, Pacatianus is Urban Prefect.

⁵ = (evidently) C.Th. 3.5.10. Combine with C. 5.2.1, 6.23.16, 9.49.8, 12.7.1; C.Th. 3.5.11, 4.19.1, 9.27.2, 9.42.9. Although addressed to different persons, the following appear to be part of the same statute: C. 5.7.1, 8.36.3; C.Th. 8.15.6; see also C. 5.9.1, 6.56.4.

[4] *Impp. Honorius et Theodosius AA. ad Marinianum pp. pr.* Si pater pactum de filiae nuptiis inierit et humana sorte consumptus ad vota non potuerit pervenire, id inter sponsores firmum ratumque permaneat, quod a patre docebitur definitum, nihilque permittatur habere momenti, quod cum defensore, ad quem minoris commoda pertinebunt, docebitur fuisse transactum. 1. Periniquum est enim, ut contra patriam voluntatem redempti forsitan tutoris aut curatoris admittatur arbitrium, cum plerumque etiam ipsius feminae adversus commoda propria inveniatur laborare consilium.

D. IIII non. Nov. Ravennae Honorio XIII et Theodosio X AA. cons.

[5] *Impp. Leo et Anthemius AA. Erythrio pp. pr.* Mulier iuris sui constituta arrarum sponsalium nomine usque ad duplum teneatur, id est in id quod accepit et aliud tantundem nec amplius, si post completum vicesimum quintum annum vel post impetratam veniam aetatis atque in competenti iudicio comprobata huiusmodi arras suscepit: in simplum autem, id est tantummodo quod accepit, si minoris aetatis est, sive virgo sive vidua sit, sive per se sive per tutorem vel curatorem vel aliam personam easdem arras acceperit.

1. Patrem vero vel matrem, legitimae videlicet aetatis constitutos, sive simul sive separatim arras pro filia susceperint, avum autem vel proavum pro nepte seu pronepte, in duplum tantummodo convenit teneri.

2. Quae ita custodiri censemus, si non propter personam vel conditionem aut aliam causam legibus vel generalibus constitutionibus interdictam futurum matrimonium constare prohibetur: tunc enim

[4]⁶ *Emperors HONORIUS and THEODOSIUS Augusti to Marinianus, Praetorian Prefect (of Italy).* *pr.* If a father entered into an agreement concerning the marriage of his daughter, and passed away without being able to witness the fulfillment of his wishes, that which is proved to have been decided by the father shall remain fixed and valid regarding the engaged couple, and an out-of-court settlement which is shown to have been arranged by the legal representative charged with the interests of the girl less than 25 years of age shall not be allowed to have force. 1. For it would be highly unfair to let the decision of a *tutor* or *curator*, perhaps one who has been corrupted, nullify the father's wish, since it is frequently true that the wishes even of the woman herself are found to run counter to her own interests.

Given November 3, at Ravenna, in the consulship of Honorius, for the thirteenth time, and Theodosius, for the tenth time, Augusti (422).

[5]⁷ *Emperors LEO and ANTHEMIUS Augusti to Erythrius, Praetorian Prefect (of the East).* *pr.* A *sui iuris* woman shall be liable for the agreed-upon amount of earnest money for engagement (*arrae sponsales*) up to twice this amount, meaning the amount she received plus the same sum over this, and no more, provided that, when she received earnest money of this kind, she either was more than 25 years of age or had secured a release from curatorship though under age (i.e., received the *venia aetatis*) and this has been proven before the appropriate court. She shall, however, be liable (only) for the amount itself, that is, just as much as she received, if she is under age (i.e., less than 25 without the *venia*), whether never married or previously married (*vidua*), and whether she received the aforesaid earnest money personally, through a *tutor*, a *curator*, or some other person.

1. But it is agreed that a father or mother, because they are clearly past the age-limit defined by law (i.e., 25 years), shall be liable for precisely twice the amount whether they receive the earnest money on behalf of their daughter conjointly or separately, just like a grandfather or a great-grandfather on behalf of a granddaughter or a great-granddaughter.

2. We ordain that these rules are to hold as such, unless the intended marriage is forbidden by statutes (*leges*) or general constitutions (*generales constitutiones*), on the ground of a person's status or the nature of the match or some

⁶ = C.Th. 3.5.12. Combine with C. 5.9.4, 5.18.11, 5.19.1.

⁷ Combine with C. 1.18.3, 5.6.8, 5.30.3.

quasi nullo facto, utpote sine causa easdem arras praestitas tantummodo reddi consequens esse praecipimus. 3. Hoc quoque his adicimus, ut etiam, si legibus prohibita non sint speratae nuptiae, post arras autem sponsalicias sponsa coniugium sponsi propter turpem vel impudicam conversationem aut religionis vel sectae diversitatem recusaverit vel eo, quod quasi vir coitum, ex quo spes subolis oritur, facere non potuerit, vel ob aliam iustam excusationis causam, si quidem probatum fuerit ante datas easdem arras sponsalicias hoc idem mulierem vel parentes eius cognovisse, sibi debeant imputare. 4. Sin vero horum ignari sponsalicias arras susceperint vel post arras datas aliqua iusta causa paenitentiae intercesserit, isdem tantummodo redditus super alterius simpli poena liberi custodiantur.

5. Quae omnia simili modo etiam de sponsis super recipiendis nec ne arras praestitis custodiri censemus: quadrupli videlicet poena, quae anterioribus legibus definita erat, in qua et arrarum quantitas imputabatur, cessante, nisi specialiter aliud ex communi consensu inter contrahentes de eadem quadrupli ratione placuit.

6. Extra definitionem autem huius legis si cautio poenam stipulationis continens fuerit interposita, ex utraque parte nullas vires habebit, cum in contrahendis nuptiis libera potestas esse debet.

D. k. Iul. Constantinopoli Marciano cons.

[6] *pr.* Ἡ διάταξις βούλεται τὸν προξενοῦντα γάμον μάλιστα μὲν μηδὲν λαμβάνειν. εἰ δὲ ὅλως ἀνέχεται λαβεῖν, εἰ μὲν μηδὲν συνεφώνησε περὶ τοῦτου, μηδὲν ὅλως λαμβάνειν· εἰ δὲ συνεφώνησε, μὴ ὑπὲρ τὴν εἰκοστὴν μοῖραν τῆς προικὸς καὶ τῆς προγαμίας δωρεᾶς ἐπιζητεῖν, ἐὰν ἡ προῖξ ἄχρι διακοσίων λιτρῶν ἔστι χρυσοῦ· ἑλαττον δὲ εἰ βούλεται λαβεῖν, ἐπιτρέπεται αὐτῷ. 1. Εἰ δὲ καὶ ὅσησδήποτε ποσότητός ἐστιν ἡ προῖξ, περαιτέρω τῶν δέκα λιτρῶν τοῦ χρυσοῦ οὐκ ἐπιτρέπεται τῷ προξενητῇ λαμβάνειν, οὐδὲ εἰ τελεία ἐστὶν ἡ προῖξ ἢ ἡ πρὸ γάμου δωρεά. 2. Εἰ δὲ παρὰ ταῦτα τις συμφωνήσῃ, μὴ ἀπαιτεῖσθαι, ἀλλὰ καὶ τὸ καταβληθὲν ἀναδιδόσθαι, εἴτε

other reason. For in that case We instruct, as a matter of logic, that the aforesaid earnest money be returned in the equivalent amount, on the ground that the payment is void insofar as it has no valid purpose. 3.⁸ We add also the following provision. Even in the case where the prospective marriage is not forbidden by statutes, and the bride-to-be, after receiving the earnest money for engagement, refuses to marry her fiancé because of his unseemly or immoral conduct, or because he belongs to a different religion or branch of a religion, or on account of the fact that the man is incapable of sexual relations, from which the hope of offspring arises, or from any other just reason for release: if it should be shown that the woman or her parents knew of this fact before the aforesaid earnest money for engagement was given, they shall have no one but themselves to blame (for its loss). 4. But if, however, they accepted the earnest money for engagement in ignorance of such matters, or some just reason for rescinding the engagement arose thereafter, once they have returned only as much as they received, they shall be freed from the obligation of paying the same amount beyond this as a penalty.

5. We rule that all this shall in like manner apply to grooms as to whether they shall receive back the earnest money given or not. This means that the fourfold penalty, in which the amount of the earnest money was also prescribed, as established by prior legislation,⁹ is suspended, unless by the mutual consent of the contracting parties some other particular provision concerning said fourfold penalty has been agreed to.

6. If, however, a guaranty (*cautio*) is offered containing a penalty backed by a stipulation that exceeds the terms of this legislation, it shall have no binding force for either party, since freedom of choice ought to hold in contracting marriages.¹⁰

Given July 1, at Constantinople, in the consulship of Marcian (472).

[6]¹¹ *pr.* The imperial constitution (*diataxis*) lays down that marriage brokers shall in principle receive no compensation. If indeed they should attempt to receive something, when no agreement was (previously) made about this, they shall receive nothing at all. If an agreement was made, they shall demand no more than one-twentieth of the dowry and prenuptial gift, provided that the dowry is less than 200 pounds of gold. If they are content with less, this shall be allowed to them. 1. But whatever the amount of the dowry may be, the marriage broker shall not be permitted to receive more than 10 pounds of gold, not even if the dowry or prenuptial gift has been paid. 2. Anything agreed to over and

⁸ §§3-5 = (in part) C. 1.4.16.

⁹ See C. 5.2.1, 5.8.1; C.Th. 3.5.11, 3.6.1, 3.10.1.

¹⁰ See C. 8.38.2; Paul. D. 45.1.134 *pr.*; Sch. *Sinaitica* 4.

¹¹ = Bas. 54.15.4, a summary in Greek of an imperial law of unknown authorship and date.

χρήματα ἔλαβεν εἴτε πράγματα ἢ ἀνεδόθη αὐτῷ ὁμολογία χρέους ἢ ὅλως ἔλαβέ τι κινήτῳ ἢ ἀκίνητῳ ἢ αὐτοκίνητῳ, κινουμένων τῶν ἀγωγῶν οὐ μόνον κατὰ τοῦ λαβόντος, ἀλλὰ καὶ κατὰ τῶν αὐτοῦ κληρονόμων, καὶ οὐ μόνον παρὰ τοῦ δεδωκότος, ἀλλὰ καὶ παρὰ τῶν αὐτοῦ κληρονόμων ὠρισμένου δέκα χρυσίου λιτρῶν ἐπιτίμιον τοῖς παρὰ ταῦτα πράττειν ἐπιχειροῦσιν.

II Si Rector Provinciae vel ad Eum Pertinentes Sponsalia Dederint

[1] *Imppp. Gratianus Valentinianus et Theodosius AAA. Eutropio pp. pr.* Si quis in potestate publica positus atque honore administrandarum provinciarum, qui parentibus aut tutoribus aut curatoribus aut ipsis quae matrimonium contracturae sunt potest esse terribilis, arras sponsalicias dederit, iubemus, ut deinceps, sive parentes sive eadem mutaverint voluntatem, non modo iuris laqueis liberentur poenaeque statutae expertes sint, sed extrinsecus data pignora lucrativa habeant, si ea non putent esse reddenda. 1. Quod ita late patere volumus, ut non solum circa administrantes, sed et circa administrantium filios nepotes ac propinquos, participes (id est consiliarios) domesticosque locum habeat, quibus tamen administrator operam dederit. 2. Impleri autem id postea matrimonium non vetamus, quod tempore potestatis ob eas personas, de quibus locuti sumus, arris fuerat obligatum, si sponsarum consensus accedat.

D. xv k. Iul. Thessalonicae Gratiano v et Theodosio AA. cons.

III De Donationibus ante Nuptias vel Propter Nuptias et Sponsaliciis

[1] *Impp. Severus et Antoninus AA. Metrodoro.* Multum interest, si ea, quae donat vir futurus, tradiderit uxori et postea in dotem acceperit, an vero donandi animo dotem auxerit, ut videatur accepisse, quod non accepit. priore enim casu donatio non impeditur, et res, quae in

above this limit shall not be collected, and if it has, it shall be returned, whether he or she (the marriage broker) has received cash, or another asset, such as the cancellation of a debt or full ownership of property that is movable, immovable, or self-moving. Actions may be launched not only against the recipient, but also against recipient's heirs, not only by the giver, but by giver's heirs as well. A penalty of 10 pounds of gold has been established for those who venture to break these rules.

Second Title If the Governor of a Province or Persons Connected to Him Give Engagement Gifts

[1]¹² *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS Augusti to Eutropius, Praetorian Prefect. pr.* If a person wielding authority in an official capacity and holding the position of provincial administrator gives earnest money for engagement, since he is capable of inspiring with fear ascendant male relatives, *tutores, curatores*, or the very women who are about to marry, We lay down that if the ascendant male relatives or the women themselves change their minds thereafter, they shall not only be released from the strictures of the law and freed from the penalty fixed therein, but they shall also keep as a benefit what has been given as a pledge, if they decide not to return it. 1. We wish this rule to extend broadly, so that it shall apply not only to provincial administrators but to their sons, grandsons, and (other) close relatives, as well as official staff, meaning advisors, and household members, provided, however, that the administrator renders them assistance. 2. We do not, however, forbid the subsequent conclusion of a marriage, when this was contracted through the payment of earnest money during an administrator's tenure, regarding any of those persons just mentioned, as long as the engaged woman gives her consent.

Given June 17, at Thessalonica, in the consulship of Gratian, for the fifth time, and Theodosius, Augusti (380).

Third Title Prenuptial Gifts, Gifts on Account of Marriage, and Engagement Gifts¹³

[1] *Emperors SEVERUS and ANTONINUS Augusti to Metrodorus.* It makes a great deal of difference whether a husband-to-be actually delivers a gift of property to a wife which he later receives as a dowry, or whether, on the other hand, with the (mere) intention of making a gift, he augments the dowry, so

¹² = (with changes) C.Th. 3.6.1. Combine with C. 5.1.3 and the laws mentioned there.

¹³ Many subscriptions in this Title are lost.

ea causa sunt, dotis effectae iudicio de dote peti possunt: posteriore autem nihil actum est donatione et, quod in dotem datum non est, non potest repeti.

[2] *Imp. Alexander A. Attalo.* Si praesidi provinciae probaveris, ut Eucliam uxorem duceres, munera te parentibus eius dedisse, nisi tibi Euclia nupserit, restitui tibi quod dedisti iubebit.

[3] *Idem A. Marcellae.* Pollicitatione a fratre quondam tuo sponsalium causa facta, et si in stipulationem deducta ideo praestanda non fuerit, quoniam in dote uxor maritum fefellit, exceptionem adversus actionem ex stipulatu recte obicies.

[4] *Imp. Gordianus A. Marco.* Quod sponsae ea lege donatur, ut tunc dominium eius adipiscatur, cum nuptiae fuerint secutae, sine effectum est.
PP. VIII k. Dec. Gordiano A. et Aviola cons.

[5] *Impp. Valerianus et Gallienus AA. Theodora.* Ea, quae tibi ut sponsae daturum se repromisit is, qui te ficto caelibatu, cum aliam matrem familias domi reliquisset, sollicitavit ad nuptias, petere cum effectum non potes, cum tu sponsa uxore domi posita non fuisti.

Acc. id. Mai. Antiochiae Tusco et Basso cons.

[6] *Imp. Aurelianus A. Donatae.* Cum in te simplicem donationem dicas factam esse die nuptiarum et in ambiguo possit venire, utrum a sponso an marito donatum sit, sic distinguendum est, ut, si in tua domo donum acceptum est, ante nuptias videatur facta esse donatio, quod si penes se dedit sponsus, retrahi possit: uxor enim fuisti.

that he might seem to have received what he did not receive. For in the former case the gift is valid, and the property, as part of the dowry, can, under such circumstances, be recovered in an action on the dowry (after dissolution of the marriage). In the latter case, the gift is void, and what is not actually given as part of the dowry cannot be recovered.

[2] *Emperor ALEXANDER Augustus to Attalus*. If you prove to the governor of the province that you made gifts to the parents of Euclia in order that that you might take her as a wife, (then,) unless Euclia did in fact marry you, he will order the gifts to be restored to you.

[3] *The same Augustus to Marcella*. If your decedent brother promised a gift on the occasion of his engagement, even if this (promise) was framed in a stipulation, there is no liability because (of the fact that) his wife deceived him as to (the size of) her dowry, and you will properly raise an affirmative defense when sued in an action on the stipulation.¹⁴

[4] *Emperor GORDIAN Augustus to Marcus*. A gift made to an engaged woman upon the condition that she acquires ownership of the property in question after the marriage takes place is not valid.

Posted November 24, in the consulship of Gordian Augustus and Aviola (239).

[5]¹⁵ *Emperors VALERIAN and GALLIENUS Augusti to Theodora*. You cannot successfully sue for a gift promised to you, as though to his fiancée, by a man who, pretending to be unmarried, proposed marriage to you, when in fact he had left behind another "wife" at home, since, (precisely) because he had a wife at home, you were not (in fact) his fiancée.

Received May 15, at Antioch, in the consulship of Tuscus and Bassus (258).

[6] *Emperor AURELIAN Augustus to Donata*. As to your declaration that you received an unconditional gift on the day of your wedding, it is potentially unclear whether it was made by your husband-to-be or by your husband. We must make the following distinction. If you received the gift in your house, it seems to have been made before the marriage; but if your "fiancé" gave it to you in his own house, it may be reclaimed, for you were then his wife.

¹⁴ Evidently the addressee was her brother's heir; see Bas, 28.3.3.

¹⁵ = (though on a different point, in part, with changes) C. 9.9.18.1, dated to May 15; Krüger prefers that date to the anomalous *xv id. Mai.* (= May 1?) in some manuscripts for this constitution.

[7] *Imppp. Carus Carinus et Numerianus AAA. Iuncianae.* Si, cum ante nuptias munera darentur, ita conventum est atque huiusmodi conscripta pactio est, ut, si qua fors extitisset contra voluntatem eius et matrimonium distraxisset, tunc quae data erant apud eum qui dedisset heredemve eius remanerent, potest qui eius hereditatem accepit, cui pacta puella munera supra dicta lege susceperat, eadem iure postulare.

PP. k. April.

[8] *Impp. Diocletianus et Maximianus AA. et CC. Euphrosyno.* Si ante matrimonium maior quinque et viginti annis constitutus sponsae suae, licet ante sponsalia, fundum donavit eamque in vacuam induxit possessionem, postea nullo titulo superstitem vel testamento eundem relinquentem alienare potuisse certi ac manifesti iuris est.

D. k. Mai. Tirallo AA. cons.

[9] *Idem AA. et CC. Iuliano.* Cum te sponsae filii tui quaedam donasse confitearis, perfectam donationem rescindi nec nostro oportet rescripto, quam tua voluntas iurisque auctoritas fecit ratam.

VIII k. Ian. AA. cons.

[10] *Idem AA. et CC. Dionysio.* Si filiae tuae sponsus ei mancipium donavit ac tu in eum iumenta liberalitatis ratione contulisti nec nuptiis secutis contra iuris rationem quod dederat abstulit, non invicem datorum restitutio, sed eius quod illicite rapuit repetitio competit.

[11] *Idem AA. et CC. Neae.* Si tibi res proprias liberalitatis causa sponsus tuus tradidit, eo, quod ab hostibus postea interfectus est, irrita donatio fieri non potest.

[12] *Idem AA. et CC. Timocleae et Cleotimae.* Si mater vestra filiae suae sponso vel marito praedia sine ulla repetendi lege donavit et eum in vacuam induxit possessionem, nuptiis divortio solutis perfecta non dissolvitur donatio.

S. vi id. Febr. Sirmi CC. cons.

[7] *Emperors CARUS, CARINUS, and NUMERIAN Augusti to Iunciana.* If, when a prenuptial gift was made, it was agreed, in writing, that if ill luck (i.e., his wife's death) should, contrary to the prospective husband's wishes, dissolve the marriage, the gift should remain the property of the giver or his heir(s), the heir of the man whose fiancée had received the gift upon the above-mentioned condition may rightfully (*iure*) demand it back.

Posted April 1.

[8] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Euphrosynus.* If a man over 25 years of age gave a farm as a prenuptial gift to his fiancée even before their engagement, and he delivered undisturbed possession to her, the certain and unambiguous rule (*certum ac manifestum ius*) is that from this point on he could not alienate it in any way while living, nor dispose of it in his will.

Given May 1 at Tirallum, in the consulship of the Augusti (293).

[9] *The same Augusti and Caesars to Iulianus.* Whereas you acknowledge that you made a gift of some property to the fiancée of your son, and the transaction followed through, since your voluntary action and the authority of law has rendered it valid, it cannot be rescinded even by an imperial rescript.

December 25, in the consulship of the Augusti (293).

[10] *The same Augusti and Caesars to Dionysius.* If the fiancé of your daughter gave her a slave as a gift and you, in a spirit of generosity, made him a gift of some draft animals, and the marriage did not take place, and he unlawfully (*contra iuris rationem*) took away what he had given, there is no place for the restitution of what was reciprocally given, but an action is granted to recover what he illegally (*illicite*) carried away.

[11] *The same Augusti and Caesars to Nea.* If your fiancé, out of a sense of generosity, made over to you a gift of property that belonged to him, the gift cannot become void by the fact that he was afterwards killed by the enemy.

[12] *The same Augusti and Caesars to Timoclea and Cleotima.* If your mother gave properties to the fiancé or to the husband of her daughter without any conditions for its return and delivered undisturbed possession to him, the gift, because a completed transaction, cannot be revoked even though the marriage has been dissolved by divorce.

Written February 8, at Sirmium, in the consulship of the Caesars (294).

[13] *Idem AA. et CC. Alexandro.* De rebus in sponsam donationis gratia collatis creditores mariti facti, si non prius obligatas sibi probent, eam convenire minime possunt.

[14] *Idem AA. et CC. Aureliae.* Si consentiente matre sua sponsus filiae tuae mancipia donavit et his acceptis in dotem non aestimatis in matrimonio post decessit, mater eademque heres eius pretium offerens restitutionem eorum improbe recusat.

[15] *Imp. Constantinus A. ad Maximum pu. pr.* Cum veterum sententia displiceat, quae donationes in sponsam nuptiis quoque non secutis decrevit valere, ea, quae largiendi animo inter sponso et sponsas iure celebrantur, redigi ad huiusmodi condiciones iubemus, ut, sive adfinitatis coeundae causa sive non ita, vel in potestate patris degentes vel ullo modo proprii iuris constituti tamquam futuri causa matrimonii aliquid sibi ipsi vel consensu parentum mutuo largiantur, si quidem sponsus vel parens eius sortiri noluerit uxorem, id quod ab eo donatum fuerit nec repetatur traditum et, si quid apud donatorem resedit, ad sponsam et heredes eius submotis ambagibus transferatur. 1. Quod si sponsa vel is in cuius agit potestate causam non contrahendi matrimonii praebeuerit, tunc sponso eiusque heredibus sine aliqua deminutione per conditionem aut per utilem in rem actionem redhibeantur. 2. Quae similiter observari oportet et si ex parte sponsae in sponsum donatio facta sit. *D. xvii k. Nov. Constantino A. v et Licinio C. cons.*

[16] *Idem A. ad Tiberianum vicarium Hispaniarum. pr.* Si ab sponso rebus sponsae donatis interveniente osculo ante nuptias hunc vel illam mori contigerit, dimidiam partem rerum donatarum ad superstitem pertinere praecipimus, dimidiam ad defuncti vel defunctae heredes, cuiuslibet gradus sint et quocumque iure successerint, ut donatio stare

[13] *The same Augusti and Caesars to Alexander.* A husband's creditors cannot sue his wife to recover a gift he made to her when she was engaged to him, unless they prove that they had a lien on it previously.

[14] *The same Augusti and Caesars to Aurelia.* If the fiancé of your daughter gave slaves as a gift to her with the consent of his mother and these were received by him as part of your daughter's dowry without an appraisal (*aestimatio*), and he subsequently died while still married, his mother and heir, though she offers to pay the value of the slaves, has no right to refuse to turn them over.

[15]¹⁶ *Emperor CONSTANTINE Augustus to Maximus, City Prefect. pr.* Since we are dissatisfied with the traditional view that gifts made to an engaged woman are valid even when the marriage does not take place, We order that the following conditions shall apply in the case of gifts lawfully made, from a spirit of generosity, between engaged persons. If persons make gifts to each other, either for the (express) purpose of contracting a marriage relationship, or otherwise, but with a view to a marriage in future, whether such persons are under paternal power or *sui iuris*, whether they act simply of their own accord or together with the consent of their ascendant male relatives, if in fact the groom-to-be (later) refuses to marry the woman or his ascendant male relative refuses to have him do so, the gift he has handed over cannot be recovered, and if any part of the gift has remained in the possession of the giver, it shall, without any legal obscurities (intervening), be turned over to the woman or her heirs. 1. But if the engaged woman or the person in whose power she stands should be responsible for the marriage not taking place, then the gift shall be recovered in its entirety by the engaged man and his heirs in an action for restitution (*condictio*) or in an analogous property action (*actio utilis in rem*). 2. These provisions shall also apply if a bride-to-be's side has made a gift to her fiancé.

Given October 16, in the consulship of Constantine Augustus, for the fifth time, and the Caesar Licinius (319).

[16]¹⁷ *The same Augustus to Tiberianus, Vicar of the Spanish provinces. pr.* If an engaged man gives property as a gift to his bride-to-be, and the transaction is sealed with a kiss, but it happens that he or she dies before the marriage takes place, We direct that one-half of the property given as a gift shall belong to the survivor, and the other half shall belong to the heirs of the deceased, no matter what their degree of relationship, and by whatever right they become heirs, so

¹⁶ = (in part, with changes) C.Th. 3.5.2.

¹⁷ = (with minor changes) C.Th. 3.5.6.

pro parte media et solvi pro parte media videatur: osculo vero non interveniente, sive sponsus sive sponsa obierit, totam infirmari donationem et donatori sponso vel heredibus eius restitui. 1. Quod si sponsa interveniente vel non interveniente osculo donationis titulo (quod raro accidit) fuerit aliquid sponso largita et ante nuptias hunc vel illam mori contigerit, omni donatione infirmata ad donatricem sponsam sive eius successores donatarum rerum dominium transferatur.

D. id. Iul. Constantinopoli Nepotiano et Facundo cons.

[17] *Imp. Theodosius et Valentinianus AA. Hierio pp.* Minoribus aetate feminis etiam actorum testificatione in ante nuptias donatione ad eas facta omissa, si patris auxilio destitutae sint, iuste consulitur, ut firma donatio sit.

D. x k. Mart. Constantinopoli Tauro et Felice cons.

[18] *Imp. Zeno A. Sebastiano pp.* Si liberis ex priore matrimonio procreatis pater ad secundas migraverit nuptias vel non migraverit, nihil omnino filiis prioris coniugii ex donatione ante nuptias, quam ipse vel alius pro ipso uxori quondam eius matri communium liberorum donaverat, servare cogatur, quoniam et mater liberis ex priore matrimonio extantibus post secundas nuptias multoque amplius, si non fuerit alteri marito sociata, nihil isdem filiis ex dote, quam patri eorum ipsa vel alius pro ea obtulerit, servare compellitur.

D. k. Mai. Zenone A. cons.

[19] *Imp. Iustinus A. Archelao pp. pr.* Si constante matrimonio consilium augendae dotis inierit vel uxor forte vel eius nomine quilibet alius, nihilo minus marito quoque liceat seu pro marito cuilibet alii tanto donationem ante nuptias additamento maiorem facere, quanto dotis augetur titulus, nec obsit in huiusmodi munificentis interdictas

that the gift shall be deemed valid for half and invalid as to the other half. But if no kiss has been exchanged and the man or woman dies, the whole gift shall be void, and shall be restored to the giver or to his heirs. 1. But in a situation where the bride-to-be makes a gift to her fiancé, which seldom happens, and he or she should happen to die before the marriage takes place, then the entire gift shall be void whether a kiss has been exchanged or not, and ownership of the property given as a gift shall be restored to the giver or to her heirs.

*Given July 15, at Constantinople, in the consulship of Nepotianus and Facundus (336).*¹⁸

[17]¹⁹ *Emperors THEODOSIUS and VALENTINIAN Augusti to Hierius, Praetorian Prefect.* Prenuptial gifts, when made to women less than 25 and deprived of paternal assistance, shall be valid, on a proper reading of the law, even without registering them in public documents.

Given February 20, at Constantinople, in the consulship of Taurus and Felix (428).

[18]²⁰ *Emperor ZENO Augustus to Sebastianus, Praetorian Prefect.* Whether a father, who has children by a prior marriage, marries again or not, he shall not be compelled to keep for the children of his prior marriage any part at all of the prenuptial gift which he, or someone else for him, had given to his former wife, the mother of their common children, since the mother too, though she has children surviving from a prior marriage, is not compelled to keep for these children, after remarrying, and even more so if she does not remarry, any part of the dowry which she personally, or someone for her, had given to their father.

*Given May 1, in the consulship of Zeno Augustus (479).*²¹

[19] *Emperor JUSTIN Augustus to Archelaus, Praetorian Prefect.*²² *pr.* If, while she is married, a wife, or someone else acting on her behalf, happens to plan on increasing her dowry, the husband, or someone else acting on his behalf, may also increase the prenuptial gift by an amount equal to the increase in the dowry, nor shall it be an objection, regarding such acts of generosity, that a

¹⁸ The date is more likely to be July 15, 335; so Seeck and Proiet Volterra.

¹⁹ = (in part, with changes) C.Th. 3.5.13. Combine with C. 2.57.2, 5.4.22, 5.11.6, 6.18.1, 6.24.11, 6.61.2.

²⁰ Combine with C. 3.28.29.

²¹ Other constitutions show that this was Zeno's second consulship.

²² C. 5.3.20.9 suggests that Justinian issued this constitution along with Justin; but Inst. 2.7.3 also attributes the constitution to Justin alone. Lounggis *et al.* date to between April 4 and August 1, 527.

esse liberalitates tempore nuptiarum: indulgendum est namque consensui communi partium, ne, cum negetur augendae potestas donationis, dotis etiam pigrius constituatur augmentum. 1. Idemque licere praecipimus etiam in his matrimoniis, in quibus interdum accidit ante nuptias quidem donationem nullam esse, solam vero dotem marito mulierem obtulisse, ut etiam tunc muliere dotem augente liceat marito quoque donationem in uxorem suam eiusdem quantitatis facere, quantum aucta dos continere dignoscitur: pactis videlicet de redhibitione vel retentione auctae dotis vel donationis, prout partes consenserint, pro iam statuto modo ineundis sive iniungendis veteribus pactis, quae initio nuptiarum de ante nuptias donatione et dote principaliter constituenda inita sunt. 2. Iura etiam hypothecarum, quae in augenda dote vel donatione fuerint, ex eo tempore initium accipiant, ex quo eadem hypothecae contractae sunt, et non ad prioris dotis vel ante nuptias donationis tempora referantur.

3. Sed et si e contrario maritus et uxor ad deminuendam dotem et ante nuptias donationem consenserint, licere eis ad similitudinem deminutionis quae in dote fit etiam ante nuptias minuere donationem, ut pacta de amborum deminutionibus ineunda firma et legitima esse intellegantur: exceptis videlicet his casibus, in quibus aut maritus ex priore matrimonio liberos habens ad secundas migraverit nuptias aut uxor similiter ex anteriore matrimonio liberis ei existentibus secundo marito se iunxerit. in hoc enim secundo matrimonio vel a parte mariti vel a parte mulieris vel ab utraque, si hoc etiam evenerit, interdictam esse deminutionem dotis et ante nuptias donationis, ne aliquid adversus filios prioris matrimonii machinari videatur, censemus.

[20] *Imp. Iustinianus A. Iohanni pp. pr.* Cum multae nobis interpellationes factae sunt adversus maritos, qui decipiendo suas uxores faciebant donationes, quas ante nuptias antiquitas nominavit, insinuare autem eas actis intervenientibus supersedebant, ut ineffectae maneam et ipsi quidem commoda dotis lucrentur, uxores autem sine nuptiali remedio relinquantur, sancimus nomine prius emendato ita rem corrigi et non ante nuptias donationem eam vocari, sed propter nuptias donationem. 1. Quare enim dotem quidem et constante matrimonio mulier marito dare conceditur, donationem autem marito nisi ante nuptias facere non permittitur? et quae huius rei differentia rationabilis potest inveniri, cum melius erat mulieribus propter fragilitatem sexus quam maribus

gift during marriage is forbidden. We should yield to the common consent of the parties, so as to avoid the result that, if the right to increase the prenuptial gift is denied, an increase in the dowry will also be made more sparingly. 1. We direct that this shall be permitted also in cases in which, as sometimes happens, no prenuptial gift at all was made, but the wife simply brought a dowry to her husband, so that if a woman in such a case increases her dowry, the husband shall be permitted to make a gift to his wife to the extent that the dowry has manifestly been increased. That is to say that a new agreement shall be made, in the manner already provided, as to the return or retention of the increased dowry or prenuptial gift, as the parties desire, or additions shall be made to the original agreements entered into at the beginning of the marriage to lay out the details directly pertaining to the prenuptial gift and the dowry. 2. Also, the rights deriving from (real) security arrangements in connection with an increased dowry or prenuptial gift shall take their beginning from the time when these very contracts were entered into, and shall not be related to the time of the prior dowry or prenuptial gift.

3. All the same, if on the contrary the husband and wife should agree to diminish the dowry and prenuptial gift, they shall be permitted to decrease the prenuptial gift in like manner as the dowry, and the agreements made as to the mutual decrease shall be valid and legal, except, of course, in those cases in which the husband, having children by a prior marriage, remarries, or the wife, similarly having children surviving from a former marriage, remarries. For We ordain that if the husband or wife or even both remarry, decrease of dowry or prenuptial gift shall be forbidden, so that no detriment shall seem to be contrived for the children of the prior marriage.

(527?).

[20] *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* Since many appeals have been made to Us against husbands who, to deceive their wives, have been accustomed to make gifts which in antiquity were called prenuptial gifts, and which, however, they neglected to register in the public records with the intent that they (the gifts) might remain invalid although they (the husbands) enjoyed the benefit of the dowry, leaving their wives moreover without a remedy once married, We lay down that the situation shall be corrected by changing the old name, and such a gift shall no longer be called prenuptial (*donatio ante nuptias*), but a gift on account of marriage (*donatio propter nuptias*). 1. For why is a woman permitted to give a dowry to her husband even, to be sure, during marriage, while a husband is not permitted to make any gift except before marriage? And how can this difference be considered reasonable, when it would be better to help women on account of the weakness of their

subveniri? 2. Sicut enim dos propter nuptias fit et sine nuptiis quidem nulla dos intellegitur, sine dote autem nuptiae possunt celebrari, ita et in donationibus, quas mariti faciunt vel pro his alii, debet esse aperta licentia et constante matrimonio talem donationem facere, quae quasi antiphrasa possit intellegi et non simplex donatio, ideo enim et antiqui iuris conditores inter donationes etiam dotes connumerant. 3. Si igitur et nomine et substantia nihil distat a dote ante nuptias donatio, quare non etiam ea simili modo et matrimonio contracto dabitur?

4. Sancimus itaque omnes licentiam habere sive priusquam matrimonia contraxerint sive postea donationes mulieribus dare propter dotis dationem, ut non simplices donationes intellegantur, sed propter dotem et propter nuptias factae, simplices etenim donationes non propter nuptias fiunt, sed propter nuptias vetitae sunt: et propter alias causas et libidinem forsitan vel unius partis egestatem, non propter ipsam nuptiarum adfectionem efficiuntur. 5. Si igitur dote iam praestita maritus nulla ante nuptias facta donatione donare mulieri res maluerit, ita tamen, ut dotis quantitatem non excedant, et hoc ipsum significaverit, quod non simplicem faciat donationem, sed propter dotem iam conscriptam et ipse ad donationem venerit, licebit ei hoc facere et supponatur pactis dotalibus huiusmodi donatio, et si quidem hoc fuerit specialiter expressum, pacta conventa servari oportet. 6. Sin autem donatio quidem talis facta sit, utpote autem dotali instrumento antecedente nulla pacta tali donationi post nuptias inserantur, re ipsa videatur esse hoc pactum, et secundum dotalia conventiones intellegantur et in tali donatione pacta fuisse conventa, ut aequis passibus utraque ambulet tam dos quam donatio.

7. Ita tamen, ut Leoniana constitutio, quae super exaequatione pactiorum loquitur non in quantitate, sed in partibus, maneat in his casibus intacta, et non solum ea immutilata custodiatur, sed etiam nostra, quam

gender (*fragilitas sexus*),²³ rather than come to the aid of males? 2. For as dowry comes about on account of marriage, and no dowry is recognized without a marriage, certainly, while marriage may be entered into without a dowry, so husbands, or others acting on their behalf, ought to have free rein to make such a gift even during marriage, which can be understood as a counter-dowry (*antipherna*) rather than as a mere gift. That is because those who established the law in antiquity categorized even dowry as a gift. 3. If, then, a prenuptial gift does not differ at all either in name or substance from dowry, why, likewise, should it not be permitted to be given even during marriage?

4. We accordingly lay down that everyone has permission to make gifts to women before or after the marriage begins on account of the giving of a dowry. These gifts shall not be considered as mere gifts, but as gifts made on account of dowry and on account of marriage. For mere gifts are not made on account of marriage, but are forbidden (precisely) on account of marriage. They come about for other motives, such as lust, perhaps, or the poverty of one of the parties, but not because of the very desire for marriage. 5. If, therefore, a dowry has already been given, but no prenuptial gift has been made, and the husband wants to make one to his wife, and he expressly states that he does not make a mere gift, but is making it on account of a dowry already reduced to writing, and he arrives at (the idea of) the gift himself, he will be permitted to do so, provided, however, it does not exceed the value of the dowry, and a record of this kind of gift shall be added to the dowry agreement. And if indeed this has been specifically set forth, it ought to be respected as a formal agreement. 6. If, moreover, such a gift has in fact been made, and, as one might expect, however, a document concerning the dowry had been previously drawn up containing no reference to a gift made after the marriage, this agreement (concerning the gift made on account of marriage) shall be construed in actual fact such that the formal agreements (concluded at the time of marriage) are understood both to have been made in line with the terms of the dowry arrangements and to have included this gift, so that both the dowry and gift shall stand on the same footing.

7. The constitution of Leo,²⁴ however, which speaks to the equalization of agreements, not as to quantity but as to the portions, shall remain in force in such cases. Not only shall that law remain in effect, but also Our constitution,²⁵ which We enacted to interpret the former, so as to dispel all ambiguity therein. Where, then, agreements providing for unequal gifts are made, We ordain that

²³ The Romans themselves typically regarded gender weakness as a biological fact (so suggesting a translation of *sexus* as "sex"), whereas we would classify it as a social/cultural construct (thus supporting the translation of "gender"). There is evidence all the same that some Romans viewed it in a manner similar to ours: see Gaius 1.190.

²⁴ C. 5.14.9.

²⁵ C. 5.14.10.

de interpretatione eius fecimus ambiguitatem eius tollentes: disparibus etenim pactionibus factis maiorem lucri partem ad minorem deducendam esse censemus, ut eodem modo uterque minorem partem lucretur. 8. Similique modo si facta quidem fuerit talis donatio, quae antea quidem ante nuptias vocabatur, nunc autem propter nuptias, non autem ante nuptias fuerit actis intervenientibus insinuata, licebit et constante matrimonio eam insinuare, nullo obstaculo penitus ex nuptiarum inventu faciendo: si enim fieri eas post nuptias concedatur, multo magis insinuari. 9. Similique modo et ea constitutio, quam pro augendis tam dotibus quam ante nuptias donationibus fecimus, intacta illabataque conservetur: omnibus videlicet, quae de simplicibus donationibus inter maritum et uxorem constante matrimonio vel a veteribus vel a nobis statuta sunt, in suo robore duraturis.

III De Nuptiis

[1] *Impp. Severus et Antoninus AA. Potito.* Cum de nuptiis puellae quaeritur nec inter tutorem et matrem et propinquos de eligendo futuro marito convenit, arbitrium praesidis provinciae necessarium est.

D. non. Mai. Anullino et Frontone cons.

[2] *Idem AA. Trophimae.* Si nuptiis pater tuus consensit, nihil oberit, quod instrumento ad matrimonium pertinenti non subscripsit.

[3] *Idem AA. Valeriae.* Libertum, qui patronam seu patroni filiam vel coniugem vel neptem vel proneptem uxorem ducere ausus est, apud competentem iudicem accusare poteris moribus temporum meorum congruentem sententiam daturum, quae huiusmodi coniunctiones odiosas esse merito duxerunt.

Id. Nov. Dextro II et Prisco cons.

the greater gift shall be equalized with the smaller, that is to say, both parties shall in equal manner have the benefit only of the smaller gift.

8. If, in like manner, such a gift shall in fact have been made, which was formerly called a prenuptial gift, but now a gift on account of marriage, but was not registered in the public records before marriage, it may be registered even during marriage, and the existing marriage shall not at all be an obstacle thereto. For if these gifts are permitted to be made after marriage, all the more shall they be permitted to be registered (after marriage). 9. In the same way, that constitution which We enacted as to the increase of both dowry and prenuptial gifts²⁶ shall also remain in full force and effect. Clearly all provisions laid down by the ancients or by us concerning mere gifts between husband and wife during marriage shall retain their full vigor.

(531-533).²⁷

Fourth Title Marriage²⁸

[1] *Emperors SEVERUS and ANTONINUS Augusti to Potitus.* When a judicial hearing is held on the marriage of a young (*sui iuris*) girl, and her tutor, mother, and close relatives fail to reach an agreement over the choice of her husband-to-be, the decision of the provincial governor is required.

Given May 7, in the consulship of Anullinus and Fronto (199).

[2] *The same Augusti to Trophima.* If your father consented to your marriage, the fact that he did not sign the appropriate marriage document is not a problem.

[3]²⁹ *The same Augusti to Valeria.* Should a freedman dare to marry his former owner, or the daughter, wife, granddaughter, or great-granddaughter of his former owner, you will be able to prosecute him before the appropriate judge. The judge will issue a sentence consistent with the policy I have pursued as emperor (*mores temporum meorum*), which has rightly regarded unions of this kind as hateful.

November 13, in the consulship of Dexter, for the second time, and Priscus (196).

²⁶ C. 5.3.19.

²⁷ See Inst. 2.7.3.

²⁸ See, D. 23.2; Inst. 1.10.

²⁹ This text is out of place; it should precede the first *constitutio* in the Title.

[4] *Imp. Alexander A. Perpetuo.* Liberi concubinas parentum suorum uxores ducere non possunt, quia minus religiosam et probabilem rem facere videntur. qui si contra hoc fecerint, crimen stupri committunt.

III id. April. Modesto et Probo cons.

[5] *Idem A. Maximae.* Si, ut proponis, pater quondam mariti tui, in cuius fuit potestate, cognitis nuptiis vestris non contradixit, vereri non debes, nepotem suum ne non agnoscat.

[6] *Imp. Gordianus A. Valeriae.* Etsi contra mandata principum contractum sit in provincia consentiente muliere matrimonium, tamen post depositum officium si in eadem voluntate perseveraverit, iustae nuptiae efficiuntur: et ideo postea liberos susceptos natosque ex iusto matrimonio legitimos esse responsum viri prudentissimi Pauli declarat.

XII k. Sept. Gordiano A. et Aviola cons.

[7] *Idem A. Apro.* Si, ut proponis, post querellam de marito a filia ad te delatam dissociatum est matrimonium nec te consentiente ad eundem regressa est, minus legitima coniunctio est cessante patris voluntate, in cuius est potestate: atque ideo non paenitente filia petitionem dotis repetere non prohiberis.

PP. IIII k. Nov. Sabino et Venusto cons.

[8] *Idem A. Romano.* In copulandis nuptiis nec curatoris, qui solam rei familiaris sustinet administrationem, nec cognatorum vel adfinium ulla auctoritas potest intervenire, sed spectanda est eius voluntas, de cuius coniunctione tractatur.

D. v k. Mart. Gordiano A. II et Pompeiano cons.

[9] *Imp. Probus A. Fortunato.* Si vicinis vel aliis scientibus uxorem liberorum procreandorum causa domi habuisti et ex eo matrimonio filia suscepta est, quamvis neque nuptiales tabulae neque ad natam filiam

[4] *Emperor ALEXANDER Augustus to Perpetuus*. Children (or grandchildren) cannot marry the concubines of their male ascendants, because this is deemed to be an act that is morally and socially objectionable. Those who do so are guilty of criminal fornication (*stuprum*).

April 11, in the consulship of Modestus and Probus (228).

[5] *The same Augustus to Maxima*. If, on the facts as you state them, the father of your decedent husband, in whose power (*potestas*) the latter stood, did not oppose your marriage though he knew about it, you need not worry that he refuses to acknowledge his grandson as his own.

[6]³⁰ *Emperor GORDIAN Augustus to Valeria*. Even though, in violation of standing imperial instructions (*mandata principum*), a marriage (with an administrator) took place in a province with the consent of the woman, nevertheless, if, after (the husband) has stepped down from his post, she should continue to be so minded, the marriage becomes valid. And for that reason a reply to a request for legal advice (*responsum*) from Paul, a man very learned (in the law), holds that their children are legitimate, being begotten and born in a valid marriage.

August 21, in the consulship of Gordian Augustus and Aviola (239).

[7] *The same Augustus to Aper*. If, on the facts as you state them, after your daughter complained to you about her husband and the marriage was ended, she then went back to him without your consent, this is not a valid marriage, since the agreement of the father, in whose power (*potestas*) she stands, is lacking. And, for that reason, if your daughter does not have a change of heart, you will not be barred from bringing an action to recover the dowry.

Posted October 29, in the consulship of Sabinus and Venustus (240).³¹

[8] *The same Augustus to Romanus*. In contracting a marriage, no weight is given to the agreement of the *curator*, who has responsibility only for managing the household assets, nor that of relatives by blood or by marriage; but consideration must be taken (only) of the will of the party to the marriage.

Given February 25, in the consulship of Gordian Augustus, for the second time, and Pompeianus (241).

[9] *Emperor PROBUS Augustus to Fortunatus*. If your neighbors or others knew that you have had a wife at home for the purpose of siring children and a daughter has been born from this marriage, then, although no documents

³⁰ = (in part, with changes) Paul. (7 *resp.*), D. 23.2.65.1.

³¹ Other constitutions show that this was the second consulship for Sabinus.

pertinentes factae sunt, non ideo minus veritas matrimonii aut susceptae filiae suam habet potestatem.

[10] *Impp. Diocletianus et Maximianus AA. Paulinae.* Cum te non ex senatore patre procreatam ob matrimonium cum senatore contractum clarissimae feminae nomen adeptam dicas, claritas, quae beneficio mariti tibi parata est, si secundi ordinis virum postea sortita es redacta ad prioris dignitatis statum, deposita est.

[11] *Idem AA. Alexandro.* Si invita detinetur uxor tua a parentibus suis, interpellatus rector provinciae amicus noster exhibita muliere voluntatem eius secutus desiderio tuo medebitur.

[12] *Idem AA. Sabino.* Ne filium quidem familias invitum ad ducendam uxorem cogi legum disciplina permittit. igitur, sicut desideras, observatis iuris praeceptis sociare coniugio tuo quam volueris non impediris, ita tamen, ut in contrahendis nuptiis patris tui consensus accedat.

D. non. Nov. Diocletiano A. II et Aristobulo cons.

[13] *Idem AA. et CC. Onesimo.* Neque sine nuptiis instrumenta facta matrimonii ad probationem sunt idonea diversum veritate continente, neque non interpositis instrumentis iure contractum matrimonium irritum est, cum omissa quoque scriptura cetera nuptiarum indicia non sunt irrita.

[14] *Idem AA. et CC. Titio.* Neque ab initio matrimonium contrahere neque dissociatum reconciliare quisquam cogi potest. unde intellegis liberam facultatem contrahendi atque distrahendi matrimonii transferri ad necessitatem non oportere.

[15] *Idem AA. et CC. Titiano.* Uxorem libertam suam manumissori, si non sit ex his personis, quae specialiter prohibentur, ducere non est interdictum, et ex eo matrimonio iustos patri filios nasci certissimum est.

were drawn up relating to the marriage or the daughter's birth, nonetheless the truth of the marriage and of the daughter you have had possesses a (probative) force of its own.

[10] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Paulina.* Since you declare that you were not born of a senatorial father, but that through marriage with a senator you acquired the status of a woman from the senatorial order (*clarissima femina*), senatorial status (*claritas*), which was achieved by you thanks to your husband, has (now) been set aside if, having subsequently chosen a husband of the second rank (i.e., an equestrian), you have been reduced to the level of your previous social rank.

[11] *The same Augusti to Alexander.* If your wife is being detained by her parents against her will, when you appeal to our good friend the provincial governor, he will, once she has been produced in court and pursuant to her wishes, provide balm for your heartache.

[12] *The same Augusti to Sabinus.* The rule of law (*disciplina legum*) does not permit that even a son in paternal power (*filiusfamilias*) be compelled to marry against his will. Therefore, in accordance with your desires, you are not prevented, provided that the relevant legal rules (*iuris praecepta*) are respected, from marrying the woman you wish, but only if your father consents to the marriage.

Given November 5, in the consulship of Diocletian Augustus, for the second time, and Aristobulus (285).

[13] *The same Augusti and the Caesars to Onesimus.* Documents drawn up to prove the existence of a marriage are void when the marriage does not take place, since the truth of the matter contradicts them. Nor is a lawfully contracted marriage invalid when documents have not been drawn up, since, even in the absence of written documentation, the other proofs of marriage are not without effect.

[14] *The same Augusti and Caesars to Titius.* No one can be compelled to start a new marriage or patch one together once it has come apart. From this you understand that the free capacity of beginning or ending a marriage ought not to be transformed into constraint.

[15] *The same Augusti and Caesars to Titianus.* A man who manumits his slave is not prohibited from marrying her when she is freed, unless he is among those persons who are specifically forbidden to do so, and it is a very fixed rule that children born from this marriage are their father's legitimate offspring.

[16] *Idem AA. et CC. Rhodoni.* Patrem, qui filiam exposuit, at nunc adultam sumptibus et labore tuo factam matrimonio coniungi filio desiderantis favere voto convenit. qui si renitatur, alimentorum solutioni in hoc solummodo casu parere debet.

[17] *Impp. Diocletianus et Maximianus AA. et CC.* Nemini liceat contrahere matrimonium cum filia nepte pronepte, itemque matre avia proavia et ex latere amita ac matertera, sorore sororis filia et ex ea nepte, praeterea fratris filia et ex ea nepte, itemque ex adfinibus privigna noverca nuru socru ceterisque, quae iure antiquo prohibentur: a quibus cunctos volumus abstinere.

D. k. Mai. Damasco Tusco et Anullino cons.

[18] *Imppp. Valentinianus Valens et Gratianus AAA. ad senatum. pr.* Viduae intra quintum et vicesimum annum degentes, etiam si emancipationis libertate gaudent, tamen in secundas nuptias sine patris sententia non conveniant. 1. Quod si in condicionis delectum mulieris voluntas repugnat sententiae propinquorum, placet admodum, ut in virginum coniunctionibus sanctum est, habendo examini auctoritatem quoque iudicariae cognitionis adiungi, ut, si pares sunt genere ac moribus petitores, is potior aestimetur, quem sibi consulens mulier adprobaverit.

2. Sed ne forte ii, qui gradu proximo ad viduarum successiones vocantur, et honestas nuptias impediant, si huiusmodi rei suspicio processerit, eorum volumus auctoritatem iudiciumque succedere, ad quos, etiamsi fatalis sors intercesserit, tamen hereditatis commodum pervenire non possit.

D. xvii k. Aug. Gratiano A. ii et Probo cons.

[19] *Impp. Arcadius et Honorius AA. Eutychiano pp.* Celebrandis inter consobrinos matrimoniis licentia huius legis salubritate indulta est, ut revocata prisci iuris auctoritate restinctisque calumniarum fomentis

[16] *The same Augusti and Caesars to Rhodo.* It is appropriate that a father, who abandoned his daughter as an infant, if she has now been raised to adulthood through your expense and effort, agree with your wish of uniting her to your son in marriage. But if he should refuse, he ought, only in this situation, to accede to paying the expenses incurred in rearing the child (*alimenta*).

[17]³² *The same Augusti and Caesars.* No one shall be permitted to contract marriage with a daughter, granddaughter, or great-granddaughter, and likewise with a mother, grandmother, or great-grandmother, and collaterally with a father's or mother's sister, one's own sister, her daughter, or her granddaughter through that daughter, and, moreover, a brother's daughter or his granddaughter through that daughter, and likewise, among relatives by marriage, a stepdaughter, stepmother, daughter-in-law, mother-in-law, and all the rest forbidden by ancient legal principle (*ius antiquum*). We wish everyone to keep away from these (marriage partners).

Given May 1, at Damascus, in the consulship of Tuscus and Anullinus (295).

[18]³³ *Emperors VALENTINIAN, VALENS, and GRATIAN Augusti to the Senate, pr.* Previously married womens less than 25 years old, even if they delight in having been emancipated from paternal power, shall nevertheless not agree to a subsequent marriage without a father's consent. 1. But if, in the choice of a marriage partner, a woman's preference (*voluntas*) is in conflict with the decision of her near relatives, We are very much of the view that, with regard to the marriages of never-married women, the rule is that, after an obligatory investigation, an authoritative judicial hearing shall also be held, so that, if the suitors are equals in birth and character, one shall be reckoned the better candidate whom the woman, consulting her own interest, has approved.

2. But so that it not happen that they, who as next-of-kin are eligible to succeed to the estates of decedent previously married women, block even honorable marriages, if a suspicion of this sort of thing should arise, We wish that the authority and judgment prevail of those persons who, even if death should intervene, nevertheless cannot gain the benefit of an inheritance.

Given July 16, in the consulship of Gratian Augustus, for the second time, and Probus (371).

[19] *Emperors ARCADIUS and HONORIUS Augusti to Eutychianus, Praetorian Prefect.* Permission is given by this salutary statute (*lex*) for first cousins to marry each other. With the authority of the ancient law (*priscum ius*) reinstated

³² = (with changes) *Collatio* 6.4.5, omitting "moreover, a brother's daughter or his granddaughter through that daughter."

³³ = (in part, with changes) C.Th. 3.7.1.

matrimonium inter consobrinos habeatur legitimum, sive ex duobus fratribus sive ex duabus sororibus sive ex fratre et sorore nati sunt, et ex eo matrimonio editi legitimi et suis patribus successores habeantur.

D. III id. Iun. Nicaeae Stilichone II et Anthemio cons.

[20] *Impp. Honorius et Theodosius AA. ad Theodorum pp. pr.* In coniunctione filiarum in sacris positarum patris expectetur arbitrium: si sui iuris puella sit intra quintum et vicesimum annum constituta, ipsius quoque exploretur adsensus. si patris auxilio destituta, matris et propinquorum et ipsius quoque requiratur adultae iudicium. 1. Si vero utroque orbata parente sub curatoris defensione consistat et inter honestos competitores matrimonii oriatur forte certamen, ut quaeratur, cui potissimum puella iungenda sit, si puella cultu verecundiae propriam noluerit depromere voluntatem, coram positis propinquis iudici deliberare permissum sit, cui melius adulta societur.

[21] *Impp. Theodosius et Valentinianus AA. Basso pp.* A caligato milite usque ad protectoris personam et sine aliqua sollemnitate matrimoniorum liberam cum ingenuis dumtaxat mulieribus contrahendi coniugii permittimus facultatem.

[22] *Idem AA. Hierio pp.* Si donationum ante nuptias vel dotis instrumenta defuerint, pompa etiam aliaque nuptiarum celebritas omittatur, nullus aestimet ob id deesse recte alias inito matrimonio firmitatem vel ex eo natis liberis iura posse legitimorum auferri, inter pares honestate personas nulla lege impediende consortium, quod ipsorum consensu atque amicorum fide firmatur.

D. x k. Mart. Constantinopoli Felice et Tauro cons.

and the kindling of malicious accusations extinguished, marriage between first cousins shall be deemed valid, regardless of whether they are the children of two brothers, or of two sisters, or of a brother and a sister. Offspring produced by such a marriage shall be deemed legitimate children and lawful claimants to their father's estates.

Given June 11, at Nicaea, in the consulship of Stilicho, for the second time, and Anthemius (405).

[20]³⁴ *Emperor HONORIUS and THEODOSIUS Augusti to Theodorus, Praetorian Prefect. pr.* The decision of the father shall be awaited regarding the marriage of daughters in his power (*sacra*). If the girl is *sui iuris* and less than 25 years old, her consent shall be ascertained as well. If she is deprived of her father's assistance, the views of her mother, near relatives, and herself too, if she is an adult, shall be solicited. 1. But if she should be a full orphan, standing under the protection of a *curator*, and a contest should happen to arise among honorable suitors for her hand in marriage, with the result that the question is brought before a court as to which candidate the girl should preferably be joined in marriage, if the girl, out of an affectation of modesty declines to disclose her own preference, it shall be permitted to the judge to take counsel, in the presence of her near relatives, as to with whom it is better that the young woman be united in marriage.

(408–409).

[21]³⁵ *Emperors THEODOSIUS and VALENTINIAN Augusti to Bassus, Praetorian Prefect.* We grant the free capacity to contract marriage, provided this is with free-born women, (to all soldiers, ranging) from the infantry rank-and-file to the imperial bodyguard, even without any kind of marriage ceremony.

(426).

[22]³⁶ *The same Augusti to Hierius, Praetorian Prefect.* If documentation of prenuptial gifts or of the dowry is lacking, and if there is no marriage procession or other aspects of a wedding ceremony, no one shall reckon on this account that a marriage otherwise correctly entered into lacks validity or that the rights of legitimate children can be taken from those born of this union, when it is contracted between persons of equal status. No law impedes it, and it is sealed by the consent of the parties and the witness of their friends.

Given February 20, at Constantinople, in the consulship of Felix and Taurus (428).

³⁴ Combine perhaps with C. 5.8.1, dated to 409; Seeck gives January 409.

³⁵ Combine with perhaps C. 6.7.4; C.Th. 4.6.7; see C.Th. 4.6.8. Seeck dates to March 30, 426.

³⁶ = C.Th. 3.7.3. Combine with C. 2.57.2, 5.3.17, 5.11.6, 6.18.1, 6.24.11, 6.61.2; C.Th. 4.6.8.

[23] *Imp. Iustinus A. Demostheni pp. pr.* Imperialis benevolentiae proprium hoc esse iudicantes, ut omni tempore subiectorum comoda tam investigare quam eis mederi procuremus, lapsus quoque mulierum, per quos indignam honore conversationem imbecillitate sexus elegerint, cum competenti moderatione sublevandos esse censemus minimeque eis spem melioris condicionis adimere, ut ad eam respicientes improvidam et minus honestam electionem facilius derelinquant. nam ita credimus dei benevolentiam et circa genus humanum nimiam clementiam quantum nostrae naturae possibile est imitari, qui cottidianis hominum peccatis semper ignoscere dignatur et paenitentiam suscipere nostram et ad meliorem statum reducere: quod si circa nostro subiectos imperio nos etiam facere differamus, nulla venia digni esse videbimur.

1. Itaque cum iniustum sit servos quidem libertate donatos posse per divinam indulgentiam natalibus suis restitui postque huiusmodi principale beneficium ita degere, quasi numquam deservissent, sed ingenui nati essent, mulieres autem, quae scaenicis quidem sese ludis immiscuerunt, postea vero spreta mala condicione ad meliorem migravere sententiam et inhonestam professionem effugerunt, nullam spem principalis habere beneficii, quod eas ad illum statum reduceret, in quo, si nihil peccatum esset, commorari potuerint: praesenti clementissima sanctione principale beneficium eis sub ea lege condonamus, ut, si derelicta mala et inhonesta conversatione commodiorem vitam amplexae fuerint et honestati sese dederint, liceat eis nostro supplicare numini, ut divinos adfatus sine dubio mereantur ad matrimonium eas venire permittentes legitimum: 1a. His, qui eis coniungendi sunt, nullo timore tenendis, ne scitis praeteritarum legum infirmum esse videatur tale coniugium, sed ita validum huiusmodi permanere matrimonium confidentibus, quasi nulla praecedente inhonesta vita uxores eas duxerint, sive dignitate praediti sint sive alio modo scaenicas in matrimonium ducere prohibeantur, dum tamen dotalibus omnimodo instrumentis, non sine scriptis tale probetur coniugium. 1b. Nam omni macula penitus direpta et quasi suis natalibus huiusmodi mulieribus

[23] *Emperor JUSTIN Augustus to Demosthenes, Praetorian Prefect. pr.* Deeming it a particular characteristic of imperial goodwill at all times to take care to look into benefits for our subjects as much as to devise relief for them, We ordain that the errors of women, by means of which they might choose, through the weakness of their gender (*imbecillitas sexus*),³⁷ a way of life unworthy of their dignity, shall be alleviated by the application of proper restraint and that in no way at all are they to be deprived of the hope of a better marriage prospect, so that, looking back upon that imprudent and dishonorable choice, they shall more easily leave it behind. For in this way We believe that We are imitating, as much as this is possible for Our (mortal) nature, the goodwill and – excessive where the human race is concerned – the forgiveness of God, who deems it ever worthy to pardon the daily sins of men and women, accept our repentance, and lead us back to a better condition. But if We should put off even doing this with respect to those subject to our power, We (Ourselves) will seem unworthy of forgiveness.

1. And so, since it would be unjust that slaves, at any rate, once granted their freedom, can be, through an act of imperial favor, granted the right of free birth, and afterwards experience an imperial benefit of this nature in such a way as though they had never been slaves, but had been born free, but that those who are born free, while females, who, admittedly, having gotten involved with theatrical productions, but later scorning their lowly status, change their disposition for the better and flee their dishonorable profession, have no hope of an imperial benefit, which would bring them back to that condition, in which, if they had done no wrong, they could have remained. We grant to them, through this instant, most forgiving statute (*sanctio*), an imperial benefit under this condition, that if they abandon their bad and dishonorable way of living, embrace a more advantageous lifestyle, and devote themselves to honorable pursuits, they shall be permitted to petition Our Divine Majesty, so that they shall without doubt merit an imperial pronouncement allowing them to proceed to a valid marriage. 1a. Those about to marry such women shall not be held back by a concern that such a marriage appear to be rendered invalid by the enactments of past laws (*leges*), but confident that a marriage of this kind will remain valid, as though they married women with no dishonorable past, whether they (such husbands) enjoy a high rank or for any other reason are forbidden to marry actresses, provided all the same that evidence for such a union be supplied by a full complement of dowry agreements and not without written documents. 1b. For it is Our wish that in future, once every blot has been completely torn away and these women have been, as it were, restored to a birthright of this kind, neither any dishonorable terminology cling to them

³⁷ On "gender" as a translation here see the note at C. 5.3.20.

redditis neque vocabulum inhonestum eis inhaerere de cetero volumus neque differentiam aliquam eas habere cum his, quae nihil simile peccaverunt:

2. Sed et liberos ex tali matrimonio procreandos suos et legitimos patri esse, licet alios ex priore matrimonio legitimos habeat, ut bona eius tam ab intestato quam ex testamento isti quoque sine ullo impedimento percipere possint. 3. Sed etsi tales mulieres post divinum rescriptum ad preces earum datum ad matrimonium venire distulerint, salvam eis nihilo minus existimationem servari praecipimus tam in aliis omnibus quam ad transmittendam quibus voluerint suam substantiam et suscipiendam competentem sibi legibus ab aliis relictam vel ab intestato delatam hereditatem.

4. Similes vero tale merentibus ab imperatore beneficium mulieribus illas etiam esse volumus, quae dignitatem aliquam, etsi non serenissimo principi supplicaverunt, ultronea tamen donatione ante matrimonium meruerint, ex qua dignitate aliam etiam omnem maculam, per quam certis hominibus legitime coniungi mulieres prohibentur, aboleri penitus oportet.

5. His illud adiungimus, ut et filiae huiuscemodi mulierum, si quidem post expurgationem prioris vitae matris suae natae sint, non videantur scaenicarum esse filiae nec subiacere legibus, quae prohibuerunt filiam scaenicae certos homines in matrimonium ducere. 5a. Sin vero ante procreatae sint, liceat preces offerentibus invictissimo principi sacrum sine ullo obstaculo mereri rescriptum, per quod eis ita nubere permittatur, quasi non sint scaenicae matris filiae: nec iam prohibeantur illis copulari, quibus scaenicae filias vel dignitatis vel alterius causae gratia uxores ducere interdicitur, ut tamen omnimodo dotalia inter eos etiam instrumenta conficiantur.

6. Sed et si a scaenica matre procreata, quae usque ad mortem suam in eadem professione duravit, post eius obitum preces imperatoriae clementiae obtulerit et divinam indulgentiam meruerit liberationem maternae iniuriae et nubendi licentiam sibi condonantem, istam quoque posse sine metu priorum legum in matrimonio illis copulari, qui dudum scaenicae filiam uxorem ducere prohibebantur.

nor there be any difference between them and those women who have not committed a similar wrong.

2. Further, (We wish) also that children shall be produced by such a marriage and that these shall be legitimate heirs of their father, even if he has legitimate children from a prior marriage, so that they are able to inherit his estate without obstacle both on intestacy and under a will. 3. And even if such women, after receiving an imperial rescript given in response to their petition, should delay marriage, We instruct that their good name shall nonetheless be preserved intact, just as in all other things, so also for the purpose of bequeathing their property to whom they wish and of receiving that inheritance which is left to them by others and due to them under the laws or that which comes their way on intestacy.

4. We also wish that those women be similar in fact to the women (just mentioned) who receive such a benefit from the Emperor, who, even if they do not (themselves) make application to the most tranquil monarch, all the same achieve before marriage some social rank, given as a gift without asking.³⁸ In accordance with this status, all other blots on their reputation, because of which women are forbidden lawfully to marry certain men, ought utterly to be removed.

5. To these rules We add the following, that, if women of this kind have daughters, provided they be born after the cleansing of the mother's prior life, they shall not be deemed to be daughters of actresses, nor to be liable to the laws which have forbidden certain men from marrying the daughter of an actress. 5a. But if, however, they were born beforehand, they shall be permitted, through addressing a petition to the Most Unconquered Emperor, to receive without any hindrance an imperial rescript, through which it shall be allowed to them to marry in such a manner as though they were not daughters of an actress mother. Nor then shall they be forbidden any longer to marry those men for whom it is prohibited, because of their social rank or for some other reason, to marry the daughters of actresses, so that, in any case, a complete set of dowry documents shall also be drawn up for them.

6. But even should the daughter of an actress, who has remained in the same profession up until her death, address a petition, after her mother's passing, to the imperial clemency and receive an imperial favor, one that grants her release from the affront committed by her mother and freedom of discretion in marrying, (We wish) that she too can, without concern for prior legislation, marry those who previously used to be forbidden to marry the daughter of an actress.

³⁸ Some believe that Justin, Justinian's uncle as well as imperial predecessor, enacted this law at his nephew's prompting. Justinian and Theodora were married after the law, but he had raised her to patrician status before its enactment.

7. Immo et illud removendum esse censuimus, quod etiam in priscis legibus, licet obscurius, constitutum est, ut matrimonia inter impares honestate contrahenda non aliter quidem valeant, nisi dotalia instrumenta confecta fuerint, his vero¹ intercedentibus omnimodo firma sint sine aliqua distinctione personarum, si modo liberae sint et ingenuae mulieres, nullaue nefariarum vel incestarum coniunctionum suberit suspicio. 7a. Nam nefarios et incestos coitus omnibus modis amputamus, sicut et illos, qui praeteritarum legum sanctione specialiter vetiti sunt, exceptis videlicet his, quos praesenti lege permisimus legitimique matrimonii iure muniri praecepimus.

8. His itaque per hanc generalem legem ita constitutis et de cetero conservandis, praeteritas etiam huiusmodi coniunctiones ex subiecto tempore factas secundum praedictam dispositionem iudicari praecipimus, ut, si quis talem uxorem ab initio nostri imperii, prout dictum est, iam duxerit et liberos ab ea procreaverit, iustos eos et legitimos et tam ab intestato quam ex testamento pater successores habeat, et legitima in posterum nihilo minus ea uxore permanente procreandi quoque liberi legitimi sint.

[24] *Imp. Iustinianus A. ad senatum.* Sancimus, si quis nuptiarum fecerit mentionem in qualicumque pacto, quod ad dandum vel faciendum vel non dandum vel non faciendum concipitur, et sive nuptiarum tempus dixerit sive nuptias nominaverit, non aliter intellegi esse condicionem adimplendam vel extenuandam, nisi ipsa nuptiarum accedat festivitas, et non esse tempus inspiciendum, in quo nuptiarum aetas vel feminis post duodecimum annum accesserit vel maribus post quartum decimum annum completum, sed ex quo vota nuptiarum re ipsa processerint, sic etenim et antiqui iuris contentio dirimetur et immensa librorum volumina ad mediocrem modum tandem pervenient.

D. Constantinopoli xi k. Aug. Lampadio et Oreste cons.

[25] *Idem A. Iuliano pp. pr.* Si furiosi parentis liberi, in cuius potestate constituti sunt, nuptias possunt contrahere, apud veteres agitabatur. 1. Et filiam quidem furiosi marito posse copulari omnes paene iuris

¹ <non>

7. Rather, We have ordained that the following also shall be abolished, which is also laid down in the ancient statutes, although less clearly, namely, that marriages to be contracted between parties of unequal standing are not, in fact, otherwise valid unless dowry documents have been drawn up. When these are indeed lacking, the marriage shall be entirely valid, without any distinction drawn between persons, provided that the women are free and free-born, and there is no reason to believe that the union is immoral or incestuous. 7a. For We are eradicating in every way immoral and incestuous relationships, just as also those which are in particular forbidden by the rules laid down by legislation in the past, except for those, obviously, which We have allowed by this instant law and which We have ordered to be endowed with full legal force of marriage.

8. Therefore, these rules laid down in this way through this general statute (*lex generalis*) shall be preserved in future. We also order that past unions of this sort that have been formed during our reign be treated according to the aforesaid rule, so that, if someone has already married such a wife from the beginning of our reign onwards, just as has been said, and has had children with her, he, as their father, shall have them as his lawful and legitimate children and his heirs both upon intestacy and under a will. Further, if she remains nonetheless in the future his lawful wife, children born later shall be legitimate as well.

(520-523).³⁹

[24] *Emperor Justinian Augustus to the Senate.* We lay down that, if anyone mentions marriage in any kind of contract for giving or doing or not giving or not doing something, whether he establishes the date of the marriage or (simply) mentions marriage, the condition shall not otherwise be considered fulfilled, in whole or in part, unless the actual celebration of the marriage takes place, and the date shall not be considered at which the age for marriage arrives, which for females is after 12 years and for males after 14 years, but instead that at which the marriage vows in actual fact take effect. For in this way both an ancient legal controversy will be settled and immense volumes of books will at last be reduced to a moderate size.

Given July 22, at Constantinople, in the consulship of Lampadius and Orestes (530).

[25] *The same Augustus to Julian, Praetorian Prefect.* pr. Among the ancient legal authorities (*veteres*) it used to be debated whether the children (or grandchildren) of a male ascendant in whose power they stood could contract marriage, if he were insane (*furiosus*). 1. And, almost all of the experts in the ancient

³⁹ Lounghis *et al.* date to between June 521, and July 522.

antiqui conditores admiserunt: sufficere enim putaverunt, si pater non contradicat.

2. In filio autem familias dubitabatur. et Ulpianus quidem rettulit constitutionem imperatoris Marci, quae non de furioso loquitur, sed generaliter de filiis mente capti, sive masculi sive feminae sint qui nuptias contrahunt, ut hoc facere possint etiam non adito principe, et aliam dubitationem ex hoc emergere, si hoc, quod in demente constitutio induxit, etiam in furiosis obtinendum est, quasi exemplo mente capti et furiosi adiuvante.

3. His itaque dubitatis tales ambiguitates decidentes sancimus hoc repleti, quod divi Marci constitutioni deesse videtur, ut non solum dementis, sed etiam furiosi liberi cuiuscumque sexus possint legitimas contrahere nuptias, tam dote quam ante nuptias donatione a curatore eorum praestanda: 4. Aestimatione tamen in hac quidem regia urbe excellentissimi praefecti urbis, in provinciis autem virorum clarissimorum earum praesidum vel locorum antistitum tam opinione personae quam moderatione dotis et ante nuptias donationis constituenda, praesentibus tam curatoribus dementis vel furiosi quam his, qui ex genere eorum nobiliores sunt: 5. Ita tamen, ut nulla ex hac causa oriatur vel in hac regia urbe vel in provinciis iactura substantiae furiosi vel mente capti, sed gratis omnia procedant, ne tale hominum infortunium etiam expensarum incremento praegravetur.

D. k. Oct. Constantinopoli Lampadio et Oreste vv. cc. cons.

[26] *Idem A. Iuliano pp. pr.* Si quis alumnam suam libertate donaverit et in matrimonio suo collocaverit, dubitabatur apud antiquos, utrumne huiusmodi nuptiae legitimae esse videantur, an non. 1. Nos itaque vetustam ambiguitatem decidentes non esse vetitum matrimonium censemus, si enim ex adfectu omnes introducuntur nuptiae et nihil impium neque legibus contrarium in tali copulatione spectamus, quare praedictas nuptias inhibendas existimaverimus? nec enim homo sic impius inveniatur, ut, quam ab initio loco filiae habuit, eam postea

law (*iuris antiqui conditores*) allowed that the daughter, certainly, of an insane father could marry. For they thought it enough if the father did not object.

2. In the case of a son-in-power, however, there was hesitation. Ulpian, for example, reports a constitution of the Emperor Marcus (Aurelius), which does not speak about an insane person, but in general terms about the children of a person not in his right mind (*mente captus*), whether they are male or female who contract marriage, to the effect that they can do so even without approaching the Emperor. (Ulpian reports) that some doubt arose from this result, as to whether the rule which the *constitutio* established in the case of the person not in his right mind should also apply in the case of insane persons, on the ground that the precedent of the person not in his right mind assists the children of insane persons.

3.⁴⁰ Therefore, since these points have been doubted, in resolving such ambiguities We ordain that that shall be supplied which seems to be lacking in the *constitutio* of the deified Marcus, so that the children of either sex not only of an unstable but also of an insane person may contract a legitimate marriage, with the dowry or premarital gift to be furnished by their *curator*. 4. Nevertheless, appraisal, however, both of the reputation of the person and the amount of the dowry and premarital gift shall be made: in this Imperial City, certainly by the *vir excellentissimus* City Prefect; in the provinces, by the *vir clarissimi* governors or the local bishops. The *curatores* both of the demented and of the insane are to be present, as well as the more distinguished members of their family (*nobiliores*). 5. But (this shall be accomplished) in such a way, nevertheless, that no loss for any reason shall befall the property of the insane or demented person either in this Imperial City or in the provinces, but everything shall be done gratuitously, so that the misfortune of such persons shall not be further aggravated by loss due to expenses.

Given October 1, at Constantinople, in the consulship of the *vir* clarissimi Lampadius and Orestes (530).

[26] The same Augustus to Julian, Praetorian Prefect. *pr.* If someone raised a female slave as a foster-child (*alumna*), freed her, and then married her, there was a controversy among the ancient legal authorities (*antiqui*) as to whether or not this was deemed a lawful marriage. 1. Therefore, by way of resolving this long-term source of doubt, We lay down that this marriage shall not be forbidden. For if all (such) marriages are motivated by affection and We observe nothing in such unions that is immoral or against the laws, why should We deem them as something to be repressed? No man could be found to be so immoral that he would raise a girl as his daughter from the beginning and

⁴⁰ §§3-5 = (in part, with changes) C. 1.4.28.

in suo collocaverit matrimonio, sed ei credendum est, qui eam ab initio non ut filiam educavit et libertate donavit et dignam esse postea suo putavit matrimonio.

2. Ea videlicet persona omnimodo ad nuptias venire prohibenda, quam aliquis, sive alumna sit sive non, a sacrosancto suscepit baptismo, cum nihil aliud sic inducere potest paternam adfectionem et iustam nuptiarum prohibitionem, quam huiusmodi nexus, per quem deo mediante animae eorum copulatae sunt.

D. k. Oct. Constantinopoli Lampadio et Oreste vv. cc. cons.

[27] *Idem A. Iohanni pp.* Sancimus nuptias, quae inter masculos et feminas maiores vel minores sexagenariis vel quinquagenariis lege Iulia vel Papia prohibitaе sunt, homines volentes contrahere et ex nullo modo vel ex nulla parte tales nuptias impediri.

[28] *Idem A. Iohanni pp. pr.* Si libertam quis uxorem habeat, deinde inter senatores scribatur dignitate illustratus, an solvatur matrimonium, apud Ulpianum quaerebatur, quia lex Papia inter senatores et libertas stare conubia non patitur. 1. Nos igitur dei sequentes iudicium non patimur in uno eodemque conubio mariti felicitatem uxori fieri infortunium, ut, quantum vir in altum tollatur, tantum et coniux eius decrescat, immo magis penitus depereat. 2. Absit itaque a nostro tempore huiusmodi asperitas et firmum maneat matrimonium et uxor marito concrescat et sentiat eius fulgorem stabileque maneat matrimonium ex huiusmodi superventu minime deminutum.

3. Simili modo si privati hominis filia ad liberti veniat conubium et postea pater mulieris ad senatoris dignitatem fuerit elatus, taceat Papiae legis crudelissima sanctio et neque per hunc modum dissolvatur matrimonium inter facti senatoris filiam et libertum, ne soceri prosperitas sine genero inveniatur. 4. Melius est enim legis Papiae severitatem in utroque casu compescere, quam eam sequendo hominum matrimonia

later take her as his wife. Instead, he should be trusted who did not bring her up from the beginning as his daughter, freed her, and afterwards deemed her worthy of marriage with him.

2. Clearly that person, whether she is his foster-child or not, shall be utterly prevented from marrying a man who received her (as a godchild) from Holy Baptism, since nothing else can so generate fatherly affection and a just prohibition of marriage as a tie of this kind, through which their souls are joined together through God's mediation.⁴¹

Given October 1, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[27] *The same Augustus to John, Praetorian Prefect.* We ordain that marriages between men and women older or younger than 60 years or 50 years, which were forbidden by (legislation pursuant to)⁴² the Lex Julia et Papia, may be entered into if the parties are willing and shall not in any way or from any direction be hindered.

(531 or 532).⁴³

[28] *The same Augustus to John, Praetorian Prefect. pr.* The question was put to Ulpian, as to whether, if someone had a freedwoman as his wife, and then was made a senator, the marriage was ended, because (legislation pursuant to) the Lex Papia does not allow legally valid marriage between senators and freedwomen. 1. Therefore We, following the judgment of God, do not permit, in one and the same marriage, the success of the husband to become a misfortune for the wife, so that, as high as the husband is raised up, to the same extent his spouse is lowered, or rather is entirely destroyed. 2. So let harshness of this sort be absent from Our reign and let the marriage relationship remain valid. Let the wife prosper along with the husband, let her bask in his reflected glow, and let their marriage bond remain strong and not at all diminished by a supervening event of this kind.

3. In a similar manner, if the daughter of a man not in public life should marry a freedman, and afterwards the father of the woman is raised to senatorial status, the very cruel regime of the lex Papia shall fall silent, and by this means the marriage between the daughter of a man who becomes a senator and a freedman shall not be dissolved, so that success not deprive the father-in-law of his son-in-law. 4. For it is better to assuage the severity of the Lex Papia in both cases, rather than by enforcing it to destroy people's marriages, not

⁴¹ Blume: "This is the first instance of prohibiting marriage on account of spiritual relationship."

⁴² The SCC *Persicianum* and *Calvisianum*, with the SC *Claudianum*.

⁴³ Lounghis *et al.* date to between February 20, 531 and January 13, 532. This constitution must date before October 18, 532; see C. 6.58.12.

dispergere non ex vitio mulieris et mariti, sed ex prospera alterutrius partis fortuna: cum enim ex una radice vitium nascitur, consequens est, ut una lege tollatur.

[29] Ὁ αὐτὸς βασιλεὺς. ... *pr.* Πάσης ... [Μ]ηδεις τὴν μὴ βουλομένην ἐλκέτω εἰς σκηνὴν μηδὲ τὴν ἐκουσίως κατελθοῦσαν κωλύετω ὕστερον βουλομένην ἡσυχάσαι μηδὲ προτροπὴν διδόντω καὶ λαμβανέτω αὐτῶν ἐγγύας περὶ τοῦ μηκέτι ἀφίστασθαι τῆς σκηνῆς. 1. Πᾶς οὖν ἐν οἰαδήποτε τάξει ὧν βίου ἢ οἰανδήποτε ἀρχὴν ἄρχων εἰ τοῦτο ποιήσειεν, ἐξέστω τῇ γυναικὶ καὶ τῷ ἄρχοντι προσιέναι, εἰ μὴ αὐτὸς ἐστὶν ὁ βιαζόμενος, καὶ τῷ ἐπισκόπῳ, ἵνα ἐκεῖνοι ἀποστήσωσι τὸν τὴν γυναῖκα βιαζόμενον, εἰδότες ὥς, ἐὰν ἀντιστῇ, τῆς πόλεως ἐκβάλλεται καὶ δημεύεται. ταῦτα μὲν εἴ τις ἐλκύσειε τινα πρὸς τὴν σκηνήν.

2. Εἰ δὲ τὴν ἐκουσίως κατελθοῦσαν κωλύει πάλιν ἀποστήναι, καὶ ἡ τῶν ἐγγυῶν δόσις λυέσθω καὶ, εἴ τι ἀπητήθησαν δοῦναι οἱ ἐγγυηταί, διπλᾶ λαμβανέτωσαν. 3. Ὀμοίως δέ, [εἰ] καὶ αὐταὶ αἱ γυναῖκες ἀπητήθησάν τι παρασχεῖν, εἰς διπλάσιον ἀπολαμβάνετωσαν, τοῦ ἄρχοντος καὶ τοῦ ἐπισκόπου ταῦτα ἐκβιβάζοντων. 4. Καὶ αὐτὸ¹¹ τὴν ἀρχὴν μηδὲ ἐγγύας ἐξέστω ἀπαιτεῖσθαι τὰς εἰς σκηνὴν κατελθούσας περὶ τοῦ μηκέτι ἀφίστασθαι.

5. Ἐξουσίαν ἔχοντος τοῦ ἐπισκόπου, ἐὰν ὁ τῆς ἐπαρχίας ἄρχων ἐστὶν ὁ βιαζόμενος, ἐναντιοῦσθαι αὐτῷ καὶ ἀζημίους φυλάττειν τοὺς ἐγγυητάς· εἰ δὲ μὴ ἐνδίδωσιν ὁ ἄρχων, ἐξέστω τῷ ἐπισκόπῳ μηνύειν, ὥστε τὸν ἄρχοντα ἀποστήναι τῆς ἀρχῆς καὶ δημευθῆναι καὶ διηνεκῶς ἐξορισθῆναι.

6. Ἐξουσίας οὐσης ταῖς τοιαύταις γυναῖξιν καὶ προσομιλεῖν γάμοις καὶ ἀνευ θείας ἀντιγραφῆς. 7. Ἀλλὰ τ[αύτην τὴν] διάταξιν κρατεῖν τοῖς ἰδίῳι χρόνοις, κωλ[υομένων] πάντων τῶν ἐξ ἀρχῆς κωλυομένων γάμ[ων], πλὴν τούτου τοῦ νῦν ἐπινοηθέντος τοῦ ποτε μὲν δεομένου θείας ἀντιγραφῆς, νῦν δὲ οὐκέτι.

8. Ταῦτα πάντα νομοθετήσασα ἡ διάταξις ἐπιφέρει τότε κρατεῖν, ἥνικα μείνωσι σωφρονοῦσαι· εἰ γὰρ μετὰ τὸ γῆμαι πάλιν βουλευθῶσι γενέσθαι σκηνικαί, οὐ μόνον τῆς εὐγενείας ἧς εἶχον ἐκπίπτουσιν, ἀλλ' οὐδὲ μετέχουσιν

¹¹ (αὐτό)

through any fault of the wife or husband, but because of the success that one party or the other has enjoyed. For since this failing arises from one source, it is logical that it be removed by one statute.

(531 or 532).⁴⁴

[29]⁴⁵ (*The same Augustus ...*). pr. No one shall force an unwilling woman to become a stage performer, nor prevent (from retiring) one who became one willingly and later wishes to retire, nor offer encouragement and accept sureties from her against her retirement from the stage. 1. For if anyone of any social rank whatsoever or holding any kind of public office whatsoever should do this, it shall be possible for the woman to approach the governor, unless he is the person using force against her, and the bishop, so that they compel the person exercising force upon the woman to cease and desist, in the knowledge that, should he resist, he shall be cast out of the city and have his property confiscated by the State. This is the rule where someone forces a person to be a stage performer.

2. But if someone prevents a woman who of her own volition became a stage performer from going into retirement, any bond given by sureties shall be void and, if anything has been claimed from the sureties, they shall receive twice that amount back. 3. In the same way, if the women themselves are made to pay a claim, they are to receive twice the amount back. The governor and the bishop shall enforce these rules. 4. In fact, it shall not even be possible from the outset to demand from female stage performers bonds against their retirement from the stage.

5. The bishop shall have the authority, if the provincial governor is the one applying force, to resist him and to ensure that the sureties are not required to pay. But if the provincial governor does not yield, it shall be possible for the bishop to make an accusation so that the governor step down from office, have his property confiscated by the State, and go into permanent exile.

6. Such women shall also be entitled to marry, even without an imperial rescript. 7. Moreover, (We ordain) that this imperial law (*diataxis*) shall have force (only) within its own limits, as all of those marriages that were previously forbidden are still forbidden. The only exception is the kind of marriage provided for now, which previously required an imperial rescript, but now no longer.

8. All of those things which this *diataxis* lays down shall have force as long as the women remain committed to honorable comportment. For if, after marriage, they again wish to become stage performers, not only shall they

⁴⁴ Lounghis *et al.* date to between 531 and 534.

⁴⁵ = Nomoc. 13.21. See C. 1.4.33. This constitution was issued on the same day as C. 1.4.33 or shortly before; Lounghis *et al.* date it to November 1, 534, the same day.

οὐδεμιᾶς βοήθειας οὔτε ἐκ ταύτης οὔτε ἐκ τῆς Ἰουστίνου τοῦ τῆς θεᾶς λήξεως διατάξεως· ὑπόκειται γὰρ στούπρου ἐγκλήματι.

V De Incestis et Inutilibus Nuptiis

[1] *Imp. Alexander A. Amphigeni.* Liberta eademque uxor tua, si a te invito discessit, conubium cum alio non habet, si modo uxorem eam habere velis.

[2] *Impp. Diocletianus et Maximianus AA. Sebastianae.* Neminem, qui sub ditione sit Romani nominis, binas uxores habere posse vulgo patet, cum et in edicto praetoris huiusmodi viri infamia notati sint. quam rem competens iudex inultam esse non patietur.

PP. III id. Dec. Diocletiano A. II et Aristobulo cons.

[3] *Imp. Constantinus A. Patroclo. pr.* Cum ancillis non potest esse conubium: nam ex huiusmodi contubernio servi nascuntur. 1. Ideoque praecipimus, ne decuriones in gremia potentissimarum domorum libidine servarum ducente confugiant. si enim decurio clam actoribus atque procuratoribus nescientibus alienae fuerit servae coniunctus, et mulierem in metallum trudi per sententiam iudicis iubemus et ipsum decurionem in insulam deportari, omnibus bonis eius civitati, cuius curialis fuerat, mancipandis, si patria potestate fuerit liberatus nullosque habeat liberos vel parentes vel etiam propinquos, qui secundum legum ordinem ad eius successionem vocantur.

2. Quod si actores vel procuratores loci, in quo flagitium admissum est, fuerunt conscii vel compertum facinus promere noluerunt, metallo eos convenit implicari. 3. Si vero dominus hoc fieri permisit vel postea cognitum celavit, si quidem in agro id factum est, fundus cum mancipiis et pecoribus ceterisque rebus, quae cultui rustico sustinentur, fisci

lose the rights of free birth which they possess, but they shall have no claim to assistance on the basis of either this *diataxis* nor that of emperor Justin of blessed memory.⁴⁶ For they are liable to a charge of criminal fornication (*stuprum*).

Fifth Title Incestuous and Void Marriages

[1] *Emperor ALEXANDER Augustus to Amphigenes.* If the woman who is at once your wife and freedwoman has separated from you against your will, she does not possess the legal capacity to marry (*conubium*) with another man, provided that you wish to keep her as your wife.

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Sebastiana.* It is commonly known law that no one who finds himself under the dominion of Rome can have two wives, since even in the Praetor's Edict men of this type have been marked with legal infamy (*infamia*). A judge with the appropriate jurisdiction will not allow this matter to go unavenged.

Posted December 11, in the consulship of Diocletian Augustus, for the second time, and Aristobulus (285).

[3]⁴⁷ *Emperor CONSTANTINE Augustus to Patroclus, pr.* There can be no legal capacity to marry (*conubium*) with slave-women. From this type of union slaves are born. 1. And on this account We instruct that decurions shall not take refuge, motivated by lust for slave-women, in the inner recesses of the most powerful houses. For if a decurion secretly, without the knowledge of the managers and the procurators, begins a relationship with someone else's slave, We ordain both that the woman shall be cast into the mines as a consequence of a sentence issued by a judge and that the decurion suffer capital exile to an island, with all of his property made over to the town in which he was a councilor, if he has been freed from paternal power (*patria potestas*) and he has no descendants, ascendants, or even close relatives, who according to the rule of law (*legum ordo*) are eligible to succeed to him.

2. But if the managers or procurators of the place in which the offense has been committed were aware of it (at the time) or refused to disclose it when they (later) became aware of it, it is fitting that they be sent to the mines. 3. If, on the other hand, the slave-owner permitted this thing to happen or concealed it when he later found out about it, if indeed this took place in the countryside,

⁴⁶ C. 5.4.23.

⁴⁷ = (in part, with changes) C.Th. 12.1.6.

viribus vindicetur: si vero in civitate id factum est, dimidiam bonorum omnium partem praecipimus confiscari poenam augentes, quoniam intra domesticos parietes scelus admissum est, quod noluit mox cognitum publicare.

D. k. Iul. Aquileiae Constantino A. v et Licinio C. cons.

[4] *Impp. Valentinianus Theodosius et Arcadius AAA. ad Andromachum comitem rerum privatarum. pr.* Qui contra legum praecepta vel contra mandata constitutionesque principum nuptias forte contraxerit, nihil ex eodem matrimonio, sive ante nuptias donatum sive deinceps quoquo modo datum fuerit, consequatur, idque totum, quod ab alterius liberalitate in alterum processerit, ut indigno indignaeve sublatum fisco vindicari sancimus:

1. Exceptis tam feminis quam viris, qui aut errore acerrimo, non adfectato insimulatoque, neque ex causa vili decepti sunt aut aetatis lubrico lapsi. 2. Quos tamen ita demum legis nostrae laqueis eximi placuit, si aut errore comperto, aut ubi ad legitimos pervenerint annos, coniunctionem huiusmodi sine ulla recrastinatione diremerint.

D. VII k. Mart.

[5] *Idem AAA. Cynegio pp. Fratris uxorem ducendi vel duabus sororibus coniungendi penitus licentiam submovemus, nec dissoluto quocumque modo coniugio.*

D. ... k. Dec. Constantinopoli Theodosio A. III et Abundantio cons.

[6] *Impp. Arcadius et Honorius AA. Eutychiano pp. pr.* Si quis incesti vetitique coniugii sese nuptiis funestavit, proprias quamdiu vixerit teneat facultates, sed neque uxorem neque filios ex ea editos habere

the farm with its slaves, its herd animals, and the other things which are maintained for agricultural purposes, shall be claimed for the accounts of the Treasury. But if this took place in a town, We instruct that one-half of all of (the owner's) goods shall be confiscated, increasing the penalty, because this wicked deed was committed within the walls of his or her house, which (the owner) refused to disclose immediately upon learning of it.

Given July 1, at Aquileia, in the consulship of Constantine Augustus, for the fifth time, and Licinius Caesar (319).⁴⁸

[4] *Emperors VALENTINIAN, THEODOSIUS, and ARCADIUS Augusti to Andromachus, the Count of the Privy Purse. pr.* Whoever happens to contract a marriage in violation of the instructions of the laws (*praecepta legum*) or in violation of imperial mandates and constitutions (*mandata constitutionesque*) shall attain nothing from said marriage, whether a gift is made before the marriage or something is given later, in any manner whatsoever, and all of this property, which has issued from the generosity of one party for the benefit of the other, We ordain shall be seized from the recipient on the ground that he or she is unworthy to receive it, and shall be claimed for the Treasury.

1. Exception shall be made for women as well as for men who have been led astray through a very serious mistake, not one which is feigned or pretended, and not from some cheap motive, or who have erred because of the unreliable judgment of the young. 2. Nevertheless they shall be eligible for this exemption from our law only insofar as, either upon discovery of their mistake or when they attain full legal majority (i.e., 25 or over), they dissolve a union of this kind without any delay.

Given February 23.⁴⁹

[5] *The same Augusti to Cynegius, Praetorian Prefect.* We utterly revoke the freedom to marry a brother's wife, or two sisters (in succession), even where the (first) union has ended in any way whatsoever.⁵⁰

Given December 1, at Constantinople, in the consulship of Theodosius Augustus, for the third time, and Abundantius (393).⁵¹

[6]⁵² *Emperors ARCADIUS and HONORIUS Augusti to Eutychianus, Praetorian Prefect. pr.* If anyone has defiled himself through an incestuous and forbidden union, although he hold his own property as long as he lives, he shall not be

⁴⁸ The year is more likely to be 318: so Seeck and Projet Volterra.

⁴⁹ Seeck gives February 23, 392.

⁵⁰ See C.Th. 3.12.2.

⁵¹ Seeck dates to November 22, 387.

⁵² = (in part, with changes) C.Th. 3.12.3.

credatur. 1. Nihil prorsus praedictis nec per interpositam quidem personam vel donet superstes vel mortuus derelinquat. 2. Dos si qua forte sollemniter aut data aut promissa fuerit, iuxta ius antiquum fisci nostri commodis cedat.

3. Testamento suo extraneis nihil relinquat, sed sive testato sive intestato legibus ei et iure succedant, si qui forte ex iusto et legitimo matrimonio editi fuerint, hoc est de descendantibus filius filia nepos neptis pronepos proneptis, de ascendentibus pater mater avus avia, de latere frater soror patruus amita. 4. Testandi sane ita demum habeat facultatem, ut his tantum personis pro iuris ac legum quod voluerit arbitrio relinquat, quas succedere imperialis praecepti tenore mandavimus: ita tamen, ut hereditate defuncti penitus arceatur, si quis ex his quos memoravimus in contrahendis incestis nuptiis consilium inisse monstrabitur, successuro in locum illius, qui post eum gradum proximus invenitur.

5. Ea sane, quae de viris cavimus, etiam de feminis, quae praedictorum sese consortiis commaculaverint, custodiantur. 6. Memoratis vero personis non extantibus fisco locus pateat.

D. VI id. Dec. Constantinopoli Arcadio IIII et Honorio III AA. cons.

[7] *Imp. Valentinianus et Marcianus AA. Palladio pp. pr.* Humilem vel abiectam feminam minime eam iudicamus intellegi, quae, licet pauper, ab ingenuis tamen parentibus nata sit. 1. Unde licere statuimus senatoribus et quibuscumque amplissimis dignitatibus praeditis, ex ingenuis natas quamvis pauperes in matrimonium sibi adsciscere, nullamque inter ingenuas ex divitiis et opulentiore fortuna esse distantiam.

2. Humiles vero abiectasque personas eas tantummodo mulieres esse censemus: ancillam, ancillae filiam, libertam, libertae filiam, scaenicam vel scaenicae filiam, tabernariam vel tabernarii vel lenonis aut harenarii filiam, aut eam quae mercimoniis publice praefuit: ideoque huiusmodi inhibuisse nuptias senatoribus harum feminarum, quas nunc enumeravimus.

deemed to have a wife or children born from her. 1. To the aforesaid he shall give nothing at all while he is alive or leave it after he is dead, not even, through a third person. 2. If any dowry happens to be formally handed over or promised, it shall accrue to the accounts of Our Treasury in accordance with ancient law (*ius antiquum*).

3. He shall leave nothing in his will to non-family members, but, whether he dies with a valid will or without, those persons shall succeed to him by legislation and under (juristic) law (*leges et ius*) if any exist who happened to be born in a just and valid marriage, that is, among descendants, a son, daughter, grandson, granddaughter, great-grandson, great-granddaughter; among ascendants, a father, mother, grandfather, grandmother; among collaterals, a brother, sister, paternal uncle, paternal aunt. 4. Certainly he shall have the capacity to make dispositions by will only to the extent that he may leave what he wishes subject to the rules established by (juristic) law and statutes only to those persons whom We have ordered to succeed by the terms of imperial legislation, with the proviso nevertheless that if anyone among those whom We mentioned be shown to have planned to contract an incestuous marriage, he be utterly disqualified from inheriting from the decedent, and the person most closely related to him succeed in his place.

5. Those things, to be sure, which We lay down concerning men shall also be observed in the case of women who disgrace themselves through unions with the aforesaid types of persons. 6. If, however, none of the aforesaid persons remains alive, a claim (of escheat) shall lie for the Treasury.

Given December 8, at Constantinople, in the consulship of Arcadius, for the fourth time, and Honorius, for the third time, Augusti (396).

[7]⁵³ Emperors VALENTINIAN and MARCIAN Augusti to Palladius, Praetorian Prefect. pr. We determine that a "low and degraded" (*humilis vel abiecta*) woman is not at all she who, although poor, is all the same born from free-born parents. 1. So We decree that it shall be permitted for senators and whoever is distinguished by high rank to marry women born from free-born parents, even though they are poor, and that, among free-born women, there exist no gulf in status on the basis of wealth and relative size of patrimony.

2. Indeed, We decree to be "low and degraded" (*humiles abiectaeque*) persons only these women: a slave-woman, the daughter of a slave-woman, a freedwoman, the daughter of a freedwoman, an actress or the daughter of an actress, a female tavern-worker, or the daughter of a tavern-worker, a pimp, or a gladiator, and a woman who has charge of merchandise for sale to the general public. And (We decree) that on this account We have curbed marriages of this kind for senators with those women whom we have now listed.

⁵³ = (in part, with changes) Nov. Marciani 4.1.2-3; combine with C. 1.14.9.

D. prid. non. April. Constantinopoli Aetio et Studio cons.

[8] *Imp. Zeno A. Epinico pp.* Licet quidam Aegyptiorum idcirco mortuorum fratrum sibi coniuges matrimonio copulaverint, quod post illorum mortem mansisse virgines dicebantur, arbitrati scilicet, quod certis legum conditoribus placuit, cum corpore non convenerint, nuptias re non videri contractas, et huiusmodi conubia tunc temporis celebrata firmata sunt, tamen praesenti lege sancimus, si quae huiusmodi nuptiae contractae fuerint, earumque contractores et ex his progenitos antiquarum legum tenori subiacere nec ad exemplum Aegyptiorum, de quibus superius dictum est, eas videri fuisse firmatas vel esse firmandas.

D. k. Sept. Constantinopoli post consulatum Leonis iunioris.

[9] *Idem A. Sebastiano pp.* Ab incestis nuptiis universi qui nostro reguntur imperio noverint temperandum. nam rescripta quoque omnia vel pragmaticas formas aut constitutiones impias, quae quibusdam personis tyrannidis tempore permiserunt scelesto contubernio matrimonii nomen imponere, ut fratris filiam vel sororis et eam, quae cum fratre quondam nuptiali iure habitaverat, uxorem legitimam turpissimo consortio liceret amplecti, aut ut alia huiusmodi committerentur, viribus carere decernimus, ne dissimulatione culpabili nefanda licentia roboretur.

VI De Interdicto Matrimonio inter Pupillam et Tutorem seu Curatorem Liberosque Eorum

[1] *Impp. Severus et Antoninus AA. Mario.* Senatus consulti auctoritatem, quo inter pupillam et tutoris filium conubium saluberrime sublatum est, circumveniri rusticitatis et imperitiae velamentis non oportet.

Given April 4, at Constantinople, in the consulship of viri clarissimi Aetius and Studius (454).

[8] *Emperor ZENO Augustus to Epinicus, Praetorian Prefect.* Although certain Egyptians have married the wives of their decedent brothers on the ground that they were said to have remained virgins after their (the brothers') passing, evidently being persuaded that, in line with the position taken by certain legal experts (*legum conditores*), marriage was not deemed to have been contracted in actual fact without sexual intercourse, even unions of this kind, solemnized at that point in time, are valid (as marriages). Nevertheless, We ordain by this instant law that if any marriages of this kind are in future contracted, the parties to them and their children shall be liable to the thrust of the ancient laws and that they shall not, on the model of the Egyptians spoken of above, be deemed to have been valid marriages, nor shall they be rendered valid.

Given September 1, at Constantinople, in the post-consulate of Leo the Younger (475).

[9] *The same Augustus to Sebastianus, Praetorian Prefect.* All those subject to Our rule shall know that they must abstain from incestuous marriages. For We decree also that all the wicked rescripts (*rescripta*), specially drafted enactments (*pragmaticae formae*), and constitutions, which allowed, during the period of tyranny,⁵⁴ certain persons to place upon an evil union the name of marriage, so that it was permitted to embrace as a lawful wife, in a most disgraceful relationship, the daughter of a brother or of a sister, and the lawful wife of a deceased brother, or so that other offenses of this type were committed, are (now) void, in order that unspeakably outrageous conduct not gain strength from a blameworthy pretense. (476-484).⁵⁵

Sixth Title Forbidden Marriage between a Female Minor Ward and a Tutor, Curator, or Their Children

[1] *Emperor ANTONINUS Augustus to Marius.*⁵⁶ The weight of the decree of the Senate most salubriously removing the legal capacity to marry (*conubium*) between a minor female ward and her tutor's son ought not to be evaded through the pretexts of a rustic lack of sophistication and inexperience (*rusticitas et imperitia*).⁵⁷

⁵⁴ This refers to a coup staged in 475 by Basiliscus, the brother of Zeno's mother-in-law Verina, that ousted Zeno for a short period.

⁵⁵ Lounghis *et al.* date to between 476 and 480 or 484.

⁵⁶ The inscription wrongly attributes this law to both Severus and Caracalla.

⁵⁷ The SC, which prohibited marriage between a female ward and her tutor, his son, or grandson, was passed in the joint reign of Marcus Aurelius and Commodus (176-180).

PP. VII id. Febr. Laeto II et Cereale cons.

[2] *Imp. Alexander A. Burrio.* Mater pupillae cum tutore filiae suae vel filio tutoris nuptias contrahere non prohibetur.

PP. non. Nov. Maximo II et Aeliano cons.

[3] *Imp. Gordianus A. Rogatiano. pr.* Cum proponas ei, quam matrimonio tuo iunctam suggeris, post liberos susceptos curatorem patrem tuum datum, quem contendis nec te in potestate habuisse: cum rite contractum matrimonium ex post facto vitari non potuerit, iusta interpretatione metuere non debes, ne liberi quos habetis non ex iusto matrimonio suscepti videantur. 1. Ut autem omnis scrupulus auferatur, insistere pater tuus debet nec non et uxor tua, ut alius loco eius detur: habebit enim facultatem repetendae rationis negotiorum gestorum ab eo qui fuerit substitutus.

[4] *Imp. Philippus A. Hygiae.* Libertinum, qui filio suo naturali, quem in servitute susceperat, postea manumisso pupillam suam eandemque patroni sui filiam in matrimonio collocavit, ad sententiam amplissimi ordinis, qui huiusmodi nuptiis interdicendum putavit, pertinere dubitari non oportet.

[5] *Imp. Philippus A. et Philippus C. Apuleio.* Curatorem adulto suo filiam suam nuptui collocare non posse falso tibi persuasum est.

PP. XV k. Sept. Philippo A. et Titiano cons.

[6] *Imp. Valerianus et Gallienus AA. Lucio. pr.* Si patris tui pupillam nondum reddita tutelae ratione vel post redditam nondum exacto quinto et vicesimo nec non etiam utili anno uxorem duxisti, nec matrimonium cum ea habuisse nec filium ex huiusmodi coniunctione procreasse videri potes. 1. Sane si hoc pater puellae, cum decederet, postulavit, et nuptiae rite contractae et filius videtur iure susceptus.

Posted February 7, in the consulship of Laetus, for the second time, and Cerealis (215).

[2] *Emperor ALEXANDER Augustus to Burrius.* The mother of a female minor ward is not prohibited from contracting marriage with the *tutor* of her own daughter or with the *tutor's* son.

Posted November 5, in the consulship of Maximus, for the second time, and Aelianus (223).

[3] *Emperor GORDIAN Augustus to Rogatianus. pr.* As you contend that your father, who, you allege, did not (then) have you in his paternal power (*potes-tas*), was given as a *curator* to the woman who you claim was (previously) joined to you in marriage and by whom you had children, (and) since a properly contracted marriage cannot be invalidated after the fact, you ought not, on a proper reading of the law, be concerned that your children will be deemed to have been born illegitimately. 1. So that, moreover, every source of anxiety is removed, your father, as well as your wife, ought to urge that another be given in his place. For she will have the possibility of demanding from the substitute an accounting regarding the management of her affairs.

[4] *Emperor PHILIP Augustus to Hygia.* There ought to be no doubt that a freedman who has married his female minor ward, the daughter of his patron, to his own "natural" (illegitimate) son,⁵⁸ who was born into slavery and later manumitted, is liable under the decree of the most distinguished Senate, which believed that marriages of this kind should be prohibited.

[5] *The same Augustus and PHILIP Caesar to Apuleius.* You have been wrongly led to believe that a *curator* cannot marry his daughter to his adult ward.

Posted August 18, in the consulship of Philip Augustus and Titianus (245).

[6] *Emperors VALERIAN and GALLIENUS Augusti to Lucius. pr.* If you have married your father's (former) female minor ward before he has rendered an account of his guardianship, or after he has done this but before she has passed 25 years of age as well as a year's worth of days in which her interests could be effectively pursued in court, you can be deemed neither to have married her nor to have sired a (legitimate) child from a union of this kind. 1. Certainly, if the father of the girl requested this (marriage) at the time of his death, the marriage is considered to have been properly contracted and the child to have been legitimately sired.

⁵⁸ *Naturalis* is also translatable here and elsewhere by the terms "biological" and "genetic", both commonly found in modern legal discourse.

PP. id. Mai. Saeculare II et Donato cons.

[7] *Impp. Diocletianus et Maximianus AA. et CC. Paregorio.* Si tutor vel curator pupillam vel adultam quondam suam sibi vel filio suo nullo divino impetrato beneficio in matrimonio collocaverit, manet infamia contra eum velut confessum de tutela, quia huiusmodi coniunctione fraudem administrationis tegere laboravit, et dos data per conductionem repeti potest.

[8] *Impp. Leo et Anthemius AA. Erythrio pp.* Si quis tutoris vel curatoris nomine usurpato, id est pro tutore seu pro curatore vel negotiorum gestore res pupillae administraverit eamque sibi filiove suo copulaverit, tales nuptias stare et non ad exemplum tutorum infirmari, ne ex huiusmodi subtili vel maligno tractatu matrimonia seu proles ex his progenita vel dos super his data vel promissa aliquam laesionem vel calumniam patiantur.

D. k. Iul. Marciano cons.

VII Si Quacumque Praeditus Potestate vel ad Eum Pertinentes ad Suppositarum Iurisdictioni Suae Adspirare Temptaverint Nuptias

[1] *Imppp. Gratianus Valentinianus et Theodosius AAA. Neoterio pp. pr.* Si quis ordinaria vel qualibet praeditus potestate circa nuptias invitis ipsis vel parentibus contrahendas, sive pupillae sive apud patres virgines sive viduae erunt, sive et iuris sui viduae, denique cuiuscumque sortis, occasione potestatis utatur et minacem favorem suum invitis his, quorum utilitas agitur, exhibere aut exhibuisse detegitur, hunc, licet

Posted May 15, in the consulship of Saecularis, for the second time, and Donatus (260).

[7] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Paregorius.* If a *tutor* or a *curator* either himself marries his former female minor or adult ward or gives her in marriage to his son, without having obtained imperial permission, legal infamy (*infamia*) remains for him as though he has admitted to wrongdoing regarding his guardianship, because he has made an effort to conceal fraud in his administration of the property through a union of this kind; and the dowry that has been given can be reclaimed by an action for restitution (*condictio*).

[8]⁵⁹ *Emperors LEO and ANTHEMIUS Augusti to Erythrius, Praetorian Prefect.* If anyone has wrongfully assumed the status of a *tutor* or a *curator*, that is, as a *tutor*, a *curator*, or a manager of affairs (*negotiorum gestor*) he administers the property of a female minor ward and marries her himself or gives her in marriage to his own son, (We decree) that such a marriage shall be valid and not rendered void on the model of *tutores*, so that, from such fastidious or malicious dealings, marriages and the children they produce or the dowries given or promised in connection with them do not result in material loss or vexatious litigation (*calumnia*).

Given July 1, in the consulship of Marcian (469).

Seventh Title If Persons of Any Degree of Authority or Their Subordinates Attempt Marriage with Women Subject to Their Jurisdiction

[1]⁶⁰ *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS Augusti to Neoterius, Praetorian Prefect. pr.* If someone with regular authority or any authority at all should make use of this opportunity in the matter of contracting marriage for unwilling parties or those whose ascendant male relatives are unwilling, whether it is a matter of female minor wards, never-married or previously married adult women in these last two cases living in a father's house, or previously married *sui iuris* women – in short, (women) of any status whatsoever – and he is discovered to display or to have displayed his menacing favor toward unwilling persons whose interests are at stake, even if he does not carry through with the prohibited marriage, for such an attempt we

⁵⁹ Combine with C. 1.4.46, 1.18.13, 5.1.5, 5.30.3.

⁶⁰ = (with changes) C.Th. 3.11.1. See C. 5.1.3.

prohibitas nuptias non peregerit, attamen pro tali conamine multae librarum auri decem obnoxium statuimus et, cum honore abierit, perfectam dignitatem usurpare prohibemus, tali scilicet poena, ut, si circa honorem eum, quo male usus est, vindicandum statutis nostris parere noluerit, eam provinciam, in qua sibi usurpaverit, habitare per iuge biennium non sinatur.

1. Illo videlicet adiciendo, ut et in potestate adhuc constituto liceat personae, quam huiusmodi ambitu circumire temptaverit, confestim contestatione proposita cum sua suorumque domo iurisdictionem eius evitare, curaturis hoc uniuscuiusque civitatis defensoribus et eiusdem iudicis apparitoribus.

2. Et quidem si haec pravitas ordinarii iudicis erit, universa eius domus ratio atque omnia vel civilia vel criminalia negotia, quamdiu idem in administratione fuerit, vicario competant. 3. Sin autem vicarius vel similis potestatis vim in huiusmodi contrahendo matrimonio molietur, vicissim ordinarius iudex intercessor existat. 4. Sin erunt uterque suspecti, ad illustrem praefecturam specialiter talium domorum, quamdiu idem administraverit, tuitio pertineat.

D. xv k. Iul. Thessalonicae Gratiano v et Theodosio AA. cons.

VIII Si Nuptiae ex Rescripto Petantur

[1] *Impp. Honorius et Theodosius AA. Theodoro pp. pr.* Quidam vetusti iuris ordine praetermisso obreptione precum nuptias, quas se intellegunt non mereri, de nobis existimant postulandas, saepe habere puellae consensum confingentes. quapropter tale sponsalium genus praesentis legis definitione prohibemus. 1. Si quis igitur contra hanc definitionem nuptias precum subreptione meruerit, amissionem bonorum et poenam deportationis subiturum se esse non ambigat et amisso iure matrimonii,

lay down that he shall be liable to a fine of 10 pounds of gold. Further, when he leaves office, we forbid that he assume the rank he otherwise has earned. Of course, he suffers the following penalty: if he has refused to comply with our enactments regarding that office, which he has badly used, and which must be avenged, he shall not be permitted to live in that province in which he abused his authority, for a continuous period of two years.

1. Plainly, the proviso shall be added that, if he still retains his office, the person whom he attempted to impose upon in this way, along with his or her household and that of any dependents, shall be permitted to avoid his jurisdiction while advancing a claim immediately. The defenders (*defensores*) in each and every city, as well as the staff members attached to the same judge, shall take responsibility for this matter.

2. And, to be sure, if such wrongful behavior is displayed by a judge with regular authority, all of the affairs of his household, as well as civil and criminal matters, shall fall to his subordinate as long as the judge remains in office. 3. But if, however, the subordinate or a person of like authority should employ force in contracting marriages of this kind, the judge equipped with regular authority shall intercede in his turn. 4. But if they both fall under suspicion, the safekeeping of such households shall, by way of exception, as long as the same person remains in office, fall to the distinguished (Praetorian) Prefecture.

Given June 17, at Thessalonica, in the consulship of Gratian, for the fifth time, and Theodosius Augusti (380).

Eighth Title Marriages Requested by Rescript

[1]⁶¹ *Emperors HONORIUS and THEODOSIUS Augusti to Theodorus, Praetorian Prefect. pr.* Certain persons, having evaded the provisions of the ancient law (*vetustum ius*) through the manipulative recourse to petitions, believe that they should make judicial requests of Us to permit marriages for which they know they do not qualify, often faking the acquisition of the consent of the young woman concerned. For this reason, We prohibit this kind of engagement through the provisions of this instant statute. 1. Therefore, if anyone in violation of these provisions gains permission to marry through manipulative recourse to petitions, let him not doubt that he will suffer confiscation of his property and the penalty of deportation. Having lost the right to marry that he gained through a claim that was wrongful and forbidden, let him also not doubt that he will not have the children sired in this union qualify as legitimate;

⁶¹ = (in part, with changes) C.Th. 3.10.1. Combine with perhaps C. 5.4.20. Seeck dates to January 409.

quod prohibita usurpatione meruerit, filios se ex hac coniunctione susceptos iustos non habiturum nec umquam postulatae indulgentiae adnotationisve indulto efficacem se veniae effectum meruisse: exceptis his, qui parentum sponsionem de nuptiis filiarum impleri desiderant vel sponsalia, hoc est arrarum data nomine, reddi sibi praecepto legum cum statuta poena deprecantur.

D. k. Febr. Ravennae Honorio VIII et Theodosio III AA. cons.

[2] *Imp. Zeno A. Basilio pp. pr.* Nefandissimum scelus fratris sororisve filiae nuptiarum, quod sacratissimis constitutionibus sub gravissimae poenae interminatione damnatum est, iterato praesentis divinae sanctionis tenore modis omnibus prohibemus. 1. Precandi quoque in posterum super tali coniugio, immo potius contagio, cunctis licentiam denegamus, ut unusquisque cognoscat impetrationem quoque rei, cuius est denegata petitio, nec si per subreptionem post hunc diem obtinuerit, sibi nec profuturam.

VIII De Secundis Nuptiis

[1] *Imppp. Gratianus Valentinianus et Theodosius AAA. Eutropio pp. pr.* Si qua mulier nequaquam luctus religionem priori viro nuptiarum festinatione praestiterit, ex iure quidem notissimo sit infamis. 1. Praeterea secundo viro ultra tertiam partem bonorum in dotem ne det neque ei testamento plus quam tertiam partem relinquat. 2. Omnium praeterea hereditatum legatorum fideicommissorum suprema voluntate relictorum, mortis causa donationum sit expers. haec namque ab heredibus vel coheredibus aut ab intestato succedentibus vindicari iubemus, ne in his, quibus correctionem morum induximus, fisci videamur habere rationem.

3. His etiam amittendis, quae prior maritus ei suprema reliquerit voluntate, quamquam haec, quae mulieri a priore viro relinquuntur et

nor that he ever earned a valid result of pardon from the grant of (imperial) favor or written release upon his appeal. Exceptions will be made for those who request that the engagement arranged by ascendant male relatives on behalf of their daughters be respected, or who demand that engagement gifts, that is, those given under the title of earnest money (*arrae*), be returned to them on the authority of the laws, along with the statutory penalty.

Given February 1, at Ravenna, in the consulship of Honorius, for the eighth time, and Theodosius, for the third time, Augusti (409).

[2] *Emperor ZENO Augustus to Basilius, Praetorian Prefect. pr.* We forbid in every way the most unspeakably evil act of marrying the daughter of a brother or a sister, which has been condemned in the most sacred (i.e., imperial) constitutions under repressive threat of a very severe penalty, the gist of this (condemnation) being repeated in this instant imperial enactment (*sanctio*). 1. We deny to everyone the possibility also in the future of making a petition regarding such a union, or rather abomination, so that each and every person realizes that even the achievement of this thing, for which the appeal process is hereby placed off limits, will not avail him even if he gains it by devious means, from this day hence.⁶²

Ninth Title Remarriage

[1]⁶³ *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS Augusti to Eutropius, Praetorian Prefect. pr.* If, in her haste to remarry, any woman utterly fails to show proper respect (*religio*) in mourning her prior husband, she shall be infamous⁶⁴ in accordance with certainly very well-known law. 1. What is more, she shall not give to her new husband more than a third of her property as a dowry, nor shall she leave more than a third to him in a will. 2. Moreover, she shall have no portion of all inheritances, legacies, or trusts left to her in a will, as well as gifts in contemplation of death (*mortis causa*). For We command that such things be claimed by the heirs, co-heirs, or those succeeding on intestacy, so that We not seem, in the case of those whose moral improvement we have promoted, to prefer the advantage of the Treasury.

3. That property too shall be forfeited which her prior husband left to her in his will, although such property which has been left to the woman by

⁶² Lounghis *et al.* date to 486.

⁶³ *pr.* = (in part, with changes) C. 6.56.4; combine with perhaps C. 5.13 and the references mentioned there.

⁶⁴ The term *infamis* designates persons involved in disgraced professions, as well as certain people who have suffered legal disabilities as a result of criminal or civil convictions.

per immaturum matrimonium vacuata esse coeperunt, primo a decem personis edicto praetoris enumeratis, id est adscendentibus et descendentibus et ex latere usque ad secundum gradum, scilicet gradibus servatis, deinde praesumi a fisco iubemus. 4. Eandem quoque mulierem infamem redditam hereditates ab intestato, vel legitimas vel honorarias, non ultra tertium gradum sinimus vindicare.

PP. xv k. Ian. Gratiano v et Theodosio AA. cons.

[2] *Idem AAA. Eutropio pp.* Si qua ex feminis perduto marito intra anni spatium alteri festinavit innubere (parvum enim temporis post decem menses servandum adicimus, tametsi id ipsum exiguum putemus), probrosis inusta notis honestioris nobilisque personae et decore et iure privetur atque omnia, quae de prioris mariti bonis vel iure sponsalium vel iudicio defuncti coniugis consecuta fuerat, amittat.

D. iiii k. Iun. Constantinopoli Eucherio et Syagrio cons.

[3] *Idem AAA. Floro pp. pr.* Feminae, quae susceptis ex priore matrimonio filiis ad secundas post tempus luctui statutum transierint nuptias, quidquid ex facultatibus priorum maritorum sponsalium iure, quidquid etiam nuptiarum sollemnitate perceperint, aut quidquid mortis causa donationibus factis aut testamenti iure directo aut fideicommissi vel legati titulo vel cuiuslibet munificae liberalitatis praemio ex bonis, ut dictum est, priorum maritorum fuerint adsecutae, id totum, ita ut perceperint, integrum ad filios, quos ex praecedente coniugio habuerint, transmittant vel ad quemlibet ex filiis (dummodo ex his tantum, quos tali successione dignissimos iudicamus), in quem contemplatione meritorum liberalitatis suae iudicium mater crediderit dirigendum.

her prior husband and now begins to be ownerless thanks to her over-hasty remarriage, We order to be claimed first by the ten types of persons listed (as intestate heirs) in the Praetor's Edict,⁶⁵ that is, by the ascendants and descendants, and collaterally up to the second degree – of course, with the regular order of degrees preserved – then, by the Treasury. 4. We also permit the same woman, now burdened with legal infamy (*infamis*), to claim inheritances left on intestacy, both under the civil and Praetorian rules, (but) not beyond the third degree.

Posted December 18,⁶⁶ in the consulship of Gratian, for the fifth time, and Theodosius Augusti (380).

[2]⁶⁷ *The same Augusti to Eutropius, Praetorian Prefect.* If any woman, having lost her husband, has hastened to marry another in less than a year – for We add a short period of time to be respected after ten months have passed,⁶⁸ even though We consider even this to be brief – branded with the marks of shame, she shall be deprived of the social rank and legal rights of a person of relatively elevated and distinguished status, and she shall forfeit all that she obtained from the property of her prior husband, either as engagement gifts or through his will.

Given May 30, at Constantinople, in the consulship of Eucherius and Syagrius (381).

[3]⁶⁹ *The same Augusti to Florus, Praetorian Prefect, pr.* As to women who, having children born from a prior marriage, proceed to a new marriage after the appointed time for mourning has passed: whatever they have received from the property of their prior husbands under title of engagement gifts, whatever they have also received at the time the marriage was solemnized, and whatever they have obtained from gifts made in contemplation of death (*mortis causa*) or by will, either by direct right (as an inheritance) or under title of a trust or a legacy, or as a reward motivated by any sort of lavish generosity from the estates of their husbands, as just said, all of this, just as they received it, they shall transmit in its entirety to the children they had by their prior husbands, or to any one of these children toward whom the mother believes, in consideration of their merits, the benefit of her generosity ought to be directed – provided that it only goes to those whom We deem to be most worthy of such a bequest.

⁶⁵ See Inst. 3.93 and 5.

⁶⁶ The month is uncertain: December or June. Seeck accepts Krüger's date.

⁶⁷ = (in part) C.Th. 3.8.1.

⁶⁸ The ten months reflect a long-standing prohibition on remarriage by widows that has been explained in terms of a desire both to avoid confusion over paternity and to respect a decedent husband's memory.

⁶⁹ = (in part, with changes) C.Th. 3.8.2.

1. Nec quicquam eadem feminae ex isdem facultatibus abalienandi in quamlibet extraneam personam vel successionem ex alterius matrimonii coniunctione susceptam praesumant atque habeant potestatem: possidendi tantum ac fruendi in diem vitae, non etiam abalienandi facultate concessa. nam si quid ex isdem rebus in alium quemlibet fuerit ab ea translatum, ex maternis redintegrabitur facultatibus, quo illibata ad hos quos statuimus liberos bona et incorrupta perveniant.

1a. Illud etiam addimus legi, ut, si aliquis ex isdem filiis, quos ex priore matrimonio susceptos esse constabit, forte decesserit, matre iam secundis nuptiis funestata, aliis etiam ex eodem matrimonio progeneris liberis superstitibus, id, quod per eandem successionem ab intestato vel ex testamento suae posteritatis mater videbitur consecuta, in diem vitae pro sibi debita portione sola tantum possessione delata, omne his qui supererunt ex priore susceptis matrimonio filiis relinquat nec super istiusmodi facultatibus testandi in quamlibet aliam extraneam personam vel quicquam alienandi habeat potestatem. 2. Quod si nullam ex priore matrimonio habuerit successionem vel natus native decesserint, omne, quod quoquo modo percepit, pleni proprietate iurisⁱⁱⁱ obtineat atque ex his nanciscendi dominii et testandi circa quem voluerit liberam habeat potestatem.

D. xv k. Ian. Constantinopoli Antonio et Syagrio cons.

[4] *Impp. Honorius et Theodosius AA. Mariniano pp. pr.* Cum aliis sanctionibus iusserimus materna bona integra ad liberos pervenire, quod tamen mulier mariti largitate perceperit, ex eo tantum liberi coniugio procreati sibi speciale tamquam paternum noverint vindicandum. 1. Itaque si habens filios in secundas nuptias fortasse transierit, sponsaliciam largitatem, quam vir secundus contulerit in uxorem, tantummodo filii qui ex secundo matrimonio suscepti sunt pro soliditate possideant, nec prosit liberis ex priore susceptis marito, quod mulier in tertia minime vota migraverit.

2. Quod si posterior vir sine liberis ex eodem matrimonio susceptis decesserit, quidquid ab eo ex sponsalium largitate uxor fuerit consecuta, id sibi iurique suo sciat esse collatum, etiamsi ex priore matrimonio donator filios reliquisse doceatur.

ⁱⁱⁱ pleno proprietatis iure

1. Nor shall these same women appropriate or enjoy the right of alienating any of this property to any non-related person or to successors born from the union of the other marriage. Only the right of the lifetime use and enjoyment of the property (*usufruct*) is granted, not also that of alienation. For if she should transfer any of this property to someone else, it shall be restored from her own resources, so that this property pass whole and undiminished to the children whom We specify.

1a. This provision We add as well to this statute, that if any of those children who are shown to have been born in the prior marriage happen to pass away, at a time when the mother has already been polluted by a subsequent marriage and the other children born in that same marriage are still surviving, then as to what the mother shall be deemed to obtain through the same succession to her child, whether on intestacy or under a will, she shall receive only the lifetime possession of the portion that is due her; she shall leave the whole to the surviving children from the prior marriage, and she shall not enjoy, with respect to property of this kind, a right of leaving it by will to any non-related person or of alienating any of it. 2. But if she has no successors from the prior marriage, or if such child or children have passed on, all that which she has obtained in any way whatsoever she shall enjoy with the full rights of ownership and she shall have the full right of acquiring ownership from these children and of leaving it by will to whom she wishes.

Given December 18, at Constantinople, in the consulship of Antonius and Syagrius (382).

[4]⁷⁰ Emperors HONORIUS and THEODOSIUS Augusti to Marinianus, Praetorian Prefect. *pr.* In other statutes (*sanctiones*)⁷¹ We have ordered that a mother's property go in its entirety to her children; nevertheless, as to that which a woman receives because of the generosity of her husband, the children born from that union shall know that it must be claimed only by them, because (it is) specific to them as though it (still) were their father's property. 1. So if a woman with children should happen to pass to a new marriage, only the children born from the subsequent marriage shall possess in its entirety that which the new husband gave as a generous engagement gift. Nor shall the fact that the mother does not marry a third time benefit the children from a prior husband.

2. But if a subsequent husband dies without children from that marriage the wife shall know that whatever she obtained from the generous engagement gift he gave to her has accrued to her and her right (of ownership), even if it should come to light that the giver had left behind children from a prior marriage.

⁷⁰ Combine with C. 5.1.4, 5.18.11, 5.19.1; C.Th. 3.5.12.

⁷¹ These have not survived.

3. Ad maternas sane veniens vel ex hoc vel ex quolibet alio titulo facultates omnis posteritas ex quocumque suscepta viro pro debita sibi portione, ut a matre vel spontanea largitate vel per testamentum eius fuerit collata, possideat. 4. Nos enim hac lege id praecipue custodiendum esse decrevimus, ut ex quocumque coniugio suscepti filii patrum suorum sponsalicias retineant facultates.

D. III non. Nov. Ravennae Honorio XIII et Theodosio x AA. cons.

[5] *Impp. Theodosius et Valentinianus AA. Florentio pp. pr.* Generaliter censemus, quoquo casu constitutiones ante hanc legem mulierem liberis communibus, morte mariti matrimonio dissoluto, quae de bonis mariti ad eam devoluta sunt servare sanxerunt, isdem casibus maritum quoque quae de bonis mulieris ad eum devoluta sunt morte mulieris matrimonio dissoluto communibus liberis servare, nec interesse, si alter pro marito donationem ante nuptias vel pro muliere dotem crediderit offerendam. 1. Haec observari praecipimus, licet res ante nuptias donatae, ut adsolet fieri, in dotem a muliere redigantur.

2. Dominium autem rerum, quae liberis vel huius legis vel praeteritarum constitutionum auctoritate servantur, ad liberos pertinere decernimus. itaque defuncto eo, qui eas liberis reservabat, extantes ab omni possessore liberi vindicabunt, consumptas ab heredibus eius exigent, qui eas servare debuerat. 3. Alienandi sane vel obligandi suo nomine eas res, quae liberis servari praeceptae sunt, eis qui reservaturi sunt adempta licentia est. 4. Negotia vero liberorum patri utiliter administrare concedimus. 5. Dividendi quoque res inter eos ipsos liberos parentibus pro suo arbitrio vel eligendi quem voluerint licentiam non negamus.

6. In his autem casibus, in quibus res ut paternas mater liberis communibus servare praecepta est, hoc est ubi morte mariti matrimonio dissoluto mulier ad alias nuptias venit, vel ubi ut maternas patrem liberis communibus servare censuimus, hoc est ubi morte mulieris matrimonio dissoluto vir ad alias nuptias venit, si hereditatem eius parentis qui prior mortuus est non adierint liberi, licebit eis, tamquam eius

3. Certainly all children coming into a mother's property under this or any title at all, whoever the husband who sired them may be, shall possess (it) in line with the portion due them, whether it accrued to them from the mother by free gift or under a will. 4. For We decree that by this law the following principle must be especially safeguarded, (namely) that children born in any marriage at all shall hold onto the engagement gifts made by their own fathers.

Given November 3, at Ravenna, in the consulship of Honorius, for the thirteenth time, and Theodosius, for the tenth time, Augusti (422).

[5]⁷² *Emperors THEODOSIUS and VALENTINIAN Augusti to Florentius, Praetorian Prefect. pr.* We lay down as a general rule that in whatever situation constitutions passed before this law (*lex*) have ordained that, when a marriage is ended through the death of the husband, the wife shall preserve for their children in common the property belonging to him that has devolved to her, in these same situations the husband too shall preserve for their common children the property of hers accruing to him when a marriage is ended through the death of the wife, nor does it matter if another person thought that a prenuptial gift should be made on behalf of the husband or a dowry should be offered on behalf of the wife. 1. We lay down that these rules shall be respected even if, as customarily happens, property given as a prenuptial gift is transformed into a dowry by the wife.

2. We decree, moreover, that ownership over that property which is guaranteed to the children by the authority of this statute or of preceding *constitutiones* shall accrue to those children. Therefore, with the death of that person who was preserving the property in question for the children, the children will (successfully) claim ownership of property that survives from every possessor, and if the property is used up they will have recourse from the heirs of the person who ought to have preserved it for them. 3. Of course, the power of alienating or making subject to lien under their own name the property which they are instructed to preserve for the children is removed from those who are going to preserve it. 4. We permit, on the other hand, fathers to administer the affairs of their children with full legal effect. 5. We also do not deny to parents the power of dividing, according to their wishes, the property among the children themselves or to choose whom they wish (as heirs).

6. In those situations, moreover, in which a mother is instructed (by prior statute) to preserve, for children she had in common with her decedent husband, property on the ground that it is paternal – that is, when after a marriage has been ended by the death of the husband the wife remarries – or where We have ordained that a father preserve, for children he had in common with his

⁷² = (in part, with changes) Nov. Theod. 14.1; combine with C. 6.61.3.

tantum res fuerint qui posterior moritur, eas sibi vindicare, scilicet si vel eius qui posterior moritur hereditatem crediderint adeundam, ne, quod favore liberorum inductum est, quibusdam casibus ad laesionem eorum videatur inventum.

7. Illud etiam humanis sensibus huic legi credidimus inserendum, ut eo quoque casu, quo lucratur vel mulier res, quae ad eam a marito perveniunt, vel maritus eas, quae ex bonis mulieris ad eum transeunt (hoc est ubi primum matrimonium alterius morte dissolvitur nec superstes ad secundas nuptias venit), si res vel maritus vel uxor (hoc est qui superstes est) non consumpserit vel alienaverit (quod eis ad secundas nuptias non venientibus quasi rerum dominis concessum esse non dubium est), liberis liceat res a patre profectas ut paternas, a matre ut maternas accipere.

D. VII id. Sept. Constantinopoli Theodosio A. XVII et Festo cons.

[6] *Imp. Leo et Anthemius AA. Erythrio pp. pr.* Hac edictali lege in perpetuum valitura sancimus, si ex priore matrimonio procreatis liberis pater vel mater ad secunda vel tertia aut ulterius repetiti matrimonii vota migraverit, non sit ei licitum novercae seu vitrico testamento vel sine scriptura seu codicillis, hereditatisve iure sive legati vel fideicommissi titulo plus relinquere, nec dotis aut ante nuptias donationis nomine seu mortis causa habita donatione conferre nec inter vivos conscribendis donationibus (quae etsi constante matrimonio civili iure interdictae sint, morte tamen donatoris ex certis causis confirmari solent), quam filio vel filiae, si unus vel una extiterit.

1. Quod si plures liberi fuerint, singulis aequas partes habentibus minime plus, quam ad unumquemque eorum pervenerit, ad eorum

decendent wife, property on the ground that it is maternal – that is, when after a marriage has been ended by the death of a wife the husband remarries – if the children do not enter upon the inheritance of the parent who has predeceased the other, they will be permitted (successfully) to claim ownership of such property as though it had belonged only to the parent who died second, obviously, even if they believed they should enter upon the inheritance only of the parent who died in second place, so that a rule that has been introduced to benefit children in certain situations does not seem to have been contrived to their disadvantage.⁷³

7. Consistent with Our humane sensibility, We believe that the following provision should also be added to this law, namely, that even in that situation in which either a wife gainfully acquires the property she has received from her husband or a husband gainfully acquires the property which has passed to him from his wife – that is, when a first marriage has ended through the death of one spouse and the other does not remarry – if the husband or wife – i.e., the surviving spouse – does not use up or alienate such property – something that is without doubt permitted to those who do not remarry, on the ground that they are owners of the property in question – the children shall be permitted to receive the property deriving from the father in that it is paternal, and that from the mother in that it is maternal.

Given September 7, at Constantinople, in the consulship of Theodosius Augustus, for the seventeenth time, and Festus (439).

[6]⁷⁴ *Emperors LEO and ANTHEMIUS Augusti to Erythrius, Praetorian Prefect. pr.* Through this law in the form of an Edict (*lex edictalis*), which shall be valid for all time to come, We lay down that, if, having children from a prior marriage, a father or a mother should marry a second or third time, or still further, it shall not be permitted to leave to him or her, as stepmother or stepfather, more than to a son or daughter if one or the other survives, in a will whether through oral declaration or through (written) codicils, whether under the rules of inheritance or the title of legacy or trust, nor to transfer more under the category of dowry, prenuptial gift, gift in contemplation of death (*mortis causa*), or for the purpose of registering gifts made during the lifetime of the giver – which, even if these are for the duration of a marriage forbidden under the rules of private law, nevertheless upon the death of the giver are for certain reasons customarily confirmed.

1. But if there is more than one child, when each one enjoys an equal share, their stepfather or stepmother shall not at all be permitted to receive more

⁷³ The last part of 6 = (with changes) C. 1.14.6. Blume: "The property became that of the children as a matter of law although they did not accept the inheritance of either parent."

⁷⁴ Combine with C. 6.20.1, 6.61.4.

liceat vitricum novercamve transferri. 2. Sin vero non aequis portionibus ad eosdem liberos memoratae transierint facultates, tunc quoque non liceat plus eorum novercae vel vitrico testantem relinquere vel donare seu dotis vel ante nuptias donationis titulo conferre, quam filius vel filia habet, cui minor portio ultima voluntate derelicta vel data fuerit aut donata, ita tamen, ut quarta pars, quae isdem liberis debetur ex legibus, nullo modo minuatur nisi ex his causis, quae de inofficioso excludunt querellas.

3. Quam observationem in personis etiam avi et aviae, proavi et proaviae, nepotum vel neptum, item pronepotum vel proneptum, sive in potestate sive emancipati emancipatae sint, ex paterna vel materna linea venientibus, custodiri censemus. sin vero plus quam statutum est aliquid novercae vel vitrico relictum vel donatum aut datum fuerit, id, quod plus relictum vel donatum aut datum fuerit, tamquam non scriptum neque derelictum vel donatum aut datum ad liberorum personas deferri et inter eas dividi iubemus: omni circumscriptione, si qua per interpositam personam vel alio quocumque modo fuerit excogitata, cessante.

4. His illud adiungimus, ut mulier in his casibus, in quibus ante nuptias donationes, ceteras etiam res a marito ad se devolutas secundum priorum legum statuta liberis communibus ut paternas servare compellitur (hoc est ubi morte mariti matrimonio dissoluto ad alias nuptias venerit), immobilium rerum et mancipiorum annonarumque civilium usu fructu dumtaxat vitae suae temporibus potiatur, alienatione earum penitus interdicta: 5. Mobilium vero rerum, iustis pretiis aestimatione habita per eos, quos utraque pars elegerit, arbitros iudicatuos interposito sacramento, simili modo usum fructum habeat, si idoneam fideiussionem praebuerit, quod easdem res mobiles vel earum pretium filii et filiabus ex eodem matrimonio procreatis vel post mortem eorum nepotibus et neptibus ex isdem liberis procreatis, sive omnibus vel uno unave superstite mori contigerit, secundum legum modum restituat:

6. Vel certe si fideiussiones idoneas praestare distulerit aut nequiverit, praedictae res mobiles necdum matri a liberis traditae apud eosdem manebunt: solutae vero eidem matri vel ab eadem detentae restituentur liberis, si tamen ab his fideiussio idonea matri fuerit oblata, qua caveri debet, quod eidem superstiti pro usu fructu earundem rerum mobilium vel pretio, quo taxatae sunt, usurarum nomine centesimae partem tertiam annuis quibusque temporibus praestare non differant, ita ut in eadem fideiussione hoc quoque caveatur, quod

than what accrues to each one of them. 2. But if, however, the aforementioned resources pass to the children in unequal shares, then too the will-maker shall not be permitted to leave, make over as a gift, or to transfer under the title of dowry or prenuptial gift more to their stepmother or stepfather than is received by the son or daughter to whom the smallest share has been left by will, transferred, or presented as a gift, with the result in any case that the portion of one-fourth, which is owed to these same children in accordance with the laws, is in no way diminished except for those reasons that exclude a claim based on an undutiful will.

3. We ordain that these rules shall hold regarding also the grandfather and grandmother, the great-grandfather and great-grandmother, grandsons and granddaughters, likewise great-grandsons and great-granddaughters, whether they are in paternal power (*potestas*) or emancipated, on both the father's and the mother's side. But if, however, something above the legislative limit has been left, transferred, or given as a gift to a stepmother or stepfather, We order that the amount in excess that has been left, given as a gift, or transferred shall be made over to the children and divided among them, as though it had not been (validly) left, given as a gift, or transferred. Every dodge shall be stripped of validity, whether one has been constructed using a third party or in any other way whatsoever.

4. We add to these provisions the following, that in those situations in which the wife is compelled to preserve for their common children, in that this is paternal property, the prenuptial gift and the other property of her husband that accrues to her pursuant to the rules of prior legislation – that is, when, after the marriage is ended by her husband's death, she remarries – she shall have the usufruct only during her lifetime of real property, slaves, and entitlements to the public grain supply. She is strictly forbidden to alienate this property. 5. She shall in fact have in a similar manner the usufruct of movable goods, after their just value is determined on an appraisal performed, upon oath, by arbitrators chosen by both parties, provided she produces a suitable surety, (guaranteeing) that she return, in accordance with the statutory rules, the property itself or its value to the sons and daughters born from that marriage or, after their death, to the grandsons and granddaughters born from these children, whether all of the children happen to pass away or if one or the other survives.

6. To be sure, if she delays in producing or cannot produce adequate sureties, the aforesaid movable property that has not yet been handed over by the children to the mother will remain with them. If it has on the other hand been given to the mother or is held by her, it will be restored to the children. Nevertheless, (this shall happen) if they offer an adequate surety to their mother, through which it ought to be provided that, for as long as she lives, they pay her promptly, in place of the usufruct of the movable goods or

a filiis filiabusque et ex his genitis liberis, si ante eandem matrem omnes eos obire contigerit, omnes res praedictae mobiles secundum legum moderationem matri, ut ad eandem lucrum redeat luctuosum, restituentur.

7. Erit itaque licitum utrilibet parti, quae fideiussionem praebuerit, si sibi commodum esse perspexerit, his rebus mobilibus uti frui eademque dare mutuo vel obligare vel vendere, ut ex his maxime liberi adquirentes possint materno adfectui sine suo incommodo servire. 8. Sin autem utraque pars praedictam fideiussionem dissimulaverit aut forte offerre nequiverit, eadem res apud mulierem usque in diem vitae suae manebunt.

9. Omnibus videlicet isdem maritalibus facultatibus, his etiam, quas habet habiturae est, tamquam si iure pignoris vel hypothecae suppositae sint, super eadem ante nuptias donatione vel rebus aliis ad eam ex mariti substantia devolutis ex eo die, quo eadem res ad eam pervenerint, liberis obligatis, ut, si quis post traditas matri vel detentas ab ea res (si ita contigerit) contractum aliquem cum eadem muliere inierit, quae se repetitis nuptiis copulaverit, in vindicandis isdem suppositis rebus posterior habeatur, liberis, qui ex eodem matrimonio procreati sunt, et nepotibus neptibusve, qui ex his liberis geniti sunt, sine dubio praeponendis.

10. Sin vero liberorum suorum adfectione servata pater materve ad alias nuptias migrare noluerit, neque vir his, quae de bonis uxoris ad se transeunt, neque mulier rebus, quae ex substantia mariti ad se pervenerint, pro suo arbitrio uti vel eas vendere aut quocumque iure vel modo eas alienare vel pignoris iure sive hypothecae (si voluerint) obligare, utpote domini earum, prohibebuntur. 11. Extantes autem praedictas res, si non fuerint alienatae sive consumptae vel suppositae, licebit liberis vindicare etiam non adeuntibus hereditatem parentum.

D. II k. Mart. Marciano cons.

[7] *Imp. Zeno A. Sebastiano pp.* In quibus casibus pater dotem, mater ante nuptias donationem vel alias res ad se ex altera parte devolutas filiis utriusque sexus servare praecepti sunt, si quem ex filiis vel filiabus ante

the value at which they are appraised, an annual rate of 3 percent interest, so that in the same surety agreement it is also laid down that from her sons and daughters and the children born from them, if they all happen to predecease her, all of the aforesaid movables will be returned to their mother, in accord with the guidance of the laws, so that the benefit, however sorrowfully, accrue to her.

7. And so either of the parties (the mother or the children) who offers surety will be permitted; if they deem it an advantage to themselves, to have the use and enjoyment (usufruct) of these movables, or to lend, place under a lien, or sell them, so that in particular the children, as they profit from this property, can pay due respect to a mother's affection without disadvantage to themselves. 8. But if, however, either party should offer the aforesaid security in a fraudulent manner or by chance should not be able to offer any, the same property will remain with the woman until the last day of her life.

9. Plainly, all of the property which the woman has received from her husband, as well as that which she has acquired (in addition) or shall acquire, shall be placed under a lien to the children (of that marriage), as though it were bound by pledge or hypothec (*hypotheca*), as well as the premarital gift and other items that she has acquired from her husband's estate, from the day on which the property came to her, so that if anyone shall enter into any contract with the mother after such property has been handed over to or kept by – if it happens this way – said woman, who remarries, in claiming a right to such encumbered property this party's claim shall not be as strong as that of the children born from said marriage or that of the grandsons and granddaughters born of these children, whose claims shall without doubt be preferred.

10. But if, however, a father or mother, out of affection for their children, refuses to remarry, neither the man, regarding the property that comes to him from his wife's estate, nor the woman, regarding the property that comes to her from her husband's estate, will be prohibited from using this as they please, or selling it, alienating it under any title or in any way whatsoever, or encumbering it under pledge or hypothec, if they wish, insofar as they are its owners. 11. Moreover, it will be permitted for children to claim such property (still) available, if it has not been alienated, consumed, or placed under a lien, even if they do not enter upon the estates of their parents.

Given February 29, in the consulship of Marcian (472).⁷⁵

[7] *Emperor ZENO Augustus to Sebastianus, Praetorian Prefect.* In certain situations the father is required to preserve the dowry; the mother, the prenuptial gift; and both, property that has come to one from the estate of the other, for

⁷⁵ Seeck gives February 26, 472.

patris vel matris obitum mori contigerit sive ante secundas nuptias sive postea, filio vel filia vel nepte aut nepote vel pluribus patre suo adhuc vivo vel matre superstite derelictis, portionem, quae defuncto filio vel filiae debebatur vel lucrum ex ea non ad fratres vel sorores mortui, sed ad filios eius vel filias vel nepotes utriusque sexus aut pronepotes avis vel proavis superstitibus pervenire decernimus: eligendi videlicet quos voluerint ex liberis superstitibus non adempta licentia.

D. k. Mart. Illo vc. cons.

[8] *Imp. Iustinianus A. Menae pp. pr.* Si quis prioris matrimonii filiorum ante secundas nuptias patris vel matris mortuus fuerit filiis a se vel nepotibus vel pronepotibus relictis, partem eius non ad fratres vel, si nullus alius frater vel soror sit, ad patrem vel matrem eius pervenire, sed ad filios vel nepotes vel pronepotes eiusdem mortuae personae sancimus, ut, sive unus sive plures sint, eam tantummodo partem vindicare possint, quae mortuo competit.

1. Illud etiam certa sanctione definire censemus, ut, si quis vel si qua ex aliquo matrimonio filiis procreatis minime ad secundas venerit nuptias, ut eo modo liceat quidem genitori res ex priore coniugio sibi acquisitas quo modo voluerit alienare vel administrare, si quae vero earum minime sint alienatae, possint liberi etiam non adeuntes paternam vel maternam hereditatem eas vindicare, certum esse sancimus,^{iv} quod etiam illa de cetero videbitur earundem fuisse rerum alienatio, quae in testamento genitoris vel specialiter relinquendo vel generaliter heredem instituendo facta sit. 2. Talem vero licentiam filiis, ut etiam non adeuntes paternam vel maternam hereditatem lucra vindicarent, quae parens eorum ex matrimonio, quod secundo toro minime mutavit, sibi acquisita non alienavit, nullo modo eis concedimus, si paternam vel maternam hereditatem ab intestato ex parte (si forte alii etiam ex anteriore matrimonio morienti parenti filii sint) sibi adquisierint.

3. In illo etiam veterem sanctionem adimplentes praecipimus exemplo matris, cuius res post secundas nuptias filiis ex priore matrimonio natis suppositae sunt ad conservanda eis lucra, quae ex priore marito ad eam pervenerunt, patris quoque bona, quae habet habiturusque est, filiis ex

^{iv} {sancimus}

their children of both sexes. If any of the sons or daughters should happen to predecease the father or mother, either before he or she has remarried or afterwards, leaving behind one or more sons, daughters, grandsons, granddaughters, with his or her own father or mother surviving, We decree that the share owed to the decedent son or daughter, or any benefit deriving from this, shall not pass to the brothers or sisters of the decedent, but to his or her sons or daughters or grandchildren of both sexes or great-grandchildren, although there are surviving grandparents or great-grandparents. Plainly, the power of choosing whom they wish (to benefit) from among their surviving children has not been taken away from them.

Given March 1, in the consulship of the vir clarissimus Illus (478).

[8]⁷⁶ *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect. pr.* If any of the children of a prior marriage should die before the remarriage of a father or mother, leaving behind children, grandchildren, or great-grandchildren, We ordain that his or her share shall not go to his or her siblings or, if there is no brother or sister, to his or her father or mother, but to the children, grandchildren, or great-grandchildren of the aforesaid decedent, so that, whether there are one or more, they can claim only that part to which the decedent was entitled.

1. We also aim to establish the following by a fixed enactment (*certa sanctio*), that if any man or woman with children from a prior marriage does not at all remarry, he or she shall be permitted – as a parent, at all events – to alienate or to administer property acquired from a prior marriage in any way he or she wishes. But if this property has not been alienated, it is certain that their children can claim it even if they do not enter upon the inheritance of their father or mother. This will also hold in the future for the alienation of that property that occurs when a parent makes a will, either leaving a particular item to someone or in general when appointing an heir. 2. In fact, We permit children, even if they do not enter upon the inheritance of a father or mother, to claim the benefit accruing from property which their parent acquired during marriage, and, after not remarrying, did not then alienate; but in no way (do We permit this) if they have acquired a portion of their father's or mother's inheritance on intestacy – if by chance there are other children of a decedent parent also from a prior marriage.

3. Also, in fulfilling the old rule, We lay down, as in the case of the mother whose property after remarriage is placed under a lien for the children from a prior marriage, so as to preserve for them its benefits which have come to her from her former husband, that the property also of a father, which he has acquired or later acquires, is placed under a lien for the children born in a prior

⁷⁶ Combine with C. 5.12.29.

priore matrimonio natis post secundas eius nuptias ad ea conservanda, quae ex eorum matre lucratus est, supposita esse. 4. Illius etiam patris, qui in sua potestate talem liberum vel liberos habens maternam eis substantiam vel ex materna linea ad eos devolutam servare compellitur, isdem liberis bona supposita esse ad conservandas easdem maternas res decernimus: ita tamen, ut occasione talium hypothecarum neque patris neque matris filii valeant administrationem perscrutari vel aliquam eis movere super hoc quaestionem, cum perspicui iuris sit, etiamsi alienata sint eorum bona, quae extra memorata lucra vel maternas res sunt, ius hypothecae integrum isdem manere filiis.

D. III id. Dec. dn. Iustiniano A. II cons.

[9] *Idem A. Menae pp. pr.* Quoniam praeteritae leges omnia, quae liberis ex priore matrimonio procreatis mulier quidem secundo marito, vir autem uxori secundae dotis vel ante nuptias donationis nomine vel alio quocumque modo dederit vel reliquerit ampliora his, quae uni filio vel filiae ex anteriore matrimonio progenitis danda vel relinquenda sunt, revocata ad solos filios ex priore matrimonio natos pervenire constituerunt nullaue in hac parte filiorum ex secundo matrimonio natorum mentio facta est, hoc quoque corrigentes omnia quae memorato modo revocantur non solum ad filios prioris matrimonii, sed etiam ad eos qui ex secundis nuptiis nati fuerint pertinere et in capita inter omnes dividenda sancimus.

1. Ad haec lucra, quae marito vel uxori ex dote vel ante nuptias donatione occasione repudii accedunt, indistincte post secundas eorum nuptias liberis ex priore coniugio procreatis ad similitudinem matrimonii morte dissoluti servari nec de cetero repudii causam requiri vel aliam in ea re exquisitionem fieri.

D. id. April. Constantinopoli Decio vc. cons.

[10] *Idem A. Demostheni pp. pr.* Cum apertissime legibus cavetur ingratos liberos a maiorum suorum hereditate merito esse repellendos, si hoc idem in suis elogiis conscripserint et re vera fuerit revelatum,

marriage after he remarries, in order to preserve those benefits he has acquired from their mother.

4. We decree that the property of that father also, who having such a child or children in his power (*potestas*), is compelled to preserve for them the property that was their mother's or that derives from their mother's family, be placed under a lien for those same children for the purpose of preserving their mother's property. But (this shall occur) on the following condition, that where such (real) security arrangements (*hypothecae*) are in place the children shall not be empowered to examine minutely the management by their father or mother or to carry out any other enquiry about this, since it is a very clear point of law (*perspicuum ius*) that even if their property, beyond that mentioned above or which was their mother's, is alienated, the right of hypothec is preserved intact as far as these same children are concerned.

Given December 11 in the consulship of Our Lord Justinian Augustus, for the second time (528).

[9] *The same Augustus to Menas, Praetorian Prefect, pr.* Laws in the past have enacted that, when there are children born in a prior marriage, everything that a woman, certainly, gives or leaves behind to a new husband, or that a man, moreover, (gives or leaves behind) to a new wife under the title of dowry, pre-nuptial gift, or in any other way, and that amounts to more than is to be given or left behind to a single son or daughter born from the prior marriage, shall be recalled and made over only to the children born in the prior marriage. No mention is made of children born in the subsequent marriage. By way of correcting this point as well, We ordain that all things recalled in the manner just mentioned shall accrue not only to children born in the prior marriage but to those born in the subsequent one as well, and must be divided up equally among all of them.

1. Moreover, (We ordain that) the benefits, which accrue to a husband or wife from the dowry or prenuptial gift at the time of a divorce, shall after remarriage, be preserved indifferently for the children born in the prior marriage on the analogy of a marriage dissolved by the death of one of the partners, and that in the future the reason for the divorce shall not be inquired into, nor shall any other enquiry be made in this matter.

Given April 13,⁷⁷ at Constantinople, in the consulship of the vir clarissimus Decius (529).

[10] *The same Augustus to Demosthenes, Praetorian Prefect, pr.* Although in the laws it is laid down most clearly that ungrateful children are rightly to be excluded from the inheritance of their elders, if the latter have written such a

⁷⁷ The precise day is uncertain: the alternatives are April 1 (preferred by Loughits *et al.*) or April 6.

reclamare videtur huiusmodi sanctioni divalis constitutio Leonis inclitae recordationis, quam super filiis ex priore matrimonio procreatis conscripsit. 1. Nam cum necessitas est patri vel matri, qui ad secunda vota migraverunt, tantum praestare per quamcumque causam secundo marito vel novercae, quantum filio vel filiae ex anterioribus nuptiis progenitis qui partem minimam habiturus est reliquerit, maxima iniquitas ex hac sanctione contra genitores efficiebatur. 2. Liberi etenim scientes, quod omnimodo aliquid sibi a genitoribus suis et nolentibus relinquendum est, et tantum, quantum secundus maritus vel noverca acceperit, cum omni licentia et lascivia suos genitores iniuriis adficiebant.

3. Quapropter sancimus ingratos re vera liberos neque hoc beneficium, quod divalis constitutio Leonis augustae memoriae eis praestitit, in posterum posse sibi vindicare, sed quasi ingratos ab omni huiusmodi lucro repelli. 4. Quam observationem in personis etiam avi et aviae, proavi et proaviae, nepotum vel neptum, item pronepotum et proneptum, sive in potestate sive emancipati emancipataeve sint, ex paterna vel materna linea venientibus custodiri censemus.

5. Sed quemadmodum genitoribus providimus, ita et innocuam posteritatem nullis adfici iniuriis patimur, ut non genitores, qui sese secundis nuptiis devoverunt, irrationabile odium ad priores liberos forsitan habentes sine iusta ratione eos ingratos vocare concedantur. 6. Eos etenim liberos huiusmodi beneficio defraudari volumus, qui re ipsa ingrati circa suam antiquitatem ab heredibus genitorum liquidis et indubitatis probationibus convicti fuerint ex huiusmodi casibus, qui antea priscis legibus enumerati sunt.

D. xv k. Oct. Chalcedone Decio vc. cons.

[11-18] ...

X Si Secundo Nupserit Mulier, Cui Maritus Usus Fructum Reliquerit

[1] *Imppp. Valentinianus Theodosius et Arcadius AAA. Tatiano pp. pr.* Si usum fructum maritus rerum suarum decedens uxori reliquerit eaque in secundas nuptias consortiumque convenerit, usum fructum,

thing in their wills and it was shown to be justified in actual fact, the imperial constitution⁷⁸ of Leo of distinguished memory, which he composed concerning children born in a prior marriage, seems to reject a rule of this kind. 1. For when the necessity was enjoined upon a father or a mother, who had remarried, to give to the new husband or stepmother, for any reason whatsoever, only as much as he or she left to the son or daughter from the prior marriage who was going to receive the smallest share, this rule was creating a (situation of) very great unfairness for the parents. 2. For, since the children knew that in any case something had to be left to them by their parents even if the latter were unwilling and that this would be as much as the new husband or stepmother received, they were inflicting injury upon their parents with all freedom and lack of restraint.

3. For this reason We decree that truly ungrateful children shall not in future be able to claim for themselves that benefit which the imperial constitution of Leo of revered memory granted to them, but that, because they are ungrateful, they shall be excluded from every advantage of this kind. 4. We lay down that this same principle shall be observed in the case also of a grandfather and grandmother, great-grandfather and great-grandmother, grandsons and granddaughters, likewise great-grandsons and great-granddaughters, whether they are in paternal power (*potestas*) or are emancipated, whether they derive from the paternal or the maternal line.

5. But in the same way as We provide for the parents, We do not allow innocent progeny to suffer any injury, so that parents who remarry and are perhaps possessed by an irrational hatred for their children from a prior marriage shall not be allowed to designate them as ungrateful without good reason. 6. For We wish those children to be deprived of a benefit of this kind who are shown by the heirs of their parents to be genuinely ungrateful in regard to their filial reverence, through clear and undoubted proofs linked to situations which have been previously set forth in the ancient laws.

Given September 17, at Chalcedon, in the consulship of the vir clarissimus Decius (529).⁷⁹

Tenth Title If a Woman, Whose Husband Has Left Her a Usufruct, Remarries

[1] *Emperors VALENTINIAN, THEODOSIUS, and ARCADIUS Augusti to Tatianus, Praetorian Prefect. pr.* If a husband upon his death leaves the usufruct of his property to his wife and she (then) remarries, she shall lose the

⁷⁸ C. 5.9.6.

⁷⁹ As many as seven additional constitutions seem to be missing from this title.

quem ex priore marito consecuta fuerit, amittat atque eum filiis ex die quo nupserit mature restituat. 1. Quod si liberos ex priore matrimonio adhuc imbecillitas habebit infantiae nec muniet tutoris auxilium ac per huiusmodi occasionem mater quae relicta fuerant usurpaverit, omnia, cum legitime repetantur, cum competentibus fructibus ad liquidum deducta ratione restituet. 2. Haec de usu fructu, quem vir extremam constituens voluntatem de rebus propriis uxori reliquerit, de usu fructu vero rerum ante nuptias donatarum ea servari quae anteriores constitutiones decreverunt sancimus.

D. id. Mart. Arcadio A. II et Rufino cons.

XI De Dotis Promissione vel Nuda Pollicitatione

[1] *Imp. Alexander A. Claudio.* Frustra existimas actionem tibi competere, quasi promissa dos tibi nec praestita sit, cum neque species ulla nec quantitas promissa sit, sed hactenus nuptiali instrumento adscriptum, quod ea quae nubebat dotem dare promiserit.

PP. k. Aug. Pompeiano et Peligno cons.

[2] *Imp. Gordianus A. Herodoto.* Si pro dote promissa usuras dare socer tuus spopondit, id quod deberi ostenderis competens iudex solvi tibi praecipiet.

PP. XII k. Sept. Pio et Pontiano cons.

[3] *Idem A. Claudio.* Si, cum ea quae tibi matrimonio copulata est nuberet, is cuius meministi dotem tibi non addita quantitate, sed quodcumque arbitratus fuisset pro ea daturum se rite promisit et interpositae stipulationis fidem non exhibet, competentibus actionibus usus ad repromissi emolumentum iure iudiciorum pervenies: videtur enim boni viri arbitrium stipulationi insertum esse.

usufruct that she obtained from her first husband and she shall promptly restore it to her children on the day she remarries. 1. But if the weakness of infancy (*imbecillitas infantiae*) still grips the children from the prior marriage and the assistance of a tutor does not protect them, and the mother seizes this opportunity to appropriate what has been bequeathed, she will restore everything upon the launch of a proper lawsuit, along with the relevant fruits (*fructus*) after a transparent accounting has been made. 2. This rule applies in the case of a usufruct which a man in making a will leaves to his wife from his own property. We ordain however that, in the case of a usufruct of property deriving from a prenuptial gift, the rules shall continue to stand that have been established by prior constitutions.

Given March 15, in the consulship of Arcadius Augustus, for the second time, and Rufinus (392).

Eleventh Title Constitution of a Dowry through Formal and Informal Promise

[1] *Emperor ALEXANDER Augustus to Claudius.* You are wrong to think that you are eligible for a right of action (*actio*) on the ground that a dowry has been formally promised (by stipulation) but not delivered to you, when there has been no promise of a particular item or a particular amount, but a note was simply made in the marriage document to the effect that the bride promised to give a dowry.

Posted August 1, in the consulship of Pompeianus and Pelignus (231).

[2] *Emperor GORDIAN Augustus to Herodotus.* If your father-in-law has undertaken by stipulation to give interest on a formally promised dowry, that sum, which you prove is owed, a judge with the appropriate jurisdiction will instruct to be paid.

Posted on August 21, in the consulship of Pius and Pontianus (238).

[3] *The same Augustus to Claudius.* If, at the time when you wed the woman (now) joined to you in marriage, the person whom you mentioned formally promised (by stipulation) that he would give to you a dowry on your wife's behalf, specifying not a particular value but whatever he deemed appropriate, and he does not live up to the stipulation, then by relying on the relevant rights of action (*actiones*), you will receive through the operation of the courts the benefit promised. For "the judgment of a good man" (*arbitrium boni viri*) is deemed to have been embedded in the stipulation.

PP. k. Ian. Sabino et Venusto cons.

[4] *Impp. Diocletianus et Maximianus AA. et CC. Rufo.* Si voluntate dotantis in dotali instrumento plura tibi tradita scripsisti quam suscepisti, intellegis de his quae desunt petendis pactum esse consecutum.

S. non. April. AA. cons.

[5] *Idem AA. et CC. Dasumianae.* Si pro te pater marito tuo stipulanti promisit dotem, non tibi, sed marito contra successores soceri competit actio.

D. VIII k. Dec. AA. cons.

[6] *Impp. Theodosius et Valentinianus AA. Hierio pp.* Ad exactionem dotis, quam semel praestari placuit, qualiacumque sufficere verba censemus, sive scripta fuerint sive non, etiamsi stipulatio in pollicitatione rerum dotalium minime fuerit subsecuta.

D. x k. Mart. Constantinopoli Felice et Tauro cons.

[7] *Imp. Iustinianus A. Iohanni pp. pr.* Si pater dotem pro filia simpliciter dederit vel pro filio ante nuptias donationem fecerit, habeat autem filius vel in potestate constitutus vel forte emancipatus res maternas vel ex alio modo tales, quae acquisitionem effugiunt, quarum usus fructus solus apud patrem remanet, vel quocumque modo poterat quasdam actiones contra patrem habere, dubitabatur apud veteres, utrumne videatur pater ex ipso debito dotis vel ante nuptias donationis fecisse promissionem vel dationem, ut sese ab huiusmodi nexu liberet, an debitum quidem remanet in sua natura, liberalitas autem paterna dotem vel ante nuptias donationem dare suggessit. 1. Et in tali dubitatione multa

Posted on January 1, in the consulship of Sabinus and Venustus (240).⁸⁰

[4]⁸¹ *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Rufus.* If, in accordance with the wishes of the person providing the dowry, you wrote in the dowry document that more was handed over to you than what was actually received, you understand that a pact has been (implicitly) made about claiming the missing items.

Written April 5,⁸² in the consulship of the Augusti (293).

[5] *The same Augusti and Caesars to Dasumiana.* If your father formally promised a dowry on your behalf through a stipulation with your husband, it is not you, but your husband, who has an action against his father-in-law's heirs.

Given on November 24, in the consulship of the Augusti (293).

[6]⁸³ *Emperors THEODOSIUS and VALENTINIAN Augusti to Hierius, Praetorian Prefect.* For the repayment of a dowry which it has been agreed was paid in the first place, We lay down that any sort of language whatsoever suffices, whether placed in written form or not, even if no stipulation accompanied the informal promise (*pollicitatio*) of dowry property.

Given February 20, at Constantinople, in the consulship of Felix and Taurus (428).

[7] *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* If a father, without further ado, gives a dowry on behalf of his daughter or a prenuptial gift on behalf of his son, and the child, whether in power (*potestas*) or by chance emancipated, should possess property that had belonged to his mother or derived from another source, which the father did not own but of which he had only the usufruct, or he or she (the child) in any way at all might be entitled to raise certain rights of action (*actiones*) against his or her father,⁸⁴ there was a controversy among the ancient jurists (*veteres*) as to whether the father is deemed to have formally promised or given the dowry or prenuptial gift out of that debt, so that he is released from liability for it, or (whether) the debt remained intact and it was the father's spirit of generosity that prompted the giving of a dowry or prenuptial gift. 1. And great numbers of lawgivers were

⁸⁰ Other constitutions show that this was the second consulship for Sabinus.

⁸¹ Combine with perhaps C. 2.21.5 and/or 5.14.6.

⁸² The precise day is uncertain: the alternatives are May 3 and 7.

⁸³ = (with changes) C.Th. 3.13.4. Combine with C. 2.57.2, 5.3.17, 5.4.22, 6.18.1, 6.24.11, 6.61.2.

⁸⁴ Blume: "A child under paternal power originally could own no property of his own. Whatever he had was his father's (or grandfather's, whoever had paternal power over him.) But gradually such child retained the title to the property which he or she received from sources other than the father. This included property derived from the mother's side." See C. 6.60.

pars legislatorum sese divisit, alio etiam incremento huiusmodi quaestioni addito, si forte dixerit in instrumento dotali ex rebus paternis et maternis dotem vel ante nuptias donationem dare, utrum pro dimidia parte videtur datio vel promissio facta esse, an pro rata portione utriusque substantiae.

2. Utramque igitur dubitationem certo fini tradentes sancimus, si quidem nihil addendum existimaverit, sed simpliciter dotem vel ante nuptias donationem dederit vel promiserit, ex sua liberalitate hoc fecisse intellegi, debito in sua figura remanente. neque enim leges incognitae sunt, quibus cautum est omnimodo paternum esse officium dotes vel ante nuptias donationes pro sua dare progenie. 3. Et liberalitas itaque talis maneat vera et irrevocabilis et puro nomine liberalitas, et debitum suam sequatur fortunam.

4. Ubi autem ex rebus tam suis quam maternis vel aliis quae non adquiruntur vel ex suis debitis dixerit fecisse huiusmodi liberalitates, tunc si quidem penitus inopia tentus est, ex illis videri rebus dotem vel ante nuptias donationem esse datam, quae ad filios vel filias pertinent.

5. Si vero et ipse substantiam idoneam possidet, et in hoc casu de suo patrimonio dotem vel ante nuptias donationem dedisse intellegatur. poterat enim secundum suas vires dotem pro filia vel ante nuptias donationem pro filio dare et consentire filiis suis, quando voluerint partem vel forte totam suam substantiam quam habent paternae liberalitati pro dote et ante nuptias donatione adgregare, ut re vera appareat, quid ipse vult dare et quid de substantia filiorum proficiscitur, ne, dum effuso sermone sese iacet, in promptum incidat sui periculum.

D. k. Nov. post consulatum Lampadii et Orestis vv. cc.

XII De Iure Dotium

[1] *Impp. Severus et Antoninus AA. Nicephoro. pr.* Evicta re, quae fuerat in dotem data, si pollicitatio vel promissio fuerit interposita, gener contra socerum vel mulierem seu heredes eorum conditione vel ex stipulatione agere potest.

divided over this controversy, with an additional factor aggravating the debate. If by chance he (the father) declared in the dowry document that he was giving a dowry or prenuptial gift deriving from paternal and maternal property, (it was disputed) whether the formal promise or gift was deemed to arise one-half from each estate or in proportion to the relative size of each.

2. Therefore, putting a definite end to both points of dispute, We ordain that if, in fact, he (the father) thought that no explanation should be added, but without further ado gave or formally promised a dowry or prenuptial gift, he shall be understood to have done this out of his own generosity, leaving the debt (to his child) intact. For the laws in which it is laid down that it is entirely the responsibility of a father to give dowries or prenuptial gifts on behalf of his descendants are not obscure. 3. And therefore such generosity shall remain genuine, unimpeachable, and unconditional in motive, and the debt shall run its own course.

4. When, however, he declares that he has made such gifts out of his own property as well as out of the maternal estate, or from other property which he does not own outright, or in payment of debts owed by him to the child, then indeed, if he is seriously afflicted with poverty, the dowry or prenuptial gift shall be considered to have been given out of the property accruing to the sons or daughters. 5. But if he possesses sufficient wealth, he shall be understood even in this situation to have given the dowry or the prenuptial gift out of his own property. For he could have given a dowry on behalf of a daughter or a prenuptial gift on behalf of a son in a manner consistent with his level of resources, and reached an agreement with his children when they wished to add a part or perhaps all of their own property to the generous act of their father in respect to the dowry or prenuptial gift. The result in actual fact would be that it is clear what he himself wished to give and what derived from the property of the children, so that, while he puffed himself up with loose talk, he did not readily incur liability with respect to his property.

Given November 1, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Twelfth Title Dowry Law⁸⁵

[1] *Emperors SEVERUS and ANTONINUS Augusti to Nicephorus. pr.* If title has failed for property given as dowry (and the husband is evicted from it), whether this was promised formally or informally, the son-in-law can sue his father-in-law, his own wife, or their heirs, either through a claim for restitution (*condictio*) or on the stipulation.

⁸⁵ See D. 23.3.

1. Sin autem nulla pollicitatio vel promissio intercesserit, post evictionem eius, si quidem res aestimata fuerit, ex empto competit actio. 2. Sin vero hoc non factum est, si quidem bona fide eadem res in dotem data est, nulla marito competit actio: dolo autem dantis interposito de dolo actio adversus eum locum habebit, nisi a muliere dolus interpositus sit: tunc enim, ne famosa actio adversus eam detur, in factum actio competit.

PP. k. Aug. Muciano et Fabiano cons.

[2] *Imp. Antoninus A. Alcibiadi. pr.* Si stipulatio de restituenda portione dotis datae subiecta est condicioque eius extitit, habet ex ea actionem, in cuius personam utiliter concepta commissaque est. 1. Secundum quod si Polla soror tua de restituenda sibi parte dotis habet actionem eo, quod mater vestra donandi animo passa est partem dimidiam dotis post obitum matris filiam stipulari, metuere non debet doli exceptionem, quod matri suae quae pactum interposuit heres ex minore quam dimidia portione extitit, nisi liquido probatum fuerit matrem eius mutasse dotis pacti voluntatem contentamque esse voluisse filiam suam pro portione hereditatis praelegationibus maritumque suum exactione liberari voluisse.

PP. d. III k. Aug. Antonino A. IIII et Balbino cons.

[3] *Imp. Alexander A. Euphemo.* Etsi dotis exactio defuncta in matrimonio filia potuisset ad patrem pertinere, dotalibus tamen servis maritus testamento directam et fideicommissariam libertatem iure dedit et praestita revocari non debuit, cum et inter vivos manumittendi mancipia dotalia constante matrimonio liberam maritus habet facultatem.

PP. VI id. Dec. Antonino et Alexandro cons.

[4] *Idem A. Valenti.* Nulla lege prohibitum est universa bona in dotem marito feminam dare.

PP. IIII id. Iul. Maximo II et Aeliano cons.

1. Without an informal or formal promise (of the dowry), however, upon failure of title a right of action on purchase (*actio ex empto*) lies if in fact the property has been appraised (*aestimata*). 2. But if, however, this has not been done, provided to be sure that the property has been given as dowry in good faith, no action is available for the husband. If, however, there was deceit (*dolus*) on the part of the giver, an action on *dolus* will lie against him. An exception occurs when *dolus* was present on the part of the wife. For in that case, in order that an action detrimental to her status and reputation (*famosa*) not lie against her, she shall be liable (only) in an action *in factum*.

Posted on August 1, in the consulship of Mucianus and Fabianus (201).

[2] *Emperor ANTONINUS Augustus to Alcibiades. pr.* If a stipulation has been made concerning the return of a portion of a dowry and a condition relevant to it has come into play, the person for whose benefit this (condition) was validly designed and executed has the action. 1. Accordingly, if your sister Polla has an action for the recovery of a portion of the dowry by reason of the fact that your mother, with the intention of making a gift, permitted her daughter to stipulate (from her step-father, evidently) for one-half of her dowry after the mother's death, she (Polla) ought not to fear the raising of an affirmative defense of deceit (*exceptio doli*; by her step-father), because she is heir to her mother, who was a party to the agreement on the dowry, for less than the half-portion (of the dowry). This does not hold if it is clearly proved that the mother changed her mind with respect to the dowry agreement and wished her daughter to be content, in place of her share of the estate, with specific legacies, and (wished) her husband to be freed from (the duty of) repayment.

Posted on July 30, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[3] *Emperor ALEXANDER Augustus to Euphemus.* Although the father of a daughter whose marriage terminated by her death might have been eligible to claim repayment of her dowry, nevertheless her husband has rightly manumitted dowry slaves either through operation of the last will (of his wife) or in fulfillment of a trust. Once given, this freedom cannot be revoked, since even without a will (*inter vivos*) a husband has the free discretion to manumit dowry slaves during the marriage.

Posted on December 8, in the consulship of Antoninus and Alexander (222).

[4] *The same Augustus to Valens.* It is prohibited by no law for a woman to give all of her property as a dowry to her husband.

Posted on July 12, in the consulship of Maximus, for the second time, and Aelianus (223).

[5] *Idem A. Statiae.* Quotiens res aestimatae in dotem dantur, maritus dominium consecutus summae velut pretii debitor efficitur. si itaque non convenit, ut soluto matrimonio res restituerentur et iure aestimatae sunt, retinebit eas, si pecuniam tibi offerat.

D. III id. April. Alexandro A. II et Marcello cons.

[6] *Idem A. Sulpicio.* Avia tua eorum, quae pro filia tua in dotem dedit, etsi verborum obligatio non intercessit, actionem ex fide conventionis ad te, si heres extitisti, transmittere potuit. nec enim eadem causa est patris et matris paciscentium, quippe matris pactum actionem praescriptis verbis constituit, patris dotis actionem profecticiae nomine competentem conventionem simplici minime creditur innovare.

D. III id. Febr. Maximino A. et Africano cons.

[7] *Imp. Gordianus A. Marco.* Cum a socero tuo pro uxore dos tibi daretur, si ea in stipulationem deducta non est sub tempore dationis, sed postea, socer tuus tecum paciscendo, si id non ex voluntate filiae suae fecit, condicionem eius laedere non potuit. quandoque enim sola de dote experiens id pactum non debere ad sui dispendium operari de iure defenditur.

PP. d. k. Octobribus Pio et Pontiano cons.

[8] *Idem A. Agrippinae.* Etiam si non dotem reddi sibi mater, sed ea, quae in dotem data sunt, ut eam sequerentur vel ad se pertineant in matrimonio defuncta filia, stipulata sit, durante matrimonio filia decedente actionem ex stipulatu videri quaesitam aequissimum esse iudicamus. cui consequens est, ut etiam id, quod additamenti causa in dotem datum est, eadem actione repetatur.

PP. k. Febr. Sabino et Venusto cons.

[5] *The same Augustus to Statia.* Whenever property with an appraised value (*res aestimatae*) is given as a dowry, the husband acquires ownership of it and becomes liable for this value as though this were its price. Therefore, if it was not agreed that the property should be restored upon dissolution of the marriage, and it was properly appraised, he will (be able to) keep it if he pays you (its value in) money.

Given on April 11, in the consulship of Alexander Augustus, for the second time, and Marcellus (226).

[6] *The same Augustus⁸⁶ to Sulpicius.* Even without a stipulation, on the basis of an informal agreement (with the husband), your grandmother could transfer to you, if you became her heir, the action for property that she gave as dowry for your daughter. For the legal basis of the claim (*causa*) of a mother making such an agreement is not the same as that of a father, since the mother's agreement gives rise to an action on the facts as indicated (*actio praescriptis verbis*), while it is held that a father's action, which he holds under the title of *dos profecticia*, cannot at all be altered by mere (informal) agreement.

Given February 11, in the consulship of Maximinus Augustus and Africanus (236).

[7] *Emperor GORDIAN Augustus to Marcus.* When a dowry was given to you by your father-in-law on behalf of your wife, with a stipulation not being made at that time but only afterwards, your father-in-law, in making an agreement with you, could not cause injury to the marital situation (*condicio*) of his daughter if he acted in this way contrary to her wishes. For whenever she brings suit on her own over the dowry, as is rightly claimed, this agreement ought not to operate to her disadvantage.

Posted on October 1, in the consulship of Pius and Pontianus (238).

[8] *The same Augustus to Agrippina.* Even if a mother did not stipulate (explicitly) that a dowry be returned to her, but only (stipulated) that the items given as the dowry should "follow her" or "belong to her" if the daughter's marriage terminates through her death, if the daughter dies while married. We hold that it is most just that the mother be deemed to acquire a right of action (*actio*) on the stipulation. As a logical result, even property that is given as dowry in the form of a supplement shall be recoverable through the same action.

Posted February 1, in the consulship of Sabinus and Venustus (240).

⁸⁶ In fact, the constitution is from Maximinus, as shown by the date. The grandmother's agreement on return of the dowry is exercised by her son as her heir.

[9] *Impp. Decius A. et Decius C. Urbicanae*. Dotis tuae potio-rem causam magis esse convenit quam rei publicae, cui postea idem maritus obnox-ius factus est.

PP. VI id. Iun. Decio A. et Grato cons.

[10] *Impp. Diocletianus et Maximianus AA. Ingenuo*. Cum dotem te aestimatam accepisse profitearis, apparet iure communi per pactum quod doti insertum est formato contractu ex empto actionem esse. quis enim dubitet aestimationem a te mulieri deberi, cum periculo tuo res deteriores fiant vel augmenta lucro tuo recipiantur?

PP. XII k. Mai. Maximo II et Aquilino cons.

[11] *Idem AA. et CC. Severae*. De his, quae in dotem data ac direpta commemoras, mariti tui esse actionem nulla est dubitatio.

D. x k. Mai. Heracliae AA. cons.

[12] *Idem AA. et CC. Rufinae*. Ex pecunia dotali fundus a marito tuo comparatus non tibi quaeritur, cum neque maritus uxori actionem empti possit adquirere ac dotis tantum actio tibi competat. unde aditus praeses provinciae, si non te transegisse reppererit, sed ex maiore dote partem consecutam, residuum restitui providebit.

D. VIII k. Mai. Heracliae AA. cons.

[13] *Idem AA. et CC. Catulae*. Si a matre vestra superstite aliquid ad vos pertinens in dotem scienti vitrico vestro datum est, intellegis nullam firmitatem iuris dationem habere, si neque pollicitatio neque stipulatio intercessit.

D. prid. k. Mai. Heracliae AA. cons.

[14] *Idem AA. et CC. Basilissae*. Mater pro filia dotem dare non cogitur nisi ex magna et probabili vel lege specialiter expressa causa: pater autem de bonis uxoris suae invitae nullam dandi habet facultatem.

[9] *Emperor DECIUS Augustus and DECIUS Caesar to Urbicana.* It is appropriate that your claim on your dowry (i.e., for its return) is stronger than that of the State, to which your husband subsequently became indebted.

Posted June 8, in the consulship of Decius Augustus and Gratus (250).

[10] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Ingenius.* Since you declare that you accepted a dowry that was at an appraised value, it seems, according to commonly established principles of law (*ius commune*), that under the agreement embedded in the dowry contract which was drawn up, a right of action on purchase (*actio ex empto*) lies (for you against the property's seller, after your eviction by a true owner). For who would doubt that the appraised value of the dowry is owed by you to your wife, when any loss in value to the property occurs at your risk, just as any increase in value accrues to your advantage?

Posted April 20, in the consulship of Maximus, for the second time, and Aquilinus (286).

[11] *The same Augusti and the Caesars to Severa.* There is no doubt that your husband has the action concerning those things which you claim were given as dowry and then stolen.

Given April 22, at Heraclea, in the consulship of the Augusti (293).

[12] *The same Augusti and Caesars to Rufina.* A farm bought by your husband with dowry money does not become yours, since a husband cannot acquire the action on purchase (*actio empti*) for his wife, and all you have is the action on the dowry. So if you approach the provincial governor, and he finds that you have not made an out-of-court settlement (*transactio*, with the ex-husband) and that you have recovered only a part of your dowry, he will see to it that the remainder is restored (to you).

Given April 24, at Heraclea, in the consulship of the Augusti (293).

[13] *The same Augusti and Caesars to Catula.* If during her lifetime your mother gave property belonging to you as a dowry to your stepfather, and he knew this, you understand that this transfer has no legal validity if accompanied by neither an informal promise nor a stipulation (from you).

Given April 30, at Heraclea, in the consulship of the Augusti (293).

[14] *The same Augusti and Caesars to Basilissa.* A mother is not obligated to give a dowry on behalf of a daughter except for a great and demonstrable reason or one that is expressly laid down in a statute. Moreover, a father has no authority to give (a dowry) from the property of his wife against her will.

S. d. IIII non. Nov. Philippopoli AA. conss.

[15] *Idem AA. et CC. Ulpianae.* Cum citra fidem etiam instrumentorum datam dotem aliunde probanti post divortium quondam uxoris secundum bonam fidem restitui debere constet, amissis etiam instrumentis sine dubio cetera probationum indicia iure prodita non habentur irrita.

D. VIII k. Aug. Sirmi AA. conss.

[16] *Idem AA. et CC. Aemiliano.* Ante divisionem soror tua intestato patri etiam ipsa succedens pro indiviso portionem fundi communis in dotem dare non prohibebatur.

D. non. Iul. Sirmi CC. conss.

[17] *Idem AA. et CC. Sabiniano.* Res, quarum usu fructu sibi deducto socrus in dotem dedit, venumdando auferre tibi nihil potest.

D. nonis Iul. Sirmi CC. conss.

[18] *Idem AA. et CC. Menestrato.* Si socrus tua fundum deducto usu fructu uxori tuae donavit tibiue in dotem uxor quidem proprietatem, socrus autem usum fructum dedit, uxore tua rebus humanis in matrimonio exempta fundum apud te remansisse secundum placiti inter vos fidem non ambigitur. nam si acceptura certum quid annuum filiae suae usum fructum locavit, mortua conductrice usus fructus extinguere minime potuit.

D. XIII k. Ian. Sirmi CC. conss.

Written November 2,⁸⁷ at Philippopolis, in the consulship of the Augusti (293).

[15] *The same Augusti and Caesars to Ulpiana.* Since it is settled law that, even without the evidence of dowry documents, the dowry of a former wife after divorce ought to be restored, in accord with good faith, to a person who offers proof from some other source, other means of proof are, when brought forth in the legally prescribed manner, without doubt considered valid even when the dowry documents are lost.

Given July 25,⁸⁸ at Sirmium, in the consulship of the Augusti (293).

[16] *The same Augusti and Caesars to Aemilianus.* Before division of the estate, your sister, who is herself also an heir on intestacy to your father, was not forbidden to give as dowry her share of an as yet undivided farm to which all heirs have a claim.

Given July 7,⁸⁹ at Sirmium, in the consulship of the Caesars (294).

[17]⁹⁰ *The same Augusti and Caesars to Sabinianus.* The property, which your mother-in-law gave you as dowry (on behalf of her daughter) after reserving its use and enjoyment (usufruct) for herself, cannot be taken from you through sale.

Given July 7, at Sirmium, in the consulship of the Caesars (294).

[18] *The same Augusti and Caesars to Menestratus.* If your mother-in-law gave a farm as a gift to your wife after reserving its usufruct for herself, and your wife, in fact, (then) gave you ownership of it in the form of a dowry, while your mother-in-law (simultaneously) gave you its usufruct, there is no doubt that if your wife's death has ended the marriage, the farm remains with you according to the sense of the agreement reached between the two of you (the mother and the son-in-law). For if she (the mother-in-law) leased the usufruct to her daughter for a fixed annual fee, the usufruct could in no way be extinguished by the death of the lessee.

Given December 19,⁹¹ at Sirmium, in the consulship of the Caesars (294).

⁸⁷ The precise day is uncertain, as is the month: Mommsen gives July 4, 293.

⁸⁸ The month is uncertain: Mommsen prefers December 25, 293, but there are three other possibilities.

⁸⁹ The month is uncertain: Mommsen gives January 5, 294, for this constitution and the next.

⁹⁰ Combine with C. 3.28.20.

⁹¹ The precise day is uncertain, as is the month: Mommsen prefers January, so the alternatives are January 15, 19, December 15.

[19] *Idem AA. et CC. Achilli. pr.* Cum patrem pro filia dotem tibi dantem, si post suam mortem in matrimonio constituta rebus humanis eadem eximatur, partem dimidiam dotis Ammiae reddi pactum proponas, post vero testamento facto cum aliis etiam Ammiam heredem scripsisse nec Ammiam quicquam ex stipulatu petere velle sanxisse, si quidem hanc sibi reddi secundum fidem pacti stipulatam Ammiam non probetur, ex alieno pacto nec prorsus ei ulla competit actio.

1. Si vero ex verborum conceptione sibi quaesivit obligationem ac tibi testatorem prospexisse probetur, contra eam ex stipulatu post eventum condicionis petentem, quatenus accepit ex defuncti voluntate quae fuit stipulata, exceptione (salva Falcidia) uti potes.

D. XIII k. Febr. Sirmi CC. cons.

[20] *Idem AA. et CC. Tiberio.* Pro oneribus matrimonii mariti lucro fructus dotis totius esse, quos ipse cepit, vel, si uxori capere donationis causa permisit, eum in quantum locupletior facta est posse agere manifestissimi iuris est.

D. v k. Mai. Sirmi CC. cons.

[21] *Idem AA. et CC. ad Geminum.* Si inter virum et uxorem pactum sit interpositum, ut, si matrimonium intra quinquennii forte tempora quoquo modo esset dissolutum, species aestimatae doti datae pretiis quibus aestimatae sunt redderentur, manifestum est non pretia specierum dari, sed ipsas species debere restitui, cum in placito specierum reddendarum idcirco pretiorum nomen videatur adnexum, ne, si species aliqua diminuta fuisset aut perditam, alio pretio quam quo taxata fuerat posceretur.

D. non. Aug. Agrippinae CC. cons.

[22] *Idem AA. et CC. Polybiana.* Rem, quam pater in dotem genero pro filia dedit nec recepit, alienare non potest.

D. v k. Oct. isdem CC. cons.

[19] *The same Augusti and Caesars to Achilles. pr.* Since you set forth that a father who gave you a dowry on behalf of his daughter made an agreement that if, after his own death, his daughter's marriage was terminated by her death, half of the dowry should be turned over to Ammia, and afterwards in fact when making his will he appointed, in addition to others, Ammia as heir and made clear that he did not want Ammia to claim anything on the basis of the (dowry) stipulation, if indeed it is not proved that Ammia (herself) stipulated, according to the sense of the agreement, for the return of the dowry to her, she has absolutely no right of action accruing to her from someone else's agreement.

1. But if she did formally make an agreement on her own behalf and it is shown that the writer of the will made the provision (barring Ammia) on your behalf, if she sues on the stipulation after its condition is fulfilled, you can, to the extent that she benefited from the decedent's will with respect to her interest in the stipulation, raise an affirmative defense (*exceptio*) against her, after appropriate deduction of the Falcidian fourth.

Given January 20, at Sirmium, in the consulship of the Caesars (294).

[20] *The same Augusti and Caesars to Tiberius.* It is a very clear point of law (*manifestissimum ius*) that, in compensation for the financial burdens of marriage, the fruits of the entire dowry accrue to the husband as income should he take them himself; or, if he has allowed his wife to take them as a gift, he can sue for them to the extent that they have increased the value of her estate.

Given April 27, at Sirmium, in the consulship of the Caesars (294).

[21] *The same Augusti and Caesars to Geminus.* If an agreement has been made between husband and wife to the effect that, if the marriage were by chance dissolved in any way within the space of five years, the appraised items (*species aestimatae*) given as dowry should be returned at their appraised value, it is clear that it is not the value of the items that is given back, but that the items themselves ought to be returned, since it is settled law (*in placito*) that a value is assigned to the items to be returned for this reason, so that if any item were damaged or lost, no other value than the one at which it was appraised would be demanded back.

Given August 5, at Agrippina (Colonia), in the consulship of the Caesars (294).

[22] *The same Augusti and Caesars to Polybiana.* A father cannot alienate property that he has given as a dowry to his son-in-law on behalf of his daughter and that he has not received back (after the dissolution of their marriage):

Given September 27, in the consulship of the Caesars (294).

[23] *Idem AA. et CC. Diogeni.* Si praedium uxor tua dotale venundedit, sponte nec ne contractum habuerit, nihil interest, cum rei tibi quaesitae dominium auferre nolenti minime potuerit.

D. v k. Oct. Viminaci CC. cons.

[24] *Idem AA. et CC. Aurelio et Lysimacho.* Si dotem marito libertae vestrae dedistis nec eam reddi soluto matrimonio vobis in continenti pacto vel stipulatione prospexistis, hanc culpa uxoris dissoluto matrimonio penes maritum remansisse constitit, licet eam ingratam circa vos fuisse ostenderitis.

D. vi k. Nov. Antiochiae CC.^v CC. cons.

[25] *Idem AA. et CC. Eutychiano.* Si mulier dotem a viro dari stipuletur, ut de ea testari possit, cum ordinationis testamenti cogitatio mortis^{vi} antecedens tempus significat nec condicionem, sed causam continet, intestata quoque muliere defuncta stipulationem committi proficiet.

D. III id. Nov. Antiochiae CC.^{vii} CC. cons.

[26] *Idem AA. et CC. Demostheni.* Si genero dotem dando pro filia pater communis eam reddi tibi extraneo constituto stipulatus est, nec sibi cessante voluntate nec tibi prohibente iure quaerere potuit actionem.

D. vi k. Ian. ipsis CC. cons.

[27] *Idem AA. et CC. Pompeiano.* Licet dos iure penes maritum remanserit, pro rebus tamen hereditariis successores, non maritus quondam, sollemnibus pensitationibus parere debent.

S. vi k. Ian. Sirmi CC. cons.

[28] *Imp. Zeno A. Aeliano pp. pr.* Mulier in minore aetate constituta dotem marito consentiente generali vel speciali curatore recte dare et exigere potest, licet ipse tempore creationis fideiussorem in minorem

^v [CC]

^{vi} morti

^{vii} [CC]

[23] *The same Augusti and Caesars to Diogenes.* If your wife sold a dowry property, it makes no difference whether she made this agreement voluntarily or not, since against your will she was not at all able to take away the ownership of property acquired by you.

Given September 27, at Viminacium, in the consulship of the Caesars (294).

[24] *The same Augusti and Caesars to Aurelius and Lysimachus.* If you gave a dowry to the husband of your freedwoman and, in an agreement or stipulation made simultaneously (with the constitution of the dowry), did not make provision for its return to you upon dissolution of the marriage, it is settled law that the dowry remain with the husband after the marriage is dissolved through the wife's fault, even though you show that she has been ungrateful to you.

Given October 27, at Antioch,⁹² in the consulship of the Caesars (294).

[25] *The same Augusti and Caesars to Eutychianus.* If a woman stipulates with her husband that he give back a dowry so that she might dispose of it by will, since the contemplation of making a will signifies a time prior to death and so stands not as a condition but as a rationale (for the stipulation), her having made the stipulation will be a benefit (to her heirs) even should she die intestate.

Given November 11, at Antioch,⁹³ in the consulship of the Caesars (294).

[26] *The same Augusti and Caesars to Demosthenes.* If your common father, giving a dowry to his son-in-law on behalf of his daughter (your half-sister), stipulated that this be returned to you after you have been emancipated, he could acquire a right of action neither for himself, since this was not his intention, nor for you, since the rule (*ius*) (against third-party beneficiaries) prevents this.

Given December 27, in the consulship of the Caesars (294).

[27] *The same Augusti and Caesars to Pompeianus.* Although the dowry stays with the husband (after his wife's death) by operation of law, nevertheless her heirs, and not her former husband, are responsible for making the payments on her estate that are prescribed by law.

Written December 27, at Sirmium, in the consulship of the Caesars (294).

[28]⁹⁴ *Emperor ZENO Augustus to Aelianus, Praetorian Prefect. pr.* With the approval of her general or special *curator*, a woman less than 25 years of age can validly give and be compelled to pay out a dowry to her husband, even though

⁹² The location is uncertain. Mommsen has it "given" at Anchialus on October 28, 294.

⁹³ The location is uncertain.

⁹⁴ Combine with C. 2.21.9, 5.75.6.

quam dos est quantitatem dicitur praestitisse. 1. Hoc idem observatur et si minor ante nuptias donationem consentiente, ut dictum est, curatore fecerit.

D. k. Ian. Basilio cons.

[29] *Imp. Iustinianus A. Menae pp. pr.* Ubi adhuc matrimonio constituto maritus ad inopiam sit deductus et mulier sibi prospicere velit resque sibi suppositas pro dote et ante nuptias donatione rebusque extra dotem constitutis tenere, non tantum mariti res ei tenenti et super his ad iudicium vocatae exceptionis praesidium ad expellendum ab hypotheca creditorem secundum praestamus, sed etiam si ipsa contra detentatores rerum ad maritum suum pertinentium super isdem hypothecis aliquam actionem secundum legum distinctionem moveat, non obesse ei matrimonium adhuc constitutum sancimus, sed ita eam posse easdem res vindicare vel a creditoribus posterioribus vel ab aliis, qui non potiora iura legibus habere noscuntur, ut potuisset, si matrimonium eo modo esset dissolutum, quo dotis et ante nuptias donationis exactio ei competere poterat: ita tamen, ut eadem mulier nullam habeat licentiam eas res alienandi vivente marito et matrimonio inter eos constituto, sed fructibus earum ad sustentationem tam sui quam mariti filiorumque, si quos habeant, abutatur.

1. Creditoribus scilicet mariti contra eum eiusque res, si quas postea forte adquisierit, integra sua iura habentibus: ipsis etiam marito et uxore post matrimonii dissolutionem super dote et ante nuptias donatione pro dotalium instrumentorum tenore integro suo iure potituris.

D. III id. Dec. dn. Iustiniano A. II cons.

[30] *Idem A. Demostheni pp. pr.* In rebus dotalibus sive mobilibus sive immobilibus seu se moventibus, si tamen extant, sive aestimatae sive inaestimatae sint, mulierem in his vindicandis omnem habere post dissolutum matrimonium praerogativam et neminem creditorum mariti, qui anteriores sunt, sibi potiore causam in his per hypothecam

the husband, at the time the dowry was constituted, is said to have offered a surety for (repayment of) less than the value of the dowry. 1. This same rule holds even if a person younger than 25 makes a prenuptial gift with, as was said, the approval of the *curator*.

Given January 1,⁹⁵ in the consulship of Basilius (480).

[29]⁹⁶ *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect. pr.* When during marriage a husband is reduced to poverty and the wife wants to consult her own interests and hold the property obligated as dowry, as well as a prenuptial gift and her own property beyond the dowry, not only do We confer upon her, if she (already) holds her husband's property and more and she is sued, the safeguard of an affirmative defense for the purpose of defeating subsequent creditors' security arrangements (*hypothecae*), but also, if she herself raises an action in accord with the provisions of the laws (*distinctio legum*) against those holding her husband's property on the basis of such securities, We ordain that the fact that her marriage still exists shall not be an impediment to her, but that she can claim this same property either from subsequent creditors or from others whose rights are recognized as no more valid under the laws, just as she could if the marriage had been dissolved in a manner that allows her the recovery of the dowry and the prenuptial gift. She does so, however, under the condition that she shall have no power of alienating this property while her husband is alive and the marriage continues, though she shall use the fruits deriving from it for the support of herself and her husband, as well as of their children, if they have any.

1. Plainly, the creditors shall have unimpaired recourse against the husband and his property, if he should by chance acquire any afterwards, while the husband and wife, after the marriage is dissolved, shall also retain unimpaired their rights over the dowry and the prenuptial gift in accordance with the content of the dowry documents.

Given December 11, in the consulship of Our Lord Justinian, for the second time (528).

[30] *The same Augustus to Demosthenes, Praetorian Prefect. pr.* After the dissolution of her marriage, (We ordain that) a wife shall enjoy all prior claims on dowry property, whether it is movable, immovable, or self-propelling, if it is still in existence, whether it has an appraised value or not, and that no prior creditor of the husband shall have a stronger claim in connection with a security arrangement (*hypotheca*); both since this property had belonged to the wife from the start and since it has remained in her ownership as a matter

⁹⁵ The exact day is uncertain: the alternative is December 28. Lounghis *et al.* accept either.

⁹⁶ Combine with C. 5.9.8.

vindicare, cum eadem res et ab initio uxoris fuerant et naturaliter in eius permanserunt dominio. non enim quod legum subtilitate transitus earum in mariti patrimonium videtur fieri, ideo rei veritas deleta vel confusa est. 1. Volumus itaque eam in rem actionem quasi in huiusmodi rebus propriis habere et hypothecariam omnibus anteriorem possidere, ut, sive ex naturali iure eiusdem mulieris res esse intellegantur vel secundum legum subtilitatem ad mariti substantiam pervenisse, per utramque viam sive in rem sive hypothecariam ei plenissime consulatur.

2. Omnis autem temporalis exceptio, sive per usucapionem inducta sive per decem sive per viginti annorum curricula seu per triginta vel quadraginta annorum metas sive ex alio quocumque tempore maiore vel minore introducta, ea mulieribus ex eo opponatur, ex quo possint actiones movere, id est opulentis quidem maritis constitutis post dissolutum matrimonium, minus autem idoneis ex quo hoc eis infortunium illatum esse claruerit, cum constante etiam matrimonio posse mulieres contra maritorum parum idoneorum bona hypothecas suas exercere iam nostra lege humanitatis intuitu definitum est: ficti divortii falsa simulatione in huiusmodi causa, quam nostra lex amplexa est, stirpitus eruenda.

Recitata septimo in novo consistorio palatii Iustiniani. d. III k. Nov. Decio vc. cons.

[31] *Idem A. Iuliano pp. pr.* Cum quidam dotes pro mulieribus dabant sive matres sive alii cognati vel extranei, recte quidem eas mariti sine monumentorum observatione suscipiebant: cum autem mulier redhibitionem casus stipulabatur et huiusmodi fortuitus casus evenisset, ipsa mulier utpote a se non facta donatione propter hoc, quod monumenta deerant, necessitatem habebat actiones huiusmodi casus ad eum qui dotem dedit per cessionem transferre vel ipsas res reddere: et ita inveniebatur forsitan post prolixa matrimonii annorum curricula et liberos forte editos infelix mulier indotata.

1. Sancimus itaque in huiusmodi omnibus casibus nullis monumentis rem indigere, sed in omni persona ratas esse huiusmodi donationes et mulierem dotem suam ipsam habere, cum fortuitus casus hoc lucrum

of course. For the truth of the matter is not effaced or obscured because, owing to the contrivance of the laws (i.e., on dowry), it seems to have passed into the estate of the husband. 1. We wish, therefore, that she have a right of action to claim the property (*actio in rem*) as though she were claiming her own property and to enjoy an action on the hypothec prior to all others, so that, whether this property is understood to be her own by reason of natural right, or it is understood to have formed part of her husband's property through legal contrivance, by either path, that of the action *in rem* or that on the hypothec, her interest shall be consulted to the fullest.

2. Every affirmative defense (*exceptio*) based on the passage of time, however, whether generated by acquisition of ownership through usucapion or based on the passing of 10, 20, 30, or 40 years (prescription), or on any other period of time whether greater or smaller, shall be opposed to such women from the time when they are able to bring such actions, i.e., only for those married to wealthy husbands, after the marriage is dissolved, but for those wed to less wealthy husbands from the time at which it is clear that this misfortune overtook them, since it is already prescribed in Our legislation²⁷ through consideration of humane sympathy (*humanitas*) that even during marriage wives can assert their own security arrangements with regard to the property of husbands who are insufficiently prosperous. False claims based on fictitious divorce in the situation contemplated by Our law are to be eliminated root and branch.

Recited for the seventh time in the New Consistory of Justinian's Palace. Given October 30, in the consulship of the vir clarissimus Decius (529).

[31] *The same Augustus to Julian, Praetorian Prefect. pr.* When certain individuals, like mothers, other blood relatives (*cognati*), or unrelated persons, used to give dowries on behalf of brides, husbands received these, perfectly legally, without recourse to documentation. When, however, the brides used to make a stipulation for return of the dowry in a certain situation, and this situation by chance would come to pass, the woman herself, inasmuch as she had not made the gift herself and documentation was lacking, found it necessary to make formal transfer (*cessio*) of the actions in this kind of situation to the person who gave the dowry, or to return the property itself. And so she would turn out to be, perhaps after a long period of years being married and perhaps after giving birth to children, an unhappy woman without a dowry.

1. We therefore lay down that in all situations of this kind there shall be no need of documentation, and that for all persons gifts of this kind shall be valid, and that the woman shall keep her own dowry if the circumstances

²⁷ 29 above.

ei addiderit, et firmiter hoc apud eam permanere, nisi ipse, qui ab initio dotem dederit, sibi dari huiusmodi casum stipulatus est: tunc etenim, cum neque ab initio suspicio aliqua liberorum concurrat, sed sibi omnem rem ille qui dotem dedit pepigerit, huiusmodi tractatus habere locum non potest. 2. Atqui in aliis omnibus casibus, in quibus ipse non stipulatus est, tristitiae suae mulier hoc proprium habeat solacium per actionem dotis.

3. Similique modo si quis extraneorum (id est qui eum pro quo dat non in potestate habeat) pro alio ante nuptias donationem nupturae dedit mulieri et necessaria monumenta adhibuerit, cum excedat summam legitimam donatio, vel non minor mater familias nuptura sit, non solum ad eam, cui ante nuptias donatio datur, monumenta suam habeant firmitatem, sed etiam ad illum pro quo dedit, ut, si lucrum ei ex dotalibus pactis accesserit, non hoc cedat donatori, sed in suum lucrum hoc maritus convertat firmumque et inrevocabile habeat, nisi donator et hic sibi reddi huiusmodi casum fuerit stipulatus, ne et in praefato casu simile anteriori vitium oriatur. 4. Sin autem minor quantitas sit vel ita res gesta sit, ut monumentorum ex omni parte nulla sit utilitas, et tunc donatio ad utramque personam valeat et maritus casum lucretur, nisi et hic donator eum stipulatus sit.

5. Praeterea sancimus, si quis in dotem vel praedia vel certum redditum vel aedes vel panes civiles spopondit vel promisit, si ex tempore matrimonii biennium transactum sit, ilico reddituum vel pensionum nec non panis civilis quaestum eum praestare, etiamsi non fuerint adhuc res principales traditae: et si tota dos in auro sit, itidem post biennium usuras usque ad tertiam partem centesimae praestari.

6. Sin autem aliae res praeter immobiles vel aurum fuerint in dote, sive in argento sive in muliebribus ornamentis sive in veste sive in aliis quibuscumque, si quidem aestimatae fuerint, simili modo post biennium et earum usuras ex tertia parte currere: aestimatione earum, quia et hoc apertius declarare oportet, ea intellegenda, quae pro singulis

(stipulated for) happen to materialize and bring her this asset, and that it shall remain with her unshakably unless the person who initially gave the dowry stipulated that in such a situation it be returned to him. For when initially there has been no thought of children, but he (the giver) has exacted the return of the entire dowry to himself, the aforesaid solution cannot find a place. 2. And yet in all other situations in which he did not make such a stipulation, the wife shall have this particular consolation for her loss in the form of an action on the dowry.

3. And in a similar fashion if an unrelated person – that is, someone who does not have in his power (*potestas*) the person on whose behalf he gives – has given on someone else's behalf a prenuptial gift to a woman about to marry and provides the necessary documentation, if the gift exceeds the legally prescribed limit, or a woman of respectable status (*mater familias*) about to marry is 25 years of age or more, the documents shall retain their validity not only with respect to her to whom the prenuptial gift was given but also with respect to him on whose behalf he gave it, so that, if any gain accrue to him from the dowry agreement, this shall not be yielded to the giver, but the husband shall turn this to his own profit, holding it firm and irrevocable, unless the giver even here had stipulated that in such a situation it be returned to him, so that, just as in the case mentioned above,⁹⁸ a problem not arise similar to the previous one. 4. But if, however, the value is less (than the legally prescribed limit) or the arrangements are made in such a way that the documentation is utterly useless, even then the gift shall be valid with respect to both persons and the husband shall profit from the situation, unless the giver has stipulated (otherwise) here as well.

5. Moreover, We lay down that, if anyone has stipulated or (otherwise) promised as dowry properties, a fixed return (on an investment), a house, or (entitlement to) the public distributions of bread, if a two-year period has passed from the time of the wedding, he shall immediately turn over the value of the returns, or of the rents, or the value of the public distributions of bread, even if the main items have not yet been handed over. And if the entire dowry consists of gold, likewise after a two-year period he shall pay interest at the rate of 3 percent.

6. But if, however, other property apart from immovables or gold is given as a dowry, whether in the form of silver or of women's jewelry or of clothing or of any other items whatsoever, if in fact they have an appraised value, in a similar fashion after a two-year period the interest on them shall also accrue at a 3 percent rate. By "appraisal" (*aestimatio*), because this term too needs clearer

⁹⁸ In the *principium*.

speciebus facta est vel pro unoquoque genere dotalium specierum, id est pro argento vel pro ornamentis vel pro veste aliisque speciebus, et non esse expectandam post singulas aestimationes unam coadunationem totius calculi, quod satis scrupulosum et per nimiam subtilitatem perniciosum est. 7. Sin autem minime res mobiles fuerint aestimatae, ea post biennium observari, quae leges post litem contestatam pro omnibus huiusmodi rebus definiunt.

8. Sin vero res permixtae fuerint et partim in auro partim in aliis rebus mobilibus vel immobilibus, pro iam facta divisione omnia procedere. licentia minime deneganda marito quando voluerit dotem petere, ne is qui debet putet sibi licentiam esse redditus vel pensiones vel usuras vel alias accessiones solventi dotis solutionem protelare: sed sive ante biennium sive postea voluerit dotem pars mariti petere, queat et secundum leges eam exigere.

D. XII k. April. Lampadio et Oreste vv. cc. cons.

XIII De Rei Uxoriae Actione in ex Stipulatu Actionem Transfusa et de Natura Dotibus Praestita

[1] *Imp. Iustinianus A. ad populum urbis Constantinopolitanae et universos provinciales. pr.* Rem in praesenti non minimam adgredimur, sed in omni paene corpore iuris effusam, tam super rei uxoriae actione quam ex stipulatu, earum communiones et differentias resecantes et in unum tramitem ex stipulatu actionis totum rei uxoriae ius, quod dignum esse valere censemus, concludentes.

1. Rei uxoriae itaque actione sublata sancimus omnes dotes per ex stipulatu actionem exigi, sive scripta fuerit stipulatio sive non, ut intellegatur re ipsa stipulatio esse subsecuta. 1a. Eodemque modo et si

definition, one ought to understand that which is made regarding individual items or regarding each and every class of dowry items, that is, regarding silver, jewelry, clothing, or other items. One ought not to wait for the individual appraisals to result in an overall tally of the entire value, because this would be a fairly sharp practice and ruinous in its excessive attention to detail. 7. But if, however, the movable property was not appraised at all, (We order) that after two years those rules shall hold which the laws lay down for all matters of this kind following joinder of issue.

8. But if, on the other hand, the property is of a mixed nature and consists partly of gold and partly of other movable or immovable property, (We order) that all things shall proceed as though the (above) distinction had already been made. The husband is not at all to be denied the power of claiming the dowry when he wishes, so that the one who owes it shall not think that he has the power to postpone the payment of the dowry by paying the returns, rents, interest or other forms of increase. But whether the husband's side wishes to claim the dowry before the lapse of the two-year period or afterwards, he shall be able to sue for that also in accordance with the laws.

Given March 21,⁹⁹ in the consulship of the viri clarissimi Lampadius and Orestes (530).

Thirteenth Title The Action on the Dowry Merged with That on Stipulation, and the Nature Ascribed to Dowries

[1]¹⁰⁰ *Emperor JUSTINIAN Augustus to the People of the city of Constantinople and to all those living in the provinces. pr.* We hereby take on a matter of no small importance, but something that is diffused in almost every branch of the law, regarding the right of action on the dowry (*actio rei uxoriae*) as well as that on stipulation (*actio ex stipulatu*), clearing away their commonalities and their differences, and directing the entire law of dowry, which We consider worth validation, into the one route of the action on the stipulation.

1. So by abolishing the action on the dowry We ordain that all dowries shall be recoverable by an action on the stipulation, whether the stipulation exists in written form or not, so that the execution of the stipulation is regarded as

⁹⁹ The exact day is uncertain: the alternative is March 18, preferred by Lounghis *et al.*

¹⁰⁰ Combine with perhaps C. 4.29.25 (dated exactly a year later).

inutiliter facta est stipulatio: adiuvari enim eam magis quam evanescere oportet. si enim, cum una in instrumento stipulatio valida inveniatur, et aliis inutilibus suam noscitur praestare fortitudinem, quare non ex nostra lege huiusmodi stipulationibus robur accedat legitimum? est enim consentaneum nobis, qui censemus, et ubi supposita stipulatio non est, intellegi eam fuisse adhibitam, multo magis etiam, si inutilis est, validam eam effici.

1b. Et ut plenius dotibus subveniat, quemadmodum in administratione pupillarium rerum et in aliis multis iuris articulis tacitas hypothecae inesse accipimus, ita et in huiusmodi actione damus ex utroque latere hypothecam, sive ex parte mariti pro restitutione dotis sive ex parte mulieris pro ipsa dote praestanda vel rebus dotalibus evictis, sive ipsae principales personae dotes dederint vel promiserint vel susceperint, sive aliae pro his personae, et dos sive adventicia sive profecticia sit secundum veteris iuris nominationem. 1c. Ita enim et imperitia hominum et rusticitas nihil eis possit adferre praeiudicium, cum nos illis et ignorantibus et nescientibus in hoc casu nostram induximus providentiam. si enim et stipulationes et hypothecae inesse dotibus intelleguntur et inutiles stipulationes emendantur, sic in posterum causa inveniatur valida et perfecta, quasi omnibus dotalibus instrumentis a prudentissimis iuris confectis.

1d. Et nemo putet nos haec sancire in his tantummodo dotibus, quae instrumentis receptae sunt: nihil enim prohibet, etsi sine scriptis dos vel detur vel promittatur vel suscipiatur, simili modo intellegi factam

implied in the thing itself (i.e., the constitution of the dowry).¹⁰¹ 1a. The same holds even where the stipulation is void, for this ought to be validated rather than allowed to disappear. For if one valid stipulation is found in a document, and it is recognized as supporting others that are invalid, why should legal validity not accrue to stipulations of this kind, in accordance with our law (*lex*)? For it is agreeable to Us, since We hold that even where a stipulation has not been made it shall be regarded as implied, and all the more so that even where one is void that it shall be rendered valid.

1b. And so that dowries receive greater support, to the extent that in the management of the property of minor wards and in many other points of law We accept that tacit hypothecs (*hypothecae*; real security arrangements) exist, with the result that in an action of this type we grant a hypothec on both sides, both on that of the husband regarding the return of the dowry and on that of the wife regarding the furnishing of the dowry or loss of title to dowry property, whether the two parties themselves have given, formally promised, or undertaken to constitute a dowry, or others have done so on their behalf, (and) whether the dowry itself is given by the woman's father or other male ascendant (*profecticia*) or by someone else (*adventicia*) according to the terminology of the old law (*vetus ius*). 1c. For in this way neither people's inexperience nor their lack of sophistication shall be able to prejudice their interests, since We have offered Our wisdom in this situation to those who are oblivious and ignorant. For if both stipulations and hypothecs are regarded as implicit and stipulations that are void are granted validity, so the arrangements in future shall be revealed to be as valid and perfect as though all of the dowry documents had been crafted by the most expert jurists.

1d. And let no one imagine that We ordain these things only in the case of those dowries that are set forth in documents. For nothing prevents a dowry, whether given, formally promised, or undertaken, from having an implied

¹⁰¹ Blume: "The instant law shows, perhaps better than any other in the Code, that the Romans, contrary to present day conceptions, considered remedies the basic foundation of all law, grouping all rights around certain remedies. They started with remedies and attached certain substantive rights thereto – such and such could be done or could be recovered thereunder. Thus as stated in the instant law, certain things could be done, or certain rights could be enforced in an action on a stipulation, certain other things or rights in an action on dowry (*uxorial actio*) – the action for the recovery of a dowry in the absence of a stipulation or other express contract. The instant law fused the two actions, so far as the recovery of dowry was concerned, and created a special action, called an action on a stipulation, which partook of the nature of the two former actions – one on an actual stipulation and the other the ordinary action, and made the new action an equitable one, although the ordinary action on a stipulation – the strict and formal contract under the Roman law (C. 8.37) – was one at strict law ... A stipulation was to be implied whenever any dowry was constituted, whether orally or in writing. If an actual stipulation had been entered into, any provisions contrary to the instant law were, of course, invalid. The law will be easily understood, if we but bear in mind the substantive rights therein intended to be given."

stipulationem et hypothecam ex utraque parte, quasi fuerit scripta. et natura quidem ex stipulatu actionis haec intellegatur, re uxoria in posterum cessante.

2. Sed etsi non ignoramus ex stipulatu actionem stricto iure esse vallatam et non ex bona fide descendere, tamen, quia novam naturam de dote stipulatio sibi invenit, accommodetur ei a natura rei uxoriae etiam bonae fidei beneficium. 2a. Et omnes quidem eventus, quos dos ex stipulatu habet, maneat pro sui natura exercens: si quid autem optimum ex rei uxoriae actione invenimus, hoc in praesenti specialiter ei addimus, ut sit et nova ista ex stipulatu quam composuimus et non propria tantum, sed etiam veteris actionis pulchritudine decorata.

3. Primum itaque quid naturale sit ex stipulatu actionis, exponatur et ita, si quid ex actione rei uxoriae supervenerit, addatur. 3a. Sciendum itaque est edictum praetoris, quod de alterutro introductum est, in ex stipulatu actione cessare, ut uxor et a marito relicta accipiat et dotem consequatur, nisi specialiter pro dote ei maritus ea dereliquit, cum manifestissimum est testatorem, qui non hoc addidit, voluisse eam utrumque consequi.

4. Maneat ex stipulatu actionis ius ad successores et sine mora transmissionis incorruptum.

5. Taceat in ea retentionum verbositas. quid enim opus est inducere ob mores retentionem alio auxilio ex constitutionibus introducto? 5a. Vel ex qua causa ob res donatas retentio introducatur, cum sit donatori facultas per actionem in rem directam vel per utilem vel per conditionem suo iuri mederi? 5b. Sed nec retentio ob res amotas necessaria est, cum pateat omnibus maritis rerum amotarum iudicium. 5c. Sileat ob liberos retentio, cum ipse naturalis stimulus parentes ad liberorum suorum educationem hortatur.

5d. Ne varium genus culpa mariti contra uxores excogitent, ut possint eadem retentione contra eas uti, cum iam etiam imperialibus constitutionibus statutum sit, si culpa mulieris dissolutum fuerit

stipulation and hypothec on both sides, though it is not committed to writing, in the same way as though these were committed to writing. And the nature, certainly, of the action shall be regarded as arising from the stipulation, since that on the dowry is hereby abolished.

2. And although We are not unaware that the action on the stipulation is hedged in by formal law (*ius strictum*) and does not derive from good faith (*bona fides*), nevertheless, because the stipulation finds a new identity for itself in connection with the dowry, it shall appropriate for itself even the advantages of *bona fides* from the action on the dowry. 2a. And all, to be sure, of the legal effects which the dowry has in connection with stipulation it shall maintain as a function of its own intrinsic nature. If, moreover, We discover any excellent feature of the action on the dowry, We add this specifically now to that on the stipulation, so that this new version of the latter that we have created shall be adorned not only by its own attractions, but also those of the old action (on the dowry) as well.

3. First of all, therefore, We shall set forth what is inherent in the action on the stipulation, and then shall add what survives from the action on the dowry. 3a. Accordingly, it must be recognized that the provision of the Praetor's Edict, which compels a widow to elect either to recover her dowry or receive a bequest under her husband's will,¹⁰² shall have no force regarding the action on stipulation, so that a wife shall both receive a bequest from a husband and recover her dowry, unless the husband made particular provision leaving her a bequest in place of the dowry, since it is most clear that the writer of a will who did not add this provision wanted her to have both.

4. The right to the action on the stipulation shall remain transmissible to the heirs unaffected by any delay in transmission.

5. That blather about rights of retention shall be silenced. For what need is there to introduce a retention on account of character and conduct (*mores*), when another form of assistance has been introduced by constitutions? 5a. And for what reason was the retention on property given as a gift introduced, when the giver had ability to seek a remedy for his (injured) right through either a direct or analogous real action (*actio in rem*) or a (personal) claim for restitution (*condictio*)? 5b. But neither is the retention on account of property that has been removed necessary, since the right of action (*iudicium*) on property that has been removed is open to all husbands. 5c. The retention for children shall be silenced, since nature offers a motive encouraging parents to attend to the raising of their own children.

5d. Husbands shall not elaborate the complex category of fault (*culpa*) to the disadvantage of their wives, so that they can employ this same retention against them, although it is also already laid down in the imperial constitutions what

¹⁰² The *edictum de alterutro*: Lenel, *Edictum*² (1927) 308.

matrimonium, quid fieri oportet. 5e. Sed nec ob impensas in res dotis factas retentio satis esse nobis videtur idonea. cum enim necessariae quidem expensae dotis minuunt quantitates, utiles autem expensae non aliter in rei uxoriae actione detinebantur nisi ex voluntate mulieris, non ab re est, si quidem voluntas mulieris intercedat, mandati actionem a nostra auctoritate marito contra uxorem indulgeri, quatenus possit per hanc hoc quod utiliter impensum est observari: vel si non intercedat mulieris voluntas, utiliter tamen res gesta est, negotiorum gestorum adversus eam sufficit actio. 5f. Quod si voluptariae sunt, licet voluntate eius expensae, deductio operis quod fecit, sine laesione tamen prioris speciei, marito relinquatur, ut sit omnium retentionum expeditus tractatus et ex stipulatu actio merito secundum sui naturam nullam accipiat retentionem.

6. Illo procul dubio in ex stipulatu actione servando, ut, si decesserit mulier constante matrimonio, dos non in lucrum mariti cedat nisi ex quibusdam pactionibus, sed ad heredes mulieris ex stipulatu actio secundum sui naturam transmittatur, sive expressa fuerit sive ex hac lege inesse intellegatur.

7. Cum autem in exactione dotis ex stipulatu quidem actio naturaliter restitutionem dotis a parte mariti uxori ilico et in solidum fieri iubebat, rei uxoriae autem annua bima trima die in his quae pondere numero mensura consistunt exactionem pollicebatur, et non in solidum, sed quantum maritus facere potest, si non dolo malo suam deminuit substantiam, in hac parte rudem figuram ex stipulatu damus actioni, ut, si matrimonium fuerit dissolutum nullo pacto adhibito, in tantum quidem maritus condemnatur, in quantum facere potest, quia hoc aequissimum est et reverentiae debitum maritali, si non dolo malo versatus est: cautione videlicet ab eo exponenda, quod, si ad meliorem fortunam pervenerit, etiam quod minus persolvit, hoc restituere procuret. 7a. Exactio autem dotis celebretur non annua bima trima die, sed omnimodo intra annum in rebus mobilibus vel se moventibus vel incorporalibus: ceteris videlicet rebus quae solo continentur ilico

ought to happen when a marriage is dissolved through a wife's *culpa*.¹⁰³ 5e. But neither does the retention for expenses made regarding the dowry seem sufficiently satisfactory to Us. For since necessary expenses (*necessariae expensae*) indeed diminish the value of the dowry, while expenses for practical reasons (*utiles expensae*) were not retained (by the husband) in the action on the dowry without the consent of the wife, it is not inappropriate, if, in fact, the wife consents, that an action on mandate be granted on Our authority to the husband against the wife, so that he be protected as much as possible by this remedy for that which he has paid out to the advantage of the dowry. And if the wife's consent is lacking, and the husband's act was nevertheless advantageous to the dowry, the action for managing the affairs of another (*negotia gesta*) suffices against the wife.¹⁰⁴ 5f. But if the expenses are luxurious in nature (*voluptuariae expensae*), although made with the wife's approval, removal of the improvements made shall be left to the husband, provided however that this occur without harm to the original item. The result shall be an efficient treatment of all retentions, and the action on the stipulation, rightly in accordance with its nature, shall admit of no retention.

6. It must remain far from doubt regarding the action on the stipulation that, if the marriage ends through the death of the wife, the dowry shall not accrue to the benefit of the husband unless pursuant to certain agreements, but that the action on the stipulation inherently shall pass to the heirs of the wife whether the stipulation was actually made or it is understood as implied in accordance with this statute.

7. Moreover, although in the matter of repaying the dowry the action on the stipulation, at any rate, by its nature compelled the husband to give back the dowry to the wife immediately and in its entirety, the action on the dowry on the other hand guaranteed repayment over three years in annual installments for those objects that can be weighed, counted or measured, and not in its entirety, but as much as the husband is able to pay, if he has not diminished his own estate through deliberate misconduct (*dolus malus*). We give to the action on stipulation an unfamiliar form in respect to this point, so that, if the marriage is dissolved with no agreement made, the husband shall be condemned for only as much as he is able to pay because this is most fair and owed to the respect spouses should have for each other, if he has not been involved in *dolus malus*. Clearly, he must give a formal guarantee that if he should become wealthier, he will make up the difference. 7a. The recovery of the dowry, moreover, shall not take place over three years in annual installments, but entirely within a year in the case of movable, self-propelled, and incorporeal property. Plainly, the rest of the properties, namely immovables,

¹⁰³ See C. 5.17.8.

¹⁰⁴ See C. 2.18.

restituendis, quod commune utriusque fuerat actionis. **7b.** Sin autem supersederit res mobiles vel se moventes vel incorporales post annale tempus restituere vel ceteras res statim post dissolutum matrimonium, etiam usuras aestimationis omnium rerum, quae extra immobiles sunt, usque ad tertiam partem centesimae ex bona fidei introducendas maritus praestet: fructibus videlicet immobilium rerum parti mulieris ex tempore dissoluti matrimonii praestandis, similique modo pensionibus vel vecturis navium sive iumentorum vel operis servorum vel quaestu civilium annonarum et aliis quae sunt eis similia parti mulieris restituendis.

8. Igitur et in sequenti capitulo sua ex stipulatu actio utatur natura, ut, si mulier a marito fuerit heres instituta et legis Falcidiae ratio emergerit, etiam dotis debitum liceat ei sicuti alia debita ex substantia mariti subtrahere et sic quartam partem deducere.

9. Cumque ex stipulatu actio in his casibus quos enumeravimus propriam habeat naturam, necessarium est in sequenti tractatu ea exponere, quae vel communia sunt utriusque actionis, quae in solam ex stipulatu actionem colligi oportet, vel propria quidem rei uxoriae actionis, exinde autem ex stipulatu actioni accommodanda. **9a.** Itaque partus dotalium ancillarum, id est quae aestimatae non sunt, vel quae servi dotales ex quacumque causa nisi ex re mariti vel operis suis adquisierint, ad mulierem pertinere utraque actio similiter voluit. **9b.** Fetus autem iumentorum et omnia quae fructuum nomine continentur ad lucrum mariti pertineant pro tempore matrimonii, sive aestimata sive non aestimata sint. **9c.** Sed et novissimi anni, in quo matrimonium solvitur, fructus pro rata temporis portione debere utrique parti assignari commune utriusque actionis est, in rebus scilicet non aestimatis. aestimatarum enim rerum maritus quasi emptor et commodum sentiat et dispendium subeat et periculum expectet.

10. Cautione videlicet defensionis in specie, in qua dotem suae uxoris vel nurus in familiae herciscundae iudicio praecipuam filius defuncti detrahit, secundum propriam naturam ex stipulatu actionis coheredibus suis praestanda.

11. Videamus igitur, quali incremento ei de rei uxoriae actione accedente formare decet ex stipulatu actionem. cumque iuris certi et indubitati est, si parens per virilem sexum adscendens dote pro filia vel nepte praestita emancpaverit eam vel ipse decesserit, in rei uxoriae

shall be given back immediately, a feature common to both actions. 7b. But if, however, a year has passed without the return of the movable, self-propelled, or incorporeal property, or the immovables have not been surrendered immediately upon the dissolution of the marriage, the husband shall also pay interest, based on an appraisal of all property apart from immovables consistent with the principle of good faith (*bona fides*) at the rate of 3 percent. The fruits of the immovable property obviously shall be paid to the wife's side from the time of the dissolution of the marriage, and in a similar manner rents, carriage fees from ships or draft animals, returns on the services of slaves, the value of public food distributions, and other things of like kind shall be given over to the wife's side.

8. Therefore too in this chapter that follows, this action shall preserve its own intrinsic nature, so that if the wife was named an heir by her husband and there was a need to calculate the fourth part ordained by the Lex Falcidia, it shall thus be permitted for her to deduct even the dowry as a debt, just as other debts, from the husband's estate and thus create the Falcidian fourth.

9. And since in these cases that we have listed the action on the stipulation shall possess its own intrinsic nature, it is necessary in the discussion that follows to set forth those features, which either are common to both actions, or which attach only to that on stipulation, or are only characteristic in fact of that on dowry, so that, however, they shall be appropriated therefrom for the action on stipulation. 9a. Therefore both actions in like wise have assured that the children of dowry slave women, that is, those who have not been appraised as to their value, as well as any property that the dowry slaves have acquired for any reason at all, except in connection with the husband's property or by their own labor, belong to the wife. 9b. Moreover, the offspring of draft animals and everything that is included under the term "fruits" (*fructus*) accrue to the husband's benefit during the marriage, whether these are appraised as to their value or not. 9c. Both actions also contemplated that the fruits of the year in which the marriage is dissolved ought to be made over to both parties, in proportion to the period of time (during which the marriage still existed), in the case, clearly, of property that has not been appraised. For the husband, as the constructive buyer of appraised property, shall reap the benefits, bear the losses, and take on the risks.

10. Of course, in the case of a suit to divide an inheritance where the son of the decedent takes the dowry of his own wife or daughter-in-law before the distribution is made, he shall, according to the nature of the action on stipulation, provide a guaranty (*cautio*) to his co-heirs against a suit for its recovery.

11. Let us see, therefore, what addition taken from the action on dowry appropriately shapes the (new) action on stipulation. Since it is fixed and undoubted law (*ius certum et indubitatum*) that if a male ascendant, after having provided a dowry for a daughter or a granddaughter, emancipates her or predeceases

actione dotem omnimodo ad mulierem pertinere, etsi fuerit exheredata (quod non erat in ex stipulatu actione: ibi etenim velut aliae actiones in omnes heredes actio dividebatur), aequissimum nobis visum est et in ex stipulatu actione mulierem dotem suam praecipuam accipere, etsi emancipata vel exheredata sit vel cum aliis heredibus scripta.

12. Quo a nobis recepto et aliae multae species promptum accipiunt exitum, cum dos possit et de inofficioso actionem excludere, maxime si sufficit ad quartam, et in collationem ferri, si intestatus pater familias decesserit, et testamento facto, quando hoc testator dixerit, quae omnia ex stipulatu actio a rei uxoriae actione accipit.

13. Accedit ei et alia species a rei uxoriae actione. si quando etenim extraneus dotem dabat nulla stipulatione vel pacto pro restitutione eius in suam personam facto, quisquis is fuerat, mulier habebat rei uxoriae actionem: quod antea in ex stipulatu actione non erat. stipulatione autem vel pacto interposito stipulator vel is qui paciscebatur habebat vel ex stipulatu vel praescriptis verbis civilem actionem. 13a. In praesenti autem non sic esse volumus, sed si non specialiter extraneus dotem dando in suam personam dotem stipulatus est vel pactum fecerit, tunc praesumatur mulier ipsa stipulationem fecisse, ut ei dos ex huiusmodi casu accedat. 13b. Neque enim in hac specie volumus videri extraneum tacitam stipulationem fecisse, ne, quod pro mulieribus introduximus, hoc adversus mulieres convertatur. immo magis in huiusmodi dotibus, quae ab extraneis dantur vel promittuntur, ipsa mulier videatur fecisse tacitam stipulationem, nisi expressim extraneus sibi dotem reddi pactus fuerit vel stipulatus, cum donasse magis mulieri quam sibi aliquid ius servasse extraneus non stipulando videtur. 13c. Extraneum autem intellegimus omnem citra parentem per virilem sexum adscendentem et in potestate dotandam personam habentem: parenti enim tacitam ex stipulatu actionem donamus.

14. Et hoc ex rei uxoriae actione simili modo ex stipulatu actioni accommodandum est. si quando etenim post solutum matrimonium dos a patre petebatur, si quidem rei uxoriae fuerat actio, non poterat solus pater sine consensu filiae suae agere: et si necdum actione mota ab hac luce fuerat subtractus et si lis contestata esset, ad filiam quasi

her, under the action on dowry the property entirely belongs to her, even if she were disinherited, it seemed most fair to Us that even under the action on stipulation the woman receive her dowry before the distribution is made, even if she has been emancipated or disinherited, or made a co-heir. This was not the case under the action on stipulation, for there, just as with other actions, the action was shared among all the heirs.

12. Once this point has been accepted by Us, many other issues also meet with a ready solution, since the dowry can even exclude an action on an undutiful will, especially if it adds up to a fourth (of what would have been due on intestacy) and can be brought as a contribution to the estate (*collatio*), if a *pater familias* dies without a valid will or, in the case of a valid will, its maker insists that this be done. The action on stipulation receives all of these attributes from that on dowry.

13. Other items too are added to it from the action on dowry. For whenever an unrelated person used to give a dowry without any stipulation or agreement about its return to himself, whoever he was, the woman used to have the action on dowry. This was previously not the case with the action on stipulation. The person who made a stipulation or an agreement, however, had a private law action either on the stipulation or with special terms (*praescriptis verbis*). 13a. From now on, however, We do not wish it to be thus, but if an unrelated person (*extraneus*) in giving a dowry has not made a particular stipulation or agreement giving him the right to its return, then the wife herself shall be assumed to have made a stipulation, so that the dowry accrues to her in this kind of situation. 13b. For in this case We do not wish the unrelated person to be deemed to have made an implicit stipulation, so that this (the benefit) which We have introduced on behalf of women not be turned against them. Rather, all the more so with dowries of this type, meaning those that are given or formally promised by unrelated persons, the woman herself shall be deemed to have made an implicit stipulation, unless the unrelated person has made a stipulation or agreement in express terms that the dowry be returned to him, since by not making a stipulation an unrelated person is considered more to have made a gift to the woman than to have preserved some right for himself. 13c. Moreover, by "unrelated person" We understand everyone apart from male ascendants who have a woman in their power (*potestas*) who must be given a dowry. For to (such) male ascendants We grant an implicit action on stipulation.

14. And in a similar manner the following incident from the action on dowry shall be transferred to that on stipulation. For whenever after the dissolution of a marriage the dowry used to be claimed by the father, if indeed he did this under the action on dowry, he could not bring suit by himself without the consent of his daughter, and if he died before trial, but after joinder of issue, the dowry used to revert to his daughter as if part of her own

proprium patrimonium dos revertebatur. 14a. Quod non erat in ex stipulatu actione: ibi enim et solus exactionem habebat consensu filiae non expectato et, si decedebat, ad suos heredes trans mittebat. sed rei uxoriae ius et in ex stipulatu actionem transponere satis humanum, satis pium, satis utile matrimoniis est.

15. Et cum lex Iulia fundi dotalis Italici alienationem prohibebat fieri a marito non consentiente muliere, hypothecam autem nec si mulier consentiebat, interrogati sumus, si oportet huiusmodi sanctionem non super Italicis tantummodo fundis, sed pro omnibus locum habere. 15a. Placet itaque nobis eandem observationem non tantum in Italicis fundis, sed etiam in provincialibus extendi. cum autem hypothecam etiam ex hac lege donavimus, sufficiens habet remedium mulier, et si maritus fundum alienare voluerit. 15b. Sed ne ex consensu mulieris hypothecae eius minuantur, necessarium est et in hac parte mulieribus subvenire hoc tantummodo addito, ut fundum dotalem non solum hypothecae titulo dare nec consentiente muliere maritus possit, sed nec alienare, ne fragilitate naturae suae in repentinam deducatur inopiam. 15c. Licet enim Anastasiana lex de consentientibus mulieribus vel suo iuri renuntiantibus loquitur, tamen eam intellegi oportet in res mariti vel dotis quidem, aestimatas autem, in quibus dominium et periculum mariti est: in fundo autem inaestimato, qui et dotalis proprie nuncupatur, maneat ius intactum, ex lege quidem Iulia imperfectum, ex nostra autem auctoritate plenum atque in omnibus terris effusum et non tantum Italicis et sola hypotheca conclusum.

16. Illud etiam generaliter praesenti addere sanctioni necessarium esse duximus, ut, si qua pacta intercesserint vel pro restitutione dotis vel pro tempore vel pro usuris vel pro alia quacumque causa, quae nec contra leges nec contra constitutiones sunt, ea observentur. 16a. Sin autem repudio matrimonium fuerit dissolutum, omnia iura, quae ex Theodosiana vel nostra lege descendunt, immutilata custodiantur. 16b. Simili modo ea, quae Anastasianae legi pro his quae bona gratia

estate. 14a. This was not a feature of the action on stipulation. For in that case he also had the right to recovery of the dowry by himself without waiting for the consent of his daughter. And if he died, the action passed to his heirs. But it is sufficiently humane, sufficiently dutiful, sufficiently useful for marriages to transfer this element of the law on dowry to the action on stipulation.

15. And since the Lex Julia prohibited the alienation of Italic rural dowry land by the husband without the consent of the wife and its being placed under hypothec even with her consent,¹⁰⁵ We have been asked whether this rule (*sanctio*) ought to have a place not only in the case of rural Italic land, but all (rural) land. 15a. It is therefore Our decision that this usage (*observatio*) shall operate not just for rural Italic land, but be extended to rural provincial land as well. Since, moreover, we have also granted a hypothec in connection with this statute,¹⁰⁶ the wife has an adequate remedy, even if the husband wishes to alienate the property. 15b. But in order that the wife's hypothec not be diminished pursuant to her consent, it is necessary even here to come to the aid of wives with just this provision added, that the husband shall not only not be able to place rural dowry property under hypothec even with his wife's consent but that he shall not be able to alienate it, so that she, through the weakness of her own nature (*fragilitas naturae suae*), not be reduced suddenly to poverty. 15c. For although the statute (*lex*) of Emperor Anastasius¹⁰⁷ speaks about women giving their consent or renouncing their rights, nevertheless, this ought to be understood to apply to property of the husband or dowry property certainly, but only if appraised as to its value, of which the husband has the title and the liability (for damage). In the case, moreover, of an unappraised piece of rural property, which is properly described also as "dowry," her rights shall remain unabridged. Though not fully realized, admittedly, under the Lex Julia, thanks to the interposition of Our authority they are full, diffused throughout all lands, and not limited only to Italic lands nor to just a hypothec.

16. We also have deemed it necessary to add the following general point to this instant law (*sanctio*), namely, that if any agreements are made concerning the recovery of the dowry, the timeframe for this, the interest to be paid, or for any other reason whatsoever, those which do not contradict statutes (*leges*) or constitutions shall remain valid. 16a. But if, however, the marriage has been ended through divorce, all rights that derive from the statute of Emperor Theodosius¹⁰⁸ or from Our own¹⁰⁹ shall be preserved intact. 16b. In like

¹⁰⁵ The *lex Julia de adulteriis coercendis* contained a rule (once itself referred to as the *lex Julia de fundo dotali*) that prohibited a husband from selling Italic rural dowry land without his wife's consent.

¹⁰⁶ In subsection 1b.

¹⁰⁷ C. 4.29.21.

¹⁰⁸ C. 5.17.8.

¹⁰⁹ C. 5.17.10.

separantur enumerata sunt, firma illibataque permaneant. 16c. Et generaliter quidquid sacratissimis constitutionibus vel libris prudentium cautum est, quod non contrarium huic legi inveniatur, et hoc in sua maneat firmitate et ex stipulatu actioni adgregetur, licet in re uxoria tractatum est.

16d. Quae omnia in his tantummodo dotibus locum habere censemus, quae post hanc legem datae fuerint vel promissae vel etiam sine scriptis habitae: instrumenta enim iam confecta viribus suis carere non patimur, sed suum expectare eventum.

D. k. Nov. Lampadio et Oreste cons.

XIII De Pactis Conventis Tam Super Dote Quam Super Donatione ante Nuptias et Paraphernis

[1] *Imp. Severus et Antoninus AA. Nicae.* Legem, quam dixisti, cum dotem pro alumna dares, servari oportet, nec obesse tibi debet, quod dici solet ex pacto actionem non nasci: tunc enim hoc dicimus, cum pactum nudum est: alioquin cum pecunia datur et aliquid de reddenda ea convenit, utilis est conditio.

PP. VII k. Febr. Albino et Aemiliano cons.

[2] *Imp. Antoninus A. Theodotae.* Fructus praediorum in dotem datorum si secundum pactum sumptibus tuis tuorumque servierunt, repeti non posse ambigere non debes.

D. XI k. April. Antonino A. IIII et Balbino cons.

[3] *Imp. Gordianus A. Torquatae.* Quamvis pater tuus, cum te nuptui collocaret, pactus sit, ut, si maritus tuus superstitionibus filiis communibus in matrimonio decessisset, pars dotis liberorum nomine retineatur, eiusmodi tamen conventio, quominus actionem integrae dotis habeas, proficere non potest.

D. VI id. Ian. Gordiano A. et Aviola cons.

manner, those rights which are set forth in the statute of Emperor Anastasius for those who divorce by mutual consent¹¹⁰ shall remain fixed and unimpaired. 16c. And, in general, whatever is laid down in the most revered *constitutiones* or in the works of the jurists (*prudentes*), which is found not to be contrary to the contents of this statute, shall also remain valid, and shall be associated with the action on stipulation, even though it was dealt with in the context of dowry.

16d. We ordain that all of these rules shall apply only to those dowries that are given, formally promised, or also received without documentation after this statute is enacted. For We do not permit that documents already executed shall lose their validity, but they shall remain effective on their own terms.

Given November 1, in the consulship of Lampadius and Orestes (530).

Fourteenth Title Agreements about Dowries, Prenuptial Gifts, and Non-Dowry Property of the Wife¹¹¹

[1]¹¹² *Emperors SEVERUS and ANTONINUS Augusti to Nica.* The terms that you provided in giving a dowry for your foster daughter must be observed. Nor ought the objection be raised against you that, as is customarily said, no action arises from a pact; for we apply this rule (only) when there is a naked pact (*pactum nudum*). But when money is given with some agreement on its return, there is available a claim for restitution (*utilis condictio*).

Posted January 26, in the consulship of Albinus and Aemilianus (206).

[2] *Emperor ANTONINUS Augustus to Theodota.* If the fruits of properties given as dowry have been used, according to an agreement (*pactum*), for the expenses incurred by you and yours, you ought not to entertain doubt that they cannot be recovered (by your husband).

Given March 22, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[3] *Emperor GORDIAN Augustus to Torquata.* Although your father, when he arranged your marriage, made an agreement that, if the marriage ended by your husband's death and the children he had with you survived him, a part of the dowry would be kept back for the maintenance of the children, nevertheless, an agreement of this kind cannot prevent you from raising an action for the recovery of the entire dowry.

Given January 8, in the consulship of Gordian Augustus and Aviola (239).

¹¹⁰ C. 5.17.9.

¹¹¹ See D. 23.4.

¹¹² = C. 2.3.10. The *lex geminata* dates to February 27, 227.

[4] *Idem A. Agatho.* Pactum dotale, quo matrem convenisse cum patre tuo proponis, ut, si in matrimonio decessisset, tibi et fratribus tuis dos restitueretur, si stipulatio ex persona vestra, cum in potestate patris constituti non essetis, legitima minus intercessit, defuncta ea in matrimonio actionem vobis quaerere non potuit. sed si obligatione verborum rite intercedente dotis petitionem habere potuisti, maxime si ad vinculum potestatis patriae non attigeris, petitionem exsequi^{viii} non prohiberis.

PP. v id. Iun. Sabino et Venusto cons.

[5] *Impp. Diocletianus et Maximianus AA. Claudio.* Hereditas extraneis testamento datur. cum igitur adfirmes dotali instrumento pactum interpositum esse vice testamenti, ut post mortem mulieris bona eius ad te pertinerent, quae dotis titulo tibi non sunt obligata, intellegis te nulla actione posse convenire heredes seu successores eius, ut tibi restituantur, quae nullo modo debentur.

PP. non. Febr. ipsis IIII et III AA. cons.

[6] *Idem AA. et CC. Rufo.* Si convenit, ut in matrimonio uxore defuncta dos penes maritum remaneret, profecticiae dotis repetitionem huiusmodi pactum inhibuisse explorati iuris est, cum deteriore causam dotis, in quem casum patri soli repetitio competit, pacto posse fieri auctoritate iuris saepissime sit responsum.

D. v non. Mai. ipsis AA. cons.

[7] *Idem AA. et CC. Phileto.* Pater, pro filia dotem datam genero ea prius in matrimonio defuncta nepotibus pactus restitui, licet his actionem quaerere non potuit, tamen utilis eis ex aequitate accommodabitur actio.

D. XIII k. Ian. Nicomediae CC. cons.

^{viii} [maxime] si ... petitionem <maxime> exsequi

[4] *The same Augustus to Agathus.* A dowry agreement through which you allege that your mother and father agreed that, if their marriage ended through her death, the dowry would be given back to you and your brothers, could not, if she died while married, confer a right of action on you unless a legally valid stipulation were made with you after you had been released (emancipated) from your father's power (*potestas*). But if a legally proper stipulation were made, you in particular could have a right of action (*petitio*) on the dowry. If you are not bound by your father's power (*patria potestas*), you above all are not prevented from launching a claim.

Posted June 9, in the consulship of Sabinus and Venustus (240).¹¹³

[5] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Claudius.* Unrelated persons (*extranei*) are made heirs (only) through a will. Since, therefore, you assert that an agreement was inserted in the dowry documents in place of a will, to the effect that after the wife's death her property would belong to you, and that property is not owed to you under title of dowry, you understand that you can sue neither her heirs nor successors in order to recover that which is in no way owed to you.

Posted February 5, in the consulship of the Augusti, for the fourth and third time, respectively (290).

[6] *The same Augusti and the Caesars to Rufus.* If an agreement is made that, should a marriage end by the death of the wife, the dowry is to remain with the husband, it is settled law (*exploratum ius*) that such an agreement blocks recovery of a dowry given by a male ascendant (*dos profecticia*), since it has very often been given as an authoritative legal opinion that, in a situation in which the father alone is entitled to sue to recover the dowry, this right can be waived through an agreement.

Given May 3, in the consulship of the Augusti (293).

[7] *The same Augusti and Caesars to Philetus.* A father gave a dowry to his son-in-law on behalf of his daughter and made an agreement that, if the marriage were ended by her death, the dowry would be given back to his grandchildren. Although he could not acquire a right of action for them, an analogous action will nevertheless be framed for them from reasons of equity (*aequitas*).¹¹⁴

Given December 19, at Nicomedia, in the consulship of the Caesars (294).

¹¹³ Other constitutions show that this was the second consulship for Sabinus.

¹¹⁴ The Byzantine jurist Thalelaeus claims that the compilers added the last phrase in contravention of classical law.

[8] *Impp. Theodosius et Valentinianus AA. Hormisdæ pp.* Hac lege decernimus, ut vir in his rebus, quas extra dotem mulier habet, quas Graeci parapherna dicunt, nullam uxore prohibente habeat communionem nec aliquam ei necessitatem imponat. quamvis enim bonum erat mulierem, quae se ipsam marito committit, res etiam eiusdem pati arbitrio gubernari, attamen quoniam conditores legum aequitatis convenit esse fautores, nullo modo, ut dictum est, muliere prohibente virum in paraphernis se volumus immiscere.

S. d. v id. Ian. post consulatum Protogenis et Asterii.

[9] *Impp. Leo et Anthemius AA. Nicostrato pp. pr.* Ex morte cuiuscumque personae sive mariti sive mulieris eandem partem, non pecuniae quantitatem, tam virum ex dote quam mulierem ex ante nuptias donatione lucrari decernimus. 1. Veluti si maritus mille solidorum ante nuptias donationem confecerit, licebit mulieri et minoris et amplioris quantitatis dotem offerre et marito similiter ante nuptias donationem: hoc tamen observandum est, ut quantam partem mulier stipuletur sibi lucro cedere ex ante nuptias donatione, si priorem maritum mori contigerit, tantam et maritus ex dote partem, non pecuniae quantitatem, stipuletur sibi, si constante matrimonio prior mulier in fata collapsa fuerit. 2. Et si pactum contra vetitum fuerit subsecutum, infirmum atque invalidum hoc esse, ut nulla ex eo procedere possit exactio, praecipimus.

3. Eadem custodiri censemus, sive pater pro filio sive mater sive ipse ducturus uxorem sui iuris constitutus sive quilibet alius pro eo ante nuptias donationem nupturae dederit. 4. Simili quoque modo, sive pater pro filia sive mater sive ipsa pro se, sui iuris videlicet constituta, sive quilibet alius pro ea uxorem ducturo dotem dederit seu promiserit, quoniam et alio pro ea offerente dotem ipsa eam pro se videtur offerre.

5. Quod adeo verum est, ut et ipsa ab alio pro se oblatam dotem in lucrum suum reposcat, nisi forte is qui eam obtulit statim, id est tempore oblationis seu promissionis, stipulatus vel pactus sit, ut sibi dos praedicta reddatur.

D. xv k. Sept. Anthemio A. II cons.

[8] *Emperors THEODOSIUS and VALENTINIAN Augusti to Hormisdas, Praetorian Prefect.* With this statute We decree that a husband, when his wife forbids it, shall have no right of ownership in, and shall place no lien upon, the property which a woman possesses beyond her dowry, which the Greeks call *parapherna*. For although it would be a good thing for a woman who entrusts herself to her husband also to permit her property to be managed at his discretion, yet because it becomes the founders of the laws (*conditores legum*) to be the partisans of equity (*aequitas*), We wish, as is said above, the husband in no way to become entangled in his wife's *parapherna*, if she forbids this.

Written January 9, in the post-consulate of Protogenes and Asterius (450).

[9] *Emperors LEO and ANTHEMIUS Augusti to Nicostratus, Praetorian Prefect.* pr. We decree that in the case of the death of either party, the husband or the wife, the same proportion, not the same amount of money, shall benefit both the husband from the dowry and the wife from the prenuptial gift. 1. For example, if the husband made a prenuptial gift of 1,000 solidi, the wife will be allowed to offer a dowry of a greater or lesser amount, and likewise the husband (is allowed to offer) a prenuptial gift (of a greater or lesser amount than the dowry). All the same, this rule must be observed, that whatever the proportion the wife shall stipulate to accrue to her from the prenuptial gift if the husband predeceases her, the same proportion, and not the (same) sum of money, the husband shall stipulate to accrue to him from the dowry, if the wife predecease him, thus ending the marriage. 2. And if an agreement is made contrary to what is forbidden, We instruct that this shall be without effect and void, so that no recovery can be made on the basis of it.

3. We ordain that the same rules hold whether a father or a mother on behalf of a son, the groom-to-be himself, being *sui iuris*, or anyone else at all on his behalf gives a prenuptial gift to the bride-to-be. 4. In a similar manner, too, whether a father or a mother on behalf of a daughter, (or) the bride herself – obviously if we assume she is *sui iuris* – or anyone else at all on her behalf gives or promises a dowry to the groom-to-be, since, even when someone else offers a dowry for her, she is deemed to offer it on her own behalf.

5. This is true to the extent that she also may demand back for her own benefit the dowry that has been offered by someone else on her behalf, unless by chance the person offering the dowry immediately – that is, at the time of the (actual) transfer or formal promise – made a stipulation or pact that the aforesaid dowry be returned to him.

Given August 18, in the consulship of Anthemius Augustus, for the second time (468).

[10] *Imp. Iustinianus A. Menae pp.* Lege Leonis divae memoriae pacta lucrorum dotis et ante nuptias donationis paria esse sanciente nec adiciente, quid fieri oporteat, si hoc minime observatum sit, nos omnia clara esse cupientes praecipimus disparibus eis factis maiorem lucri partem ad minorem deduci, ut eo modo uterque minorem partem lucretur.

D. VIII id. April. Constantinopoli Decio vc. cons.

[11] *Idem A. Iohanni pp. pr.* Si mulier marito suo nomina, id est feneraticias cautiones, quae extra dotem sunt dederit, ut loco paraphernarum apud maritum maneant, et hoc dotali instrumento fuerit adscriptum, utrumne habeat aliquas ex his actiones maritus sive directas sive utiles, an penes uxorem omnes remaneant, et in quem eventum dandae sint marito actiones, quaerebatur.

1. Sancimus itaque, si quid tale evenierit, actiones quidem omnimodo apud uxorem manere, licentiam autem marito dari easdem actiones movere apud competentes iudices nulla ratihabitione ab eo exigenda, et usuras quidem eorum circa se et uxorem expendere, pecunias autem sortis quas exegerit servare mulieri vel in causas, ad quas ipsa voluerit, distribuere. 2. Et si quidem in dotali instrumento hypothecae pro his nominatim a marito scriptae sunt, his esse mulierem ad cautelam suam contentam. sin autem minime hoc scriptum inveniatur, ex praesenti nostra lege habeat hypothecam contra res mariti, ex quo pecunias ille exegit. 3. Antea etenim habeat ipsa mulier facultatem, si voluerit, sive per maritum sive per alias personas easdem movere actiones et suas pecunias percipere et ipsas cautiones a marito recipere, securitate ei competente facienda.

4. Dum autem apud maritum remanent eadem cautiones, et dolum et diligentiam maritus circa eas praestare debet, qualem circa suas res habere invenitur, ne ex eius malignitate vel desidia aliqua mulieri accedat iactura. quod si evenierit, ipse eandem de proprio resarcire compelletur.

D. k. Nov. Lampadio et Oreste vv. cc. cons.

[10] *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect.* Since the statute of Emperor Leo of blessed memory¹¹⁵ provided that agreements regarding benefits from dowry and prenuptial gift shall be equal, but did not add what ought to be done if this rule is not at all observed, from Our desire that everything be clear, We instruct that in the case where the proportions are unequal the greater share shall be reduced to the level of the smaller, so that in this way both shall benefit from the smaller-sized share.

Given April 6, at Constantinople, in the consulship of vir clarissimus Decius (529).

[11] *The same Augustus to John, Praetorian Prefect. pr.* If a wife gives to her husband names – that is, of guarantors for loans at interest – that are outside the dowry, so that they remain with the husband under the category of her non-dowry property, and this detail has been recorded in the dowry document, the question arose as to whether the husband has some rights of action in connection with these, whether direct or analogous, or they all stay with the wife, or in what situation they should be given to the husband.

1. We therefore lay down that, if any such thing come to pass, the actions, at any rate, shall remain entirely with the wife, but that the power shall be given to the husband of raising these same actions before the appropriate judges, without demanding of him proof of his wife's approval, of spending interest, certainly, from this property on himself or his wife, moreover, of preserving for the wife the principal which he has collected, or of distributing this for purposes as she directs. 2. And if, in fact, hypothecs (*hypothecae*; real security arrangements) are specifically made for these by a husband in a dowry document, (We direct) that the wife shall be content with these for her own protection. But if, however, this is discovered not at all been to have been written down, she shall, in accordance with this instant statute of Ours, have a hypothec against her husband's property from the time when he collected the money. 3. For beforehand the wife herself shall have the capacity, if she wishes, to launch, either through her husband or through other persons, these actions, to collect her money, or to receive the guaranties (*cautiones*) from her husband, though she shall give him appropriate security (for them).

4. While, however, the same guaranties remain with the husband, he ought to refrain from the intentional infliction of harm (*dolus*) and maintain the same standard of care toward them as he is shown to display toward his own property (*diligentia quam suis*), so that some loss not accrue to the wife through his maliciousness or slackness. But if it occurs, he himself will be forced to compensate her from his own resources.

Given November 1, in the consulship of the viri clarissimi Lampadius and Orestes (530).

¹¹⁵ C. 5.14.9.

XV De Dote Cauta et Non Numerata

[1] *Imp. Severus et Antoninus AA. Dionysiae.* Dotem numeratio, non scriptura dotalis instrumenti facit: et ideo non ignoras ita demum ad petitionem dotis admitti te posse, si dotem a te re ipsa datam probatura es.

D. XIII k. Aug. Cilone et Libone cons.

[2] *Imp. Alexander A. Papiniana.* Quod de suo maritus constante matrimonio donandi animo in dotem adscripsit, si eandem donationem legitime confectam non revocavit, qui incrementum doti dedit, et durante matrimonio mortem obiit, ab heredibus mariti, quatenus interposita liberalitas munita est, peti potest.

PP. non. Dec. Alexandro A. III et Dione cons.

[3] *Imp. Iustinianus A. Menae pp.* In dotibus, quas datas esse dotalibus instrumentis conscribi moris est, cum adhuc nulla datio, sed pollicitatio tantum subsequuta sit, liceat non numeratae pecuniae exceptionem opponere non solum marito contra uxorem vel heredes eius morte mulieris vel repudio dissoluto matrimonio, sed etiam heredibus mariti, cuius morte dissolutum est matrimonium, socero etiam vel eius heredibus, si cum filio suo dotem suscepisse dotalibus instrumentis scriptum sit, omnique personae, quam dotem suscepisse una cum marito conscribitur, et eius similiter heredibus, ita tamen, ut intra annum tantum continuum a morte mariti vel mulieris vel missione repudii computandum ea licentia detur.

D. k. Iun. dn. Iustiniano A. II cons.

Fifteenth Title Dowry Promised But Not Paid

[1] *Emperors SEVERUS and ANTONINUS Augusti to Dionysia.* The act of paying out, and not the execution of a dowry document, makes a dowry. And for this reason you are not unaware that to this extent you can be allowed to sue for a dowry: if you are prepared to show that the dowry was in actual fact given by you.

Given July 20,¹¹⁶ in the consulship of Cilo and Libo (204).

[2] *Emperor ALEXANDER Augustus to Papiniana.* That which your husband recorded as an addition to the dowry with the intention of giving a gift from his own estate during your marriage, provided he did not recall this gift, made in a legally valid manner, if it increased the value of the dowry and the marriage is ended through his death, can be claimed from the husband's heirs (by the wife), insofar as this generosity is fortified by the production (of proof).¹¹⁷

Posted December 5, in the consulship of Alexander Augustus, for the third time, and Dio (229).

[3]¹¹⁸ *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect.* Concerning dowries, for which it is the custom to register in dowry documents (items) as having been given when there has been as yet no actual giving, but only an informal promise has been made, not only the husband shall be permitted to raise an affirmative defense of "money not paid out" (*exceptio non numeratae pecuniae*) against his wife or her heirs when the marriage is ended through her death or a divorce, but also the husband's heirs, when the marriage is ended through his death, as well as the (wife's) father-in-law or his heirs, if it were written in the dowry documents that he, together with his own son, had received the dowry, and every person, who is recorded as having received the dowry together with the husband, and likewise his or her heirs, in such a way, however, that this power shall be given only for a year to be reckoned continuously from the death of a husband or wife, or from the sending of notice of divorce.

Given June 1, in the consulship of Our Lord Justinian Augustus, for the second time (528).

¹¹⁶ The precise day is uncertain: the alternative is July 18.

¹¹⁷ The original text required a stipulation.

¹¹⁸ Combine with C. 4.2.17, 4.20.18, 4.21.17, 4.30.14, 4.30.15(?).

XVI De Donationibus Inter Virum et Uxorem et a Parentibus in Liberos Facti et de Ratihabitione

[1] *Imp. Antoninus A. Tryphaenae.* Bona quondam mariti tui fiscus si nemine ei successore existente ut vacantia occupavit, donationes ab eo factae, si usque ad finem vitae in eadem voluntate permansit, revocari non possunt.

PP. III id. Ian. duobus Aspris cons.

[2] *Idem A. Marco militi.* Si ancillam nummis tuis comparatam esse praesidi provinciae probaveris donationisque causa focariae tuae nomine instrumentum emptionis esse conscriptum, eam tibi restitui iubebit. nam licet cessante iure matrimonii donatio perfici potuerit, milites tamen meos a focariis suis hac ratione fictisque adulationibus spoliari nolo.

PP. XII k. Mart. Antonino A. IIII et Balbino cons.

[3] *Idem A. Epicteto. pr.* Donatio mancipiorum aliarumque rerum, quas tibi ab uxore tua donatas dicis, si modo suae potestatis, cum donaret, fuit vel patris voluntate id fecit et in eadem voluntate donationis usque ad ultimum diem vitae perseveravit, ex mea et divi Severi patris mei constitutione firmata est. 1. Sin autem post mortem filiae facta est donatio a quondam socero tuo, etiam inter vivos ea perfici potuit.

PP. IIII non. Mart. Antonino A. IIII et Balbino cons.

[4] *Imp. Alexander A. Claudiano.* Nec inter eas quidem personas, quarum iuri subiecti sunt vir et uxor quive in eorum potestate sunt, donationes iure civili fieri possunt.

PP. XVII k. Oct.

[5] *Idem A. Quintillae.* Si, ut proponis, pater tuus, in cuius potestate fuisti, marito tuo genero suo instrumentum debitoris donationis causa

Sixteenth Title Gifts Between Husband and Wife, by Parents to Children, and Ratification of Them¹¹⁹

[1] *Emperor ANTONINUS Augustus to Tryphaena.* If your decedent husband has no surviving heir and the Treasury has seized his estate as unclaimed property (*bona vacantia*), the gifts made by him (to you), provided he did not change his mind before he died, cannot be revoked.

Posted January 11, in the consulship of the two Aspri (212).

[2] *The same Augustus to Marcus, a soldier.* If you prove to your provincial governor that the slave-woman was purchased with your money, and that a sale document was written up under the name of your concubine in order to make a gift, he will order her to be returned to you. For, although the gift could have been validly made since there was no marriage, nevertheless, I do not wish my soldiers to be stripped of their goods in this way by their concubines through their feigned blandishments.

Posted February 18, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[3] *The same Augustus to Epictetus. pr.* A gift of slaves and other property, which you allege was given to you by your wife, provided that she was of independent legal status (*suae potestatis*) when she made the gift or did so with the approval of her father, and did not change her mind about the gift as long as she lived, is confirmed according to the constitution promulgated by myself and my father, the deified Severus.¹²⁰ 1. But if, however, the gift was made by your former father-in-law after his daughter's death, this gift could be validly made even between living persons (*inter vivos*).

Posted March 4, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[4] *Emperor ALEXANDER Augustus to Claudianus.* Under private law (*ius civile*), gifts cannot be validly made between persons, certainly, in whose power (*potestas*) a husband or wife stands, or between those who are in the *potestas* of such persons.

Posted September 15.

[5] *The same Augustus to Quintilla.* If, as you allege, your father, in whose power (*potestas*) you were, gave as a gift to your husband, his son-in-law, a document

¹¹⁹ See D. 24.1.

¹²⁰ This refers to an SC prompted by an *oratio* of Severus and Caracalla in 206. It allowed gifts between spouses to be valid where the donor died during the marriage and had not revoked the gift.

dedit isque matrimonio durante vita functus est ac postea a marito divortisti, quod gestum est non valet.

PP. id. Febr. Albino et Maximo cons.

[6] *Idem A. Nepotiano. pr.* Etiam si uxoris tuae nomine res quae tui iuris fuerunt depositae sunt, causa proprietatis ea ratione mutari non potuit, etsi donasse te uxori res tuas ex hoc quis intellegat, cum donatio in matrimonio facta prius mortua ea quae liberalitatem exceptit irrita sit. 1. Nec est ignotum, quod, cum probari non possit, unde uxor matrimonii tempore honeste quaesierit, de mariti bonis eam habuisse veteres iuris auctores merito credidissent.

PP. non. Dec. Alexandro A. III et Dione cons.

[7] *Idem A. Theodotae.* Si ex voluntate patris tui filio tutoris nupta es, collata in maritum donatio ipso iure irrita est, sed si matrimonium iure non valuit, licet ipso iure donatio tenuerit, quia tamen indigna persona eius fuit, qui nec maritus potest dici, utiles actiones super revocandis his tibi competunt.

PP. k. Oct. Lupo et Maximo cons.

[8] *Idem A. Leoni.* Si fructus eorum praediorum, quae in dotem accepisse te dicis, matrimonii tempore uxorem tuam percipere passus es eosque uxor tua absumpsit, restitui tibi post divortium oportere nulla ratione contendis. sin autem ab his locupletior facta est, in tantum potest conveniri.

PP. v k. Oct. Maximo et Paterno cons.

[9] *Imp. Gordianus A. Origeni.* Etsi de tua pecunia mancipia uxori tuae comparata sunt, tamen, si ei sunt tradita, eorum dominium non ad te, sed ad eam pertinet, pecuniae autem tantummodo repetitionem habes, sive negotium eius gerens numerationem fecisti sive in eam donationem conferens quantitatem pretii largitus es: etenim vel in solidum vel quatenus locupletior facta est actione cum ea competenti poteris experiri.

PP. VII k. Oct. Pio et Pontiano cons.

testifying to the existence of a debt, and he (your father) died during the marriage, after which you divorced your husband, your father's action is not valid.

Posted February 13,¹²¹ in the consulship of Albinus and Maximus (227).

[6] *The same Augustus to Nepotianus. pr.* Although property belonging to you was given as a deposit under your wife's name, title to property could not be changed in this way, even if someone might understand from this that you gave the property as a gift to your wife, since a gift made during a marriage is void when the beneficiary predeceases the benefactor. 1. Nor is it unrecognized that, when the source of what a wife honorably acquired during marriage cannot be demonstrated, the ancient legal authorities (*veteris iuris auctores*) rightly believed that she had acquired this from the property of her husband.

Posted December 5, in the consulship of Alexander Augustus, for the third time, and Dio (229).

[7] *The same Augustus to Theodota.* If, in accordance with the last wishes of your father, you married the son of your tutor, a gift made (by you) to your husband is invalid by operation of law. But if the marriage was not legally valid, although by operation of law the gift would (then) be valid, because nevertheless his status was unworthy and he cannot even be called a husband, analogous actions (*actiones utiles*) for reclaiming this property are available to you.

Posted October 1, in the consulship of Lupus and Maximus (232).

[8] *The same Augustus to Leo.* If while you were married you allowed your wife to reap the fruits of those properties which you declare you received as a dowry, and she consumed them, you have no reason to claim that they (the fruits) ought to be restored to you after divorce. But if, however, she has been enriched for this reason, up to this amount she can be sued.

Posted September 27, in the consulship of Maximus and Paternus (233).

[9] *Emperor GORDIAN Augustus to Origenes.* Even if slaves were bought for your wife with your money, nevertheless, if they have been delivered to her, ownership of them is not yours but hers. You have, however, a suit to recover (not the slaves but) just the money, (regardless of) whether you paid it out while managing her business or you paid the purchase price in order to make her a gift. For you will be able to raise the relevant action (*actio*) against her for the entire amount or to the extent that she has been enriched.

Posted September 25,¹²² in the consulship of Pius and Pontianus (238).

¹²¹ The precise day is uncertain: the alternative is February 9.

¹²² The precise day is uncertain: the alternative is September 24.

[10] *Idem A. Veriano.* Si maritus quondam uxoris tuae, cum sui iuris esset, in eam praedia vel cetera donationis titulo contulit et in ea voluntate usque ad mortem suam perseveravit, ex oratione divi Severi confirmata est donatio: ac si eas res pater defuncti iniuriose abstulit, per praesidem provinciae eas restituere cogetur. nec enim, quasi maleficiis eius sit maritus extinctus, crimen intendens sub praetextu accusationis quae donata sunt auferre debuit, cum causa liberalitatis a criminatione separata sit.

PP. III k. April. Gordiano A. et Aviola cons.

[11] *Idem A. Maximo.* Sicut cessat petitio quantitatis, quam de suo maritus uxori in menses singulos vel annos singulos proprii usus eius gratia promittit, ita ex ea causa nummi soluti erogatique non dari repetitionem manifestum est.

PP. v k. Iul. Gordiano A. II et Pompeiano cons.

[12] *Idem A. Secundinae.* Si maritus tuus creditores sortitus post factam in te donationem fundum, quem ex donatione iuri tuo vindicas, isdem specialiter obligavit, eandem obligationem defensionis tuae firmitatem inrumpere intellegere debes, cum sit manifestum non solum ex huiusmodi obligatione, sed etiam ex donatione vel venditione vel alio quolibet modo rebus alienatis revocatam esse a viro in mulierem factam donationem.

PP. VI k. Febr. Arriano et Papo cons.

[13] *Impp. Diocletianus et Maximianus AA. Rufinae. pr.* Si quidem ante donationem possessionis in te iure, ut dicis, a marito collatam praedium ab eodem creditori obligatum fuit, alienationem eius salvo iure debiti (si tamen iuris ratio actionem eius non excludit) factam esse dubium non est. 1. Quod si donatione iure celebrata eo, quod vel ante nuptias facta est vel in isdem casibus, in quibus etiam constante matrimonio donatio procedere potest, obligatio insecuta est, factum mariti, quem diem suum obisse memorasti, iuri tuo officere non posse certum est.

PP. XII k. Iul. Maximo II et Aquilino cons.

[10] *The same Augustus to Verianus.* If the decedent husband of your wife, when he was *sui iuris*, gave her real properties and other things as a gift and did not change his mind about this before his death, in accordance with the legislative proposal (*oratio*) of the deified Severus, the gift is validated. And if the father of the decedent wrongfully seized those properties, he will be compelled to restore them by the governor of the province. For he ought not to seize those gifts under the pretext of an accusation, by raising a criminal charge on the ground that the husband died because of her wrongdoing, since the question of the legal status of the gift is a different matter from a criminal prosecution.

Posted March 30, in the consulship of Gordian Augustus and Aviola (239).

[11] *The same Augustus to Maximus.* Just as a suit fails to lie for the amount of money that a husband formally promises to pay his wife from his own funds for her own use on a monthly or yearly basis, so for the same reason it is clear that a suit for recovery is not given for money that (with or without such a promise) has been paid and expended.

Posted June 27, in the consulship of Gordian Augustus, for the second time, and Pompeianus (241).

[12] *The same Augustus to Secundina.* If your husband, after making a gift to you of a farm which you now claim as your own in connection with the gift, later specially bound it over as security to creditors, you ought to understand that this same encumbrance shatters the foundation of your argument, since it is clear that not only by an encumbrance of this kind, but also by a gift, sale, or alienation of property in any other way, a gift made by a husband to his wife is revoked.

Posted January 27, in the consulship of Arrianus and Papus (243).

[13] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Rufina. pr.* If, in fact, a gift of land was legally made to you, as you claim, by your husband and he had previously bound it over to a creditor, there is no doubt that its alienation has been validly accomplished even as the debt-obligation is preserved, if, all the same, no rule of law (*iuris ratio*) bars a right of action over this. 1. But if the gift were accomplished in a legally valid manner, (whether) because it was made before marriage or because it was made in one of those situations in which a gift (between spouses) can be made even during marriage, and the placing of the property under lien followed, then it is certain that the action of your husband, who, as you say, has passed on, cannot impede your right over it.

Posted June 20, in the consulship of Maximus, for the second time, and Aquilinus (286).

[14] *Idem AA. Octavianae. pr.* Ex verbis, quae in postremis iudiciis inseruntur, licet ad fideicommissum vel legatum utilia sunt, non omnimodo legati vel fideicommissi persecutio datur, sed ita demum, si relinquendi studio huiusmodi verba fuerint adscripta. unde te voluntatis, non iuris quaestionem in preces tuas contulisse palam est. 1. Cum igitur lecto testamento animadvertimus maritum tuum ex praecedente donatione dominium tibi conservasse securitatisque tuae ad obtinendam proprietatem cavisse, inditorum verborum conceptio non fideicommissum relictum ostendit, sed ex senatus consulti auctoritate liberalitatem mariti tui, cui custodiendae etiam moriens prospexit, quatenus firmare potuit dominium, mortis tempore tibi esse addictam.

PP. III non. Oct. ipsis AA. cons.

[15] *Idem AA. Iustiniano et aliis. pr.* Si non verum contractum pater vester gessit, sed sub specie venditionis donationem possessionis in matrem vestram contulit nec ex bonis, quae in persona patris vestri permansisse videbantur, ob primipilum indemnitati fiscali satisfieri potuit, licet in eadem donandi voluntate perseverasse eum probari potest, ex eadem possessione ad supplendam pecuniam, quae ex bonis ab eo relictis colligi nequivit, conferendum est. 1. Quod si liberalitatis tenorem mutata voluntate pater tuus interrupit, in hereditate eius dominium resedissee nulla dubitatio est.

PP. IIII k. Febr. Tiberiano et Dione cons.

[16] *Idem AA. Theodoro.* Si filii tui emancipati matris hereditatem sibi adquisierunt, proba apud praesidem provinciae non donandi animo te nomine uxoris tuae praedia comparasse, sed nominis dumtaxat eius titulo usum per possessionem rerum a venditoribus tibi traditarum dominum esse effectum, ut comprehensa filiorum tuorum iniuria proprietatis ius incolume perseveret. nam si largiendi proposito id te fecisse constiterit, pecuniae tibi persecutio competit.

PP. VI id. Mart. Tiberiano et Dione cons.

[14]¹²³ *The same Augusti to Octaviana. pr.* Although words inserted into a will may create a trust or a legacy, a claim on a trust or a legacy does not always arise therefrom, but only to the extent that such words were written with the intent of making an actual bequest. So it is manifest that your petition raises an issue of fact regarding decedent's wishes, not one of law. 1. Since therefore, upon reading the will, We note that your husband confirmed your ownership of the gift he had previously made to you and took care that you should be safe in your ownership thereof, the precise language shows that he did not leave a trust but that the generous gift of your husband, which he took care to safeguard even at the time of his death, insofar as he was able to confirm ownership of the property, was assigned to you precisely at the time of his death, in accordance with the authoritative decree of the Senate.¹²⁴

Posted October 5,¹²⁵ in the consulship of the Augusti (290).

[15] *The same Augusti to Justinianus and others. pr.* If your father did not make an actual contract, but under the appearance of a sale made a gift of a property to your mother, and his liability to the Treasury arising from his holding the position of chief centurion (*primipilus*) could not be made good out of the property that appeared to have remained in his ownership, (then) even though he can be shown not to have changed his mind about the gift, a contribution must be made from this land to top off the money which could not be collected from the property he left behind. 1. But if your father changed his mind and abrogated the gift, there is no doubt that the ownership of this land re-accrued to his estate.

Posted January 29, in the consulship of Tiberianus and Dio (291).

[16] *The same Augusti to Theodorus.* If your children, being emancipated, have come into their mother's inheritance, prove before the provincial governor that you did not buy real properties in your wife's name with the intent of giving them to her as a gift, but that having used her name you became owner of the properties by taking possession of them when the sellers conveyed them to you, so that the offensive conduct of your children shall be understood for what it is and your rights of ownership shall continue intact. For if it is shown that you did this with the intention of making a gift, you (still) have a claim for recovering the money (that you paid).

Posted March 10,¹²⁶ in the consulship of Tiberianus and Dio (291).

¹²³ See C. 8.10.5.

¹²⁴ Passed in 206 (above).

¹²⁵ The precise day is uncertain: the alternative is October 2.

¹²⁶ The precise day is uncertain: the alternative is March 11.

[17] *Idem AA. et CC. Capitolinae.* De his, quae extra dotem in domum illata a marito erogata commemoras, si quidem te donante consumpta sunt, intellegis adversus heredes non nisi in quantum locupletior fuit habere te actionem: si vero contra voluntatem tuam, omnia tibi restitui oportere.

Sub die VIII k. Mai. Heracliae AA. cons.

[18] *Idem AA. et CC. Maternae.* A marito in uxorem donatione collata matrimonii tempore nec initio dominium transferri potest nec post, si divortium intercesserit vel prior persona quae liberalitatem accepit rebus humanis fuerit exempta vel ab eo qui donavit fuerit revocata, potest convalescere.

Sub die XIII k. Iul. Serdicae AA. cons.

[19] *Idem AA. et CC. Dionysiae.* Si constante matrimonio tibi mater domum tradidit, hanc in tuis fecit bonis.

D. id. Iul. Philippopoli CC. cons.

[20] *Idem AA. et CC. Claudiae.* Creditor debito soluto de pignore liberato nihil ad uxorem debitoris quondam transferre potuit. sed nec consensus eiusdem debitoris per eum qui creditor fuit accedens imaginariae factae venditioni ad dominium transferendum prodesse quicquam potuit, cum tam ea quae simulate aguntur, quam quae in uxorem a marito donationis causa tempore matrimonii procedunt propter iuris civilis interdictum (cum proponas uxorem superstitute marito rebus humanis exemptam) pro infectis habeantur.

D. v id. Aug. Viminaci CC. cons.

[21] *Idem AA. et CC. Cacaliae.* Si propriis habitis contractibus quam acceperas mutuam pecuniam pro marito donationis causa erogasti, cum nec ad dignitatem profuerit nec locupletior sit factus, intellegis nullam tibi contra eum competere actionem.

D. III id. Aug. Viminaci CC. cons.

[17]¹²⁷ *The same Augusti and the Caesars to Capitolina.* Regarding that property, apart from dowry, that you claim was brought into your marital home and used by your husband, if, in fact, you gave this as a gift and it was consumed, you understand that you have a right of action (*actio*) against his heirs only to the extent that he was enriched thereby. If, indeed, this happened without your consent, everything ought to be restored to you.

On April 24,¹²⁸ at Heraclea, in the consulship of the Augusti (293).

[18] *The same Augusti and Caesars to Materna.* When a gift is made by a husband to a wife during marriage, ownership cannot pass at the start. Nor can it become valid afterwards, if a divorce occurs, the recipient predeceases the giver, or the gift is revoked by the giver.

On June 28, at Serdica, in the consulship of the Augusti (293).

[19] *The same Augusti and Caesars to Dionysia.* If your mother conveyed a house to you while you were married, she made this accrue to your property (and not your husband's).

Given July 15, at Philippopolis, in the consulship of the Caesars (294).¹²⁹

[20] *The same Augusti and Caesars to Claudia.* A creditor could not, when his debt was paid, transfer any of the now unencumbered pledge to the wife of the former debtor. Nor could the consent of said debtor (the husband), along with that of the former creditor, to an imaginary sale avail at all in transferring ownership, since not only those acts which are done as a pretense, but also the transfer of property by the husband to the wife during marriage as a gift – since you allege that the wife has died and her husband survives her – shall be regarded as void, because of a prohibition that arises in the private law (*ius civile*).

Given August 9, at Viminacium, in the consulship of the Caesars (294).¹³⁰

[21] *The same Augusti and Caesars to Cacalia.* If you, having made your own contracts, paid out money as a gift to your husband that you had accepted as a loan, since it did not help him advance in status (*dignitas*) nor was he enriched thereby, you understand that no action lies for you against him.

Given August 11, at Viminacium, in the consulship of the Caesars (294).¹³¹

¹²⁷ Combine with C. 8.42.11.

¹²⁸ The precise day is uncertain: the alternative is April 27.

¹²⁹ The precise year is uncertain: Mommsen prefers July 15, 293.

¹³⁰ The precise year is uncertain: Mommsen prefers August 9, 293.

¹³¹ The precise year is uncertain: Mommsen prefers August 11, 293.

[22] *Idem AA. et CC. Arsinoae.* Maritus manumissionis causa servum mulieri constante matrimonio donare potest.

S. k. Aug. Sirmi CC. cons.

[23] *Idem AA. et CC. Caecilianae.* Si te in vacuam possessionem praedii socrus tua titulo donationis ante matrimonium vel post induxit, ad rescindendam donationem paenitentia nihil proficit.

S. k. Nov. Brundusii CC. cons.

[24] *Imp. Constantinus A. Petronio Probiano. pr.* Res uxoris, quae vel successione qualibet vel emptione vel etiam largitione viri in eam ante reatum iure pervenerant, damnato ac mortuo ex poena marito vel in servilem condicionem ex poenae qualitate deducto, illibatas esse praecipio nec alieni criminis infortunio stringi uxorem, cum paternis maternisque ac propriis frui eam integro legum statu religiosum sit. 1. Et donatio maritalis ante tempus criminis ac reatus collata in uxorem, quia pudicitiae praemio cessit, observanda est, tamquam si maritum eius natura, non poena subduxerit.

2. Sin autem aqua et igni ei interdictum erit vel deportatio illata, non tamen mors ex poena subsecuta, donationes a viro in uxorem collatae adhuc in pendentem maneat, quia nec matrimonium huiusmodi casibus dissolvitur, ita ut, si usque ad vitae suae tempus maritus eas non revocaverit, ex morte eius confirmantur: fisco nostro ad easdem res nullam in posterum communionem habituro.

D. III k. Mart. Serdicae Crispo II et Constantino II CC. cons.

[25] *Imp. Iustinianus A. Menae pp. pr.* Donationes, quae parentes in liberos cuiuscumque sexus in potestate constitutos conferunt vel uxor in suum maritum vel maritus in suam uxorem vel alteruter eorum in aliam personam, cui constante matrimonio donare non licet, vel ipsae aliae personae in eam cui donare non poterant, ita firmas esse per

[22] *The same Augusti and Caesars to Arsinoa.* During marriage a husband can give a slave as a gift to his wife for the purpose of manumission.

Written August 1, at Sirmium, in the consulship of the Caesars (294).

[23] *The same Augusti and Caesars to Caeciliana.* If your mother-in-law granted you undisturbed possession of a piece of real property as a gift either before or after you married, a change of heart on her part avails nothing for the purpose of rescinding the gift.

Subscribed November 1, at Brundisium,¹³² in the consulship of the Caesars (294).

[24]¹³³ *Emperor CONSTANTINE Augustus to Petronius Probianus.* *pr.* I instruct that a wife's property, whether this has been acquired in a legally valid manner through any kind of bequest, purchase, or even as a gift from her husband before his commission of a criminal offense, shall remain intact after her husband has been condemned and suffered a sentence of death or has been reduced to slave status per the nature of the penalty. The wife shall not suffer misfortune on account of someone else's criminal offense, since it is fair that she enjoy her paternal, maternal, or her own property with her status under the laws unimpaired. 1. And a husband's gift made to the wife before the commission of his crime and his prosecution for it, because it accrued to her as a reward for her chastity (*pudicitia*), must be upheld, as though nature, not a criminal law penalty, had carried off the husband.

2. But if, however, he is sentenced to denial of fire and water or deportation (i.e., capital exile), and death nevertheless does not follow from the penalty, gifts made from a husband to a wife shall still remain in suspense, because the marriage is not ended in situations of this kind, with the result that, if the husband up until the end of his life does not revoke them, they shall be confirmed at the time of his death. Our Treasury shall have no claim on such property in future.

Given February 27, at Serdica, in the consulship of Crispus, for the second time, and Constantine, for the second time, Caesars (321).

[25] *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect.* *pr.* Gifts that ascendant male relations give to children of either sex who are in their power (*potestas*), (or) that a wife gives to a husband, a husband to his wife, (or) either of them to some other person, to whom they are not permitted to make gifts during marriage, or those other persons themselves to a person to whom they were not permitted to give gifts, We ordain shall be valid through the silence

¹³² Written at Burtudizum: Mommsen.

¹³³ *pr.*-1 = (in part, with changes) C.Th. 9.42.1.

silentium donatoris vel donatricis sancimus, si usque ad quantitatem legitimam vel eam excedentes actis fuerint intimatae. nam amplioris quantitatis donationem minime intimatam nec per silentium eius qui donavit confirmari concedimus.

1. Sin vero specialiter eas in suprema voluntate donator vel donatrix confirmaverit, sine ulla distinctione ratae habebuntur, ita tamen ut, si quidem ultra lege finitam quantitatem expositae minime actis intimatae fuerint, specialis earum confirmatio ex eo tempore vim habeat, ex quo eadem donationes confirmatae sunt.

2. Sin vero vel non amplior sit donatio vel, cum amplior esset, in actis insinuata sit, tunc et silentium donatoris vel donatricis et specialis confirmatio ad illud tempus referatur, quo donatio conscripta sit: sicut et alias ratihabitiones negotiorum ad illa reduci tempora oportet, in quibus contracta sunt. nec in ceterum subtilem divisionem facti vel iuris introduci posse.

D. III id. Dec. dn. Iustiniano A. II cons.

[26] *Idem A. Menae pp.* Donationes, quas divinus imperator in piissimam reginam suam coniugem vel illa in serenissimum maritum contulerit, ilico valere sancimus et plenissimam habere firmitatem, utpote imperialibus contractibus legis vicem obtinentibus minimeque opitulatione quadam extrinsecus egentibus.

D. VIII id. April. Constantinopoli Decio vc. cons.

[27] *Idem A. Iohanni pp. pr.* Si unus ex his, qui matrimonio fuerant copulati, in alium donatione facta ab hostibus captus est et in servitutum deductus et postea ibi morte peremptus, quaerebatur, an huiusmodi liberalitas, quam antea fecit, ex hoc roborari videtur an vacillare: et iterum si donator quidem in civitate Romana constitutus decesserit, mortis autem eius tempore is qui donationem accepit in captivitate degebat et postea reversus est, an videtur et tunc donatio rata haberi. 1. Cum itaque in utroque casu oportet augusto remedio causam dirimi, cum nihil aliud tam peculiare est imperiali maiestati quam humanitas, per quam solam dei servatur imitatio, in ambobus casibus donationem firmam esse censemus.

D. k. Dec. Lampadio et Oresta vv. cc. cons.

of the male or female giver, if it is at or below the legally prescribed value or, if above this, recorded in the public register. For We do not permit that a gift which exceeds this value and is not at all recorded (in the public register) to be confirmed as valid by the silence of the giver.

1. But if, however, the giver confirms such gifts specifically in his or her will, they will be considered valid without distinction, with the result all the same that if, in fact, the value of the gifts exceeded that set forth in the statute and they were not at all recorded in the public register, this particular confirmation shall have force (only) from that time in which these gifts are (thus) confirmed.

2. But if, however, the gift either does not exceed (the statutory limit), or it does but is recorded in the public register, then the silence of the male or female giver and the particular confirmation shall relate back to the time in which the gift was made, just as also other legally valid ratifications ought to refer back to the times at which the transactions being ratified took place. Nor in the future shall an overly fine distinction of fact or of law be able to be introduced.

Given December 11, in the consulship of Our Lord Justinian Augustus, for the second time (528).

[26] *The same Augustus to Menas, Praetorian Prefect.* Gifts which the blessed emperor gives to his most devout queen and wife, or which she gives to her most serene husband, We ordain shall be immediately valid and enjoy a very full force, inasmuch as imperial transactions have the force of statute and do not at all require any external assistance.

Given April 6, at Constantinople, in the consulship of vir clarissimus Decius (529).

[27] *The same Augustus to John, Praetorian Prefect.* *pr.* If someone who was joined to another in marriage made a gift to the other, and then was captured by the enemy, reduced to slavery, and subsequently died there, the question used to be debated as to whether a gift of this kind, that had been made previously, seemed to be confirmed or invalidated on this set of facts. And again if the giver, to be sure, died while still a Roman citizen, while the recipient at the time of the giver's death was living in captivity and later returned, (the question used to be debated as to) whether in that case too it seemed that the gift was considered valid. 1. Since therefore in both situations the controversy ought to be removed by the application of an imperial remedy, given that nothing else is as peculiar to the imperial majesty as humane sympathy (*humanitas*), through which alone the imitation of God is preserved, in both situations We lay down that the gift shall be valid.

Given December 1, in the consulship of the viri clarissimi Lampadius and Orestes (530).¹³⁴

¹³⁴ Lounghis *et al.* date to November 27, 531.

XVII De Repudiis et Iudicio de Moribus Sublato

[1] *Imp. Alexander A. Avittianae.* Matrimonium quidem deportatione vel aqua et igni interdictione non solvitur, si casus, in quem maritus incidit, non mutet uxoris adfectionem. ideoque dotis actio ipso iure non competit, sed indotatam esse eam, cuius laudandum propositum est, nec ratio aequitatis nec exempla permittunt.

PP. non. Nov. Alexandro A. III et Dione cons.

[2] *Imp. Valerianus et Gallienus AA. et Valerianus C. Paulinae.* Liberum est filiae tuae, si sponsum suum post tres peregrinationis annos expectandum sibi ultra non putat, omissa spe huius coniunctionis matrimonium facere, ne opportunum nubendi tempus amittat, cum posset nuntium remittere, si praesente eo consilium mutare voluisset.

PP. VII k. April. Aemiliano et Basso cons.

[3] *Imp. Diocletianus et Maximianus AA. Tullio. pr.* Dubium non est omnia omnino, quae consilio recte geruntur, iure meritoque effectu et firmitate niti. 1. Quare si tu dotem pro muliere dedisti et ex morte eius repetitionem stipulatus es, circumscribendi autem tui causa ficto repudio matrimonium brevi tempore rescissum est, res dotales, quas ante nuptias obtulisti, praeses provinciae recipere te non dubitabit. 2. Certum est enim daturum operam moderatorem provinciae, ut, quae contra fas gesta sunt, fructum calliditatis obtinere non possint, cum nobis huiusmodi commenta displiceant. 3. Imaginarios enim nuntios (id est repudia) nullius esse momenti, sive nuptiis fingant se renuntiasse sive sponsalibus, etiam veteribus iuris auctoribus placuit.

D. II k. Sept. Tiberiade ipsis AA. cons.

**Seventeenth Title Divorce and the Abolition of the Action on
Misconduct¹³⁵**

[1] *Emperor ALEXANDER Augustus to Avitiana.* A marriage, to be sure, is not ended by the infliction (of a penalty of capital exile) of deportation or of the refusal of fire and water,¹³⁶ as long as the misfortune into which the husband has fallen does not alter the affection his wife has (for him). And for that reason an action on the dowry does not lie by operation of law (independently of her wish to remain married). Instead, neither arguments from equity (*aequitas*) nor precedents allow that she remain without a dowry whose course of action should be praised.

Posted November 5, in the consulship of Alexander Augustus, for the third time, and Dio (229).

[2] *Emperors VALERIAN and GALLIENUS Augusti and VALERIAN Caesar to Paulina.* Your daughter, if she does not think that she should wait any longer for her fiancé, having lost hope of marriage with him after three years of him traveling about, is free to marry (someone else), so that she does not see close a favorable window of time for getting married, since (*a fortiori*) she would have been able to send notice were he nearby and she wished to change her intentions.

Posted March 26,¹³⁷ in the consulship of Aemilianus and Bassus (259).

[3] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Tullius. pr.* There is no doubt that all things carried out properly and with due deliberation rest entirely on a bedrock, rightly and deservedly, of effectiveness and validity. 1. For this reason, if you gave a dowry on behalf of a woman and contracted, through stipulation, that it be returned to you (only) upon her death, but in order to defraud you the marriage was ended a short time later by a phony divorce, the provincial governor will not hesitate to assist you in recovering the dowry property you gave before the marriage. 2. For it is a certainty that the provincial governor will see to it that those acts which offend against a fundamental moral sensibility are not able to reap the fruits of their cunning, since falsehoods of this type are displeasing to Us. 3. For the principle that fictitious divorce notices – that is, divorces – are void, whether they (the parties) pretend to dissolve a marriage or engagement, was settled law even for the ancient legal authorities (*veteres iuris auctores*).

Given August 31, at Tiberias, in the consulship of the Augusti (290).¹³⁸

¹³⁵ See D. 24.2.

¹³⁶ Alexander treats these as alternatives; Ulpian, D. 48.19.2.1, has deportation replace refusal of fire and water.

¹³⁷ The precise day is uncertain: the alternative is March 28.

¹³⁸ So Krüger, though other years, e.g., 293, seem possible. Mommsen dates to August 31, 286.

[4] *Idem AA. et CC. Pisoni. Filiae divortium in potestate matris non est.*
D. III k. Ian. Sirmi CC. cons.

[5] *Idem AA. et CC. Scyrioni. pr.* Dissidentis patris, qui initio consensit matrimonio, cum marito concordante uxore filia familias ratam non haberi voluntatem divus Marcus pater noster religiosissimus imperator constituit, nisi magna et iusta causa interveniente hoc pater fecerit.
1. Invitam autem ad maritum redire nulla iuris praecepit constitutio.
2. Emancipatae vero filiae pater divortium in arbitrio suo non habet.
D. v k. Sept. Nicomediae CC. cons.

[6] *Idem AA. et CC. Phoebo. Licet repudii libellus non fuerit traditus vel cognitus marito, dissolvitur matrimonium.*
D. XVIII k. Ian. Nicomediae CC. cons.

[7] *Imp. Constantinus A. ad Delmattum. pr.* Uxor, quae in militiam profecto marito post interventum annorum quattuor nullum sospitatis eius potuit habere indicium atque ideo de nuptiis alterius cogitavit nec tamen ante nupsit, quam libello ducem super hoc suo voto convenit, non videtur nuptias inisse furtivas nec dotis amissionem sustinere nec capitali poenae esse obnoxia, quae post tam magni temporis iugitatem non temere nec clanculo, sed publice contestatione deposita nupsisse firmatur. 1. Ideoque observandum est, ut, si adulterii suspicio nulla sit nec coniunctio furtiva detegitur, nullum periculum ab his quorum coniugio erant copulae vereantur, cum, si conscientia maritalis tori furtim esset violata, disciplinae ratio poenam congruam flagitaret.
D. ... Naïsso Feliciano et Titiano cons.

[8] *Impp. Theodosius et Valentinianus AA. Hormisdæ pp. pr.* Consensu licita matrimonia posse contrahi, contracta non nisi misso repudio

[4] *The same Augusti and the Caesars to Piso.* A mother has no legally recognized authority to bring about the divorce of her daughter.

Given December 30, at Sirmium, in the consulship of the Caesars (294).¹³⁹

[5] *The same Augusti and Caesars to Scyrio. pr.* The deified Marcus, Our predecessor (*pater*) and a most scrupulous emperor, established that if a father initially granted consent to a marriage and (then after the marriage) changed his mind, his will (*voluntas*) is deemed legally ineffective when his daughter-in-power is living in harmony with her husband. But (the outcome is) otherwise if the father acts on the basis of a great and just reason. 1. No imperial constitution, however, has required that an unwilling woman return to her husband. 2. A father, in fact, does not have it within his discretion to bring about the divorce of a daughter who is freed from his power (emancipated).

Given August 28, at Nicomedia, in the consulship of the Caesars (294).¹⁴⁰

[6] *The same Augusti and Caesars to Phoebus.* Although a written announcement of a divorce has not been delivered to or is not known to a husband, the marriage is ended.

Given December 15, at Nicomedia, in the consulship of the Caesars (294).

[7] *Emperor CONSTANTINE Augustus to Delmattus. pr.* A wife whose husband set out on military service and who has been able to secure no evidence of his well-being after a period of four years, and so has considered marrying another man, and yet did not marry before approaching his (her husband's) commanding officer through a document disclosing her intentions, is not deemed to have entered upon a secret marriage, nor to be liable to the loss of her dowry, nor to be vulnerable to the capital penalty (*capitalis poena*), since she, after such a long period of time, is shown to have begun a new marriage not rashly or secretly but publicly, by submitting a declaration (of her intent). 1. On that account the rule must be upheld that, if there is no reason to suspect adultery and no secret union is uncovered, women shall fear no risk from the men to whom they are joined, since, it is (only) if the marriage bed were knowingly violated in secret that criminal law policy would demand a suitable punishment.

Given ... at Naissus, in the consulship of Felicianus and Tittanus (337).¹⁴¹

[8] *Emperors THEODOSIUS and VALENTINIAN Augusti to Hormisdas, Praetorian Prefect. pr.* We instruct that lawful marriages can be contracted

¹³⁹ The precise year is uncertain: Mommsen prefers December 30, 293.

¹⁴⁰ The precise month is uncertain: Mommsen gives November 27, 294.

¹⁴¹ Seeck dates the constitution to winter 337; Barnes, to summer 337.

solvi praecipimus. solutionem etenim matrimonii difficiliorum debere esse favor imperat liberorum.

1. Causas autem repudii hac saluberrima lege apertius designamus. sicut enim sine iusta causa dissolvi matrimonia iusto limite prohibemus, ita adversa necessitate pressum vel pressam, quamvis infausto, attamen necessario auxilio cupimus liberari. 2. Si qua igitur maritum suum adulterum aut homicidam vel veneficum vel certe contra nostrum imperium aliquid molientem vel falsitatis crimine condemnatum invenerit, si sepulchrorum dissolutorem, si sacris aedibus aliquid subtrahentem, si latronem vel latronum susceptorem vel abactorem aut plagiarium vel ad contemptum sui domi suae ipsa inspiciente cum impudicis mulieribus (quod maxime etiam castas exasperat) coetum ineuntem, si suae vitae veneno aut gladio vel alio simili modo insidiantem, si se verberibus, quae ab ingenuis aliena sunt, adficiantem probaverit, tunc repudii auxilio uti necessariam ei permittimus libertatem et causas discidii legibus comprobare.

3. Vir quoque pari fine claudetur nec licebit ei sine causis apertius designatis propriam repudiare iugalem, nec ullo modo expellat nisi adulteram, nisi veneficam aut homicidam aut plagiarium aut sepulchrorum dissolutricem aut ex sacris aedibus aliquid subtrahentem aut latronum fautricem aut extraneorum virorum se ignorante vel nolente convivia appetentem aut ipso invito sine iusta et probabili causa foris scilicet pernoctantem, nisi circensibus vel theatralibus ludis vel harenarum spectaculis in ipsis locis, in quibus haec adsolent celebrari, se prohibente gaudentem, nisi sui veneno vel gladio aut alio simili modo insidiatricem, vel contra nostrum imperium aliquid machinantibus consciam, seu falsitatis se crimini immiscentem invenerit, aut manus audaces sibi probaverit ingerentem: tunc enim necessariam ei discendi permittimus facultatem et causas discidii legibus comprobare.

4. Haec nisi vir vel mulier observaverint, ultrici providentissimae legis poena plectentur. nam mulier si contempta lege repudium mittendum esse temptaverit, suam dotem et ante nuptias donationem amittat

through the consent of the parties, (but) that, once contracted, they shall not be ended except by sending a notice of divorce. For a policy bias in favor of children (*favor liberorum*) demands that dissolving a marriage ought to be rather difficult.¹⁴²

1. Moreover, We more clearly lay down in this most salutary statute (*lex*) the grounds for divorce. For just as We forbid marriages to be ended without just cause, (placing them) within appropriate parameters, so We desire that a husband or a wife overwhelmed by dire necessity shall be freed through assistance that, although unfortunate, is nevertheless necessary. 2. Therefore, if any woman discovers that her husband is an adulterer, a murderer, a poisoner, or, at any rate, that he is contriving some plot against Our rule, or that he has been condemned on the charge of falsification, or if she proves that he is a tomb-robber, that he steals from churches, that he is a brigand, an accomplice of brigands, rustles cattle, steals slaves, or that, out of self-contempt in his own house in her sight – something which especially tries the patience of even chaste women – he has sex with unchaste women, or that he is plotting to murder her by poison, sword, or in some other similar fashion, or that he beats her, an inappropriate treatment for the free-born, then We allow her to employ, as a necessary means of freeing herself, the aid of a divorce notice, and (thereafter) to demonstrate the grounds for divorce in accordance with statute.

3. Husbands also will be constrained by a like boundary, nor will it be permitted to them to divorce their own spouses without grounds that are spelled out more openly, and (so) they shall not in any way cast a wife out unless he finds that she is an adulterer, a poisoner, a murderer, a stealer of slaves, a tomb-robber, someone who steals from churches, an accomplice of brigands, someone who frequents the dinner parties of men not related to her without her husband's knowledge or consent, or who unmistakably spends the night away from home against his will and without a demonstrably good reason, (or) who takes pleasure, against his express prohibition, in circus games, theatrical productions, or shows at the amphitheater, in the places in which these are usually staged, (or he finds out) that she is plotting to murder him by poison, sword, or in some other similar fashion, or that she is an accomplice of those who are hatching a plot against Our rule, or that she is involved in a criminal act of falsification, or he shows that she has attacked him physically. For then We allow him the necessary capacity to divorce and then to demonstrate the grounds for divorce in accordance with statute.

4. Unless husband and wife observe these provisions, they will be struck by the vengeful sanction of this most provident law. For if a woman attempts to send a notice of divorce in defiance of this statute, she shall lose her dowry and

¹⁴² See Nov. Theod. 12 pr.

nec intra quinquennium nubendi habeat denuo potestatem: aequum est enim eam interim carere conubio, quo se monstravit indignam. 4a. Quod si praeter haec nupserit, erit ipsa quidem infamis, conubium vero illud nolumus nuncupari: insuper etiam arguendi hoc ipsum volenti concedimus libertatem. 4b. Si vero causam probaverit intentatam, tunc eam et dotem recuperare et ante nuptias donationem lucro habere aut legibus vindicare censemus et nubendi post annum ei, ne quis de prole dubitet, permittimus facultatem.

5. Virum etiam, si mulierem interdicta arguerit attemptantem, tam dotem quam ante nuptias donationem sibi habere seu vindicare uxoremque, si velit, statim ducere hac iusta definitione sancimus. sin autem aliter uxori suae renuntiare voluerit, dotem redhibeat et ante nuptias donationem amittat.

6. Servis scilicet seu ancillis puberibus, si crimen adulterii vel maiestatis ingeritur, tam viri quam mulieris ad examinandam causam repudii, quo veritas aut facilius eruatur aut liquidius detegatur, si tamen alia documenta defecerint, quaestionibus subdendis. super plagis etiam, prout dictum est, illatis ab alterutro commovendis easdem probationes (quoniam non facile quae domi geruntur per alienos poterunt confiteri) volumus observari.

7. Si vero filio seu filiis, filia seu filiabus extantibus repudium missum est, omne quidquid ex nuptiis lucratum est filio seu filiis, filiae seu filiabus post mortem accipientis servari, id est si pater temere repudium miserit, donationem ante nuptias a matre servari, si mater, dotem ipsam eidem vel eisdem filio seu filiae^{lx} patre moriente dimitti censemus: patri videlicet vel matri in scribendis filiis heredibus, unum seu unam vel omnes si scribere vel uni ex his donare velit, electione servata. 7a. Nec ullam alienandi seu supponendi memoratas res permittimus facultatem: sed si aliquid ex isdem rebus defuerit, ab heredibus seu earum detentatoribus, si tamen non ipsos heredes scripserit aut scripti filii non adierint, praecipimus resarciri, ut etiam hoc modo inconsulti animi ad repudium mittendum detrimento retrahantur.

^{lx} eidem vel eisdem, si mater, dotem ipsam filio seu filiae

her prenuptial gift, and she shall not again have the capacity to marry for a five-year period. For it is just that in the meantime she lack the right to marry (*conubium*) who has shown herself unworthy of it. 4a. But if she remarries anyway, she herself, certainly, will be punished with legal infamy (*infamis*). We refuse in fact to call that union a legitimate marriage. We moreover allow to anyone who wishes the freedom also to prosecute this relationship. 4b. But if she proves the grounds for divorce she raises, then We lay down that she shall recover her dowry and keep the prenuptial gift as a benefit or claim it under statute. We also allow her the capacity to remarry after a year, so that no one entertains doubts about the offspring.

5. We ordain with this lawful pronouncement (*iusta definitio*) that the husband too, if he successfully accuses his wife of setting out to do what is forbidden, shall keep or claim the dowry as well as the prenuptial gift, and if, he wishes, immediately remarry. But if, however, he wishes to divorce his wife otherwise, he shall return the dowry and lose the prenuptial gift.

6. It is clear that if a charge of adultery or of treason is brought (by one party against the other), but other proofs are lacking, the male and female adult slaves of the husband as well as of the wife are to be put to judicial examination under torture for the purpose of critical evaluation of the reason behind the divorce, so that the truth may be unearthed more easily or more clearly uncovered. We wish this same method of examining evidence also to be followed in raising the matter of physical violence visited, as said above, by one upon the other, because it is not easy for outsiders to be able to attest to what goes on inside the household.

7. But if notice of divorce is sent when one or several male or female children are alive, We lay down that all gain, whatever there is, arising from the marriage shall be preserved for the child or children, male or female, until the time of death of the party receiving the benefit. That is, We instruct that, if a father sends a notice of divorce without just cause, the prenuptial gift shall be preserved by the mother for the same person or persons, while if the mother does so the dowry itself shall, upon the death of the father, be released to the male or female child. Clearly, choice shall be preserved for the father and the mother in appointing their children as heirs, if they should wish to appoint one or the other or all of them, or give to one of them a gift. 7a. Nor do We grant any capacity to alienate or place under lien the aforesaid property. But if some of this property is not accounted for, We instruct that restitution shall be made by the heirs or the persons into whose physical control the property has come, if all the same the children have not been named as heirs or were named but have not entered upon the inheritance, so that even in this manner unreflecting minds shall be restrained from sending a divorce notice with destructive consequences.

8. Pactiones sane, si quae adversus praesentia scita nostrae maiestatis fuerint attemptandae, tamquam legum contrarias nullam habere volumus firmitatem.

D. v id. Ian. Protogene et Asterio cons.

[9] *Imp. Anastasius A. Theodoro.* Si constante matrimonio communi consensu tam mariti quam mulieris repudium sit missum, quo nulla causa continetur, quae consultissimae constitutioni divae memoriae Theodosii et Valentiniani inserta est, licebit mulieri non quinquennium expectare, sed post annum ad secundas nuptias convolare.

D. xv k. Mart. Anastasio A. II cons.

[10] *Imp. Iustinianus A. Menae pp.* In causis iam dudum specialiter definitis, ex quibus recte mittuntur repudia, illam addimus, ut, si maritus uxori ab initio matrimonii usque ad duos continuos annos computandos coire minime propter naturalem imbecillitatem valeat, possit mulier vel eius parentes sine periculo dotis amittendae repudium marito mittere, ita tamen, ut ante nuptias donatio eidem marito servetur.

D. III id. Dec. dn. Iustiniano A. pp. II cons.

[11] *Idem A. Hermogeni magistro officiorum. pr.* Iubemus, ut, quicumque mulierem cum voluntate parentum aut, si parentes non habuerit, sua voluntate maritali adfectu in matrimonium acceperit, etiamsi dotalia instrumenta non intercesserint nec dos data fuerit, tamquam si cum instrumentis dotalibus tale matrimonium processisset, firmum coniugium eorum habeatur: non enim dotibus, sed adfectu matrimonia contrahuntur.

1. Si quis autem eam, quam sine dote uxorem acceperat, a coniugio suo repellere voluerit, non alias ei hoc facere licebit, nisi talis culpa intercesserit, quae a nostris legibus condemnatur. 1a. Si vero sine culpa eam relecerit vel ipse talem culpam contra innocentem mulierem commiserit, compellatur ei quartam partem propriae substantiae pro

8. Of course, We wish any agreements that are drawn up in violation of these instant imperial decisions (*scita*) to have no validity, on the ground that they are against the laws (*leges*).

Given January 9, in the consulship of Protogenes and Asterius (449).

[9] *Emperor ANASTASIUS Augustus to Theodorus.* If, during a marriage, notice of divorce has been sent by the common consent of husband and wife, and this contains none of the justifications set forth in the very prudent constitution of Theodosius and Valentinian,¹⁴³ of blessed memory, the woman need not wait five years, but will be permitted to remarry after a year.

Given February 15, in the consulship of Anastasius Augustus, for the second time (497).

[10] *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect.* To the justifications now for some time specifically set forth under which notice of divorce is properly sent, We add this one, namely, that if a husband is utterly unable, because of biological impotence (*naturalis imbecillitas*), to have sexual relations with his wife for two continuous years reckoned from the beginning of the marriage,¹⁴⁴ the woman or her parents can, without risk of losing her dowry, send a notice of divorce to the husband, on condition, however, that the premarital gift accrues to the husband.

Given December 11, in the consulship of Our Lord Justinian, Ever Augustus, for the second time (528).

[11]¹⁴⁵ *The same Augustus to Hermogenes, Master of Offices. pr.* We order that whenever someone has taken in marriage a woman with the consent of her parents, or if she had no parents, with her own consent, and with conjugal affection (*affectus maritalis*), even if no dowry documents were executed and no dowry was given, their union shall be considered as valid as though such a marriage had begun attended by dowry documents. For it is not by dowries, but by (marital) affection that marriages are contracted.

1. If, moreover, anyone wishes to divorce a woman whom he had married without a dowry, he will not be permitted to do this unless such misconduct (*culpa*) is present as is condemned by our laws. 1a. But if he divorces her when she is innocent of (such) misconduct, or if he himself is guilty of such misconduct toward his wife, who is blameless, he shall be compelled to pay to her one-fourth of his property in a fixed proportion, so that if, at all events, the husband

¹⁴³ C. 5.17.8.

¹⁴⁴ Nov. 22.6 extends this to three years.

¹⁴⁵ Combine with C. 1.3.53, 7.24.1(?), 9.13.1, 11.48.24(?). The present law was reenacted and lightly amended: Nov. 22.18, 117.5. See also Nov. 74.5.

rata portione persolvere, ut, si quidem quadringentarum librarum auri vel amplius vir substantiam habeat, centum libras auri mulieri praestet et nihil amplius, etsi quantamcumque substantiam possideat: sin vero minus quadringentis libris auri puta substantia eius fuerit, tunc quarta pars computatione facta purae^x substantiae eius usque ad minimam quantitatem mulieri detur. 1b. Eodem modo servando et in mulieribus, quae indotatae constitutae sine culpa mariti constitutionibus cognita eos repudiaverint vel ipsae culpam innocenti marito praebuerint, ut ex utraque parte aequa lance et aequitas et poena servetur. 1c. Hoc lucro quartae partis filiis quidem non extantibus ipsis viro et mulieri competenti et ab his quo modo voluerint disponendo, filiis autem et deinceps personis ex eodem matrimonio intervenientibus eis servando ad similitudinem dotis et propter nuptias donationis per omnia, quae super his statuta sunt.

2. Inter culpas autem uxoris constitutionibus enumeratas et has addimus, si forte uxor sua ope vel ex industria abortum fecerit, vel ita luxuriosa est, ut commune lavacrum viris libidinis causa habere audeat, vel, dum est in matrimonio, alium maritum fieri sibi conata fuerit. 2a. Et in his enim causis locum habere constitutiones sancimus, quae de culpa tam mariti quam uxoris loquuntur, ut, quemadmodum dos et donatio propter nuptias perit, ita et mulieres indotatae in quartam partem, quam et viris et mulieribus ex hac lege destinavimus, amissionis periculum sustineant.

2b. Iudicio de moribus, quod antea quidem in antiquis legibus positum erat, non autem frequentabatur, penitus abolito: omnibus etenim causis requisitis et perlectis, quas antiquitas introducebat, nihil validum praeter eas, quas anteriores constitutiones et praesens dispositio introduxit, invenimus.

D. xv k. Dec. Constantinopoli dn. Iustiniano pp. A. III cons.

[12] Ὁ αὐτὸς βασιλεὺς Ἰωάννη ὑπάρχῳ πραιτωρίων. Ζητήσεως εἰς ἡμᾶς ἐλθούσης τοιαύτης τινὸς ἐκ τῆς Κωνσταντινίσων πόλεως, ἥπερ μία τῶν ἐπὶ τῆς Ὀσροηνῆς πόλεων ἐστὶ, ἔγνωμεν, ὡς παῖδες τινες πονηροὶ τοῖς ἑαυτῶν ἐπιβουλευόντες πατράσιν παρὰ τὴν τῶν πατέρων γνώμην διέλυσαν τὰ

^x pura

owns property worth 400 pounds of gold or more, he shall pay 100 to his wife and no more, despite the fact that he has property of whatever (greater) value. But if, however, he has property worth less than 400 pounds of gold, net, then, after a valuation is made, one-fourth of the net value of his property, down to the last penny, shall be given to the wife. **1b.** The same rule shall apply also to undowered wives who divorce their husbands when the latter is innocent of misconduct recognized by constitutions or are themselves guilty of such misconduct while their husbands are blameless, so that on both sides justice and punishment shall be maintained in an even balance. **1c.** If there are, in fact, no children still living, the benefit of the one-fourth share shall accrue to the husband and wife, and they shall dispose of this in whatever manner they wish. If there are, however, children and others standing in a line of descent from the same marriage this shall be preserved for them like the dowry and the prenuptial gift through all the regulations that have been devised concerning these.

2. Moreover, to the cases of wifely misconduct laid down in constitutions We add the following: if, say, the wife causes an abortion through her own means or deliberately, or is so given over to extravagant living that she dares to share a bath with men for sexual purposes, or, while she is still married, attempts to acquire another husband for herself. **2a.** For even in these cases We ordain that the constitutions dealing with misconduct by the husband as much as by the wife shall apply, so that, in the same way that the dowry and the premarital gift are lost, so too undowered wives shall incur the risk of losing the one-fourth share of the property which we have set aside for both husbands and wives under this law.

2b. The action on misconduct (*iudicium de moribus*), which was in the past certainly provided for in the ancient laws, but was not being used very much, is completely abolished. This is because after seeking out and examining thoroughly all of the causes for divorce that antiquity introduced, we have found nothing valid, except for those which prior constitutions and this instant enactment (*dispositio*) have laid down.

Given November 17, at Constantinople, in the consulship of Our Lord Justinian, Ever Augustus, for the third time (533).

[12]⁴⁶ *The same Augustus to John, Praetorian Prefect.* From an enquiry that came to Us on this subject from Constantine, a city in the province of Osrhoene, We have learned that some wicked children, plotting against their fathers, ended their marriages against the wishes of their fathers, working in

⁴⁶ See Nov. 22.19. There are considerable gaps in the preserved text. The translation in part relies on supplements.

πρὸς τὰς γαμετὰς συνοικέσια ταῖς γαμεταῖς συνεργασάμενοι | αὐταῖς
 την.. τῆς πρὸ γάμου δωρεᾶς [ε]ῖσπρα[ξ]ι[ν] * | ἐντεῦθεν | *οντας
 προῖκας ἢ πρὸ γάμ[ο]υ δωρεᾶς ἢ καὶ ὑποδεξα[μένους ὑποβαλ] | λοντες
 τοιαύταις ἀπαιτήσεσιν του|*** ἀπόρους τελευτᾶν παν ... | ***η*α*****
 δι' αἰσχύνην κατ.. | ... αἱ γαμεταὶ ... | ἀποροι |
 | ... θ[εσπ]ιζομεν.. | | | ... εἴτε ἄρρενες εἴτε | θήλειαι,
 διαλ[ύε]ιν τὰ πρὸς τοὺς [ὀ]μοζύγ[ους] κατα[στάντα] συ[ν]οικ[ε]σια εἰς
 βλάβην καὶ ζημίαν τῶν | [τὰς προῖ]κ[α]ς [ἢ τὰς] πρ[ὸ] γάμου δωρεᾶς
 ἐπιδεδωκότων ἢ ὑποδεξαμένων γονέων ἀρρένων τε καὶ θηλειῶν· καὶ
 ὥσπερ ὁ γάμος οὐκ ἂν **|***** εἰ μὴ συναινέσει τῶν ἐχόντων [τοὺς]
 παῖδας ὑπε[ξ]ουσίους, [οὐ]τως οὐδὲ λύειν τοὺς γάμους παρὰ γνώμην τῶν
 γονέων.. | ... κἂν εἴ τι τοιοῦτο παρὰ τῶν παίδων [με]λετηθῇ, μηδεμίαν
 εἶναι κατὰ τῶν γονέων εἰσπραξιν προικός ἢ προγαμίας δωρεᾶς, κἂν εἰ
 τύχοιεν αὐτοὶ ταύτας ἐπιδεδωκότες ἢ ὑποδεξάμενοι, ἀλλ' ἐπ' αὐτὸν τὸν
 ταῦτο πεπραχότα φέρεσθαι καὶ τὸν ἐντεῦθεν κίνδυνον· ταύτην γὰρ τῆς
 κακουργίας ἐπιτιθεμένην ποινὴν τοῖς οὕτως ἀσεβῶς τοῖς πράγμασι
 χρωμένοις, ὥς καὶ ἑαυτοῖς αἰσχύνην καὶ τοῖς γεγεννηκόσιν τὴν ἐντεῦθεν
 ἐνάγειν ἀπορίαν, καὶ γὰρ ἀνοήτων [οἱ]όμεθα κατάξιον τοῖς μὲν πατράσιν
 ἀπηγορεύσθαι, καθάπερ Μάρκῳ τῷ φιλοσοφωτάτῳ τῶν αὐτοκρατόρων
 ἐδόκει, δίχα τῆς τῶν παίδων συναινέσεως διαλύειν τὸν γάμον μεγάλης
 ἐκτὸς καὶ ἀπαραιτήτου προφάσεως, τοῖς δὲ παισὶν ἴσως καὶ νέοις οὖσιν
 καὶ οὐδὲ τὸ συμφέρον ἐπισταμένοις ἢ καὶ ἐξεπίτηδες, καθάπερ εἰπόντες
 ἔφθην, κακουργοῦσιν δοθῆναι παρρησίαν ἑαυτοὺς μὲν αἰσχύνειν, ζημιοῦν
 δὲ τοὺς γεγεννηκότας.

D. III id. Aug. Constantinopoli dn. Iustiniano pp. A. III et Paulino
 vc. cons.

XVIII · Solutio Matrimonio Dos Quemadmodum Petatur

[1] *Impp. Severus et Antoninus AA. Geminae.* Dubium non est post aestimationem dotis pactione vel stipulatione interposita, ut ipsae res, si dissoluto matrimonio extarent, uxori reddantur, ancillas cum partu ex stipulatu iudicio restitui oportere.

PP. III id. April. Laterano et Rufino cons.

[2] *Idem AA. Aquiliae.* Secundum rationem iuris existimas restitui tibi debere dotem a fisco, qui bona damnati patris tui suscepit. licet enim viro quondam tuo pater tuus heres extiterit, attamen iuri tuo hoc

concert with their wives, (so that) the recovery of (the dowry and) of the prenuptial gift (would be facilitated). They thereupon forced parents who had given or received a dowry or prenuptial gift to make repayments of this nature ... (that children, whether in-power or emancipated,) male or female, shall not be able to end their marriages through divorce in order to defraud and cause loss to their parents, male or female, who have given or received dowries or prenuptial gifts. Just as marriage shall not (be valid) without the consent of those who have (the spouses as) children in their power, (neither shall marriage be ended against the will) of the parents ... and if any wrong of this kind has been done by the children, that there shall be no claim against the parents to repay a dowry or a prenuptial gift, even if they have given or received the same; instead, the relevant liability shall be borne by the same person who behaves in this way. For We impose this penalty for evildoing on those who act so impiously that they bring shame on themselves and by so doing cause financial distress for their parents. For We think it would be a proposition worthy of fools to forbid fathers to end a marriage without the consent of their children, as Marcus, the most philosophical of emperors decided, without a great and inexorable reason, but to allow children, who are perhaps young and do not understand their own interest or who, as We stated above, even deliberately do wrong, free rein to bring shame on themselves and loss on their parents.

Given August 11, at Constantinople, in the consulship of Our Lord Justinian, Ever Augustus, for the fourth time, and vir clarissimus Paulinus (534).

Eighteenth Title How to Sue for the Dowry When a Marriage Ends¹⁴⁷

[1] *Emperors SEVERUS and ANTONINUS Augusti to Gemina.* There is no doubt that, after a dowry has been appraised and a stipulation or agreement (pact) has been put in place, the property itself, if still in existence when the marriage ends, shall be returned to the wife, and female slaves and their offspring ought to be returned in an action on the stipulation.

Posted April 11, in the consulship of Lateranus and Rufinus (197).

[2] *The same Augusti to Aquilia.* In accord with the rules of private law (*ratio iuris*), you (rightly) believe that your dowry ought to be restored to you by the Treasury, which seized the property of your father when he was condemned. For although your father became heir to your decedent husband, nevertheless,

¹⁴⁷ See D. 24.3.

derogari non potest, cum et ipse pater sine voluntate tua nec exigere nec accipere dotem poterat.

PP. prid. non. April. Apro et Maximo cons.

[3] *Imp. Antoninus A. Hostiliae.* Si ignorans statum Erotis ut liberum duxisti et dotem dedisti isque postea servus est iudicatus, dotem ex peculio recipies et si quid praeterea tibi debuisse eum apparuerit, filii autem tui, ut ex libera nati incerto tamen patre, spurii ingenui intelleguntur.

PP. vi k. Sept. Laeto II et Cereale cons.

[4] *Idem A. Apollonio.* Dos a patre profecta, si in matrimonio decesserit mulier filia familias, ad patrem redire debet.

PP. xvi k. Sept. Fusco II et Dextro cons.

[5] *Impp. Valerianus et Gallienus AA. et Valerianus C. Tauro.* Si quidem vivit apud hostes uxor tua, nondum frater eius quasi heres dotem repetere potest, si vero diem functa est et hereditatem eius possit vindicare, dotis quoque repetitio ei iure competit, cum in stipulatum deducta sit.

PP. II non. Mai. Aemiliano et Basso cons.

[6] *Impp. Diocletianus et Maximianus AA. Alexandriae et Neroni. pr.* Si circumscripta matre vestra viliori pretio dotales res aestimatae sunt, quid super huiusmodi contractuum vitio statutum sit, vulgo patet. 1. Proinde si dolosis artibus mariti circumventam matrem vestram iniqua aestimatione circumscriptam apud praesidem provinciae evidentibus probationibus ostenderitis, quando possidentibus vobis ad obtinenda praedia etiam doli mali exceptionis potestas opituletur, sciet, quatenus religionem iudicationis suae temperare debeat. 2. Sin autem etiam maritus in aestimatione gravatum se adleget, veritate examinata non amplius quam pretium iustum restituere compellatur.

this cannot impair your right, since even your father himself could not, without your consent, either demand or receive your dowry.

Posted April 4, in the consulship of Aper and Maximus (207).

[3] *Emperor ANTONINUS Augustus to Hostilia.* If, ignorant of the status of Eros, you married him and gave him a dowry as though he were free and subsequently he was adjudged to be a slave, you will receive your dowry from his *peculium* as well as anything else he is found to owe you. Moreover, your children, inasmuch as they were born from a free mother but from a father of uncertain status, are understood to be free-born and illegitimate.

Posted August 27,¹⁴⁸ in the consulship of Laetus, for the second time, and Cerealis (215).

[4] *The same Augustus¹⁴⁹ to Apollonius.* If the marriage of a wife who was a daughter-in-power (*filiafamilias*) ends through her death, a dowry given by her father (*dos profecticia*) ought to return to him.

Posted August 17,¹⁵⁰ in the consulship of Fuscus, Consul for the second time, and Dexter (225).

[5] *Emperors VALERIAN and GALLIENUS Augusti and VALBRIAN Caesar to Taurus.* If, in fact, your wife lives among the enemy, her brother does not yet have the right to claim the dowry back on the ground that he is her heir. But if she has died, he shall be able to claim the inheritance too. The right to claim the dowry also lies for him by law, since this was provided for by stipulation.

Posted May 6, in the consulship of Aemilianus and Bassus (259).

[6] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Alexandria and Nero. pr.* If your mother was defrauded and her dowry property was appraised at too low a value, it is very clear what rule holds in the case of a defective agreement of this kind. 1. So if you prove by clear evidence before the provincial governor that your mother was misled by the deceitful practices of her husband and defrauded through an unfair appraisal, since, for the purpose of retaining them, you as possessors of the properties shall also be assisted by the prerogative of an affirmative defense for fraud (*exceptio doli mali*), he will know how he ought to fulfill his solemn duty of giving judgment. 2. But if, however, the husband too claims that he was harmed in the assessment, the truth of the matter shall be looked into and he shall be forced to restore not more than the just value.

¹⁴⁸ The precise day is uncertain: the alternative is August 30.

¹⁴⁹ Actually, Alexander Severus, as the date indicates.

¹⁵⁰ The precise day is uncertain: the alternative is August 15.

3. Haec tum locum habent, cum res in natura sunt. si tamen extinctae sint, pretium, quod dotali instrumento inditum sit, id considerabitur.

PP. VII k. Nov. ipsis AA. conss.

[7] *Idem AA. et CC. Erotio. pr.* Filiae pecuniam adimere, quam habes in potestate, minime prohiberis. nam si pro ea dotem dedisti, hanc constante matrimonio ne consentiente quidem ipsa, matrimonio autem dissoluto invita repetere non potes.

S. v id. Febr. Sirmi CC. conss.

[8] *Idem AA. et CC. Sallustiae.* Nec maritus, licet post divortium in quantum facere possit condemnandus est, post idoneus factus, qui non reddiderat integrum, residuam probabiliter solutionem recusat. at cum eius heredes in solidum conveniendos non ambigitur, ne cum his solvendo factis experiri non possis, superstitiosam geris sollicitudinem.

D. XIII k. April. Sirmi CC. conss.

[9] *Idem AA. et CC. Marciae.* Dotis actione successores mariti super eo, quod ei dotis nomine fuerat datum, convenire debes. ingrediendi enim in possessionem rerum dotalium, heredibus mariti non consentientibus, sine auctoritate competentis iudicis nullam habes facultatem.

S. d. viii k. Nov. CC. conss.

[10] *Idem AA. et CC. Epigono.* Si socero filiae tuae dotem dedisti, licet in eius positus potestate gener tuus rebus humanis exemptus sit, tamen non de peculio, sed in solidum a te consentiente filia conventum eum satis oportet facere.

S. VII id. Nov. Heracliae CC. conss.

[11] *Impp. Honorius et Theodosius AA. Mariniano pp.* Si constante matrimonio maritus fatali fuerit sorte consumptus, dos, quae data dicitur vel promissa ex eius uxoris facultatibus, ad eam revertatur, nihilque sibi

3. These provisions apply when the property still exists. If they do not, the value that is set forth in the dowry document will be taken into consideration.

Posted October 26, in the consulship of the Augusti (290 or 293).

[7] *The same Augusti and the Caesars to Erotium.* You are not at all prevented from taking the money⁴⁵¹ of your daughter whom you have in power (*potestas*). For (on the other hand) if you have given a dowry on her behalf, you cannot, even with her consent, claim this back during the marriage, and when the marriage is ended you cannot claim it against her will.

Written February 9, at Sirmium, in the consulship of the Caesars (294).

[8] *The same Augusti and Caesars to Sallustia.* Although a husband ought to be condemned after divorce to pay as much as he is able, if he subsequently becomes wealthy and has not paid the full amount, he has no good reason to refuse to repay the remainder. And since there is no doubt that his heirs can be sued for the full amount, your concern about being able to sue those who are solvent is without foundation.

Given March 20,⁴⁵² at Sirmium, in the consulship of the Caesars (294).

[9] *The same Augusti and Caesars to Marcia.* You ought to sue, through an action on dowry (*actio dotis*), the heirs of your husband over that which was given to him as a dowry. For you have no right to enter into possession of the dowry properties without the consent of the heirs, except with authorization from the appropriate judge.

Written October 25, in the consulship of the Caesars (294).

[10] *The same Augusti and Caesars to Epigonus.* If you gave a dowry to the father-in-law of your daughter, although your son-in-law died while in his father's power (*potestas*), nevertheless, if sued with the consent of your daughter, he (the father-in-law) ought to return the whole, not just an amount up to the value of his son's *peculium*.

Written November 7, at Heraclea, in the consulship of the Caesars (294).

[11]⁴⁵³ *Emperors HONORIUS and THEODOSIUS Augusti to Marinianus, Praetorian Prefect.* If a marriage is ended through the death of the husband, the dowry, which is said to have been given or formally promised from the resources of his wife, shall return to her, and the heir of the decedent shall not

⁴⁵¹ Preferable may be to read *peculium* here.

⁴⁵² The precise day is uncertain: the alternative is April 15

⁴⁵³ = (with minor changes) C.Th. 3.13.3 pr. Combine with C. 5.1.4, 5.9.4, 5.19.1; C.Th. 3.5.12.

ex hoc defuncti heres audeat vindicare, quod ad mulierem recurrere fecit obitus maritalis.

D. III non. Nov. Ravennae Honorio XIII et Theodosio x AA. cons.

XVIII Si Dos Constante Matrimonio Soluta Fuerit

[1] *Impp. Honorius et Theodosius AA. Mariniano pp.* Si constante matrimonio a marito uxori dos sine causa legitima refusa est, quod legibus stare non potest, quia donationis instar perspicitur obtinere, eadem uxore defuncta ab eius heredibus cum fructibus ex die refusae dotis marito restituatur, ita ut proprietas eiusdem liberis ex eadem susceptis alienari contra leges a marito non possit.

D. III non. Nov. Ravennae Honorio XIII et Theodosio x AA. cons.

XX Ne Fideiussores vel Mandatores Dotium Dentur

[1] *Imppp. Gratianus Valentinianus et Theodosius AAA. Cynegio pp.* Sive ex iure sive ex consuetudine lex proficiscitur, ut vir uxori fideiussorem servandae dotis exhibeat, eam iubemus aboleri.

D. VIII non. Sept. Eucherio et Syagrio cons.

[2] *Imp. Iustinianus A. Iuliano pp.* Generali definitione constitutionem pristinam ampliante sancimus nullam esse satisfactionem vel mandatum pro dote exigendum vel a marito vel a parte eius vel ab omnibus qui dotem suscipiunt. si enim credendam mulier se suamque dotem parti mariti existimavit, quare fideiussor vel alius intercessor exigitur, ut causa perfidiae in conubio eorum generetur?

D. x k. Aug. Lampadio et Oresta cons.

dare to claim for her- or himself anything which the death of her husband has made revert to the wife.

Given November 3, at Ravenna, in the consulship of Honorius, for the thirteenth time, and Theodosius, for the tenth time, Augusti (422).

Nineteenth Title Return of the Dowry during Marriage

[1]¹⁵⁴ *Emperors HONORIUS and THEODOSIUS Augusti to Marinianus, Praetorian Prefect.* If during a marriage a dowry was returned to a wife by her husband without a legally valid reason, something which cannot stand according to the laws because it is regarded as having the status of a gift, and the wife dies, the dowry, together with its fruits from the day on which it was returned, shall be restored by her heirs to the husband, so that ownership of it cannot be alienated by the husband from her children in violation of the laws.

Given November 3, at Ravenna, in the consulship of Honorius, for the thirteenth time, and Theodosius, for the tenth time, Augusti (422).

Twentieth Title No Sureties or Mandators Shall Be Given for Dowry

[1] *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS Augusti to Cynegius, Praetorian Prefect.* Whether deriving from law (*ius*) or custom (*consuetudo*), the rule (*lex*) that a husband give a surety to his wife for the preservation of the dowry We order to be abolished.

Given September 6,¹⁵⁵ in the consulship of Eucherius and Syagrius (381).¹⁵⁶

[2] *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect.* Filling out an older constitution¹⁵⁷ with a general rule (*definitio*), We ordain that no security or mandate shall be demanded from the husband, or from anyone on his side, or from anyone who receives a dowry. For if a woman thought she should entrust herself and her dowry to her husband's side, why is a surety or other guarantor demanded, so that a rationale for mistrust is created during the marriage?

Given July 23,¹⁵⁸ in the consulship of Lampadius and Orestes (530).

¹⁵⁴ = (with changes) C.Th. 3.13.3.1. Combine with C. 5.1.4, 5.9.4, 5.18.11; C.Th. 3.5.12.

¹⁵⁵ This is to take *id.* for non.: the date as given is impossible.

¹⁵⁶ Gothofredus points out that these consuls do not suit the prefecture of Cynegius, which fell in the years 384-389. Seeck gives September 2, 381.

¹⁵⁷ A reference to the immediately preceding C. 5.20.1.

¹⁵⁸ The precise day is uncertain: the alternative is August 1, preferred by Lounghis *et al.*

XXI Rerum Amotarum

[1] *Imp. Alexander A. Polydeucae. pr.* Compensationis aequitatem iure postulas. non enim prius exsolvi quod debere te constiterit aequum est, quam petitioni mutuae responsum fuerit, eo magis, quod ea te persequi dicis, quae divortii causa amota quereris. 1. Cum igitur apud competentem iudicem ex stipulatu conveniaris, apud eundem doce tui iuris res ablatas esse.

PP. XVI k. Dec. Alexandro A. III et Dione cons.

[2] *Impp. Diocletianus et Maximianus AA. et CC. Sereno.* Divortii gratia rebus uxoris amotis a marito vel ab uxore mariti rerum amotarum edicto perpetuo permittitur actio. constante etenim matrimonio neutri eorum neque poenalis neque famosa actio competit, sed de damno in factum datur actio.

D. v k. Oct. ipsis AA. cons.

[3] *Idem AA. et CC. Quartioni.* De rebus, quas divortii causa quondam uxorem tuam abstulisse proponis, rerum amotarum actione contra successores eius non in solidum, sed quantum ad eos pervenit, quod si res extent, dominii vindicatione uti non prohiberis.

D. v non. Dec. ipsis AA. cons.

XXII Ne pro Dote Mulieri Bona Mariti Addicantur

[1] *Impp. Diocletianus et Maximianus AA. et CC. Apollinariae.* Ut uxori pro dote addicantur bona quondam mariti, iure prohibitum est. sane si nullo relicto successore non idoneus decessit, secundum iuris formam,

Twenty-First Title Property Removed¹⁵⁹

[1]¹⁶⁰ *Emperor ALEXANDER Augustus to Polydeuces. pr.* You rightly demand the just solution of an offset (against your ex-wife). For it is not fair that you pay what it is established that you owe before your counterclaim has been satisfied, all the more so since you state that you are suing for that property which you complain has been removed on account of divorce. 1. Since therefore you shall sue on the stipulation before the appropriate judge, make sure he knows that the property over which you have a legally valid claim has been carried off.

Posted November 16,¹⁶¹ in the consulship of Alexander Augustus, for the third time, and Dio (229).

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Serenus.* A right of action (*actio*) for property removed is granted by the Perpetual Edict when, because of a divorce, a wife's property is removed by a husband or a husband's by a wife. For during a marriage neither party is allowed to bring either a criminal law action or one entailing infamy (*famosa*), but an action on the facts is given for loss.

Given September 27, in the consulship of the Augusti (290 or 293).

[3] *The same Augusti and Caesars to Quartio.* Concerning the property that you allege your former wife has carried off because of a divorce, (you may raise) an action for property removed against her heirs, not for all of it, but for as much as they have acquired of it. But if the property itself still exists, you are not prevented from bringing a suit on ownership (*vindicatio*).

Given December 1,¹⁶² in the consulship of the Augusti (290 or 293).

Twenty-Second Title A Husband's Property Shall Not Be Adjudged to a Wife in Place of the Dowry

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Apollinaria.* It is prohibited by law that the property of a deceased husband shall be adjudged to his wife in place of the dowry. Clearly, if he died insolvent and without an heir, according to the rules of law (*iuris forma*) you are not

¹⁵⁹ See D. 25.2. The action on removed property (*actio rerum amotarum*) was available to a spouse for recovering property in the other spouse's control at the end of a marriage.

¹⁶⁰ *Pr.* = (with changes) C. 4.31.6.

¹⁶¹ The precise day is uncertain: the alternative is November 27.

¹⁶² The precise date is uncertain: Mommsen dates to December 3, 293.

quatenus successionis modus patitur, indemnitati tuae consulere non prohiberis.

D. v non. Dec. AA. cons.

XXIII De Fundo Dotali

[1] *Impp. Severus et Antoninus AA. Didae.* Si aestimata praedia data essent in dotem et convenisset, ut electio mulieri servetur, nihilo minus lex Iulia locum habet. est autem alienatio omnis actus, per quem dominium transfertur.

PP. XII k. Mart. Antonino A. IIII et Balbino cons.

[2] *Imp. Gordianus A. Domitianae.* Mariti, qui fundum communem cum alio in dotem inaestimatum acceperunt, ad communi dividundo iudicium provocare non possunt, licet ipsi possint provocari.

PP. v non. Oct. Gordiano A. II et Pompeiano cons.

XXIII Divortio Facto apud Quem Liberi Morari vel Educari Debent

[1] *Impp. Diocletianus et Maximianus AA. et CC. Caelestinae.* Licet neque nostra neque divorum parentum nostrorum ulla constitutione caveatur, ut per sexum liberorum inter parentes divisio celebretur, competens tamen iudex aestimabit, utrum apud patrem an apud matrem matrimonio separato filii morari ac nutrirī debent.

S. XVI k. Iul. Beroae CC. cons.

prevented from consulting your interest in being made whole, insofar as the situation of his estate allows.

Given December 1,¹⁶³ in the consulship of the Augusti (290 or 293).

Twenty-Third Title Dowry Land¹⁶⁴

[1] *Emperors SEVERUS and ANTONINUS Augusti to Dida.* If appraised real properties were given to you as a dowry and it had been agreed that the wife's right of election (to take the property or its assessed value upon return of the dowry) was to be preserved, nonetheless the *Lex Julia* applies.¹⁶⁵ Moreover, every act in law whereby ownership of property is transferred counts as alienation.

Posted February 18,¹⁶⁶ in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2] *Emperor GORDIAN Augustus to Domitiana.* Husbands who have accepted an unappraised farm owned in common with another person as dowry cannot sue for the division of property, though they themselves can be sued.

Posted October 3, in the consulship of Gordian Augustus, for the second time, and Pompeianus (241).

Twenty-Fourth Title Persons with Whom Children Ought to Reside or by Whom They Ought to Be Raised Following a Divorce

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Caelestina.* Although it is not specified in any constitution of ours or of our deified predecessors (*parentes*) that a distinction according to the sex of the children be made when assigning them to parents, nevertheless the appropriate judge will reckon whether the children ought to reside with and be raised by their father or by their mother when a marriage has ended through divorce.

Written June 16, at Beroe (Stara Zagora), in the consulship of the Caesars (294).¹⁶⁷

¹⁶³ The precise date is uncertain: Mommsen dates to December 3, 293.

¹⁶⁴ See D. 23.5.

¹⁶⁵ The *lex Julia de adulteriis coercendis* contained a rule (once itself referred to as the *lex Julia de fundo dotali*) that prohibited a husband from selling rural Italian dowry land without a wife's consent.

¹⁶⁶ The precise day is uncertain: the alternative is February 27.

¹⁶⁷ The precise day is uncertain (the alternative is June 24), as is the year; Mommsen prefers May 17, 293.

XXV De Alendis Liberis ac Parentibus

[1] *Imp. Pius A. Basso.* Parentum necessitatibus liberos succurrere iustum est.

Sine die et consule.

[2] *Divi fratres Celeri.* Competens iudex a filio te ali iubebit, si in ea facultate est, ut tibi alimenta praestare possit.

D. id. April. ipsis III et II AA. cons.

[3] *Idem AA. Tatianae.* Si competenti iudici eum, quem te ex Claudio enixam esse dicis, filium eius esse probaveris, alimenta ei pro modo facultatum praestari iubebit. idem, an apud eum educari debeat, aestimabit.

PP. XIII k. Mart. Romae Rustico et Aquilino cons.

[4] *Impp. Severus et Antoninus AA. Sabino.* Si patrem tuum officio debito promerueris, paternam pietatem tibi non denegabit. quod si sponte non fecerit, aditus competens iudex alimenta pro modo facultatum praestari tibi iubebit. quod si patrem se negabit, quaestionem istam in primis idem iudex examinabit.

PP. non. Febr. Laterano et Rufino cons.

XXVI De Concubinis

[1] *Imp. Constantinus A. ad populum.* Nemini licentia concedatur constante matrimonio concubinam penes se habere.

PP. XVIII k. Iul. Caesareae Constantino A. VII et C. cons.

**Twenty-Fifth Title Providing Support for Children and
Parents¹⁶⁸**

[1] *Emperor PIUS Augustus to Bassus.* It is right for children to come to the assistance of their parents in need.

Without day or year.

[2] *The DEIFIED BROTHERS (Augusti) to Celer.* The appropriate judge will order your son to support you if his financial situation is such that he is able to provide you with support (*alimenta*).

Given April 13, in the consulship of Marcus Aurelius, for the third time, and Lucius Verus, for the second time, Augusti (161).

[3] *The same Augusti to Tatiana.* If you prove to the appropriate judge that he, whom you claim to be the son of Claudius and you, is his son, he (the judge) will order him (Claudius) to provide support (*alimenta*) for him in accordance with his means. He will also assess whether he ought to be raised by him.

Posted February 17, at Rome, in the consulship of Rusticus and Aquilinus (162).

[4] *Emperors SEVERUS and ANTONINUS Augusti to Sabinus.* If you have deserved well of your father in terms of the respect (*officium*) you owe him, he will not deny you a father's affection (*pietas*). But if he does not do so of his own accord, the appropriate judge, once you approach him, will order him to provide support (*alimenta*) in accordance with his means. But should he deny that he is your father, the same judge will look into that issue first of all.

Posted February 5, in the consulship of Lateranus and Rufinus (197).

Twenty-Sixth Title Concubines¹⁶⁹

[1] *Emperor CONSTANTINE Augustus to the People.* No one shall be allowed to keep a concubine while he is married.

Posted June 14, at Caesarea, in the consulship of Constantine Augustus, for the seventh time, and Constantius Caesar (326).

¹⁶⁸ See D. 25.3.

¹⁶⁹ See D. 25.7.

**XXVII De Naturalibus Liberis et Matribus Eorum et ex Quibus
Casibus Iusti Efficiuntur**

[1] *Imp. Constantinus A. ad Gregorium. pr.* Senatores seu perfectissimos, vel quos in civitatibus duumviralitas vel sacerdotii, id est Phoenicarchiae vel Syriarchiae, ornamenta condecorant, placet maculam subire infamiae et alienos a Romanis legibus fieri, si ex ancilla vel ancillae filia vel liberta vel libertae filia vel scaenica vel scaenicae filia vel ex tabernaria vel ex tabernarii filia vel humili vel abiecta vel lenonis aut harenarii filia vel quae mercimoniis publicis praefuit susceptos filios in numero legitimorum habere voluerint aut proprio iudicio aut nostri praerogativa rescripti: ita ut, quidquid talibus liberis pater donaverit, sive illos legitimos seu naturales dixerit, totum retractum legitimae suboli reddatur aut fratri aut sorori aut patri aut matri.

1. Sed et uxori tali quodcumque datum quolibet genere fuerit vel emptione collatum, etiam hoc retractum reddi praecipimus: ipsas etiam, quarum venenis inficiuntur animi perditorum, si quid quaeritur vel commendatum dicitur, quod his reddendum est quibus iussimus aut fisco nostro, tormentis subici iubemus. 2. Sive itaque per ipsum donatum est qui pater dicitur, vel per alium sive per interpositam personam, sive ab eo emptum vel ab alio, sive ipsorum nomine comparatum, statim retractum reddatur quibus iussimus aut, si non existunt, fisci viribus vindicetur. 3. Quod si existentes et in praesentia rerum constituti agere noluerint pacto vel iureiurando exclusi, totum sine mora fiscus invadat.

4. Quibus tacentibus et dissimulantibus a defensione fiscali duum mensuum tempora limitentur, intra quae si non retraxerint vel propter retrahendum rectorem provinciae interpellaverint, quidquid talibus filiis vel uxoribus liberalitas impura contulerit, fiscus noster invadat, donatas vel commendatas res sub poena quadrupli severa quaestione perquirens.

**Twenty-Seventh Title Illegitimate Children, Their Mothers, and
in What Situations They Are Rendered Legitimate¹⁷⁰**

[1]¹⁷¹ *Emperor CONSTANTINE Augustus to Gregorius. pr.* It is laid down that senators and *virī perfectissimi*, as well as those in the towns distinguished by the position of *duumvir* or a priesthood, meaning that of *Phoenicarch* or *Syriarch*, shall suffer the disgrace of infamy (*infamia*) and loss of citizenship if they, relying on their own opinions or on the authority of Our rescript, should wish to treat as legitimate the children born to them from a slave-woman, the daughter of a slave-woman, a freedwoman, the daughter of a freedwoman, an actress, the daughter of an actress, a female tavern-worker, the daughter of a (male or female) tavern-worker, a lowborn and degraded woman, the daughter of a pimp or gladiator, or a woman who has charge of merchandise for sale to the general public. Whatever a father gives to such children, whether he describes them as legitimate or "natural," shall be seized in its entirety and restored to his legitimate offspring, or to his brother, sister, father, or mother.

1. So also if any property of any sort is given to such a wife or bestowed upon her through a sale, this too We order to be seized and restored. We command as well that the women themselves, by whose black arts the minds of ruined men are poisoned, shall be given over to torture, should something be sought from them or said to have been handed over to them which ought to be restored to those whom We have ordered, or to Our Treasury. 2. Thus, whether a gift has been made by a person alleged to be the father or by another, whether by a person introduced (for this purpose), or something has been bought by him or another person, or it has been acquired in the name of (the children and mother) themselves, it shall be immediately seized and restored to those whom We have ordered or, if there are no such persons, it shall be made over to the coffers of the Treasury. 3. But if they do exist and, when present, refuse to bring suit because prevented by private agreement or oath, the Treasury shall seize the property in its entirety without delay.

4. If such persons should remain silent and feign ignorance, a period of two months shall be set for them to exclude the claim of the Treasury, within which, if they have not recovered the property or made application to the governor of the province with the aim of recovering it, Our Treasury shall seize whatever a disreputable generosity has bestowed upon such children or wives, seeking out by means of a severe enquiry and through the imposition of a fourfold penalty the property that has been given as a gift or entrusted (to them).

¹⁷⁰ In what follows the words "natural" and "illegitimate" translate the same word, *naturalis*, usually found in the phrase *naturales liberi*, and refer to the same thing, namely, children who are in biological terms regarded as those of their putative father, but not recognized in law as legitimate. *Naturalis* is also translatable here and elsewhere by the terms "biological" and "genetic," both commonly found in modern legal sources.

¹⁷¹ = (in part, with changes) C.Th. 4.6.3. See Nov. Marc. 4.1.

Lecta XII k. Aug. Carthagine Nepotiano et Facundo cons.

[2] *Impp. Arcadius et Honorius AA. Anthemio pp.* Matre vel legitimis filiis vel nepotibus aut pronepotibus cuiuscumque sexus, uno pluribusve, existentibus bonorum suorum unam tantum unciam pater naturalibus filiis seu filiabus eorumque genetrici vel, si sola sit concubina, semunciam largiendi vel relinquendi habeat potestatem. quidquid vero ultra modum concessum relictum sit, legitimis liberis vel matri vel ceteris successoribus iure reddetur.

D. id. Nov. Constantinopoli Stilichone II et Anthemio cons.

[3] *Impp. Theodosius et Valentinianus AA. ad Apollonium pp. pr.* Si quis seu liber ipse seu curiae sit nexibus obligatus, et tradendi filios naturales, vel omnes vel quos quemve maluerit, eius civitatis curiae unde ipse oritur et in solidum heredes scribendi liberam ei concedimus facultatem. 1. Quod si cui non ex urbe, sed vico vel possessione qualibet oriundo naturales liberi contigerunt, eosque velit sub definitione praedicta curiae splendore honestare et hereditatis opibus adiuvere, eius civitatis adscribendi sunt ordini, sub qua vicus ille vel possessio censeatur.

2. Quod si alterutram regaliū civitatum patriam sortiatur, sit ei liberum susceptam ex inaequali coniugio subolem cuiuscumque civitatis decurionibus immiscere, dummodo civitas quae eligitur totius provinciae teneat principatum. indignum est enim, ut, qui sacratissimae urbis ubere gloriatur, naturales suos non illustris ordine civitatis illuminet.

3. Haec sive postrema definiat sive donationem cuiuslibet quantitatis in liberos naturales pater conferat: et quod de subeunda sorte curiali seu testamento seu actorum fide constituat, ita ratum esse stabiliterque

Read July 21, at Carthage, in the consulship of Nepotianus and Facundus (336).

[2]¹⁷² *Emperors ARCADIUS and HONORIUS Augusti to Anthemius, Praetorian Prefect.* When a father is survived by legitimate children, (their) mother, (his) legitimate grandchildren or great-grandchildren of either sex,¹⁷³ whether there are one or more of these, he shall have the power (*potestas*) of bestowing on or leaving as a bequest to his "natural" (i.e., illegitimate) sons or daughters and their mother only one-twelfth of his property or, if there is only a concubine, one-twenty-fourth. Whatever, on the other hand, has been left beyond the approved limit will be restored by operation of law to the legitimate children, their mother, or the remaining successors.

Given November 13, at Constantinople, in the consulship of Stilicho, for the second time, and Anthemius (405).

[3]¹⁷⁴ *Emperors THEODOSIUS and VALENTINIAN Augusti to Apollonius, Praetorian Prefect. pr.* Whether someone is free from the obligation to serve on his town council (*curia*) or not, We grant him the free choice both of giving over his "natural" (illegitimate) children, either all of them or one or more as he prefers, to (serve on) the council (*curia*) of his city of origin, and of appointing them as heirs to his estate in its entirety. 1. But if someone who does not come from a city, but from a settlement not recognized as a town (*vicus*) or any kind of landed estate (*possessio*), happens to have natural children and wishes to honor them with the status of town councilor on the terms described above and to assist them with the resources of an inheritance, they are to be enrolled in the town council (*ordo*) of the town to which the *vicus* or *possessio* is officially ascribed.

2. If he happens to come from either of the ruling cities (Rome or Constantinople) he shall be free to place the progeny arising from a union between unequals (i.e., concubinage) among the town councilors (*decuriones*) of any city whatsoever, provided that the city which is chosen is the capital of an entire province. For it is unworthy that a person who boasts of provenance from a most sacred (i.e., imperial) city should honor his natural children with membership in the *ordo* of a town that is not distinguished.

3. Whether a father sets forth these matters in a will or gives a gift of any size to his natural children, We wish that what he establishes regarding the enrolment in a council, whether in a will or in a public register (associated

¹⁷² = (with changes) C.Th. 4.6.6.

¹⁷³ The order of the survivors has been altered to make clearer that the "mother" is the parent of the children and not of the testator: see C.Th. 4.6.6.

¹⁷⁴ Pr.-3 = (with changes) Nov. Theod. 22.1.5, 7-9.

volumus observari, ut, sive abstinendo hereditatibus sive abdicando donationes naturales liberi curialem voluerint evitare fortunam posteaque paternarum opum vel in solidum vel ex parte reperti fuerint possessores, licet eas alienaverint, omnimodo ad condicionem, in qua pater eos amplificatis opibus esse voluit, etiam inviti cogantur accedere.

4. Et si filiam naturalem vel filias habuit et eam vel eas curiali vel curialibus civitatis, ex qua oriundus est vel sub qua vicus vel possessio unde oritur consistit, vel eius civitatis, quae principatum totius provinciae tenet, matrimonio collocavit, haec eadem et in persona eius vel earum ad exemplum marium obtinebunt. 5. Quid enim interest, utrum per filios an per generos commoditatibus civitatum consuletur, et utrum novos lex faciat curiales, an foveat quos invenit?

D. xvii k. Ian. Constantinopoli post consulatum Eudoxii et Dioscori.

[4] *Impp. Leo et Anthemius AA. Armasio pp. pr.* Quoniam desideria morientium ex arbitrio viventium non sine iusta ratione colligimus, et is, qui naturalem filium habens hortantibus legibus ultro ad instar legitimi filii municipalibus eum voluit adgregare muneribus et donare patriae principalem, manifestavit notumque fecit sine dubio professione certissima facultatum suarum omnium elegisse se adfectione debita successorem, cum certe huiusmodi personis adeo sacratissima constitutione subventum sit, ut nec renuntiandi eis aut alienandi vel repudiandi paternas hereditates aut donationes in fraudem curiae concedatur facultas, sed muneribus patriae susceptis patrimonia subire cogantur, nullam e diverso calumniantium vocem penitus patiemur admitti, sed ipsum Philocalum et paternorum bonorum omnium ab intestato heredem et Bostrenae civitatis curiae principalem iniuncta vel iniungenda sibi munera subire ex eoque genitos vel nascendos filios

with the gift), be maintained as valid and sound, so that, if the natural children wish to avoid enrolment in a council by renouncing the inheritance or abstaining from the gift, and are afterwards found to be in full or partial possession of their father's property, even if they have (subsequently) alienated this, they shall be in every way compelled, even against their will, to assume the status which their father wished for them, having increased their material resources.

4.¹⁷⁵ And if he had one or more natural daughters and married off one or more of them to a member or members of the council of his town of origin or that to which his *vicus* or *possessio* of origin is assigned, or of that which is the capital of an entire province, the same rules will apply also to them on the analogy of males. 5. For what does it matter if the interests of cities are consulted through sons or sons-in-law, and whether legislation makes new town councilors (*curiales*) or supports those whom it finds?

Given December 16, at Constantinople, in the post-consulate of Eudoxius and Dioscorus (443).¹⁷⁶

[4] *Emperors LEO and ANTHEMIUS Augusti to Armasius, Praetorian Prefect.* pr. A man who had a "natural" son and who wished, of his own accord and with the encouragement of the laws, to associate him with municipal duties and present him as a gift to his home town as a leader, like a legitimate son, (subsequently) made it clear and well known beyond doubt through a very unambiguous declaration that he had chosen him, out of due affection, as the heir of all his property. Because we construe the wishes of dying persons, not without good reason, from the decisions they took while alive, (and) since, at any rate, assistance is (also) provided to persons of this kind by a most sacred (i.e., imperial) constitution¹⁷⁷ to such an extent that the possibility neither of refusing, nor of alienating, nor of rejecting the inheritances or gifts from their fathers for the purpose of wrongfully evading membership in a town council (*curia*) is granted to them – instead, they are compelled to enter upon their inheritance (only) after undertaking the public duties associated with their home towns – We will not at all allow the contrary claims of false accusers to find a place. Instead, We instruct that Philocalus himself, the intestate heir of all his father's property and a leader of the council of the town of Bostrena, shall take up the duties that have been and that are going to be laid upon him, and that his children, already born or to be born in future, shall be likewise subject to their father's status.

¹⁷⁵ 4–5 = (with changes) Nov. Theod. 22.2.11.

¹⁷⁶ Seeck gives December 16, 442.

¹⁷⁷ C. 5.27.3.

similiter paternae condicioni subiacere praecipimus. 1. Et huiusmodi formam in omnibus causis, quae similiter in cuiuscumque civitatis ordine curiaque contigerint, in posterum decernimus observari.

D. k. Ian. Constantinopoli Iordane et Severo cons.

[5] *Imp. Zeno A. Sebastiano pp. pr.* Divi Constantini, qui veneranda Christianorum fide Romanum munivit imperium, super ingenuis concubinis ducendis uxoribus, filiis quin etiam ex isdem vel ante matrimonium vel postea progenitis suis ac legitimis habendis, sacratissimam constitutionem renovantes iubemus eos, qui ante hanc legem ingenuarum mulierum (nuptiis minime intercedentibus) electo contubernio cuiuslibet sexus filios procreaverunt, quibus nulla videlicet uxor est, nulla ex iusto matrimonio legitima proles suscepta, si voluerint eas uxores ducere, quae antea fuerant concubinae, tam coniugium legitimum cum huiusmodi mulieribus ingenuis, ut dictum est, posse contrahere, quam filios utriusque sexus ex earundem mulierum priore contubernio procreatos, mox quam nuptiae cum matribus eorum fuerint celebratae, suos patri et in potestate fieri et cum his, qui postea ex eodem matrimonio suscepti fuerint, vel solos, si nullus alius deinde nascatur, tam ex testamento volentibus patribus etiam ex integro succedere quam ab intestato petere hereditatem paternam: pactis, quae matrimonii tempore super dotalibus vel ante nuptias donationis rebus subsecuta fuerint, etiam ad ipsorum personas pertinentibus, ut una cum fratribus suis postea ex isdem parentibus forte progenitis, aut soli, si nullus alius sit procreatus, dotis et ante nuptias donationis pro tenore legum nec minus pactorum emolumenta recipiant.

1. Hi vero, qui tempore huius sacratissimae iussionis necdum prolem aliquam ex ingenuarum concubinarum consortio meruerunt, minime huius legis beneficio perfruantur, cum liceat easdem mulieres sibi prius iure matrimonii copulare non extantibus legitimis liberis aut uxoribus ac legitimos filios utpote nuptiis procedentibus procreare, nec debeant, quos ex ingenua concubina dilato post hanc legem matrimonio nasci voluerint, ut iusti ac legitimi postea videantur, magnopere postulare.

D. x k. Mart. post consulatum Armati.

1. And We decree that this sort of rule (*forma*) shall be maintained in future in all cases that arise in a similar way regarding the councilors (*ordo*) and council of each town.

Given January 1 at Constantinople, in the consulship of Jordanes and Severus (470).

[5] *Emperor ZENO Augustus to Sebastianus, Praetorian Prefect. pr.* In revisiting the most sacred (i.e., imperial) constitution⁷⁸ of the blessed Constantine, who fortified the Roman empire with the venerable Christian religion, as to marrying free-born concubines and, moreover, as to considering children born from such unions either before or after marriage as their *sui heredes* and legitimate, We order that those who, before this (instant) law (*lex*), have chosen concubinage – where no marriage at all occurs – with free-born women, have sired children of either sex, and manifestly have no wife and no legitimate children born from a legally valid marriage, if they wish to marry those women who have previously been concubines, they shall be able, as has been said, to contract lawful marriage with free-born women of this kind, just as the children of either sex born from the prior concubinage with these same women, as soon as marriage is concluded with their mothers, shall become *sui heredes* and be in his power (*potestas*) along with those who are subsequently born from this same marriage, or by themselves, if no other is born later. They shall succeed, even in full, through a will in accordance with the wishes of their fathers, as well as seek their paternal inheritance on intestacy. They shall also benefit from the agreements made at time of marriage regarding dowry and prenuptial gifts so that they, together with their siblings, if any happen to be born subsequently to the same parents or on their own, if no one else is born, shall receive the benefits of the dowry and prenuptial gift, according to the substance of the laws as well as of the agreements.

1. Those however who at the time (of enactment) of this most sacred law (*iussio*) have not yet had children from a union with free-born concubines shall not at all enjoy the benefit of this (instant) law, since they shall be permitted, if they have no legitimate children and lawful wives, first to marry these same women under the law of marriage and to produce legitimate children insofar as marriage has preceded them, nor ought they earnestly to request that those children whom they have wished to be born from a free-born concubine, having put off marriage after the passage of this (instant) law, later be deemed proper and legitimate.

Given February 20, in the post-consulate of Armatius (477).

⁷⁸ Evidently a reference to a lost law missing from the beginning of C.Th. 6.1.

[6] *Imp. Anastasius A. Sergio pp. pr.* Iubemus eos, quibus nullis legitimis existentibus liberis in praesenti aliquae mulieres uxoris loco habentur, ex his sibi progenitos seu procreandos suos et in potestate sua legitimosque habere propriasque substantias ad eos vel per ultimas voluntates vel per donationes seu alios legi cognitos titulos si voluerint transferre, ab intestato quoque eorum ad hereditatem vocandos, nec aliquam quaestionis seu altercationis exercendae sub qualibet astuta subtilique legum vel constitutionum occasione super his vel agnatis seu cognatis genitoris eorum vel quibusdam aliis superesse facultatem in posterum: nihilo minus, quisquis huiusmodi mulierem uxoris loco dotalibus instrumentis confectis habuerit, pro eius subole similem eandemque formam custodiri, ne adimatur ei licentia sibi quodammodo per liberos proprios suum patrimonium acquirendi. 1. Filios insuper vel filias iam per divinos adfatus a patribus suis in adrogationem susceptos vel susceptas huius providentissimae nostrae legis beneficio et iuvamine potiri censemus.

D. k. April. Anastasio et Agapeto cons.

[7] *Imp. Iustinus A. Marino pp. pr.* Legem Anastasii divinae recordationis, quae super naturalibus filiis emissa est, in his valere tantum casibus concedimus, qui nunc usque subsecuti sunt pro eiusdem legis tenore in matrimoniis tunc constantibus vel postea contractis, ita tamen, ut non aliunde progenitis subvenisse credatur quam non ex nefario nec incesto coniugio. 1. Naturalibus insuper filiis seu filiabus ex cuiuslibet mulieris cupidine non incesta non nefaria procreatis et in paterna per adrogationem seu per adoptionem sacra susceptis ex divinis iussionibus, sive antequam eadem lex inrepserit seu post eandem legem usque ad praesentem diem, non sine ratione duximus suffragandum, ut adoptio seu adrogatio firma permaneat, nullis prorsus improbanda quaestionibus, quasi quod impetrarunt lege quadam interdictum sit, quoniam, et si qua prius talis emergebat dubitatio, remittenda fuit movente misericordia, qua indigni non sunt qui alieno laborant vitio. 2. Sint itaque post eandem adrogationem seu adoptionem sui et in potestate patrum successionesque tam ex testamento quam ab intestato capiant, prout in adoptatis seu et in adrogatis constitutum est.

[6] *Emperor ANASTASIUS Augustus to Sergius, Praetorian Prefect. pr.* We order that those, who have no surviving legitimate children and presently have some woman in place of a wife, shall consider children already or subsequently born to them from such women to be their *sui heredes*, in their power (*potestas*), and legitimate, and, if they wish, transfer their property to them either through a will, gift, or other means known to law. (We order) also that these children shall be eligible to receive the estates of their fathers on intestacy. There shall also remain in future no possibility of launching a judicial procedure or confrontation on any clever and complicated pretext arising from legislation (*leges*) or constitutions regarding these matters, neither for agnates or cognates of their father, nor for certain others. Equally, one and the same rule shall hold on behalf of his offspring for any man having a woman of this kind in place of a wife after drawing up dowry documents, so that the power of acquiring property through his children in a certain manner not be taken from him. 1. We ordain, moreover, that sons and daughters already adopted through adrogation by their fathers thanks to imperial permission shall enjoy the benefit and assistance of this most providential law of Ours.

Given April 1, in the consulship of Anastasius Augustus and Agapetus (517).

[7] *Emperor JUSTIN Augustus to Marinus, Praetorian Prefect. pr.* We allow that the law (*lex*) of Anastasius, of blessed memory, which was enacted regarding "natural" children, shall be valid only in those cases which have occurred up to this point in congruence with the sense of the law, meaning for marriages then existing or contracted later, so nevertheless, with the qualification that it shall only be deemed to benefit those children born in unions that are not immoral or incestuous. 1. Moreover, We deemed it necessary, not without reason, to assist both natural sons and daughters who were born in a passionate union with any sort of woman that is not incestuous or immoral and who have been brought under paternal power (*sacra*) through adrogation or adoption in accordance with imperial pronouncements (*iussiones*), whether before this law was promulgated or after this same law up to the present day, so that the adoption or adrogation shall remain valid, and must not be rendered invalid under any judicial procedure at all, on the ground that what they (the children) sought was forbidden by some law, because, even if some such hesitation used to arise previously, it ought to be dismissed, from considerations of mercy, for the reason that they are not unworthy who suffer from someone else's fault. 2. Therefore, they shall be, subsequent to the same adrogation or adoption, *sui heredes* and in the power (*potestas*) of their fathers. They shall also take their inheritance either under a will or on intestacy, just as is laid down for those who have been adrogated or adopted.

3. In posterum vero sciant omnes legitimis matrimoniis legitimam sibi posteritatem quaerendam, ac si praedicta constitutio lata non esset, iniusta namque libidinum desideria nulla de cetero venia defendet, nulum sublevabit novum adminiculum praeter anteriorum dispositionum ordinem, non ante lata sanctio, quam ex hoc die resecandam pia suggerit ratio, non adrogationum vel adoptionum praetextus, quae ulterius minime ferendae sunt, non astutiae sive divinis adfectandae litteris seu quibusdam illicitis ambiendae machinationibus, cum nimis indignum, nimis sit impium flagitiis praesidia quaerere, ut et petulantiae servire liceat et ius nomenque patris, quod eis denegatum est, id altero legis colore praesumant.

D. v id. Nov. Constantinopoli Iustino A. et Eutherico cons.

[8] *Imp. Iustinianus A. Menae pp. pr.* Humanitatis intuitu naturalibus patribus hoc indulgemus, ut liceat eis nulla legitima subole vel matre subsistente naturalem vel naturales filios matremque eorum non tantum ex tribus unciiis, quod praeteritae leges permittebant, sed etiam ex duplici portione, id est sex unciiis, heredes scribere, ut, licet ab intestato nullam communionem ad patris naturalis successionem haberent, ex suprema tamen eius voluntate permittatur eis usque ad praedictas sex uncias (si hoc scilicet naturalis pater voluerit) hereditatem eius capere, ita tamen, ut memoratam sex unciarum quantitatem in omnibus naturalibus filiis et matre eorum minime testator excedat. 1. Quam et in legatis et fideicommissis eis relinquendis et dotibus et donationibus, tam aliis quam ante nuptias, usque ad aestimationem sex unciarum liberam similiter naturalibus eorum patribus damus potestatem. 2. Haec autem in futuris tantummodo testamentis vel ultimis voluntatibus vel dotibus vel donationibus locum habebunt.

D. k. Ian. Constantinopoli dn. Iustiniano A. II cons.

[9] *Idem A. Menae pp. pr.* Communium rerum esse utilitatem recte iudicantes lucidis et omni ambiguitate segregatis legibus uti nostro

3. As for the future, however, let everyone know that they must seek legitimate offspring in lawful marriages, as though the aforesaid constitution was not enacted. For henceforth no pardon will safeguard the improper desires occasioned by lust, no new prop will support them contrary to the tenor of previous provisions, as will no previously enacted rule, which a moral rationale has prompted Us to rescind from this day forth, no allegations of adrogations or adoptions, which are from this point not at all to be tolerated, no exercise of cleverness, is to be either applied to the interpretation of imperial correspondence (*litterae*; i.e., legislation) or engineered by means of certain unlawful schemes, since it is highly unworthy, highly immoral, to seek protections for improper behavior, in order both that it is permitted (to them) to be a slave to outrageous conduct and that they usurp under an alternative pretense of law the rights and status of "father" which had (otherwise) been denied to them.

Given November 9, at Constantinople, in the consulship of Justin Augustus and Euthericus (519).

[8]¹⁷⁹ *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect. pr.* Prompted by humane sympathy (*humanitas*), We grant to fathers of "natural" children that it shall be permitted to them, if they have no surviving legitimate children nor lawful mother of the same, to name their natural child or children and the mother of the latter as heir(s) not only for one-quarter, which past legislation permitted, but even for double this fraction of the estate, namely, one-half, so that, although they have no claim on the intestate succession to their natural father, it shall nevertheless be permitted to them, in accordance with his will, to take an inheritance up to the aforesaid one-half of the estate (clearly, if their natural father should wish this), so that, all the same, the will-maker not exceed the aforesaid one-half of his estate for all his natural children and their mother (combined). 1. We likewise grant to their fathers this free capacity, up to the appraisal of one-half, in bequeathing legacies, trusts, dowries, and gifts, pre-nuptial as all others, to their natural children. 2. These provisions, moreover, will apply only to future wills, expressions of last wishes, dowries, and gifts.

Given January 1,¹⁸⁰ at Constantinople, in the consulship of Our Lord Justinian Augustus, for the second time (528).

[9]¹⁸¹ *The same Augustus to Menas, Praetorian Prefect. pr.* Rightly judging it to be useful for the public interest that those subject to Our imperial command

¹⁷⁹ Combine with C. 5.27.9, 10.35.3, 10.44.4.

¹⁸⁰ The precise month is uncertain: January or rather June (preferred by Lounghis *et al.*).

¹⁸¹ Combine with C. 5.27.8, 10.35.3, 10.44.4.

subiectos imperio, ad praesentem sanctionem venimus, per quam omni dubitatione amputata, quae usque adhuc obtinebat, certissimum facimus, ut, quotiens naturales filii curiali fortunae patriae sui genitoris adsignantur, vel adhuc vivente patre vel post eius obitum pro dispositione testamenti ab eo conditi, et eo modo legitima iura in paterna successione adipiscuntur (quod recte fieri minime dubium est), licet illustrem dignitatem, ex qua curialis fortunae liberatio competere non potest, naturales filii antea meruerunt, ne permittatur eis contra substantiam ab eodem naturali patre descendantium vel adscendentium vel ex latere cognationis vel agnationis iure eidem patri coniunctorum, licet ipsi legitimi successores eidem naturali patri per memoratam fortunam efficiantur, aliquod ius sibi vindicare.

1. Quod et in his locum habebit, qui iam a naturali patre curiali conditioni traditi adhuc superstites sunt, eodem scilicet modo nec illis contra substantiam eiusdem naturalis filii vel ex eo descendantium vel adscendentium vel ex latere coniunctorum aliquod sibi ius vindicare valentibus. 2. Sed si quidem iste naturalis filius sive postquam legitimus successor patri factus sit sive in antecedenti tempore filios ex legitimo matrimonio vel alios descendentes liberos habeat, eos modis omnibus ad eius successionem sine testamento morientis vocari nec curiae locum esse, praeterquam si quarta portio bonorum eius eidem curiae debeatur eo, quod nullus forte ex mortui liberis curialia munera peragere cogitur: illo videlicet observando, ut ii, quos iste naturalis filius, posteaquam fortunae curiali datus est, procreaverit, decuriones sine dubio sint et curialia peragere munera compellantur.

3. Sin vero sine liberis cuiuscumque gradus intestatus decesserit, si quidem matre superstita, tertiam quidem partem bonorum eius matrem habere, duas vero alias partes curiam, cui a patre datus est. 4. Sin autem mater quidem defuncti non superesset, alii vero cognati ex materna linea descendentes vel adscendentes vel ex latere venientes ad eius vocentur successionem, tunc ea quidem, quae a patre naturali ad eum pervenerunt, eidem curiae competere: si quid vero filio posteaque legitimo successori effecto vel a matre sua vel aliunde quocumque legitimo modo adquisitum sit, hoc ad proximos maternos eius cognatos pervenire.

5. Illo videlicet observando, ut, sive matre eius superstita sive ea ante filium mortua aliquis ex eius genere eiusdem curiae fortunam subire

employ laws that are clear and free from every ambiguity, We arrive at the instant rule (*sanctio*), through which, after every hesitation which has held up to this point has been cleared away, We make most certain that whenever "natural" sons are assigned (by their father) to the council (*curia*) of his native town either while the father is still alive or after this death through the dispositions of his will, and in this way they acquire legally recognized rights to the estate of their father – something which it is perfectly certain occurs rightly – although the natural sons have previously risen to the rank of *vir illustris*, which cannot free them from the council, it shall not be permitted for them to claim any right to the property of (legitimate) ascendants or descendants of their natural father, or of collateral relations linked to the same father by cognate or agnate right, even though they themselves are rendered lawful successors to their natural father through assignment to the council, as mentioned.

1. This rule will also apply to those who have already been assigned to the status of town councilor by their natural father and are still living. Clearly in the same way they (the relations of the father listed above) do not have any valid claim to the property of the natural son, nor to that of his ascendants, descendants, or collaterals. 2. And if indeed a natural son has children born of a lawful marriage or other descendants who count as *liberi* (i.e., the first Praetorian class of heirs), whether this occurred after he was made a legitimate successor to his father or beforehand, (We order) that they in every way shall be eligible to succeed to his estate if he dies intestate and that the council shall have no claim, apart from when a fourth part of his property is owed to that same council because not one perhaps of the decedent's *liberi* (i.e., heirs in the first Praetorian class) is compelled to perform duties in connection with the council. It is clear that this rule shall be observed, that those sons born to a natural son after he joins the council shall themselves without doubt become councilors (*decuriones*) and shall be compelled to perform the duties associated with this status.

3. But if, however, he dies intestate without *liberi* (heirs in the first Praetorian class), of whatever degree, if in fact his mother survives him, (We order) that his mother shall receive one-third, at any rate, of his property and the council, to which his father assigned him, two-thirds. 4. But if, however, the mother of the decedent does not survive him, while other blood relatives (*cognati*) on his mother's side, descendants, ascendants, or collaterals, are eligible to succeed to his estate, then that property, to be sure, which came to him from his natural father accrues to the same council. If the son, who afterwards became (his father's) legitimate successor, has in fact acquired something from his mother or from some other source in any legally recognized manner (We allow) this to accrue to his nearest maternal blood relatives (*cognati*).

5. It is clear that this rule shall be observed, that, whether his mother has survived or predeceased him, should someone from her side be willing to

paratus sit, liceat ei se offerenti eidem curiae bona mortui, quae de substantia patris ad eum pervenerunt, capere muneraque peragere curialia, quo accedente mater defuncti, si adhuc supersit, non solum tertiam partem eorum, quae extra paternam substantiam filius eius aliunde adquisivit, sed omnia ea vel ipsa sola vel cum coheredibus suis capiet.

6. Ea vero, quae de successione naturalis filii post curialem conditionem morientis constituimus, non tantum in his locum habere debent, qui postea a patre suo naturali curiae dati fuerint, sed etiam in illis, qui iam dati sunt, si tamen adhuc supersunt. 7. Quod si ante praesentem sanctionem mortui sunt, minime ad eorum successionem eandem nostram sanctionem extendimus.

8. Et quoniam omnimodo favendum est curiis civitatum, illud etiam in hac parte addendum esse censemus, ut liceat patribus naturales filios curiae patriae suae tradere non solum nulla eis legitima subole existente, sed etiam si filios vel alios liberos ex legitimis matrimoniis procreatos habeant, et eo modo naturales quoque filios sibi legitimos successores efficere, ita tamen, ut minime eisdem patribus liceat per donationem vel ultimam voluntatem amplius eidem naturali filio dare vel relinquere, quam uni filio ex matrimonio legitimo procreato dederit vel reliquerit, cui minima portio data vel relicta sit.

D. k. Iun. dn. Iustiniano A. II cons.

[10] *Idem A. Demostheni pp. pr.* Cum quis a muliere libera et cuius matrimonium non est legibus interdictum cuiusque consuetudine gaudebat aliquos liberos habuerit, minime dotalibus instrumentis compositis, postea autem ex eadem adfectione etiam ad nuptialia pervenerit instrumenta et alios iterum ex eodem matrimonio liberos procreaverit, ne posteriores liberi, qui post dotem editi sunt, sibi omne paternum patrimonium vindicare audeant quasi iusti et in potestate effecti, fratres suos, qui ante dotem fuerant nati, ab hereditate paterna repellentes, huiusmodi iniquitatem non esse ferendam censemus. 1. Cum enim adfectio prioris subolis et ad dotalia instrumenta efficienda et ad posteriorem filiorum edendam progeniem praestitit occasionem, quomodo

enter the same council, it shall be permitted to the one volunteering for the same council to take the property of the decedent that accrued to him from the estate of his father and to perform the duties associated with the council. If this happens, the mother of the decedent, if she is still alive, will receive not only a third part of the property which, apart from that of his father, the son acquired from other sources, but all of it, either by herself or together with her co-heirs.

6. Those rules, certainly, which We establish concerning the succession to the estate of a natural son who dies after becoming a town councilor ought to apply not only to those who shall afterwards be assigned to the council by their natural father but also to those who have already been assigned, if they are still alive. 7. But if they have died before this instant enactment (*sanctio*), We do not at all apply this same set of rules (*sanctio*) of Ours to the succession to their estate.

8. And because the *curiae* of the towns are to be favored in every way, We ordain that this rule too must be added at this point, that it shall be permitted for fathers to hand over their natural sons to the council of their native town not only when they have no legitimate progeny, but even if they have children or others who qualify as *liberi* born in lawful marriages, and in this manner to make their natural sons too their lawful successors, with this qualification all the same, that it shall not at all be permitted for the same fathers through gift or will to give or bequeath more to their natural son than the smallest portion they have given or bequeathed to any child from a lawful marriage.

Given June 1, in the consulship of Our Lord Justinian Augustus, for the second time (528).

[10]¹⁸² *The same Augustus to Demosthenes, Praetorian Prefect. pr.* A man has some children with a free woman with whom marriage is not forbidden by the laws and he has been happy in the relationship, no dowry documents having been drawn up. Afterwards, however, he proceeds, from this same spirit of affection, even to the point of framing a marriage contract, and he produces other children, again from the same marriage. The younger children, who were born after the constitution of the dowry, shall not dare to claim the entire paternal estate for themselves on the ground that they are legitimate and were in their father's power (*potestas*), driving their siblings, who were born before the constitution of the dowry, from their father's inheritance. We ordain that an injustice of this kind is not to be tolerated. 1. For since affection for the prior offspring provided the motive both for drawing up the dowry documents and for producing the subsequent children, how is it not most unjust that the later progeny exclude the prior as illegitimate, when they ought to express gratitude to their siblings

¹⁸² Combine with C. 6.57.5.

non est iniquissimum ipsam stirpem secundae posteritatis quasi iniustam excludere, cum gratias agere fratribus suis posteriores debeant, quorum beneficio ipsi sunt iusti filii et nomen et ordinem subsecuti. 2. Neque enim verisimile est eum, qui postea vel donationem vel dotem conscripsit, et ab initio talem adfectionem circa mulierem non habuisse, quae eam dignam esse uxoris nomine faciebat.

3. Quapropter sancimus in huiusmodi casibus omnes liberos, sive ante dotalia instrumenta editi sunt sive postea, una eademque lance trutinari et omnes suos et in potestate suis existere genitoribus, ut nec prior nec iunior ullo habeatur discrimine, sed ii, qui ex isdem maioribus procreati sunt, et simili perfruantur fortuna.

D. xv k. Oct. Chalcedone Decio vc. cons.

[11] *Idem A. Iuliano pp. pr.* Nuper legem conscripsimus, per quam iussimus, si quis mulierem in suo contubernio collocaverit non ab initio adfectione maritali, eam tamen, cum qua poterat habere conubium, et ex ea liberos sustulerit, postea vero adfectione procedente etiam nuptialia instrumenta cum ea fecerit filiosque vel filias habuerit, non solum secundos liberos qui post dotem editi sunt iustos et in potestate esse patribus, sed etiam anteriores, qui et his qui postea nati sunt occasionem legitimi nominis praestiterunt.

1. Quam legem quidam putaverunt sic interpretari, ut sive non progeniti fuerint post dotem conscriptam liberi sive etiam ab hac luce subtracti, non anteriores filios iustos haberi, nisi in utroque tempore viventes et superstites liberi inveniantur. 2. Quorum supervacuum subtilitatem penitus inhibendam censemus. sufficiat etenim talem adfectionem habuisse, ut post liberorum editionem et dotalia efficiant instrumenta et spem tollendae subolis habeant. 3. Licet enim hoc quod speratum est ad effectum non pervenit, nihil anterioribus liberis fortuitus casus derogare concedatur: et multo magis, si quis mulierem, quam in contubernio suo habuerat, praegnantem fecerit, postea autem adhuc gravida muliere constituta dotalia fecerit instrumenta et puer vel puella editus vel edita sit, iusta patri suboles nascatur et in potestate efficiatur et heres ei existat morienti sive ab intestato sive ex testamento. satis enim absurdum est, si filii post dotem progeniti et anterioribus liberis adiutorium adferant, ipsum puerum vel puellam sibi opitulari non posse.

thanks to whom they attained both the status and the condition of legitimate children? 2. For it is not likely that he, who afterwards has put into writing either a (prenuptial) gift or a dowry, did not also from the beginning possess such an affection regarding the woman which rendered her worthy of the status of wife.

3. For this reason We lay down in cases of this kind that all children, whether they are born before the drawing up of dowry documents or afterwards, shall be weighed in one and the same scale, and that all shall rank as *sui heredes* and stand in the power (*potestas*) of their fathers, so that no distinction be drawn between older and younger, but those who are born to the same parents shall enjoy a like fortune.

Given September 17, at Chalcedon, in the consulship of the vir clarissimus Decius (529).

[11]¹⁸³ The same Augustus to Julian, Praetorian Prefect. pr. Recently We put into writing a law (*lex*), in which We ordained that, if anyone enters into a union with a woman whom he had the right to marry (*conubium*) without the intent to marry at the beginning, and he has children with her, but afterwards, as the intent to marry develops, he even draws up marriage documents with her, and has sons and/or daughters, not only shall the children born after the constitution of the dowry be legitimate and in the power (*potestas*) of their fathers, but also the children born beforehand, who provided the opportunity of legitimate status for those born later.

1. Certain persons have thought to interpret this law in such a way that, if there were no children born after the dowry was put into writing or if they died, the prior ones should not be considered legitimate, unless it were shown that there were children from both periods surviving. 2. We ordain that their useless cleverness must be entirely checked. For it shall suffice that he had an intention of such a kind that, after the birth of children, they drew up the dowry documents and entertained the hope of raising (more) children. 3. For, although this hope is not realized, this chance circumstance shall not be allowed to take anything away from the prior children. This is all the more true if someone makes pregnant a woman whom he had as a concubine and, while the woman is still pregnant, he draws up dowry documents and a boy or girl is born. The offspring shall be born as the legitimate child of the father, shall stand in his power (*potestas*), and shall qualify as his heir either under a will or on intestacy when he dies. For it is fairly absurd that, if children born after the constitution of the dowry benefit the prior children, this very boy or girl cannot benefit him- or herself.

¹⁸³ Pr. = (with changes) Inst. 3.1.2a; combine with C. 5.29.4; 5.35.3. This constitution refers to the previous one.

4. Et generaliter definimus et, quod super huiusmodi casibus variabatur, definitione certa concludimus, ut semper in huiusmodi quaestionibus, in quibus de statu liberorum est dubitatio, non conceptionis, sed partus tempus inspiciatur: et hoc favore facimus liberorum. et editionis tempus statuimus esse inspectandum exceptis his tantummodo casibus, in quibus conceptionem magis approbari infantium condicionis utilitas expostulat.

D. xv k. April. Constantinopoli Lampadio et Oresta vv. cc. cons.

[12] *Idem A. Iohanni pp. pr.* Cuidam, qui iustum filium habebat, nepos accessit naturalis: si nepotis nomen huiusmodi suboli legibus accommodandum est, quaerebatur. volebat enim tali naturali nepoti ex suo legitimo filio iam defuncto progenito totam suam substantiam relinquere, quasi sacris constitutionibus tantummodo in filiis naturalibus prohibentibus totum patrimonium sive quantam partem voluerit eis relinquere et certo fini partes eorum concludentibus. 1. Huiusmodi autem dubitatio et in alia specie ventilata est. quid enim, si ex naturali filio nepotem habet avus legitimum patri suo vel naturalem?

2. In omnibus itaque talibus dubitationibus cum nulla legitima consequentia in huiusmodi personis custoditur, sed interventu subolis naturalis nihil ius legitimum subesse potest, ut necessitas relinquendi aliquid eis ex legibus immineat, liceat eis quantum voluerint suae substantiae in eos conferre, scilicet nulla legitima subole subsistente. 3. Filiis enim naturalibus relinqui constitutiones quantum voluerint ideo prohibuerunt, quia vitium paternum frenandum esse existimaverunt. in nepotibus autem non eadem observatio in praefatis speciebus custodienda est, ubi legitima minime suboles facit impedimentum. ea enim subsistente veterum constitutionum tenorem in naturalibus filiis statutum et in nepotes extendimus. 4. Sed haec in his tantummodo sancimus, in quibus voluntate aliquid consecuti sunt. iura etenim ab intestato in avi successionem nemini eorum penitus aperimus. 5. Et haec non solum eis accedere censemus a substantia avi paterni naturalis, sed etiam proavi vel eius cognationis, si quid saltem huiusmodi vocabuli in tam degeneres homines extendere maluerint.

D. k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

4. We both make precise in general terms and round off with a fixed rule (*definitio*) what was presenting itself in a variety of ways in this sort of matter, that always in cases of this kind, where there is doubt about the status of children, the time, not of conception, but of birth, shall be looked at. And this We do to benefit children.¹⁸⁴ And (so) We lay down that the time of birth is to be looked into, with the sole exception of those instances in which benefiting the children's status demands that the time of conception be emphasized.

Given March 18, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[12] *The same Augustus to John, Praetorian Prefect. pr.* A certain man with a legitimate son had a "natural" (i.e., illegitimate) grandson. The question was put as to whether, under the laws, the status of (legitimate) grandson ought to be granted to this kind of progeny. For he wished to bequeath all of his property to this natural grandson born of that legitimate son, who was now dead, on the ground that the imperial constitutions that prohibited bequeathing an entire estate or as much as one wished to bequeath of it, and limited the bequest to a fixed share, only applied to natural children (i.e., and not natural grandchildren).

1. A doubt of this kind however arose also in another case. What if a grandfather has a legitimate or natural grandson by a son who is himself natural?

2. Therefore in all such doubtful cases, when there is no legitimate progeny to safeguard with regard to such persons and the presence of natural offspring cannot prejudice the rights of the legitimate, so that the necessity of bequeathing something to (the latter) pursuant to the laws looms, they shall be permitted to bequeath as much of their property to (the former) as they wish, clearly, (only) when there is no legitimate progeny surviving. 3. For the constitutions prohibited leaving to natural children as much as one desired for this reason, because they thought that paternal misbehavior should be reined in. In the case of grandchildren, however, the same rule does not have to be observed in the aforesaid circumstances, where no legitimate offspring presents an obstacle. For if there is surviving legitimate progeny We apply the content set forth in the ancient *constitutiones* regarding natural children also to the case of grandchildren. 4. But We enact these rules only in the case where they have obtained something through a will. For We do not open at all to any of them the right to succeed to a grandfather on intestacy. 5. And We lay down that these benefits shall accrue to them from the estate not only of a paternal natural grandfather, but also of a great-grandfather or of his cognate relative, if they wish to apply any term even of this kind to such immoral persons.

Given November 1, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

¹⁸⁴ The phrase *favor liberorum* suggests a policy inclination to benefit children. Compare similar phrases such as *favor libertatis*, *favor matrimonii*, *favor dotis*.

XXVIII De Tutela Testamentaria

[1] *Impp. Severus et Antoninus AA. Speratae.* Quem dicis tibi tutorem testamento patronae datum, si administrationi se non miscuit, nulla actione tibi tenetur: neque enim iure datus tutor fuit. quod si administravit sponte res tuas, experiri adversus eum actione negotiorum gestorum potes.

PP. xvii k. Aug. Apro et Maximo cons.

[2] *Imp. Antoninus A. Sabiniano.* Etsi a patre tuo testamento iure tutor tibi datus eo tempore, quo heres extitisti, in rebus humanis fuit, tamen codicillis alius tutor recte datus est et uterque propter voluntatem testatoris tutor erit, nisi testamento datum pater alium codicillis dando reprobaverit: tunc enim posterior solus tutor erit.

PP. id. April. duobus Aspris cons.

[3] *Imp. Alexander A. Gorgiae.* Si tutores testamento vobis dati sunt, quamquam unus vestrum suae aetatis factus sit, id est pupillarem aetatem excesserit, tutela tamen vestra ad eum non pertinet.

PP. v k. Ian. Maximo II et Aeliano cons.

[4] *Idem A. Feliciano.* Mater testamento filiis tutores dare non potest, nisi eos heredes instituerit. quando autem eos heredes non instituerit, solet ex voluntate defunctae datus tutor a praesidibus confirmari. nullo vero ex his interveniente si res pupillares qui dati sunt administraverint, protutela actione tenentur.

PP. vii k. Iun. Iuliano et Crispino cons.

[5] *Impp. Valerianus et Gallienus AA. Daphno.* Si pupillorum pater alienum servum, de quo postulas, et tutorem esse voluit et liberum, ante tamen tutore alio pupillis dato, redimi et manumitti hunc apud praesidem et curatorem adiungi oportet.

PP. III k. Mart. Saeculare II et Donato cons.

Twenty-Eighth Title Tutelage Granted under a Will¹⁸⁵

[1] *Emperors SEVERUS and ANTONINUS Augusti to Sperata.* If the man you claim was given to you as a *tutor* in your female patron's will did not involve himself in the management of your affairs, he is not liable to you on an action (on tutelage), since he was not lawfully given as a *tutor*. But if he took up managing your property of his own accord, you can sue him with an action on the management of affairs (*negotia gesta*).

Posted July 16, in the consulship of Aper and Maximus (207).

[2] *Emperor ANTONINUS Augustus to Sabinianus.* Although the *tutor* who was given lawfully to you by your father in his will was still alive at the time you became heir, another *tutor* was nevertheless properly appointed in codicils. Both will be *tutores* in accordance with the wishes of the will-maker, unless your father in appointing the second one in the codicils released the one appointed in the will, for in that case only the second one will be *tutor*.

Posted April 13, in the consulship of the two Aspri (212).

[3] *Emperor ALEXANDER Augustus to Gorgias.* If *tutores* were given to you in a will although one of you had already reached adulthood, tutelage does not apply in his case.

Posted December 28, in the consulship of Maximus, for the second time, and Aelianus (223).

[4] *The same Augustus to Felicianus.* A mother cannot give her children *tutores* in her will unless she makes them her heirs. When, however, she does not make them heirs, it is customary for provincial governors to confirm the *tutor* named in the will of the decedent. But if this does not happen and those who are given (nonetheless) manage the affairs of the ward, they are liable in an action on quasi-tutelage (*actio protutela*).

Posted May 26, in the consulship of Julian and Crispinus (224).

[5]¹⁸⁶ *Emperors VALERIAN and GALLIENUS Augusti to Daphnus.* If a father of minor children wished that someone else's slave, about whom you are making a claim, be free and the *tutor* of these children, and, nevertheless, another person has been given as a *tutor* to them beforehand, the slave ought to be purchased and manumitted before the provincial governor and added as a *curator*.

Posted February 28, in the consulship of Saecularis, for the second time, and Donatus (260).

¹⁸⁵ See D. 26.2; Inst. 1.14.

¹⁸⁶ Combine with C. 7.4.10.

[6] *Imp. Diocletianus et Maximianus AA. et CC. Domnae.* Si tibi pater avunculum testamento recte tutorem dedit nec is excusatus est, eum tutelae iudicio tam administratis quam neglectis, cum administrari deberent, apud competentem iudicem conveni secundum bonam fidem tibi satisfacere iussurum.

S. non. April. Sirni CC. cons.

[7] *Idem AA. et CC. Tryphaenae.* Tutelae contra tutorem mota, quem testamento patris (si in eius fuisti potestate) datum proponis, reddi tibi si quid debetur competens iudex aditus iubebit. curatorem enim inutiliter in testamento dari non ambigitur.

D. xvii k. Mai. Sirni CC. cons.

[8] *Imp. Theodosius et Valentinianus AA. Florentio pp.* Tutores etiam Graecis verbis licet in testamentis relinquere, ut ita tutores dari videantur, ac si legitimis verbis eos testator dedisset.

D. prid. id. Sept. Constantinopoli Theodosio A. xvii et Festo cons.

XXVIII De Confirmando Tutore

[1] *Imp. Alexander A. Prisco.* Testamento matris tutores dati excusare necesse non habent, nisi decreto secundum voluntatem defunctae, et quidem inquisitione habita, dati fuerint.

PP. iiii non. Mart. Iuliano et Crispino cons.

[2] *Idem A. Valerio.* Neque per epistulam neque ex imperfecto testamento tutorem recte dari indubitati iuris est. sed voluntas patris in constituendis tutoribus vel curatoribus in huiusmodi casibus a iudice, ad cuius officium haec res pertinet, servari solet. secundum quae vereri non debes, ne tempus, antequam confirmareris, cesserit.

PP. viii id. Aug. Alexandro A. ii et Marcello cons.

[6] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Domna.* If your father properly gave you your maternal uncle as a *tutor* in his will, and he has not been excused, sue him in an action on tutelage for affairs that have been either managed or neglected – since they should have been managed – before the appropriate judge, who will order him to make you whole according to the standard of good faith (*bona fides*).

Written April 5, at Sirmium, in the consulship of the Caesars (294).

[7] *The same Augusti and Caesars to Tryphaena.* If you raise an action on tutelage against the *tutor* you allege was appointed in your father's will – provided you were in his power (*potestas*) – the appropriate judge, once approached, will order whatever is owed to you to be paid. There is no doubt that a *curator* cannot be appointed in a will.

Given April 15, at Sirmium, in the consulship of the Caesars (294).

[8]¹⁸⁷ *Emperors THEODOSIUS and VALENTINIAN Augusti to Florentius, Praetorian Prefect.* It is permitted to appoint *tutores* in a will even using Greek, so that *tutores* are deemed to have been appointed, as though the testator had used the statutory language (i.e., Latin).

Given September 12, at Constantinople, in the consulship of Theodosius Augustus, for the seventeenth time, and Festus (439).

Twenty-Ninth Title Confirming a Tutor¹⁸⁸

[1] *Emperor ALEXANDER Augustus to Priscus.* *Tutores* appointed in a mother's will do not need to be excused (from acting) unless they were (subsequently) appointed by a judicial decree confirming this provision in the decedent's will, following, certainly, an enquiry into the facts.

Posted March 5, in the consulship of Julian and Crispinus (224).

[2] *The same Augustus to Valerius.* It is undoubted law (*indubitatum ius*) that a *tutor* cannot be properly appointed by a letter or by an invalid will. But in cases of this kind the wishes of a father in appointing *tutores* and *curatores* are customarily safeguarded by the judge responsible for these matters. Accordingly, you need not fear that time has run out before your confirmation.

Posted August 6, in the consulship of Alexander Augustus, for the second time, and Marcellus (226).

¹⁸⁷ = (with changes) Nov. Theod. 16.1.8. Combine with C. 6.23.21, 7.2.14.

¹⁸⁸ See D. 26.3. In this and following titles, the compilers tend to equate *tutores* and *curatores*.

[3] *Idem A. Sosiano*. Si, ut proponis, pupillo cuius meministi pater inutiliter testamento tutores dedit et, priusquam ii confirmarentur, alii ab eo cuius interest²¹ dati sunt, id quidem, quod iure gestum est, revocari non potest: an autem qui iudicium patris habent curatores eidem pupillo constitui debeant, aditus competens iudex perspectis utilitatibus eius aestimabit.

PP. III id. April. Modesto et Probo cons.

[4] *Imp. Iustinianus A. Iuliano pp.* Naturalibus liberis providentes damus licentiam patribus eorum in his rebus, quas quocumque modo eis dederint vel dereliquerint, scilicet intra praefinitum nostris legibus modum, etiam tutorem eis relinquere, qui debet apud competentem iudicem se confirmare et ita res gerere pupillares.

D. xv k. April. Constantinopoli Lampadio et Oresta cons.

XXX De Legitima Tutela

[1] *Impp. Diocletianus et Maximianus AA. Firminae*. Ad avunculos nec masculorum tutelae ex lege duodecim tabularum deferuntur, cum solum patruis, si non excusaverint, id ius tributum sit.

PP. VIII k. Iun. ipsis AA. IIII et III cons.

[2] *Idem AA. et CC. Asclepiodoto*. Ad agnatos pupilli iure legitimo sollicitudinem tutelae pertinere, nisi capitis deminutionem sustinuerunt, manifestissimum est.

S. III non. April. AA. cons.

[3] *Imp. Leo A. Erythrio pp.* Constitutione divae memoriae Constantini lege Claudia sublata, pro antiqui iuris auctoritate salvo manente

²¹ iurisdictio est

[3] *The same Augustus to Sosianus.* If, as you allege, a father, without legal effect, appointed *tutores* in his will for the minor child whom you mention, and, before these were confirmed, others were appointed by the official with jurisdiction in the matter, that which was done according to the law cannot, certainly, be rescinded. Whether, however, those who enjoyed the confidence of the father ought to be appointed as *curatores* to the same minor ward, the appropriate judge, once approached, will determine with an eye to the child's best interest (*utilitates*).

Posted April 11, in the consulship of Modestus and Probus (228).

[4]¹⁸⁹ *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect.* In looking out for the interests of "natural" (illegitimate) children, We grant permission to their fathers also to appoint a *tutor* for them (in their will) regarding that property which in any way at all they give or bequeath to them, clearly within the limits already set forth in Our laws. The *tutor* ought to be confirmed by the appropriate judge and then manage the property of the minor ward.

Given March 18, at Constantinople, in the consulship of Lampadius and Orestes (530).

Thirtieth Title Statutory Tutelage¹⁹⁰

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Firmina.* Under the Twelve Tables tutelage of males is not granted to maternal uncles, since this privilege is conceded only to paternal uncles, unless they are excused.

Posted May 25, in the consulship of the Augusti, for the fourth and the third time, respectively (290).

[2]¹⁹¹ *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Asclepiodotus.* It is very clear that the responsibility for tutelage of a minor ward accrues to his or her agnates according to a privilege granted by statute (the Twelve Tables), unless they have undergone a change in legal status (i.e., emancipation).

Written April 3, in the consulship of the Augusti (293).

[3]¹⁹² *Emperor LEO Augustus to Erythrius, Praetorian Prefect.* Under the constitution enacted by Constantine of blessed memory abolishing the Lex Claudia,¹⁹³

¹⁸⁹ Combine with C. 5.27.11, 5.35.3.

¹⁹⁰ See D. 26.4; Inst. 1.15, 17–18. In the context of tutelage, *legitimus vel sim.* consistently refers to the Twelve Tables (5.6) as modified by subsequent statutes.

¹⁹¹ Combine with C. 5.31.9.

¹⁹² Combine with C. 1.4.16, 1.18.13, 5.1.5, 5.6.8.

agnationis iure tam consanguineus (id est frater) quam patruus ceterique legitimi ad pupillarum feminarum tutelam vocantur.

D. k. Iul. Marciano cons.

[4] *Imp. Anastasius A. Polycarpo pp.* Frater emancipatus, qui in germani sui vel sororis successionem omnes inferiores seu prolixiores gradus non tantum cognatorum, sed etiam agnatorum antecedere a nobis pro nostra dispositione iussus est, etiam ad legitimam fratrum et sororum nec non liberorum fratrum tutelam, quasi minime patris potestate per ius emancipationis relaxatus, si non alia iuri cognita excusatione munitus sit, vocari nec sub praetextu capitis deminutionis alienum huiusmodi onere semet contendere sancimus.

D. k. April. Iohanne et Paulino cons.

[5] *Imp. Iustinianus A. Demostheni pp. pr.* Nemo neque frater neque alius legitimus in tutelam sive ingenui sive liberti vocetur, antequam quintum et vicesimum annum suae aetatis impleat, immineat enim ei pro sua tantummodo administratione periculum nec alieno onere alius praegravetur. 1. Sic etenim et pupillis et adultis competens gubernatio inducitur et naturalis ordo per omnia conservabitur. cui^{xii} enim ferendum est eundem esse tutorem et sub tutela constitui, et iterum eundem curatorem et sub cura agere? haec certe et nominum et rerum foeda confusio est.

2. Discretis itaque omnibus vel dativi vel legitimi fiant tutores vel curatores ii, qui talis aetatis sunt, cui suarum rerum administratio committitur, quorumque res possunt plenissimo iure hypothecarum teneri. 3. Omnibus, quae de successionibus tam ingenuorum quam libertorum prioribus legibus disposita sunt, in suo robore duraturis nec aliquam

^{xii} qui

the rights of agnates were restored as in the ancient law (*ius antiquum*), meaning that, for the tutelage of female minor wards, siblings with the same father – that is, a brother – are as eligible as paternal uncles and the rest recognized by statute (*legitimi*).

Given July 1, in the consulship of Marcian (472).¹⁹⁴

[4] Emperor ANASTASIUS Augustus to Polycarpus, Praetorian Prefect. We ordained in a prior statute (*dispositio*)¹⁹⁵ that, with regard to succeeding to a full brother or sister, an emancipated brother shall take precedence over all persons of lesser or more distant degrees of relationship, not only cognates but also agnates. We (now) lay down that he shall also be eligible under the statutory regime for the tutelage of his brothers and his sisters, as well as of his brother's children, as though he had not at all been freed from paternal power (*potestas*) through the procedure of emancipation unless he is protected by some other legally recognized excuse; nor shall he assert that he is free from such a burden under the pretext of his change in status.

Given April 1, in the consulship of John and Paulinus (498).

[5] Emperor JUSTINIAN Augustus to Demosthenes, Praetorian Prefect. *pr.* No one, not a brother nor any person statutorily charged (*legitimus*), shall be eligible for the tutelage of a free-born or freed-person before completing 25 years of age. So he shall bear liability only in connection with the management of his own property and shall not be weighed down by someone else's burden. 1. For in this way sound management is introduced for the property of both minor and adult wards, and the natural order will be preserved in all things. For how is it tolerable that the same person is both a *tutor* and placed under tutelage, or again is both a *curator* and placed under curatorship? Such phenomena are at minimum an ugly confusion of names and things.

2. Therefore, with all proper distinctions having been drawn, those persons shall become *tutores* or *curatores*, whether appointed (in a will or by an official) or qualifying under statute (*legitimi*), who are old enough to have the management of their own property granted to them and whose property can be liable to an unrestricted lien (*hypothec*). 3. All dispositions made by prior laws regarding the succession to the estates both of free-born and of freed-persons shall remain (fully) valid and not suffer any derogation through the rules (*sanctio*) of this instant statute (*lex*), especially concerning the succession

¹⁹³ C.Th. 3.17.2. The *lex Claudia*, passed in the reign of the Emperor Claudius, abolished the agnatic tutelage over women.

¹⁹⁴ The precise year is uncertain: 472 or 469. Seeck accepts Krüger's date.

¹⁹⁵ This does not survive. See under C. 6.57.15.1.

imminutionem ex praesentis legis sanctione accepturis maxime in libertorum successione ne videantur ex eo, quod ad tutelae gravamen non veniunt, successionis emolumentum amittere.

Recitata septimo in novo consistorio palatii Iustiniani. d. III k. Nov. Decio vc. cons.

XXXI Qui Petant Tutores vel Curatores

[1] *Imp. Antoninus A. Chrysanthae.* Admone adulescentem, adversus quem consistere vis, ut curatores sibi dari postulet, cum quibus secundum iuris formam consistas. qui si in petendis his cessabit, potes tu competentem iudicem adire, ut in dandis curatoribus officio suo fungatur.

PP. II non. Febr. Messala et Sabino cons.

[2] *Idem A. Epaphrodito.* Patroni tui filii si eius aetatis sunt, ut res eorum per tutores administrari debeant, cura adire praetorem et nomina edere, ex quibus tutores constituantur, ne, si cessaveris, obsequii deserti periculum subeas.

PP. III non. Iul. Messala et Sabino cons.

[3] *Idem A. Atalantae.* In locum tutoris defuncti vel in perpetuum delegati alium dari tutorem filiis tuis idoneum ex eadem provincia ab iudice competente postula, qui secundum officium suum utilitatibus eorum providebit.

PP. III id. Iul. Laeto II et Cereale cons.

[4] *Idem A. Domnino.* Si filiis debitoris tui non sunt necessarii, qui tutores petant, potes ipse curare, ut accipiant, per quos legitime defendantur.

PP. III id. Iul. Laeto II et Cereale cons.

[5] *Imp. Alexander A. Fuscianae.* Amita tutores petere filiis fratris sui non prohibetur.

to the estates of freed-persons, so that they (i.e., the young) are not deemed to lose the benefits of succession because they are not eligible for the burden of tutelage.

Recited seven times in the New Consistory of Justinian's Palace. Given October 30, in the consulship of the vir clarissimus Decius (529).

Thirty-First Title Those Seeking to Have *Tutores* or *Curatores*¹⁹⁶

[1] *Emperor ANTONINUS Augustus to Chrysanthia.* Admonish the young adult (*adulescens*), against whom you wish to bring a lawsuit, to apply for *curatores* to be appointed for him, so that you may proceed with them according to the rules of law (*ius formae*). If he fails to apply for them, you can approach the appropriate judge to fulfill his responsibility by appointing *curatores*.

Posted February 4, in the consulship of Messala and Sabinus (214).

[2] *The same Augustus to Epaphroditus.* If the children of your patron are of an age such that their property ought to be managed through *tutores*, take care to approach the Praetor and produce names (of persons) from among whom *tutores* can be appointed, in order that you avoid liability for neglect of a required duty if you fail to do so.

Posted July 5, in the consulship of Messala and Sabinus (214).

[3] *The same Augustus to Atalanta.* In place of a tutor who is deceased or permanently relegated (exiled), apply to the appropriate judge for another tutor for your children who is suitably wealthy and from the same province. He (the judge) will, in fulfillment of his duty, provide for their interests (*utilitates*).

Posted July 12, in the consulship of Laetus, for the second time, and Cerealis (215).

[4] *The same Augustus to Domninus.* If no close relatives of the children of your (now deceased) debtor are available to apply for *tutores*, you yourself can see to it that they receive ones through whom they are defended according to the rules of law.

Posted July 13,¹⁹⁷ in the consulship of Laetus, for the second time, and Cerealis (215).

[5] *Emperor ALEXANDER Augustus to Fusclana.* A paternal aunt is not forbidden to apply for *tutores* for her brother's children.

¹⁹⁶ See D. 26.6.

¹⁹⁷ The precise day is uncertain: the alternative is July 12.

PP. v k. Iul. Maximo II et Aeliano cons.

[6] *Idem A. Otaciliae.* Matris pietas instruere te potest, quos tutores filio tuo petere debes, sed et observare, ne quid secus quam oportet in re filii pupilli agatur. petendi autem filiis curatores necessitas matribus imposita non est, cum puberes minores anno vicesimo quinto ipsi sibi curatores, si res eorum exigit, petere debeant.

PP. x k. Oct. Iuliano et Crispino cons.

[7] *Imp. Gordianus A. Dionysio.* Admone eam, quae quondam pupilla tua fuit, cum eam non tantum viri potentem, sed etiam nupsisse proponas, ut sibi petat curatorem. quod si ea petere neglexerit, quo maturius possis rationes reddere administrationis, adito eo cuius super ea re notio est petere curatorem non vetaris.

PP. vi id. Ian. Gordiano A. et Aviola cons.

[8] *Impp. Diocletianus et Maximianus AA. Musico.* Cum a matribus sedulum petendi tutoris officium exigatur, non fortuiti casus impedi-
mentis adscribantur, proponasque procuratorem, qui ad petendum pupillo tutorem a matre fuerat constitutus, a latronibus interfectum petitionem^{xii} ex necessitate demoratam esse, ab hereditatis successione matrem repelli, cuius nullum vitium intercessisse adseris, perquam durum est.

PP. v id. Mart. Tiberiano et Dione cons.

[9] *Idem AA. et CC. Asclepiodoto.* Cum iure habenti tutorem tutor dari non possit, intellegis matrem non officium pietatis in petendo tutore deseruisse, sed iure munitam merito filio suo tutorem non postulare.

S. III non. April. Byzantii AA. cons.

[10] *Idem AA. et CC. Prisco.* Nepotibus fratris tui, si eorum mater in petendis tutoribus debito non fungatur officio, petere tutores sollemniter potes.

S. prid. k. Mai. Sirmi CC. cons.

^{xii} petitionemque

Posted June 27, in the consulship of Maximus, for the second time, and Aelianus (223).

[6]¹⁹⁸ *The same Augustus to Otacilia.* The familial affection (*pietas*) of a mother can instruct you as to which *tutores* you ought to seek for your son, but also ensure that nothing untoward is done regarding the property of your son, a minor ward. Moreover, the necessity of applying for *curatores* for their children is not imposed on mothers, since those who are past the age of adulthood (i.e., c. 14 for males and 12 for females) but younger than 25 ought to seek *curatores* for themselves, if their situation demands it.

Posted September 22, in the consulship of Julian and Crispinus (224).

[7] *Emperor GORDIAN Augustus to Dionysius.* Admonish the woman who used to be your minor ward, since you assert that she is not only of marriageable age, but in fact married, to apply for a *curator* for herself. But if she neglects to seek one, in order that you may more quickly give a final account of your management, you are not forbidden from approaching the official with jurisdiction in this matter and applying for a *curator* (for her).

Posted January 8, in the consulship of Gordian Augustus and Aviola (239).

[8] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Musicus.* Although energetic exercise of the responsibility of seeking a *tutor* is required of mothers, random events shall not be counted against them. You allege that a procurator, who was chosen by a mother to apply for a *tutor* for her son, a minor ward, had been murdered by robbers, and the application (for a *tutor*) has been of necessity delayed; but it is very harsh to deny rights to the inheritance to a mother whom you assert to be without blame.

Posted March 11, in the consulship of Tiberianus and Dio (291).

[9]¹⁹⁹ *The same Augusti and the Caesars to Asclepiodotus.* Since a *tutor* cannot be given to someone who lawfully has a *tutor*, you understand that the mother has not neglected the duty imposed upon her by familial affection (*pietas*) in seeking a *tutor*, but that, fortified by legal principle, she rightly does not apply for a *tutor* for her son.

Written April 3, at Byzantium, in the consulship of the Augusti (293).

[10] *The same Augusti and Caesars to Priscus.* If the mother of your brother's grandsons does not discharge the duty she owes in seeking *tutores* for them, you can make formal application for *tutores*.

Written April 30, at Sirnium, in the consulship of the Caesars (294).

¹⁹⁸ Combine with C. 5.35.1.

¹⁹⁹ Combine with C. 5.30.2.

[11] *Imp. Zeno A. Dioscoro pp.* Matres naturalibus etiam filiis ad similitudinem eorum, qui ex iustis ac legitimis nuptiis sunt procreati, petendorum tutorum necessitati subiaceant, nulla eis ignorantia iuris ad evitanda legibus vel sacris constitutionibus definita, si petitionem tutorum minus curaverint, profutura.

D. k. Sept. Constantinopoli Zenone A. II cons.

XXXII Ubi Petantur Tutores vel Curatores

[1] *Imp. Antoninus A. Aristobulae.* Magistratus eius civitatis, unde filii tui originem per condicionem patris ducunt vel ubi eorum sunt facultates, tutores vel curatores his quam primum secundum formam perpetuam dare curabunt, quod si filii tui neque possident quicquam in provincia, ubi morantur, neque inde originem ducunt, restituti apud patriam suam et ubi patrimonium habent morabuntur, ut ibi defensores legitimos sortiantur.

PP. k. Oct. Laeto II et Cereale cons.

XXXIII De Tutoribus et Curatoribus Illustrum vel Clarissimarum Personarum

[1] *Imppp. Valentinianus Theodosius et Arcadius AAA. Proculo pu. pr.* Illustris praefectus urbis adhibitis decem viris e numero senatus amplissimi et praetore clarissimo viro, qui tutelaribus cognitionibus praesidet, tutores curatoresve ex quolibet ordine idoneos faciat retentari, et sane id libero iudicio expertesque damni constituent iudicantes. 1. Et si regendis pupillaribus substantiis singuli creandorum pares esse non possunt, plures ad hoc secundum leges veteres conveniet advocari, ut, quem coetus ille administrandis negotiis pupillorum dignissimum iudicabit,

[11] *Emperor ZENO Augustus to Dioscorus, Praetorian Prefect.* Mothers shall be subject to an obligation to seek *tutores* also for their "natural" (illegitimate) children, on the analogy of those who are born in proper and legitimate marriages, and no ignorance of the law (*ius*) shall avail them in evading what is prescribed in the laws (*leges*) and imperial constitutions if they fail to make an application for *tutores*.

Given September 1,²⁰⁰ at Constantinople, in the consulship of Zeno Augustus, for the second time (479).

Thirty-Second Title Where Application Is Made for *Tutores* and *Curatores*²⁰¹

[1] *Emperor ANTONINUS Augustus to Aristobula.* The public officials of the town from which your children trace their origin because of their father's status, or where they have their sources of income, will see to appointing *tutores* or *curatores* for them as soon as possible according to the rules set forth in the Perpetual Edict (*forma perpetua*). But if your children neither possess any property in their province of residence, nor trace their origin from that place, they will be restored to their hometown and where they own property and will reside there, so that they there obtain legally recognized protectors.

Posted October 1, in the consulship of Laetus, for the second time, and Cerealis (215).

Thirty-Third Title *Tutores* and *Curatores* of Persons with the Rank of *Illustris* or *Clarissimus*

[1]²⁰² *Emperors VALENTINIAN, THEODOSIUS, and ARCADIUS Augusti to Proculus, City Prefect. pr.* The *vir illustris* City Prefect shall summon ten men from the ranks of the most distinguished Senate as well as the *vir clarissimus* Praetor who presides over cases involving tutelage, and shall see to it that suitable *tutores* and *curatores* are secured without regard to rank (*ordo*). Of course, they will make decisions of their own accord, free from liability. 1. If individual candidates are not equal to the task of managing a ward's property, it will be appropriate, according to the ancient laws, that several persons be appointed to this end, so that the one whom the above committee (*coetus*) will deem most

²⁰⁰ Lounghis *et al.* date to February 1, 475.

²⁰¹ See D. 26.6.

²⁰² = (with changes) C.Th. 3.17.3 (omitting §5).

sola sententia obtineat praefecturae, super cuius nomine, sollemnitate servata, postea per praetorem interponatur decretum. 2. Itaque hoc modo remoti a metu qui consilio adfuerint permanebunt et parvulis adultisque clarissimis iusta defensio sub hac prudentium deliberatione perveniet.

3. Quod tamen circa eorum personas censuisse nos palam est, quibus neque testamentarii defensores neque legitimi vita aetate facultatibus suppetunt. nam ubi forte huiusmodi homines offeruntur, si nihil ad defensionem suis privilegiis comparabunt, ut teneri possint, iure praescribimus. 4. Ceterum alia, quae in causis minorum antiquis legibus cauta sunt, manere intemerata decernimus.

5. In provinciis autem curiales in nominandis tutoribus et curatoribus clarissimarum personarum exhibeant debitam cautionem, et discriminis sui memores cognoscant indemnitati minorum obnoxias etiam suas deinceps esse facultates.

D. III k. Ian. Mediolani Timasio et Promoto cons.

[2] *Imppp. Valentinianus Theodosius et Arcadius AAA. Aurelio pu.* Generali lege prospectum est, ne qui ad illustrium senatorum tutelam curialibus occupati necessitatibus vocarentur.

D. VIII k. Aug. Theodosio A. III et Abundantio cons.

XXXIII Qui Dare Tutores vel Curatores et Qui Dari Possunt

[1] *Imp. Alexander A. Ambibulo.* Cum tibi in ea aetate constituto, ut, si de statu constaret, per tutores sive curatores negotia tua administrari deberent, libertatis controversiam fieri adleges, non oportuit impediri,

capable of managing the ward's property shall hold this position solely through the decision of the Prefect, which nomination shall be confirmed, with due procedure being preserved, by a subsequent judicial decree of the Praetor. 2. Accordingly, those who participate in the work of the committee (*consilium*) will in this way remain free from fear (of liability for the acts of guardians) and an adequate protection of the interests of minor and adult wards with the rank of *clarissimus* will be afforded through the deliberations of men of learning.

3. It is clear, all the same, that We have made provision (only) concerning such persons as have no guardians (*defensores*) given under a will or provided according to statutory rules (and) who are of an appropriate lifestyle, age, and level of financial resources. For when men of this type happen to present themselves, We with justice direct that they be held to perform this duty if they obtain nothing by way of privileges to excuse them. 4. As for the rest, We ordain that the other things that have been laid down by the ancient laws concerning the situations of minor wards shall remain unchanged.

5. Moreover, town councilors (*curiales*) in the provinces shall furnish the guaranty (*cautio*) required in naming *tutores* and *curatores* for persons with the rank of *clarissimus* and, mindful of the risk to themselves, shall realize that henceforth their property too shall be liable to make good the losses incurred by minor wards.

Given December 30,²⁰³ at Mediolanum (Milan), in the consulship of Timasius and Promotus (389).

[2] Emperors VALENTINIAN, THEODOSIUS, and ARCADIUS Augusti to Aurelius, City Prefect. It has been laid down through general statute (*lex generalis*) that no one involved with the duties of a town councilor shall be eligible to act as tutor for senators with the rank of *illustris*.

Given July 25, in the consulship of Theodosius Augustus, for the third time, and Abundantius (393).

Thirty-Fourth Title Those Who Can Appoint, and Those Who Can Be Appointed As, *Tutores* and *Curatores*²⁰⁴

[1] Emperor ALEXANDER Augustus to Ambibulus. Although you are of an age such that, if your status were unambiguous, your affairs ought to be managed through *tutores* or *curatores*, and you declare that your status as a free person

²⁰³ The precise day is uncertain: an alternative is December 28, but Seeck prefers December 27, 389.

²⁰⁴ See D. 26.5.

quo magis liberali causa ordinata, quia interim pro libero habebaris, curator tibi daretur, per quem defendi causa tua potest.

PP. k. Nov. Alexandro A. cons.

[2] *Idem A. Artemisiae.* Maritus etsi rebus uxoris suae debeat adfectionem, tamen curator ei creari non potest.

PP. k. Iul. Fusco II et Dextro cons.

[3] *Imp. Philippus A. Dolenti.* Luminibus captum curatorem habere falso tibi persuasum est.

PP. XIII k. Aug. Peregrino et Aemiliano cons.

[4] *Idem A. Emerito militi.* Armatae militiae muneribus occupatus neque si legitimus sit neque si ex testamento datus fuerit nec alio modo, etsi voluerit, tutor aut curator fieri potest: sed si errore ductus res administraverit, negotiorum gestorum actione convenitur.

PP. X k. Aug. Peregrino et Aemiliano cons.

[5] *Imp. Diocletianus et Maximianus AA. et CC. Aetianae.* Neque a praeside alterius provinciae neque a magistratibus municipalibus tutorem ortum ex alia civitate nec domicilium ubi nominatur habentem iure dari posse ab eo, cuius iurisdictioni subiectus non est, certissimi iuris est: neque cessatio iniuncti perperam officii ad periculum eius pertinet.

S. XII k. Mai. AA. cons.

[6] *Idem AA. et CC. Leontio.* Quod dicis matrem filiis tutores nolle petere, super hac re adi praesidem provinciae, cum, si eam neglexisse perspexerit, etiam ipse magistratus dare tutores vel nomina mittere, ut ab ipso decreto tribui possint, iubere non prohibeatur.

PP. prid. k. Mai. AA. cons.

[7] *Idem AA. et CC. Rufo.* In servili condicione constitutum tutorem vel curatorem a praeside dari non posse nullam habet iuris dubitationem.

S. prid. non. Iul. Philippopoli AA. cons.

has been disputed, this ought not to have prevented a *curator* being appointed for you through whom your case can be defended, and all the more so since the judicial procedure over your status had begun and so in the meantime you were considered free.

Posted November 1, in the consulship of Alexander Augustus (222).

[2] *The same Augustus to Artemisia.* Even if a husband should show concern for his wife's property, he cannot be appointed as a *curator* for her.

Posted July 1, in the consulship of Fuscus, for the second time, and Dexter (225).

[3] *Emperor PHILIP Augustus to Dolens.* You have been wrongly persuaded that a sight-impaired person has a *curator* (appointed for him or her).

Posted July 20, in the consulship of Peregrinus and Aemilianus (244).

[4] *The same Augustus to Emeritus, a soldier.* A person employed in the duties of active military service cannot become a *tutor* or *curator*, whether appointed in a will, through statutory rules, or in any other way, even if he wishes this. But if he, induced by mistake, manages (a ward's) property, he can be sued on an action for management of affairs (*negotia gesta*).

Posted July 23, in the consulship of Peregrinus and Aemilianus (244).

[5] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Aeliana.* It is a very settled legal rule (*certissimum ius*) that a person who is a native of another town and who does not have his legal domicile where he is nominated cannot validly be appointed as a *tutor* by someone to whose jurisdiction he is not subject, whether by the governor of a different province or by the municipal officials (of a different town). He is not liable for failure to fulfill a duty wrongly imposed upon him.

Written April 20, in the consulship of the Augusti (293).

[6]²⁰⁵ *The same Augusti and Caesars to Leontius.* Since you say that a mother refuses to seek *tutores* for her children, approach the governor of the province about this matter. If he determines that she has neglected her duty, even he shall not be forbidden to order the municipal authorities to appoint *tutores* or to provide names from whom they can be appointed by his own judicial decree.

Posted April 30, in the consulship of the Augusti (293).

[7] *The same Augusti and Caesars to Rufus.* There is no doubt at law that a man of slave status cannot be appointed *tutor* or *curator* by a provincial governor.

Written July 6, at Philippopolis, in the consulship of the Augusti (293).

²⁰⁵ Combine, probably, with C. 5.71.12, addressed on the same day to Leontius.

[8] *Idem AA. et CC. Euelpisto.* Creditorem debitoribus tutorem datum non tantum petitionem non amittere, sed etiam ipsum sibi posse solvere non ambigitur.

PP. v^{xiv} non. Ian. CC. cons.

[9] *Idem AA. et CC. Maximiano.* Si sororis tuae filiis, tutore legitimo patruo constituto nec ullo excusato privilegio, tutor datus es, cum habenti tutorem alium dari prohibeant iura, necessitatem administrationis ad eum pertinere nec te datione teneri non ambigitur.

S. III k. Febr. Sirmi CC. cons.

[10] *Idem AA. et CC. Florentino.* Curatorem habenti neque adiungi nisi causa cognita nec in loco eius alium substitui non ante priore remoto ambigui iuris non est: teque adfuturum damni, quod medio tempore negotiis pupillaribus contigit, esse succedaneum, cum actorem periculo tuo constituere debueris, nec iure magistratum in absentiam tuam alium creasse certum est.

PP. III k. April. CC. cons.

[11] *Imp. Constantinus A. et Constantinus C. ad Bassum pu.* In universis litibus placet non prius puberem iustam habere personam, nisi interposito decreto aut administrandi patrimonii gratia aut in litem fuerit curator datus, ut iuxta praecedentia nostrae pietatis statuta legitime initiae litis agitata in iudiciis controversia finiatur.

D. IIII id. Oct. Aquileiae Constantino A. v et Licinio C. cons.

[12] *Imppp. Gratianus Valentinianus et Theodosius AAA. Eutropio pp.* Curator adulescenti ordinatus post inchoatam litem non potest

[8] *The same Augusti and Caesars to Euelpistus.* There is no doubt that a creditor appointed *tutor* for his debtors not only does not lose his claim, but can even pay himself.

Posted January 4, in the consulship of the Caesars (294).²⁰⁶

[9] *The same Augusti and Caesars to Maximianus.* If you have been appointed *tutor* to your sister's children after their paternal uncle had (previously) been made *tutor* according to statutory rules and has no legally recognized excuse, since the law (*iura*) forbids appointing a *tutor* for a person who already has one, there is no doubt that he has the obligation to manage their property and that you are not bound by your appointment.

Written January 30, at Sirmium, in the consulship of the Caesars (294).

[10] *The same Augusti and Caesars to Florentinus.* There is no doubt at law that a person who has a *curator* cannot be given another one without a judicial hearing or that a substitution cannot be made without removing the prior *curator*. So it is certain that you are going to be liable for loss that befell the minor ward's property in the period of your absence, since you ought to have appointed a representative at your own risk, nor (could) an official have legally appointed another while you were away.

Posted March 30, in the consulship of the Caesars (294).

[11]²⁰⁷ *Emperor CONSTANTINE Augustus and CONSTANTINE Caesar to Bassus, City Prefect.* It is decided that in all lawsuits a (young adult) person who has reached the age of legal majority shall not possess full legal capacity before a *curator* has been appointed through judicial decree, whether to manage the ward's property or to serve as his or her representative in court, so that, in addition to prior legislative manifestations of Our affection for Our subjects (*pietas*),²⁰⁸ a controversy debated in the courts over a lawfully initiated lawsuit may reach closure.

Given October 12, at Aquileia, in the consulship of Constantine Augustus, for the fifth time, and Licinius Caesar (319).²⁰⁹

[12] *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS Augusti to Eutropius, Praetorian Prefect.* Once a lawsuit has begun, a *curator* appointed for a young adult ward (*adulescens*) cannot, under the pretext of a special

²⁰⁶ Mommsen dates to January 3, 294.

²⁰⁷ = (with minor changes) C.Th. 3.17.1.

²⁰⁸ C.Th. 2.4.1.

²⁰⁹ The precise day is uncertain (an alternative is October 13, but Seeck gives October 2); the year is more likely to be 318: Proiet Volterra.

sub praetextu specialis curatoris a se nominati aut litem contestatam deserere aut ab administratione se subtrahere.

D. IIII k. Oct. Constantinopoli Eucherio et Syagrio cons.

[13] *Imp. Honorius et Theodosius AA. Monaxio pu.* Ne magistratum ulterius procedat licentia, plenius designamus, ne patrimonialem colonum sive alium, qui privilegio ab hac nuncupatione defenditur, tutelae muneris adstringat officium.

D. ... Honorio VIII et Theodosio III AA. cons.

XXXV Quando Mulier Tutelae Officio Fungi Potest

[1] *Imp. Alexander A. Otaciliae.* Tutelam administrare virile munus est, et ultra sexum femineae infirmitatis tale officium est.

PP. x k. Oct. Iuliano et Crispino cons.

[2] *Imppp. Valentinianus Theodosius et Arcadius AAA. Tatiano pp. pr.* Matres, quae amissis viris tutelam administrandorum negotiorum in liberos postulant, priusquam confirmatio officii talis in eas iure veniat, fateantur actis sacramento praestito ad alias se nuptias non venire. 1. Sane in optione huiusmodi nulla cogitur, sed libera in condiciones quas praestituimus voluntate descendat: nam si malunt alia optare matrimonia, tutelas filiorum administrare non debent. 2. Sed ne sit facilis in eas post tutelam iure susceptam inruptio, bona eius primitus, qui tutelam gerentis adfectaverit nuptias, in obligationem venire et teneri obnoxia rationibus parvulorum praecipimus, ne quid incuria, ne quid fraude depereat.

curator being named by himself, either abandon a lawsuit that is underway or withdraw himself from management of the ward's property.

Given September 28, at Constantinople, in the consulship of Eucherius and Syagrius (381).

[13] *Emperors HONORIUS and THEODOSIUS Augusti to Monaxius, City Prefect.* In order that the outrageous conduct of public officials proceed no further, We point out more clearly that the responsibility of taking up a tutelage shall not obligate a bound tenant of the Emperor (*patrimonialis colonus*) or anyone protected from such an appointment by a legally recognized excuse.

Given ... in the consulship of Honorius, for the eighth time, and Theodosius, for the third time, Augusti (409).²¹⁰

Thirty-Fifth Title When a Woman Can Discharge the Responsibility of Tutelage

[1]²¹¹ *Emperor ALEXANDER Augustus to Otacilia.* Managing a tutelage is a duty reserved for males (*munus virile*), such a responsibility being beyond (the capacity of) the gender of womanly weakness (*ultra sexum femineae infirmitatis*).²¹²

Posted September 22, in the consulship of Julian and Crispinus (324).

[2]²¹³ *Emperors VALENTINIAN, THEODOSIUS, and ARCADIUS Augusti to Tatianus, Praetorian Prefect. pr.* Mothers who, after losing their husbands, formally request tutelage in order to administer their children's property, before they receive ratification at law of such a responsibility, shall declare in the public records, upon offering an oath, that they will not remarry. 1. Of course, no woman is forced to make such a choice, but shall, of her own free will, agree to the conditions We have set forth. For if they prefer to remarry, they ought not to manage the tutelage of their children. 2. And so to prevent easy interference with such women after they lawfully undertake tutelage, We instruct that, from the first, the property of that man who aims at marriage with a woman managing (her children's) tutelage shall be encumbered and bound to cover (losses in) the accounts of the little ones so that nothing be lost through neglect or through fraud.

²¹⁰ A version of the constitution at C. 1.4.30 has perhaps dropped out here.

²¹¹ Compare with C. 5.31.6.

²¹² On "gender" as a translation here see the note at C. 5.3.20.

²¹³ = (with changes) C.Th. 3.17.4.

3. His illud adiungimus, ut mulier, si aetate maior est, tunc demum petendae tutelae ius habeat, cum tutor testamentarius vel legitimus defuerit vel privilegio a tutela excusetur vel suspecti genere submoveatur vel ne suis quidem per animi aut corporis valetudinem administrandis facultatibus idoneus inveniatur. 4. Quod si feminae tutelas refugerint et praeoptaverint nuptias, tunc demum vir illustris praefectus urbis adscito praetore, qui impertiendis tutoribus praesidet, sive iudices, qui in provinciis iura restituunt, de alio ordine per inquisitionem dari minoribus defensores iubebunt.

D. XII k. Febr. Mediolano Valentiniano A. IIII et Neoterio cons.

[3] *Imp. Iustinianus A. Iuliano pp. pr.* Si pater secundum nostram constitutionem naturalibus liberis in his rebus, quae ab eo in eos profectae sunt, tutorem non reliquerit, mater autem voluerit eorum, sive masculi sunt sive feminae, subire tutelam, ad exemplum legitimae subolis liceat ei hoc facere, quatenus actis sub competenti iudice intervenientibus iuramentum antea praestet, quod ad nuptias non perveniat, sed pudicitiam suam intactam conservet et renuntiet senatus consulti Velleiani praesidio omnique alio legitimo auxilio suamque substantiam supponat. 1. Et ita filiorum suorum vel filiarum naturalium tutricem eam existere sancimus: omnibus, quae pro matribus et liberis earum ex legitimo matrimonio progenitis divalibus constitutionibus cauta sunt, in huiusmodi matribus observandis. 2. Si enim in filiis iustis, in quibus et testamentariae et legitimae sunt tutelae, tamen matribus (his deficientibus) ad providentiam filiorum suorum venire conceditur, multo magis in huiusmodi casibus, ubi legitima tutela evanescit, saltem alias eis dari humanissimum est.

D. XV k. April. Constantinopoli Lampadio et Oreste vv. cc. cons.

3. To these rules We add that the woman, if she is of age (i.e., 25 or older), shall only then have the right to request the tutelage when no *tutor* has been named in a will or appointed according to statutory rules, or when one has been released from tutelage for a legally recognized excuse, has been removed because he falls into a class of suspect persons, or has been found to be inadequate, for reasons of mental or physical health, to manage even his own property. 4. But if women shun tutelage and prefer marriage instead, then in the end the *vir illustris* City Prefect, acting in concert with the Praetor who supervises the appointment of *tutores*, or the judges (at minimum, governors) who administer the laws in the provinces, will, after an investigation, order the appointment of guardians of another sort (*ordo*) for the minor wards in question.

Given January 21, at Milan, in the consulship of Valentinian Augustus, for the fourth time, and Neoterius (390).

[3]²⁴⁴ Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect. *pr.* If a father has not, in accordance with Our constitution,²⁴⁵ named a *tutor* for his "natural" (illegitimate) children regarding that property which they have obtained from him, but their mother wishes to undertake the tutelage, then, regardless of whether they are male or female, she shall be permitted to do this on the analogy of legitimate children, provided that she swears beforehand an oath for the public records before the appropriate judge, that she will not remarry, but preserve her chastity (*pudicitia*) intact, she renounces the protection of the SC *Vellaeorum* and every other legally recognized safeguard, and places a lien on her own property. 1. We ordain that she shall become in this way the female *tutor* (*tutrix*) of her natural sons and daughters. All provisions that have been set forth in imperial constitutions regarding mothers and their children born from lawful marriage shall apply to mothers of this kind. 2. For just as in the case of legitimate children, who have (in theory) a *tutor* named in a will or appointed according to the statutory rules, but, when these are unavailable, their mothers are permitted to intervene in order to look out for the interests of their own children, so it is much more consistent with a very high standard of humane sympathy (*humanissimum*) that in cases of this kind, where there is no prospect of tutelage according to the statutory rules, it is at least otherwise provided for them.

Given March 18, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

²⁴⁴ Combine with C. 5.27.11, 5.29.4.

²⁴⁵ C. 5.29.4.

**XXXVI In Quibus Causis Tutorem Habenti Tutor vel Curator
Dari Potest**

[1] *Imp. Antoninus A. Tiberiano et Rufo. pr.* Si in locum eius tutoris ad tempus dati estis, qui rei publicae causa aberat, isque iam finito munere quod ei iniunctum est abesse desiit, quin ad eius officium curamque pertineant negotia pupillae, ambigere non debetis. 1. Sed consultius feceritis, si praesidem provinciae virum clarissimum adieritis, ut is ad administrationem tutelae compellatur.

PP. VIII k. Aug. Antonino A. IIII et Balbino cons.

[2] *Imp. Alexander A. Valentino.* Potuit quidem et debuit competens iudex in locum excusati curatoris, licet pupillus alios quoscumque haberet tutores, dare. quamvis autem curator cum aliis in locum eius substitutus sis, tamen periculo administrationis ultra pubertatis tempora non adstringeris.

PP. v id. Iun. Modesto et Probo cons.

[3] *Idem A. Hylae.* Propter late diffusum (id est in diversis locis constitutum) patrimonium vel quod solus administrationi non sufficiat, an tibi tutelam administranti adiungi aliquos curatores oporteat, praeses provinciae, si te non sufficientemprehenderit, aestimabit.

PP. VIII id. Dec. Pompeiano et Peligno cons.

[4] *Imp. Valerianus et Gallienus AA. Euploio.* Licet tutorem habenti tutor dari non potest, tamen certis ex causis alius idoneus substitui sententia competentis iudicis solet, id est in locum suspecti, qui convictus ac remotus est, et in locum excusati vel defuncti vel relegati tutoris.

PP. id. Mart. Saeculare II et Donato cons.

**Thirty-Sixth Title In What Situations a Tutor or a Curator Can
Be Appointed for Someone Who Has a Tutor**

[1] *Emperor ANTONINUS Augustus to Tiberianus and Rufus. pr.* If you have been appointed as temporary replacements for a *tutor* who is away on public business, and he, having now concluded the task that was assigned to him, has returned, you need not doubt that the affairs of the female ward are now his responsibility and concern. 1. But you would be acting more advisedly if you were to approach the *vir clarissimus* governor of the province in order that he (the *tutor*) be compelled to resume the management of the tutelage.

Posted July 25, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2] *Emperor ALEXANDER Augustus to Valentinus.* The appropriate judge had the authority to appoint a substitute, certainly – and (indeed) was bound to do so – for the *curator* who was excused, even though the minor ward had other *tutores* of whatever kind. Moreover, though you were appointed as *curator* along with others in his place, you are nevertheless not liable for the risk of management past the time when the ward reaches adulthood.²¹⁶

Posted June 9, in the consulship of Modestus and Probus (228).

[3]²¹⁷ *The same Augustus to Hylas.* Because the property is widely distributed – meaning it is situated in different places – so that you are perhaps not equal to its management by yourself, the governor of the province will decide, if he discovers that you are not able to act alone, whether some *curatores* ought to be added alongside you as you manage the tutelage.

Posted December 6, in the consulship of Pompeianus and Pelignus (231).

[4]²¹⁸ *Emperors VALERIAN and GALLIENUS Augusti to Euploius.* Although a *tutor* cannot be appointed for a person who already has one, nevertheless, for certain reasons, it is customary for the appropriate judge to appoint through judicial decree another appropriate person as a substitute, for example, in place of a suspect person who has been convicted and removed, and in place of a *tutor* who has been excused, is deceased, or has been relegated.

Posted March 15,²¹⁹ in the consulship of Saecularis, for the second time, and Donatus (260).

²¹⁶ The rescript deals with two issues, presumably raised by the recipient. First, was his appointment as *curator* legitimate? (yes); second, over what period of time did his liability run? (not past the time of ward's legal majority).

²¹⁷ = (in part, with changes) C. 5.62.11.1.

²¹⁸ Combine with C. 5.42.2.

²¹⁹ The precise month is uncertain: March or May.

[5] *Impp. Diocletianus et Maximianus AA. et CC. Zenoni. pr.* Cum ob augmentum facultatum curatores adiungi solent, non prius tutores dati administratione eorum liberantur. 1. Sane si is qui administravit tempore finitae tutelae fuit solvendo, secuti temporis periculum ad te pertinere non potuisse manifestum est.

D. III k. April. CC. cons.

XXXVII De Administratione Tutorum et Curatorum et de Pecunia Pupillari Feneranda vel Deponenda

[1] *Impp. Severus et Antoninus AA. Modesto.* Frustra times administrare res adolescentis, cuius curator es, ne ex hoc aliquis existimet commune periculum prioris temporis te recepisse: sed ea, quae agenda putas, age et, quod magis interest omnium partium, insta, ut iudex inter te et tutores datus quam primum partibus suis fungatur.

PP. XII k. Oct. Albino et Aemiliano cons.

[2] *Idem AA. Timoni et Helpidophoro.* Adversus curatorem adolescentis, cui collegae dati estis, quamdiu administratio communis durat, exerceri iudicium non potest.

PP. II k. Mai. Apro et Maximo cons.

[3] *Imp. Antoninus A. Eumuso.* Sumptus in pupillum tuum necessario et ex honestis iustisque causis iudici, qui super ea re cogniturus est, si probabuntur facti, accepto ferentur, etiamsi praetoris decretum de dandis eis non sit interpositum. nam quod a tutoribus sive curatoribus bona fide erogatur, potius iustitia quam aliena auctoritate firmatur.

D. XIII k. Sept. duobus Aspris cons.

[4] *Idem A. Proculae.* Nisi eam pecuniam, quam constiterit libertum paternum tutorem filiae tuae rationi eius debere, vel deposuerit vel

[5] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Zeno. pr.* Although customarily *curatores* are added on account of an increase of property, the *tutores* who had been previously appointed are not released from their duty of management. 1. Of course if the person who managed the tutelage was solvent at the time his responsibility ended, it is clear that the liability for the period that followed could not accrue to you.

Given March 30, in the consulship of the Caesars (294).

**Thirty-Seventh Title Management by *Tutores* and *Curatores*,
and Money Belonging to Wards That Should Be Lent out
at Interest or Placed in Deposit²²⁰**

[1] *Emperors SEVERUS and ANTONINUS Augusti to Modestus.* Your concern is groundless that, in managing the property of the young adult (*adulescens*) whose *curator* you are, for this reason someone would think that you had taken on a joint share of the liability for the preceding period. But do what you think needs to be done and, what is in the greater interest of all parties, press the judge who has been appointed to decide between you and the *tutores* to fulfill his duty as quickly as possible.

Posted September 20, in the consulship of Albinus and Aemilianus (206).

[2] *The same Augusti to Timo and Helpidophorus.* A suit cannot be launched against a *curator* of the young adult (*adulescens*) to whom you were assigned as colleagues as long as your joint management persists.

Posted April 30, in the consulship of Aper and Maximus (207).

[3] *Emperor ANTONINUS Augustus to Eumusus.* Expenses paid on behalf of your minor ward that are necessary and arise from reasons that are honorable and appropriate, if they are proved to have been made before the judge who is going to decide the case, will be credited even if there is no judicial decree of the Praetor about repaying them. For what is paid out by *tutores* and *curatores* in good faith (*bona fides*) is validated by general considerations of justice (*iustitia*) rather than by someone else's authorization.

Given August 19, in the consulship of the two Aspri (212).

[4] *The same Augustus to Procula.* Unless your father's freedman, the *tutor* of your daughter, has either placed on deposit or used for the purchase of real properties the money that it is clear he owes to her account, he will be

²²⁰ See D. 26.7.

in praediorum comparationem converterit, remittetur ad praefectum urbis, secundum ea quae constituta sunt arbitrio eius puniendus.

PP. XII k. Oct. Antonino A. IIII et Balbino cons.

[5] *Idem A. Rufino.* Frustra tutores quondam adolescentium, quorum curam administras, iudicatum facere detractant, cum exacta pecunia possit auctoritate praesidis in depositi causam haberi.

PP. k. Iul. Laeto II et Cereale cons.

[6] *Imp. Alexander A. Paconio.* Non est ignotum tutores vel curatores, si nomine pupillorum vel adultorum scientes calumniosas institunt actiones, eo nomine condemnari oportere, ne sub praetextu nominis eorum propter suas similitudines secure lites suas exercere posse existiment.

PP. VI id. Mai. Maximo II et Aeliano cons.

[7] *Idem A. Valerio.* Tutelam pupillorum tuorum sic administrare debes, ne aedificium, quod his relictum est, contra formam alienandi testamento datam vendas.

PP. VI id. Iul. Maximo II et Aeliano cons.

[8] *Idem A. Aprili.* Etsi scisses te curatorem datum nec administrasses, ceteris curatoribus et administrationem peragentibus et sufficientibus damno praestando contra te actio dari non potest. si autem nescisses curatorem datum, etiamsi solvendo ceteri non sint, damni periculum ad te non redundabit.

PP. VI id. Dec. Alexandro A. III et Dione cons.

remanded to the City Prefect according to standard operating procedure, to be punished at his discretion.

Posted September 20, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[5] *The same Augustus to Rufinus.* It is futile for the former *tutores* of the young adults (*adulescentes*) for whom you now act as *curator*, to refuse to comply with the judgment against them, since the money can be paid out and placed in a deposit (for safekeeping) under the aegis of the provincial governor.²²¹

Posted July 1,²²² in the consulship of Laetus, for the second time, and Cerealis (215).

[6] *Emperor ALEXANDER Augustus to Paconius.* It is not unknown that, if *tutores* or *curatores* knowingly bring false accusations under the names of their minor or adult wards, they ought to be condemned under that name (i.e., their own), so that they do not think they can pursue their own suits, motivated by their private quarrels, free from care under the pretext of suing under the name of their wards.

Posted May 10, in the consulship of Maximus, for the second time, and Aelianus (223).

[7] *The same Augustus to Valerius.* You ought to manage the tutelage of your minor wards in such a way that you do not sell the building that was left to them on condition against alienating it as set forth in the will.

Posted July 10, in the consulship of Maximus, for the second time, and Aelianus (223).

[8] *The same Augustus to Aprilis.* Even if you knew that you had been appointed as a *curator* and you did not take up the management of the property in question, since the other *curatores* were doing a thoroughly sufficient job of it, an action for recovering loss cannot be granted against you. If, however, you did not know that you had been appointed as *curator*, even if the rest are not solvent, liability for loss will not fall to you.

Posted December 8,²²³ in the consulship of Alexander Augustus, for the third time, and Dio (229).

²²¹ Blume: "In this case, as stated in the *Basilica* 38.9.19, the guardians would not pay till it had been shown that the curator was about to loan the money out at interest or buy some property with it; and they also raised the objection that he was spendthrift. None of these objections were available because the money could be deposited for safe-keeping."

²²² The precise month is uncertain: July or June.

²²³ The precise day is uncertain: the alternative is November 25.

[9] *Idem A. Melitiae.* Si curatores habes hique dotare te^{xv} bonis tuis cessant, adito praeside impetrabis, ut, quod moderatum est honestae personae, praestare cogantur.

PP. xvii k. Mai. Agricola et Clemente cons.

[10] *Idem A. Rufinae.* Si liberti eiusdemque curatoris culpa seu fraude ratio vestra laesa sit, sarciri damnum ab eo qui dedit praeses provinciae curabit, non dubitaturus etiam graviores exsecutionem adhibere, si quid tam aperta fraude commissum est, ut puniendum in liberto crimen deprehendatur.

PP. xi k. Aug. Agricola et Clemente cons.

[11] *Imp. Gordianus A. Caecilio.* Si bonam causam ea cuius tutor es habuit et adversus latam sententiam non appellasti seu post appellationem provocationis sollemnia implere cessaveris, tutelae iudicio indemnitate pupillae praestare debes.

PP. v id. Aug. Gordiano A. et Aviola cons.

[12] *Idem A. Octaviana.* De his, quae in fraudem administrationis a tutore gesta vel negligenter acta a curatoribus eorum quibus successisti adlegas, agere debes, si modo annos legitimae aetatis implesti. neque enim ignoras non multum patrocinari fecunditatem liberorum feminis ad rerum suarum administrationem, si intra aetatem legitimam sunt constitutae.

PP. iii non. Oct. Gordiano A. ii et Pompeiano cons.

[13] *Idem A. Longino.* Tutores debita pupillaria seu deposita reposcentes ad satisfactionem compelli non posse manifestum est.

PP. viii k. Mai. Arriano et Papo cons.

[14] *Imp. Philippus A. et Philippus C. Clementi.* Rationes curae administratae ante impletum vicesimum et quintum annum durante officio posci iure non posse manifestum est.

PP. prid. non. Aug. Philippo A. et Titiano cons.

[9] *The same Augustus to Melitia.* If you have *curatores* and they fail to constitute a dowry (for you) from your property, once you approach the provincial governor you will prevail upon them to provide what is becoming to a respectable person.

Posted April 15, in the consulship of Agricola and Clemens (230).

[10] *The same Augustus to Rufina.* If your account has been compromised through the negligence or fraud of the man who is both your freedman and *curator*, the governor of the province will see to it that the loss is made whole by the person who caused it. He is not going to hesitate to resort to more serious measures as well, if anything was done through such a manifest fraud that a criminal offense that ought to be punished on the part of the freedman is uncovered.

Posted July 22, in the consulship of Agricola and Clemens (230).

[11] *Emperor GORDIAN Augustus to Caecilius.* If the female minor ward whose *tutor* you are had a just cause and you did not appeal an adverse decision, or after making the appeal you failed to carry out the formalities for proceeding, you ought to make your ward whole under a suit for tutelage.

Posted August 9, in the consulship of Gordian Augustus and Aviola (239).

[12] *The same Augustus to Octaviana.* You ought to sue regarding those things which you allege were done through the fraudulent management of a *tutor* or performed negligently by the *curatores* of those whose heir you are, provided that you have reached the age of full legal majority (i.e., 25 or over). For you are not unaware that the bearing of children by women does not avail them much in the management of their property if they have not reached the age of full majority.

Posted October 5, in the consulship of Gordian Augustus, for the second time, and Pompeianus (241).

[13] *The same Augustus to Longinus.* It is clear that *tutores* calling in the debts or deposits of their minor wards cannot be compelled to give security.

Posted April 24, in the consulship of Arrianus and Papus (243).

[14] *Emperor PHILIP Augustus and PHILIP Caesar to Clemens.* It is clear that the accounts of a *curator* cannot at law be demanded for review before the ward has completed his twenty-fifth year (i.e., turned 25) and while the *curator* is still in place.

Posted August 4, in the consulship of Phillip Augustus and Titianus (245).

[15] *Impp. Diocletianus et Maximianus AA. Licinio*. Si non subscripsisti quasi fideiussor, frustra vereris, ne ex ea intercessione, qua signasti ut curator, olim liberatus (ut adfirmas) sententia praesidis, ex officio curatoris conveniri possis.

PP. prid. non. Mart. Diocletiano III et Maximiano AA. cons.

[16] *Idem AA. et CC. Proculo*. Non omni titulo rerum^{xvi} pupilli potestatem alienandi tutores habent, sed administrationis tantum causa distrahentes, quae venum eis dare licet, iustam causam possidendi comparantibus praestant. cum itaque donare nulla ratione res eorum quorum administrant negotia potestatem habent, vindicare dominium a possidentibus non prohiberis.

S. x k. Mai. Heracliae AA. cons.

[17] *Idem AA. et CC. Martiali*. De successione sua tutores frustra timent, cum his qui tutelam administraverunt testamenti factio non denegetur. nec de bonis suis donare aliquid prohibentur.

S. xvi k. Nov. Sirmi AA. cons.

[18] *Idem AA. et CC. Sotericho*. Debitoribus pupillae pro officii ratione, tutorem te constitutum adseverans ad te nominum periculo pertinente, parere solutioni denuntia. qui si satis non fecerint, in venditione pignorum uti communi iure potes.

S. prid. k. Ian. Sirmi AA. cons.

[19] *Idem AA. et CC. Vindiciano*. Tutor licet absens decreto datus, si sciens se sollemniter non excusaverit, administrationi constituitur obnoxius.

S. III id. Febr. Sirmi CC. cons.

[20] *Imp. Constantinus A.* Pro officio administrationis tutoris vel curatoris bona, si debitores existant, tamquam pignoris titulo obligata

[15] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Licinius.* If you did not sign on as a surety, you are groundlessly concerned that you can be sued in connection with your responsibilities as *curator* on the basis of the assumption of an obligation you signed as though you were *curator* when you had already been – as you allege – freed from these duties through a judicial decision of the provincial governor.

Posted March 6, in the consulship of Diocletian, for the third time, and Maximian Augusti (287).

[16] *The same Augusti and the Caesars to Proculus.* *Tutores* do not have the capacity to alienate the property of a minor ward on every basis. By making over property solely in connection with their duties of management, which permits them to sell, they provide a legally recognized ground for possession to buyers. Since, therefore, they do not enjoy a capacity under any theory to give as a gift the property of those whose affairs they manage, you (as a former ward) are not prevented from claiming ownership from the possessors.

Written April 22, at Heraclea, in the consulship of the Augusti (293).

[17] *The same Augusti and Caesars to Martialis.* Your *tutores* are groundlessly concerned about their rights under the law of succession, since making a will is not denied to those who manage a tutelage, nor are they forbidden to give away some of their own property as a gift.

Written October 17, at Sirmium, in the consulship of the Augusti (293).

[18] *The same Augusti and Caesars to Soterichus.* Since you assert that you have been appointed tutor, so that the liability for (collecting) the (relevant) debts accrues to you, make a formal demand for payment to the debtors of your female minor ward, in accordance with your responsibilities. If they do not pay up, you can make use of the standard entitlement to sell their pledges.

Written December 31, at Sirmium, in the consulship of the Augusti (293).

[19] *The same Augusti and Caesars to Vindicianus.* If a tutor has been appointed by judicial decree even though he is not present, he is obligated to manage the property if he knew about the appointment and did not formally seek to be excused.

Written February 11, at Sirmium, in the consulship of the Caesars (294).

[20]²²⁴ *Emperor CONSTANTINE Augustus.* Wards are not at all prevented from claiming the property of a tutor or a *curator* if the latter owe them money in connection with their duties of management, as though the property were

²²⁴ = (with changes) C.Th. 3.30.1.

minores sibimet vindicare minime prohibentur. idem est et si tutor vel curator quis constitutus res minorum non administravit.

D. VII k. April. Treviris Volusiano et Anniano cons.

[21] *Idem A. ad Maximum pp.* Pupillorum seu minorum defensores, si per eos donationum condicio neglecta est, rei amissae periculum praestent.

D. III non. Febr. Romae Sabino et Rufino cons.

[22] *Idem A. ad populum. pr.* Lex, quae tutores curatoresque necessitate adstrinxit, ut aurum argentum gemmas vestes ceteraque mobilia pretiosa, urbana etiam mancipia, domos balnea horrea atque omnia intra civitates venderent omniaque ad nummos redigerent praeter praedia et mancipia rustica, multum minorum utilitati adversa est. 1. Praecipimus itaque, ut haec omnia nulli tutorum curatorumve liceat vendere, nisi hac forte necessitate et lege, qua rusticum praedium atque mancipium vendere vel pignorare vel in dotem dare in praeteritum licebat, scilicet per inquisitionem iudicis, probationem causae, interpositionem decreti, ut fraudi locus non sit.

2. Ante omnia igitur urbana mancipia, quia totius suppellectilis notitiam gerunt, semper in hereditate et in domo retineant: nam boni servi fraudem fieri prohibebunt, mali, si res exegerit, sub quaestione positi poterunt prodere veritatem. 2a. Atque ita omnia observabunt, ut nec inventaria minuere nec mutare vel subtrahere aliquid tutor valeat: quod in veste margaritis gemmis et in vasculis ceteraque suppellectili necessarium est. 2b. Et tolerabilius est, si ita contigerit, servos mori suis dominis, quam servire extraneis. quorum fuga potius tutori adscribitur, sive neglegentia dissolutam patiatur esse disciplinam, sive durtia vel inedia atque verberibus eos adficiat. 2c. Nec enim dominos execrantur, sed magis diligunt, ita ut haec lex per hoc quoque melior antiqua sit: tunc enim remota servorum custodia etiam vita minorum saepius prodebatur.

obligated under the title of pledge. The same holds even if someone who has been appointed as a *tutor* or *curator* has not managed the property of their wards.

Posted March 26, at Trier, in the consulship of Volustanus and Annianus (314).

[21]²²⁵ *The same Augustus to Maximus, Praetorian Prefect.* If the guardians of minor or adult wards have neglected a condition attached to a gift, they shall be liable for making good the loss.

Given February 3,²²⁶ at Rome, in the consulship of Sabinus and Rufinus (316).²²⁷

[22]²²⁸ *The same Augustus to the People. pr.* The law (*lex*) which has required *tutores* and *curatores* to sell gold, silver, precious stones, clothing, and all other movables of value, as well as city slaves, townhouses (*domus*), baths, storage facilities and everything situated in towns, and to liquidate everything except rural real properties and slaves, is very much contrary to the interests (*utilitas*) of their wards. 1. Therefore, We instruct that no *tutor* or *curator* shall be permitted to sell any of these things except perhaps under the same necessary circumstances given in the law that permitted them in the past to sell, pledge, or give as dowry rural real property and slaves, obviously after a judge's investigation, the furnishing of proof, and the issuance of a judicial decree, so that there be no opportunity for fraud.

2. Above all, therefore, let them hold onto, always as part of the inheritance and in the household, city slaves, because they have knowledge of all the furnishings. For good slaves will prevent fraud from occurring, while bad ones, if necessary, once put to judicial examination under torture, will be able to disclose the truth. 2a. And so they will keep watch over everything, so that the *tutor* will not be able to diminish the inventory nor to alter or filch something. This is necessary in the case of clothing, pearls, precious stones, as well as for household utensils and the rest of the furnishings. 2b. And it is more tolerable for slaves to die, if such happens, along with their masters, than that they serve others. Their flight will be ascribed to the *tutor*, whether he permits discipline to be softened through neglect, or he visits them with harsh treatment, hunger, or corporal punishment. 2c. For they do not hate, but rather love, their masters, so that this statute for this reason too is better than the ancient one. For then, when the protective care of slaves was taken away, even the lives of wards were too often being placed in jeopardy.

²²⁵ = (with minor changes) C.Th. 3.30.2; *Frag. Vat.* 249.4. Combine with C. 8.53.25; *Consultatio* 9.13.

²²⁶ The precise day is uncertain: the alternative is January 30.

²²⁷ The year is uncertain: Mommsen prefers 323 (*Projet Voherra*); Seeck argues for 320.

²²⁸ = (in part, with changes) C.Th. 3.30.3. Combine with C. 2.27.2; perhaps also 4.32.25.

3. Nec vero domum vendere liceat, in qua defecit pater, minor crevit, in qua maiorum imagines aut videre fixas aut revulsas non videre satis est lugubre. ergo et domus et cetera omnia immobilia in patrimonio minorum permaneant, nullumque aedificii genus, quod integrum hereditas dabit, collapsum tutoris fraude depereat. 3a. Sed et si parens vel cuiuscumque heres est minor reliquerit deformatum aedificium, tutor testificatione operis ipsius et multorum fide id reficere cogetur: ita enim annui redditus plus minoribus conferent quam per fraudes pretia deminuta.

4. Servi etiam, qui aliqua sunt arte praediti, operas suas commodo minoris inferent et reliqui, qui in usum minoris domini esse non poterunt quibusque ars nulla est, partim labore suo partim alimoniarum taxatione pascantur. 5. Lex enim non solum contra tutores, sed etiam contra feminas immoderatas atque intemperantes prospexit minoribus, quae plerumque novis maritis non solum res filiorum, sed etiam vitam addicunt. 5a. Huic accedit, quod ipsius pecuniae, in qua robur omne patrimoniorum veteres posuerunt, fenerandi usus vix diuturnus, vix continuus et stabilis est: quo facto saepe intercidente pecunia ad nihilum minorum patrimonia deducuntur.

6. Iam ergo venditio tutoris nulla sit sine interpositione decreti, exceptis his dumtaxat vestibus, quae detritae usu aut corruptae servando servari non potuerint. 7. Animalia quoque supervacua minorum quin veneant, non vetamus.

D. id. Mart. Sirmi Constantino A. VII et Constantio C. cons.

[23] *Idem A. Felici.* Si tutoris vel curatoris culpa vel dolo, eo quod vectigal praedio emphyteutico impositum minime dependere voluissent, minori fuerit amissum, damnum quod ei contigit ex substantia eorum resarciri necesse est.

D. XIII k. Mai. Constantinopoli Dalmatio et Zenophilo cons.

3. Nor in fact shall it be permitted to sell the house in which the father died, the ward grew up, and in which it is fairly depressing either to see the images of the ancestors still in place or not to see them because they have been removed. Therefore, the houses and all the other immovables shall remain in the wards' estate, and no kind of structure that has been bequeathed in good shape, shall collapse and degrade through the fraudulent action of a *tutor*. 3a. Furthermore, if a parent or the person whose heir the ward is has bequeathed a house in bad condition, the *tutor* will be compelled to repair it as needed, on the evidence of the refurbishing itself and of the testimony of many persons. For in this way the annual returns in rent will benefit the wards more than a sale price depressed by fraud.

4. Slaves, too, who are equipped with some skill, will turn their services to the benefit of the ward, and the rest, who cannot be of use to their master the ward and have no (particular) skill, shall be supported partly by their own efforts and partly by a set level of maintenance. 5. For the law has protected wards not only against *tutores*, but also against extravagant and unrestrained women (i.e., the mothers of wards), who frequently give over to their new husbands not only the property of their children but even their lives. 5a. A further point is the fact that with regard to the money itself, which the ancients regarded as the entire backbone of the estate, the practice of lending it out at interest is hardly lasting, hardly uninterrupted and secure. When this is done, the money is often lost and the estates of wards are reduced to nothing.

6. Therefore there shall now be no capacity to sell property granted to *tutores* without the issuance of a judicial decree, with the exception only of clothing that is worn with use or spoiled and cannot be preserved even with effort.²²⁹ 7.²³⁰ We also do not forbid the sale of animals belonging to the wards that are not needed.

Given March 15, at Sirmium, in the consulship of Constantine Augustus, for the seventh time, and Constantius Caesar (326).²³¹

[23]²³² *The same Augustus to Felix.* If a ward should lose a long-term lease arrangement (by *emphyteusis*), because through the negligence (*culpa*) or malicious intent (*dolus*) of a *tutor* or *curator* they refused to pay the rent due, it is necessary that the loss which befell the ward be made up from the (guardian's) property.

Given April 18,²³³ at Constantinople, in the consulship of Dalmatius and Zenophilus (333).

²²⁹ "with the exception ... effort" = C. 5.72.4.

²³⁰ 7 = (with minor changes) C.Th. 3.30.3.7.

²³¹ The year is more likely to be 329; Seeck and Projet Volterra.

²³² = (with changes) C.Th. 3.30.5.

²³³ So Seeck. The precise day is uncertain; the alternative is April 19.

[24] *Impp. Arcadius et Honorius AA. Eutychiano pp. pr.* Tutores vel curatores, mox quam fuerint ordinati, sub praesentia publicarum personarum inventarium sollemniter rerum omnium et instrumentorum facere curabunt. 1. Aurum argentumque et quidquid vetustate temporis non mutatur, si in pupilli substantia reperiatur, in tutissima custodia collocent, ita tamen, ut ex mobilibus aut praedia idonea comparentur aut, si forte (ut adsolet) idonea non potuerint inveniri, iuxta antiqui iuris formam usurarum crescat accessio, quarum exactio ad periculum tutoris pertinet.

D. vi k. Mart. Constantinopoli Arcadio IIII et Honorio III AA. cons.

[25] *Imp. Iustinianus A. Iuliano pp.* Sancimus creatione tutorum et curatorum cum omni procedente cautela licere debitoribus pupillorum vel adultorum ad eos solutionem facere, ita tamen, ut prius sententia iudicialis sine omni damno celebrata hoc permiserit. 1. Quo subsecuto, si et iudex pronuntiaverit et debitor persolverit, sequitur huiusmodi causam plenissima securitas, ut nemo in posterum inquietetur: non enim debet, quod rite et secundum leges ab initio actum est, ex alio eventu resuscitari. 2. Non autem hanc legem extendimus etiam in his solutionibus, quae vel ex redditibus vel ex pensionibus vel aliis huiusmodi causis pupillo vel adulto accedunt: sed si extraneus debitor ex feneraticia forsitan cautione vel aliis similibus causis solutionem facere et se liberare desiderat: tunc enim eandem subtilitatem observari censemus.

D. x k. Mart. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[26] *Idem A. Iohanni pp. pr.* Cum quaedam mulier testamento condito filium suum praeterisset, idem autem filius, qui praeteritus erat, vel fratris vel extranei esset tutor vel curator, qui scriptus a matre tutoris fuerat heres, in praesenti specie manifestissimum erat stare tutorem vel curatorem in praecipiti loco. 1. Sive enim auctoritatem suam vel consensum ad adeundam hereditatem praestare pupillo vel adulto minime voluerit, ne ex hac causa sua iura aliquod patiantur praeiudicium, satis

[24]²³⁴ *Emperors ARCADIUS and HONORIUS Augusti to Eutychianus, Praetorian Prefect. pr.* As soon as they are appointed, *tutores* and *curatores* will see to making a formal inventory of all property and documents in the presence of public officials. 1. They shall place in very safe custody, gold, silver, and whatever is not altered through the passing of time, if it is found to belong to the ward's estate, provided however that they either shall use the movables to purchase suitable properties or, if as usually happens suitable lands cannot be found, according to the precepts of the ancient law (*antiqui iuris forma*) they shall increase the estate through lending money at interest, the collection of which is the liability of the *tutor*.

Given February 24 or 25,²³⁵ at Constantinople, in the consulship of Arcadius, for the fourth time, and Honorius, for the third time, Augusti (396).

[25]²³⁶ *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect. pr.* We ordain that, since the appointment of *tutores* and *curatores* proceeds with every caution, it shall be permitted to the debtors of minor or adult wards to pay them, on the condition however that previously a judicial decree permitting this be issued, without court costs. 1. When this has happened, if the judge has spoken and the debtor has paid, a very full safeguard accompanies this kind of case so that no one in future be disturbed. For what has been done from the beginning properly and according to the laws, ought not to be revisited when things turn out differently. 2. We do not, however, extend this (instant) law also to those payments which accrue to the minor or adult ward from income, rents, or other such causes. But if an outside debtor wants to make payment and so free himself perhaps from a guaranty on a promise to pay interest or for other similar reasons, then We lay down that the same complex procedure shall be followed.

Given February 20, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[26] *The same Augustus to John, Praetorian Prefect. pr.* When a certain woman, in making her will, passed over her own son, and the same son, who was passed over, was the *tutor* or *curator* of a (younger) brother or a non-relative who was appointed her heir by the mother of the *tutor*, it was very clear that in the present case the *tutor* or *curator* is in a delicate situation. 1. For if he refused to give his formal release or consent to the minor or adult ward to accept the inheritance, so that for this reason his own claims suffer no prejudice, he has a fair prospect of liability under an action on tutelage or an analogous one on

²³⁴ = (with changes) C.Th. 3.30.6.

²³⁵ Seeck gives February 24, 396. The precise day is uncertain: alternatives are February 22 and 23.

²³⁶ See Inst. 2.8.2.

ei imminet periculum tutelae vel utilis negotiorum gestorum actionis, ne pupillus vel adultus utpote ex illius tarditate laesus litem ei ingerat: sive huiusmodi timore perterritus auctor fuerit pupillo vel adulto, aliud periculum emergebat: dum enim alii consentit, ipse sua iura perdit: videbatur etenim confirmare matris suae iudicium, quod oppugnandum esse existimabat.

2. Et multae aliae insuper species oriuntur, ex quibus verendum est tutori vel curatori circa suas res praeiudicium, puta in hypothecis et aliis variis casibus. 3. Invenimus autem generaliter definitum post officium depositum omnes actiones, quas tutor vel curator ex necessitate officii subierit, in quondam pupillum vel adultum transferri. 4. Quare tam optimo exemplo argumentati non et in aliis omnibus casibus, in quibus veretur tutor vel curator, ne praeiudicium aliquid ei fiat, timorem eius removemus?

5. Damus igitur eis cum summa fiducia res pupillorum vel adultorum gubernare, scituris, quod lex nostra eis sua iura immutilata reservat nihil ex huiusmodi auctoritate vel consensu praeiudicii subituris.

D. x k. Sept. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[27] *Idem A. Iohanni pp.* Constitutionem, quam nuper fecimus disponentes, quemadmodum debent solutiones in contractibus minorum causa fieri sive ex redditibus sive ex pensionibus sive ex aliis similibus causis, etiam in usuras extendimus, quae tamen non summatim neque ex multis annis collectae iam debentur, biennales metas et centum solidorum quantitatem minime excedentes.

D. k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[28] *Idem A. Iohanni pp. pr.* Sancimus neminem tutorum vel curatorum pupilli vel adulti vel furiosi aliarumque personarum, quibus tam ex veteribus quam ex nostris constitutionibus curatores creantur, defensionem quam pro lite susceperunt recusare, sed ab initio litis modis omnibus memoratas personas defendere et litem praeparatam secundum leges instruere scientes, quod et hoc munus necessarium est tam tutelae quam curationi.

management of affairs (*negotia gesta*) which the ward may bring inasmuch as he or she has suffered loss from the guardian's delay. Or if, worried about this kind of situation, he granted his authorization to the ward, another risk would arise, that in giving his consent to another, he loses his own rights. For it seemed as though he was confirming his mother's decision (to exclude him), which he thought should be countered.

2. And many other individual instances are arising besides this one, in which a *tutor* or a *curator* must fear incurring prejudice to his own interests, for example, in (real) security arrangements (*hypothecae*) and other varied situations. 3. We find it, however, generally provided that after their charge has expired, all actions to which a *tutor* or a *curator* is necessarily exposed by virtue of his position are transferred to the former minor or adult ward. 4. Therefore, reasoning from such an excellent precedent, shall We not also, in all other cases in which a *tutor* or a *curator* fears incurring some prejudice to his interests, remove this anxiety?

5. We accordingly grant them the capacity to manage the affairs of their minor or adult wards with the greatest confidence, in the knowledge that Our law preserves their rights for them untrammelled, and since they shall suffer no prejudice from such a grant of authorization or consent.

Given August 23, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[27] *The same Augustus to John, Praetorian Prefect.* The constitution which We have recently enacted,²³⁷ providing in what manner payments ought to be made regarding contracts on behalf of wards for income, rents, or other similar things, We extend also to loans for interest, where, however, the interest is not owed in a lump sum nor has accrued over many years and is still owed, but when it does not exceed the time limit of two years or the amount of 100 solidi.

Given November 1,²³⁸ at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[28] *The same Augustus to John, Praetorian Prefect. pr.* We ordain that no one who is a *tutor* or *curator* of a minor or adult ward, of an insane person, or of the other types for whom *curatores* are appointed not only in accordance with ancient but also our own constitutions, shall refuse to defend a lawsuit which they have undertaken, and that from the start of the suit they shall in every way defend the aforesaid persons and shall prepare and conduct the lawsuit in accordance with the laws, in the knowledge that this responsibility too is an essential part of managing a tutelage as much as a curatorship.

²³⁷ C. 5.37.25.

²³⁸ The precise day is uncertain: the alternative is October 23.

1. Et si hoc recusaverint vel subire distulerint, non solum utpote suspecti amoveantur amissa eorum existimatione, sed etiam ex substantia sua omne detrimentum, quod antelatae personae ex recusatione defensionis sustineant, resarcire cogantur. 1a. Sed et si quis ex quadam interpellatione admonitus, propter litis instructionem consuetam cautelam exposuerit, vel post litem contestatam, quam per se et non per procuratorem suscepit, vel demens vel furiosus factus fuerit, sancimus continuo curatorem ei in competenti iudicio ordinari cura et provisione tam iudicis, sub quo lis vertitur, quam cognatorum et propinquorum et actoris, si voluerit, ut non ab eo instituta lis diutius protrahatur: necessitatem habente creando curatore defensionem subire et cetera litis adimplere.

2. Personis etiam, quae periculo proprio vel suae substantiae tutores vel curatores petierunt, sive matres forte fuerint vel quidam alii, compellendis eos, quos ordinaverint tutores vel curatores, praeparare talem subire defensionem. 2a. Vel si illi noluerint hoc facere et propter huiusmodi defensionis recusationem tutela vel curatione removeantur, sic necessitatem imponimus memoratis personis alios tutores vel curatores ordinare in ipsis gestis, in quibus tutores vel curatores creantur, ex sua confessione declarantes talem subire defensionem. 2b. Ne autem tales personae sine provisione debita relinquantur vel contra eos agentium iura diutius protelentur, sancimus continuo, id est post recusationem defensionis, in casibus videlicet, in quibus (sicut dictum est) hoc fieri possit, creationem aliorum tutorum vel curatorum celebrari: cognatis aliisque propinquis vel adfinibus vel creditoribus vel aliis quorum interest adeuntibus vel admonentibus eos, qui secundum leges ius habent tutores vel curatores constituere.

3. Defensionem autem et nomen eius in hoc casu apertius declarantes, ne forte putaverint tutores vel curatores gravamen sibimet imponi, illam decernimus defensionem eos subire, quae non satisfactione pro eventu litis constituitur, sed ut tantummodo litem secundum legum ordinem pro pupillo vel adulto aliisque personis instruant, licentiam ex hac nostra auctoritate habentes sine decreto res quarum gubernationem gerunt pro cautela litis subsignare.

4. Omnem autem dubitationem pro defensione pupillorum et adultorum aliarumque personarum penitus amputantes sancimus omnes

1. Furthermore, if they refuse this or put off taking it up, not only shall they be removed inasmuch as they are suspect, with consequent loss to their reputation (*existimatio*), but they shall also be compelled to make whole from their own property all material loss which the aforesaid persons have suffered, because of the refusal to defend the suit. 1a. What is more, if someone, admonished by (notice of) a certain lawsuit, for the sake of building a case has furnished the customary guaranty, or who, after joinder of issue in a suit that he has undertaken on his own and not through a procurator, has become unstable or insane, We ordain that a *curator* shall be appointed immediately for him in the appropriate court, through the care and foresight not only of the judge overseeing the lawsuit, but also of the blood relatives and near relations (of the ward), and of the plaintiff, if he wishes, so that the lawsuit he has initiated not drag on for too long. For the *curator* who shall be appointed has the obligation to defend the suit and perform the remaining responsibilities connected with this.

2. Persons too, who request *tutores* or *curatores* at their own risk or that of their property, whether they are perhaps mothers or certain others, shall be compelled to prepare those whom they have caused to be appointed as *tutores* or *curatores* to undertake such a defense. 2a. Or even if they refuse to do this and for such a refusal to defend a suit are removed from the tutelage or curatorship, We thus enjoin upon the aforesaid persons the obligation of seeking the appointment of other *tutores* or *curatores*, who declare openly that they will undertake such a defense, in the context of those procedures by which *tutores* or *curatores* are appointed. 2b. Moreover, so that such persons shall not be left without due oversight, and the rights of those who are their adversaries at trial shall not be too long postponed, We ordain that immediately, that is, after the refusal to defend, in cases, clearly, in which – as stated above – this can happen, the appointment of other *tutores* or *curatores* shall take place. Blood relatives, other close relations, connections by marriage, creditors and others who have an interest shall approach and encourage those, who have this right according to the laws, to appoint *tutores* or *curatores*.

3. Making clearer, moreover, what we mean by defense and the status of the person who undertakes this, so that *tutores* and *curatores* do not imagine perchance that a great burden is being imposed upon them, We decree that they shall undertake a form of defense that does not consist in giving security against the outcome of the case, but that they merely prepare the lawsuit pursuant to the dictates of the laws on behalf of the minor or adult ward, or other types of ward, in possession of permission granted by this authorization of Ours to assign the property that they manage as a guaranty for the suit without the issuance of a judicial decree.

4. Moreover, clearing away thoroughly every doubt regarding the defense of minor and adult wards, as well as of the other types of ward, We ordain that

tutores vel curatores non alias creari, nisi prius cum aliis sollemnibus verbis, quae pro gubernatione rerum tam in gestis quam in cautionibus ab his conscribuntur, et hoc specialiter expresserint, quod omnimodo sine ulla dilatione defensionem pro pupillis et adultis aliisque supra memoratis personis subire eos necesse est.

5. Hisque adicimus nullam neque in hoc capitulo ambiguitatem relinquentes tutoribus et omnibus curatoribus licere fructus, sive qui ex redditibus praediorum colliguntur sive ex substantia personarum quarum gubernationem habent inventi fuerint, id est vinum et oleum et frumentum vel cuiuscumque speciei sunt, sine decreto distrahere iusto pretio, quod in his locis, in quibus venditio celebratur, tunc temporis noscitur obtinere, et quae ex venditione eorundem fructuum colliguntur pecuniae, cum alia pupillorum vel adutorum aliarumque personarum substantia administrentur.

D. XII k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

XXXVIII De Periculo Tutorum et Curatorum

[1] *Imp. Alexander A. Quinto.* Et qui notitiae causa liberti tutores dantur, quamvis soli administrandorum negotiorum pupillorum sive adutorum facultatem interdum non accipiant propter tenuitatem sui patrimonii, periculo tamen omnes sunt obligati, sive ea, quae scire deberent ex utilitate eorum, tutores sive curatores dissimulaverunt aut fraudem aliquam adhibuerunt vel cum aliis participaverunt aut, cum suspectos facere deberent, in officio muneris vel obsequio debito cessaverunt.

PP. VIII k. Febr. Alexandro A. II et Marcello cons.

[2] *Idem A. Saturo.* Ad eos, qui in alia provincia tutelam administrant, periculum administrationis ex persona tutorum, qui in alia provincia res pupilli gerunt, non porrigitur.

PP. non. Iul. Alexandro A. II et Marcello cons.

all *tutores* and *curatores* shall be appointed on condition that, beforehand, in addition to the other formal promises which they commit to writing regarding their management of (the ward's) property in the public records as well as in the form of sureties, they also make particular mention of the fact that they are obligated in every way without delay to take up the defense of minor and adult wards as well as the other types mentioned above.

5. To these provisions We add, leaving no room for ambiguity in this chapter as well, that it shall be permitted for *tutores* and all (types of) *curatores* to sell, at a just price that is then known to prevail at the point and time of sale and without a judicial decree, the fruits that derive from the returns on real properties or that otherwise arise from the property of the persons whose affairs they manage, meaning wine, oil, grain, or any other kind of produce. Also, the money that derives from the sale of these fruits shall be managed along with the other property of the minor or adult wards or other types of ward.

Given October 21, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).²³⁹

Thirty-Eighth Title Liability of *Tutores* and *Curatores*²⁴⁰

[1] *Emperor ALEXANDER Augustus to Quintus.* Even freedmen who are appointed *tutores* because of their knowledge, although sometimes, on account of their poverty, they do not assume management of the affairs of the minor or adult ward by themselves, are all, nevertheless, held to liability (for mismanagement), whether as *tutores* or *curatores* they have feigned ignorance of those things they should have known to the advantage (*utilitas*) of their wards, or they have engineered some fraud on their own or have participated in such with others, or, when they ought to have called others into suspicion, have failed in the fulfillment of the duty or the respect that they owe.

Posted January 24, in the consulship of Alexander Augustus, for the second time, and Marcellus (226).

[2] *The same Augustus to Satorus.* The liability for management of those *tutores* who manage a minor ward's tutelage in one province does not extend to those who manage the tutelage in another province.

Posted July 7, in the consulship of Alexander Augustus, for the second time, and Marcellus (226).

²³⁹ The precise day (the alternative is October 18, preferred by Lounghis *et al.*) and year are uncertain: 531 or 532.

²⁴⁰ See D. 26.7.

[3] *Imp. Philippus A. et Philippus C. Gratiano.* Si res pupillares, quas horreo conditas habere aut etiam venumdare debuisti, in hospitio tuo, ut adseveras, vi ignis absumptae sunt, culpam seu segnitiam tuam non ad tuum damnum, sed ad pupilli tui spectare dispendium minus probabili ratione deposcis.

PP. III k. April. Philippo A. et Titiano cons.

[4] *Idem A. et C. Floro.* Tutoribus seu curatoribus fortuitos casus, adversus quos caveri non potuit, imputari non oportere saepe rescriptum est.

PP. XII k. Sept. Philippo A. et Titiano cons.

[5] *Impp. Diocletianus et Maximianus AA. Severo.* Si tutor petitus vel testamento datus tutorem te constitutum esse non ex remissioris negligentiae vitio, sed iustae ignorationis ratione non didicisti idque liquidis probationibus ostenderis, periculo eius temporis, quod ignorante te transmissum est, non teneberis.

PP. III id. Sept. ipsis IIII et III AA. cons.

[6] *Idem AA. et CC. Epicteto.* Temporis, quod insequitur post tutelae translationem, administrationis officio finito ad eos qui fuerunt tutores gerendae rei non pertinere periculum rationis est.

S. v k. Dec. CC. cons.

XXXVIII Quando ex Facto Tutoris vel Curatoris Minores Agere vel Conveniri Possunt

[1] *Imp. Antoninus A. Septimo.* Iuliana, cuius tibi curatores condemnati sunt, si vicesimum quintum annum aetatis egressa est, actio iudicati utilis adversus ipsam bonaque eius exercenda est. nam tutores curatoresque finito officio non esse conveniendos ex administratione pupillorum adolescentiumque saepe decretum est.

PP. VIII k. Iul. Romae Antonino A. IIII et Balbino cons.

[3] *Emperor PHILIP Augustus and PHILIP Caesar to Gratianus.* If the property of your minor ward, which you ought to have placed in a storage facility or even to have sold, was destroyed by a fire in your lodgings, as you assert, you request unpersuasively that your fault (*culpa*) or inertia count not as your loss, but as that of your ward.

Posted March 30, in the consulship of Philip Augustus and Titianus (245).

[4] *The same Augustus and Caesar to Florus.* It has often been laid down in rescripts that random accidents (*fortuiti casus*), which could not be guarded against in advance, ought not count to the detriment of *tutores* and *curatores*.

Posted August 21, in the consulship of Philip Augustus and Titianus (245).

[5] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Severus.* If you were appointed as *tutor* upon petition to an official or in a will, and you did not learn of your appointment, not through the fault of a rather lax negligence on your part but because of a justified ignorance that you demonstrate with clear proofs, you will not be liable for that period of time which passed without you knowing of your appointment.

Posted September 11, in the consulship of the Augusti, for the fourth and third time, respectively (290).

[6] *The same Augusti and the Caesars to Epictetus.* It is reasonable that liability for managing property does not extend to former *tutores* for the period of time subsequent to their transfer of the tutelage (to others), when their responsibility for management has been concluded.

Written November 27, in the consulship of the Caesars (294).

Thirty-Ninth Title When Wards May Sue or Be Sued Because of the Act of a Tutor or Curator²⁴¹

[1] *Emperor ANTONINUS Augustus to Septimus.* If Juliana, against whose *curatores* you had a judgment, has passed her twenty-fifth year (i.e., turned 25), an analogous action on the judgment (*actio iudicati utilis*) shall be given against her and her property. For it has often been held in court that *tutores* and *curatores*, once their responsibilities have been concluded, cannot be sued in connection with their management on behalf of their minor or adult wards.

Posted June 24, at Rome, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

²⁴¹ See D. 26.9.

[2] *Imp. Alexander A. Sosandro.* Etsi tutores tui, cum pecuniam pupillarem crederent, ipsi stipulati sunt, utilis actio tibi datur.

PP. xv k. Sept.

[3] *Imp. Gordianus A. Prudentiano.* Si in rem minoris pecunia profecta sit, quae curatori vel tutori eius nomine mutuo data est, merito personalis in eundem minorem actio danda est.

PP. non. Sept. Gordiano A. et Aviola cons.

[4] *Imp. Diocletianus et Maximianus AA. et CC. Maximianae.* Si hi, qui te in pupillari aetate constituta fuerunt tutores, postea in administratione perseverantes vel curatores constituti tua praedia locaverunt, eos competenter conveni: sed ex eorum contractu utilis tibi quaeri potuit contra successores conductoris actio.

S. III non. Mart. AA. cons.

[5] *Idem AA. et CC. Onesimae.* Per tutorem pupillo actio nisi certis ex causis quaeri non potest.

D. id. Dec. CC. cons.

XXXX Si ex Pluribus Tutoribus vel Curatoribus Omnes vel Unus Agere pro Minore vel Conveniri Possunt

[1] *Imp. Antoninus A. Miltiadi.* Ab uno ex tutoribus vel curatoribus posse causam minoris defendi, cum alii tutores vel curatores eum defendere noluerint, ignorare non debes.

PP. non. Nov. Messala et Sabino cons.

[2] *Imp. Constantinus A. et Licinius C. ad Symmachum.* Si divisum administrationis periculum per provincias sit, his tantum omnibus insinuari convenit et ab ipsis inferri litem, qui in ea provincia tutelae vel curae officium sustinent, ne de aliis provinciis defensores minorum ad iudicia producantur.

D. prid. non. Febr. Constantino A. v et Licinio C. cons.

[2] *Emperor ALEXANDER Augustus to Sosandrus.* Even if your *tutores*, when they lent out the money you had as a ward, themselves made the stipulation (for its return), an analogous action (*actio utilis*) is granted to you.

Posted August 18.

[3] *Emperor GORDIAN Augustus to Prudentianus.* If money given as a loan to a *curator* or *tutor* in the name of a ward was spent on the ward's property, a personal action (*actio personalis*) rightly shall be given against the same ward.

Posted September 5, in the consulship of Gordian Augustus and Aviola (239).

[4] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Maximiana.* If those who, while you were under age, were your *tutores* continued to manage your property afterwards, perhaps following appointment as *curatores*, and leased out your real properties, you have the right to sue them. But you have had the possibility of acquiring on their contract an analogous action against the heirs of the lessee.

Written March 5, in the consulship of the Augusti (293).

[5] *The same Augusti and Caesars to Onesima.* An action cannot be acquired by a minor ward through a *tutor* except in certain situations.

Given December 13, in the consulship of the Caesars (294).

Fortieth Title If, Out of Several *Tutores* or *Curatores*, All or One Can Sue or Be Sued on Behalf of the Ward

[1] *Emperor ANTONINUS Augustus to Miltiades.* You ought not to be unaware that a ward's case can be defended by one of the *tutores* or *curatores*, (even) when the others refuse to do so.

Posted November 5, in the consulship of Messala and Sabinus (214).

[2]²⁴² *Emperor CONSTANTINE Augustus and LICINIUS Caesar to Symmachus.* If the liability for management has been divided by province, it is settled that only all those can be sued or sue who have the responsibility for managing a tutelage or a curatorship in that province, so that defenders of lawsuits against wards not be summoned to court from other provinces.

Given February 4, in the consulship of Constantine Augustus, for the fifth time, and Licinius Caesar (319).

²⁴² = (in part) C.Th. 2.4.1.1, ascribing the constitution to Constantine alone. Seeck dates to February 4, 318.

XXXXI Ne Tutor vel Curator Vectigal Conducatur

[1] *Imp. Antoninus A. Sexto. pr.* Competens iudex non ignorat non esse admittendos ad vectigalia conducenda eos, qui pupillorum vel adulescentium tutelam seu curam administrant vel eius administrationis rationem nondum reddiderunt. 1. Sed quamvis contra interdictum ad vectigale conducendum accesseris, tamen, quoniam ultro me adisti, si tam vectigali quam pupillis satisfeceris, falsi crimine carebis. 2. Cum autem fisco iam obstrictum postea tutorem esse dicas, periculo te excusare poteris.

PP. VIII k. Aug. Romae Antonino A. IIII et Balbino cons.

XXXXII De Tutore vel Curatore Qui Satis Non Dedit

[1] *Impp. Valerianus et Gallienus AA. Titio et Flaviano.* Si nondum vobis aetas legitima completa est, satisfactionem ab his, quos minus idoneos curatores vobis ab adversario, cum magistratu fungeretur, datos dicitis, postulate. prohibentur enim ab administratione, nisi securitati vestrae satisfactione prospexerint.

PP. non. Iul. Aemiliano et Basso cons.

[2] *Idem AA. et Valerianus C. Euploio. pr.* Et eum tutorem qui superest, si secundum praesidis praeceptum et iuris formam satis non dat, removeri a tutela (si inopia hoc faciat, sine infamia, si fraude, etiam cum nota) aditus provinciae rector iubebit: et in locum defunctorum alios idoneos substitui praecipiet, praesertim cum patrimonium pupilli nova hereditate auctum esse proponas. 1. Tutores autem dati ab heredibus eorum, quos decessisse dicis, rationem tutelae reposcent.

PP. id. Mai. Saeculare et Donato cons.

Forty-First Title A Tutor or Curator Shall Not Farm Taxes

[1] *Emperor ANTONINUS Augustus to Sextus. pr.* The appropriate judge is not unaware that those who manage the tutelage or curatorship of minor or adult wards or who have not yet given an account of their management shall not be allowed to lease contracts (from the Treasury) for the collection of impost duties (*vectigalia*). 1. And although you have violated this prohibition against farming taxes, nevertheless, because you have approached me of your own accord, if you make good on the tax lease as well as to your wards, you will be free from a charge of falsification. 2. Since, moreover, you declare that when you were already obligated to the Treasury you then became a *tutor*, you will be able to excuse yourself from liability (for violating the prohibition).

Posted July 25, at Rome, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

Forty-Second Title A Tutor or Curator Who Has Not Given Security

[1] *Emperors VALERIAN and GALLIENUS Augusti to Titius and Flavianus.* If you have not yet arrived at the age of full legal majority (i.e., 25), demand security from those, who, as you say, were appointed as your *curatores* – even though they did not possess sufficient resources – by your personal enemy when he was a public official. For they are prohibited from managing your property unless they make provision for your financial stability by giving security.

Posted July 7, in the consulship of Aemilianus and Bassus (259).

[2]²⁴³ *The same Augusti and VALERIAN Caesar to Euploius. pr.* And the governor of the province, once approached, will order that the remaining *tutor*, if he does not give security in accordance with the instructions of the governor and pursuant to the rules of law (*iuris forma*), be removed from the tutelage – if he fails to do this through poverty, without legal infamy (*infamia*); if through fraud, with legal infamy. And he will instruct that other sufficiently wealthy persons shall replace those who have passed away, especially since you allege that the minor ward's estate has been increased through a new inheritance. 1. Moreover, the *tutores* who are appointed will demand an accounting of the tutelage from the heirs of those who you say are deceased.

Posted May 15,²⁴⁴ in the consulship of Saecularis and Donatus (260).

²⁴³ Combine with C. 5.36.4.

²⁴⁴ The precise month is uncertain: May or March.

[3] *Impp. Diocletianus et Maximianus AA. Stratonicae. pr.* In dubium non venit tutores, qui non testamento dati sunt, administrandi potestatem nisi satisfactione emissa salvam tutelam fore non habere. 1. Si igitur tutor, qui pro tutelari officio non caverat, iudicio expertus est, adversus eum lata sententia iuri tuo officere non potuit, nec ea quae ab eo gesta sunt ullam firmitatem obtinent. 2. Frustra igitur in integrum restitutionis auxilium desideras, quando ea quae ab eo gesta sunt ipso iure irrita sunt.

PP. xviii k. Ian. Nicomediae Diocletiano III et Maximiano AA. cons.

[4] *Idem AA. et CC. Tertullo.* Non omnium tutorum par similisque causa est. quapropter exemplo testamentarii confirmatum a praeside vel datum ex inquisitione non onerari satisfactione rem salvam fore pupillorum manifestum est, pluribus autem datis ex inquisitione tutoribus illum, qui satis secundum formam edicti rem pupilli salvam fore dedit, in administratione praeferrī iam dudum obtinuit.

S. id. Dec. Nicomediae CC. cons.

[5] *Impp. Constantius et Maximianus AA. et Severus et Maximinus CC. pr.* Tutor, qui satisfactionem, cum dare debuit, minime interposuit, nihil omnino ex bonis pupilli alienare potest. 1. Posteaquam autem ad tutelae administrationem electus est, et bonorum possessionem pupilli nomine agnoscere eum potuisse et cetera eius, quae tempore artarentur, persequi debuisse aperte claret.

D. xi k. Ian. Constantio v et Maximiano v AA. cons.

XXXXIII De Suspectis

[1] *Imp. Antoninus A. Domitiae.* Libertum tuum et tutorem filii tui, si fraudulenter res eius administrare existimas, suspectum facere potes,

[3]²⁴⁵ *Emperors DIOCLETIAN and MAXIMIAN Augusti to Stratonica. pr.* There is no doubt that *tutores* who are not appointed in a will lack the capacity of managing the ward's property if they do not give security that the tutelage will be protected. 1. If, then, your *tutor*, who gave no security for his tutelage, was involved in a lawsuit, a verdict against him could not prejudice your rights, nor do his transactions have any validity. 2. Hence you needlessly seek the benefit of restoration of rights, since his acts are void by operation of law.

*Posted December 15, at Nicomedia, in the consulship of Diocletian, for the third time, and Maximian, Augusti (287).*²⁴⁶

[4] *The same Augusti and the Caesars to Tertullus.* The situation of all *tutores* is not exactly the same. For this reason, though it is clear that, like a *tutor* named in a will, one who is confirmed by a provincial governor or appointed after a judicial hearing is not burdened with the obligation to give security that the minor wards' property is going to be protected, when, nonetheless, several *tutores* are appointed in a judicial hearing, it has for a long time been the rule that the one who has given security guaranteeing the ward's estate pursuant to the regulations in the Edict is preferred for the active management of the property.

Written December 13, at Nicomedia, in the consulship of the Caesars (294).

[5] *Emperors CONSTANTIUS and MAXIMIAN Augusti and SEVERUS and MAXIMINUS Caesars. pr.* A *tutor* who has not at all given security when he ought to have done so can make no alienation at all of the minor ward's property. 1. It is reasonably clear, however, that, after he has been chosen to manage the tutelage, he could have acknowledged the possession of property (*bonorum possessio*) and ought to have carried out the remaining aspects of the ward's affairs that do not admit of delay.

Given December 22, in the consulship of Constantius, for the fifth time, and Maximian, for the fifth time, Augusti (305).

Forty-Third Title Suspect *Tutores* and *Curatores*²⁴⁷

[1] *Emperor ANTONINUS Augustus to Domitia.* You can request the removal of the man who is your freedman and the *tutor* of your son, if you think he is managing the ward's property fraudulently, on the ground of suspected misconduct, provided that his responsibilities have not been concluded by the

²⁴⁵ §§1-2 = (with changes) C. 2.40.4.

²⁴⁶ Mommsen dates to December 15, 294.

²⁴⁷ See D. 26.10; Inst. 1.26.

modo si officium eius pubertate pupilli finitum non est. nam si eo iure tutor esse desiit, iudicio tutelae conveniendus est.

PP. id. Aug. Romae duobus Aspris cons.

[2] *Idem A. Longino.* Curatores quidem suo periculo, quanto tardius ad eos tutela transfertur, cessant. quod si id fraude factum existimas, suspectos eos postula: qui si submoveri meruerint, in locum eorum alios accipies.

PP. id. Ian. Laeto II et Cereale cons.

[3] *Imp. Alexander A. Fortunatae.* Praeses provinciae tutores filiorum tuorum strictioribus remediis adhibitis omnimodo administrationis officium compellet agnoscere. quod si in eadem contumacia perseveraverint, suspectos postulare, ut alii in locum eorum petantur, non prohiberis.

PP. id. Ian. Alexandro A. III et Dione cons.

[4] *Idem A. Thalidae.* Etiam testamento patris tutorem datum suspectum postulare potes, si fraudem tutoris argueris.

PP. v id. Sept. Alexandro A. III et Dione cons.

[5] *Idem A. Asclepiadi.* In postulandis suspectis tutoribus seu curatoribus non vires patrimoniorum principaliter, sed an nihil segaiter, nihil fraudulenter geratur, perpendi oportet.

PP. VIII k. Ian. Maximo II et Paterno cons.

[6] *Imp. Gordianus A. Felici. pr.* Pietatis fungeris munere, qui fratris tui filios, ut necessitudo sanguinis suadet, protegere conaris. 1. Si igitur tutores vel curatores eorum non recte administrant, suspectis eis postulatis atque ostensis, ut alii in loco eorum constituentur, facile impetrabis. 2. Quod si nihil in fraudem egerunt, verum ita egeni sunt, ut in eorum administratione fratris tui filiorum substantia periclitetur,

son's arrival at the age of adulthood. For if he has ceased to be *tutor* for that reason, he must be sued in an action on tutelage (*iudicium tutelae*).

Posted August 13, at Rome, in the consulship of the two Aspri (212).

[2] *The same Augustus to Longinus. Curatores*, to be sure, who fail to take up their responsibilities, are liable in proportion to the delay in the transfer of the tutelage to them. But if you think this was done fraudulently, make a judicial request that they be removed on the ground of suspected misbehavior. If they deserve to be removed, you will receive others in their place.

Posted January 13, in the consulship of Laetus, for the second time, and Cerealis (215).

[3] *Emperor ALEXANDER Augustus to Fortunata*. The governor of the province will force the *tutores* of your children thoroughly to undertake their duty of management by applying rather severe measures. But if they persist in the same spirit of contempt, you are not prevented from requesting in court their removal on the ground of suspect behavior, so that others can be sought in their place.

Posted January 13, in the consulship of Alexander Augustus, for the third time, and Dio (229).

[4] *The same Augustus to Thalida*. You can make a judicial request for the removal, on the ground of suspect conduct, even of a *tutor* appointed in a father's will, if you accuse him of fraud in connection with his duties as a *tutor*.

Posted September 9, in the consulship of Alexander Augustus, for the third time, and Dio (229).

[5] *The same Augustus to Asclepiades*. In making judicial requests for the removal of *tutores* and *curatores* on the ground of suspected misconduct, it is not chiefly the financial health of the estate, but whether it has been managed in a passive or fraudulent manner, that ought to be weighed.

Posted December 25, in the consulship of Maximus, for the second time, and Paternus (233).

[6] *Emperor GORDIAN Augustus to Felix. pr.* You will fulfill a duty of family affection (*pietas*), when, urged on by the ties of blood, you try to protect the children of your brother. 1. If, then, their *tutores* or *curatores* do not properly manage their property, and they have been accused and found to be guilty of misconduct, you will easily gain your request that others be appointed in their place. 2. But if they have done nothing fraudulently, but are so poor that under their management the property of your brother's children is placed in danger, the governor of the province will determine whether a *curator* of

an eis iniungendus sit curator, qui idoneis facultatibus sit, rector provinciae aestimabit. 3. Removendi autem licentia non solum parentibus utriusque sexus, sed etiam cognatis et extraneis et infamibus et ipsi cuius res administrantur, si non impubes sit, arbitrio cognatorum bonae opinionis constitutorum conceditur.

PP. v id. Nov. Pio et Pontiano cons.

[7] *Idem A. Gorgoniae.* Eum, quem ut suspectum tutorem vel curatorem accusas, pendente causa cognitionis abstinere ab administratione rerum tuarum, donec causa finiatur, praeses provinciae iubebit. alius tamen interea in locum eius in administratione rerum ordinandus est.

PP. vii k. Mart. Sabino II et Venusto cons.

[8] *Imp. Philippus A. et Philippus C. Proculo.* Si non suspectum contutorem tuum postulare ac remove ab administratione bonorum pupilli curaveris, admitti nequaquam potest ratio desiderii tui iam nunc postulantis tutelam tibi nomine eiusdem pupilli restitui.

PP. xiii k. Nov. Peregrino et Aemiliano cons.

[9] *Imp. Diocletianus et Maximianus AA. et CC. Ammiano.* Suspectos tutores ex dolo, non etiam eos, qui ob negligentiam remoti sunt, infames fieri manifestum est.

S. viii k. Mai. CC. cons.

XXXXIII De in Litem Dando Tutore vel Curatore

[1] *Imp. Antoninus A. Miltiadi.* Si quas petitiones adversus pupillos tuos habes, dirigere eas potes, adsistentibus causamque defendentibus contutoribus tuis, cum et, si alios tutores non haberent, ad hoc genus litis defendendae curatores accipere deberent.

PP. xiii k. Aug. Antonino A. IIII et Balbino cons.

[2] *Imp. Alexander A. Euaristo. pr.* An tibi partis fundi paterni vindictio competat, is cuius de ea re notio est aestimabit. 1. Respicere autem

sufficient resources must be appointed to act with them. 3. Moreover, freedom of (requesting) removal is granted not only to ascendant relatives of either sex, but also to (other) blood relatives, non-relatives, and persons marked with legal infamy (*infames*), as well as to the very person whose property is under management, at the discretion of the blood relatives who enjoy a good reputation, if he or she is not a minor.

Posted November 9, in the consulship of Pius and Pontianus (238).

[7] *The same Augustus to Gorgonia.* The governor of the province will order that the man whom you accuse of misconduct as *tutor* or *curator* abstain from the management of your property while the case is pending, until it is completed. Meanwhile, however, another person must be appointed to manage the property in his place.

Posted February 23, in the consulship of Sabinus, for the second time, and Venustus (240).

[8] *Emperor PHILIP Augustus and PHILIP Caesar to Proculus.* If you failed to request in court that your fellow *tutor* be removed from the management of the minor ward's property for misconduct, and thereby to remove him, the basis for your claim, as you now request in court that the tutelage in the name of the same ward be turned over to you, can in no way be respected.

Posted October 20, in the consulship of Peregrinus and Aemilianus (244).

[9] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Ammianus.* It is clear that *tutores* who are accused of and removed for intentional misconduct (*dolus*), not also those who are accused of and removed for negligence, are marked with legal infamy (*infames*).

Written April 24, in the consulship of the Caesars (294).

Forty-Fourth Title Appointing a Tutor or Curator for a Lawsuit

[1] *Emperor ANTONINUS Augustus to Miltiades.* If you have any claims against your minor wards, you can put them forward (in court) with your fellow *tutores* present and defending the suit. Also, if the wards have no other *tutores*, they ought to receive *curatores* for defending a suit in this kind of situation.

Posted July 20, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2] *Emperor ALEXANDER Augustus to Euaristus. pr.* Whether you have the right to recover a part of your father's farm will be decided by the public official

debes officium, in quo te esse tutorem dicis, ne ob eiusmodi petitionem evictione secuta ultra pretii quantitatem auctoris heredem pupillum tuum oneres, qui laudatus per te defendi debeat, cum aut compensationis rationem habere aut contrario tutelae iudicio experiri possis.

2. Sed ne tuum ius, si quod habes, impediatur, ad eam rem defendendam, quae adversus te vindicantem agenda erit, curatores pupillo petuntur.

PP. XII k. Mai. Iuliano et Crispino cons.

[3] *Imp. Gallienus A. Valerio.* Ad protegendam causam tutor sive curator datus conveniri non potest administrationis periculo, cum sola suscepti negotii tutela mandata est, si nihil igitur, ut adlegas, praeter negotium gessisti, frustra conveniris.

PP. k. April. Valeriano et Lucillo cons.

[4] *Idem A. Irenaeo.* Ad litem datus tutor si quid bona fide erogasti, a contutoribus more solito exigere potes.

PP. k. Nov. Paterno et Arcesilao cons.

[5] *Impp. Diocletianus et Maximianus AA. et CC. Tigrani.* Sive ex testamento sive iure legitimo fratris tui filiorum tutelae onus ad te pertineat, vereri non debes de his quaestionibus, quas adversus fratrem quondam tibi fuisse dicis, cum, si qua emergerit lis, procuratore dato et illis curatore ad litem constituto et sollemnitati iuris, ubi tutor exigitur, et indemnitati utriusque prospici possit.

S. IIII k. Mai. CC. cons.

with jurisdiction in this case. 1. You ought to have regard, however, for the responsibilities that you have as a *tutor*, as you declare you are, so that upon eviction on such a claim you do not burden your ward, the heir of the seller, beyond the value of the price itself, since the just-mentioned ward ought to be defended by you, and you can either exercise the right of set-off (*compensatio*) or raise a countersuit on the tutelage.

2. But so that the exercise of your right, if you have one, not be hindered, *curatores* are assigned to the ward to defend against the matter that will have to be pursued in court with you as plaintiff.²⁴⁸

Posted April 20, in the consulship of Julian and Crispinus (224).

[3] *Emperor GALLIENUS Augustus to Valerius.* A *tutor* or *curator* appointed to oversee a lawsuit cannot be sued as if liable for managing the estate, since only the tutelage of the task he undertook was entrusted to him. If, then, as you allege, you did nothing aside from that task, you are being sued to no effect.

Posted April 1, in the consulship of Valerianus and Lucillus (265).

[4] *The same Augustus to Irenaeus.* As a *tutor* appointed for a lawsuit, if you have paid out any expenses in good faith (*bona fides*), you can claim these from your fellow *tutores* in the usual manner.

Posted November 1, in the consulship of Paternus and Arcesilaus (267).

[5] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Tigranes.* Whether the burden of the tutelage over your brother's children rests on you because of appointment in his will or according to the statutory rules, you ought to have no concern over those disputes that as you say, you had with your deceased brother. The reason is that, if a lawsuit arises, a procurator will be appointed who will be their *curator* for the lawsuit. The legal formalities that require a *tutor* can (thus) be observed and the interests of both parties can be safeguarded against loss.

Subscribed April 28, in the consulship of the Caesars (294).

²⁴⁸ The constitution concerns a potential conflict between the financial interests of a *tutor* and those of his ward, but the details are a little obscure. P(laintiff) has a property right in a farm that survives the death of T(estator), and exercise of this right potentially prejudices the interests of H(eir), who is P's ward. If P forces a return of the farm by its purchaser, H will be forced to pay the latter twice the value of the whole (the penalty for eviction). The Emperor invites P to respect his fiduciary relationship with H (*tutor* and minor ward) by seeking the value of the portion due to him directly from the latter, and outlines two possible means: set-off and counter-suit on the tutelage. We are not told the full extent of the relationship between P and H, apart from the tutelage; P may be an emancipated brother of H or a family friend, for example.

XXXXV De Eo Qui Pro Tutore Negotia Gessit

[1] *Imp. Valerianus et Gallienus AA. Marcello.* Etiam mulieres, si res pupillares pro tutore administraverunt, ad praestandam rationem tenentur.

PP. Aemiliano et Basso cons.

[2] *Imp. Diocletianus et Maximianus AA. et CC. Marco.* Non utiliter nominatus tutor pupillorum agendo nomine, licet ex eorum persona iniunctam impleat intentionem, exceptione 'si tutor non est' submovetur.

D. non. Dec. CC. cons.

XXXXVI Si Mater Indemnitem Promiserit

[1] *Imp. Alexander A. Bruttiae.* Suo potius periculo magistratus tutores quos petisti dederunt, quam tu contra sexus condicionem alicui ex ea obligatione obstricta es, quod tuo periculo tutores filiis tuis dari postulasti.

PP. III id. Mart. Maximo II et Urbano cons.

[2] *Imp. Philippus A. et Philippus C. Asclepiadi et Menandro.* Quaedam pupillorum vestrorum a matre itemque avo paterno administrata eorumque nomine indemnitem vobis promissam esse adseveratis. quae si ita sunt et idem pupilli legitimae aetatis effecti non adversus matrem suam itemque avum, sed contra vos congregari malunt, non immerito indemnitem ab his praestari desiderabitis, quos et administrationem suo periculo pridem suscepisse proponitis.

PP. IIII id. Iul. Praesente et Albino cons.

[3] *Imp. Diocletianus et Maximianus AA. et CC. Gaiano.* Ob tutorem non idoneum a matre petitem frustra vobis eam teneri contenditis, cum

Forty-Fifth Title Persons Who Act in Place of a Tutor²⁴⁹

[1] *Emperors VALERIAN and GALLIENUS Augusti to Marcellus.* Even women, if they have managed the property of a minor ward in place of a tutor, are held to give an account of their management.

Posted in the consulship of Aemilianus and Bassus (259).

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Marcus.* One who was appointed tutor without legal effect, although victorious in a lawsuit enjoined upon him in the name of his wards, will fail (to recover his expenses) if the affirmative defense that “he is not a tutor” is raised.

Subscribed December 5, in the consulship of the Caesars (294).

Forty-Sixth Title A Mother Promises Security Against Loss

[1] *Emperor ALEXANDER Augustus to Bruttia.* The public officials have appointed the *tutores* you requested with their own risk of liability, rather than that you, contrary to the status of your gender (*sexus condicio*),²⁵⁰ should be bound to someone from an obligation that arose because you made a request in court that *tutores* be appointed for your children at your risk of liability.

Posted March 13, in the consulship of Maximus, for the second time, and Urbanus (234).

[2] *Emperor PHILIP Augustus and PHILIP Caesar to Asclepiades and Menander.* You assert that certain matters regarding your minor wards were managed by their mother and likewise their paternal grandfather, and that it was promised in their names you would not be held liable (in these matters). If that is so, and the same wards, when they reach adulthood, prefer to sue not their own mother or likewise their grandfather, but you instead, not unjustly will you seek freedom from liability to be furnished by those who, as you declare, also took up the management some time ago at their own risk.

Posted July 12, in the consulship of Praesens and Albinus (246).

[3] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Gaianus.* You assert to no purpose that your mother is liable because she nominated a tutor without sufficient resources. For she is not bound by that obligation,

²⁴⁹ See D. 27.5.

²⁵⁰ On “gender” as a translation here, see the note at C. 5.3.20.

non, nisi specialiter eius periculo dari decreto fuisset comprehensum, ex ea obligatione obstricta est.

S. k. Dec. AA. cons.

XXXXVII Si Contra Matris Voluntatem Tutor Datus Sit

[1] *Imp. Severus et Antoninus AA. Tertio.* Si contra matris ultimam voluntatem Fuscium filio communi tutorem datum probaveris, eum sine damno existimationis a tutela removendum praetor decernet. quae rescriptio, si in fraude convictus fuerit, non suffragabitur.

PP. XIII k. Mart. Laterano et Rufino cons.

XXXXVIII Ut Causae post Pubertatem Adsit Tutor

[1] *Imp. Philippus A. Dextro. pr.* Tutores, qui necdum administrationis rationem ad curatores transtulerunt, defensionis causarum pupillarium adsistere oportere saepe rescriptum est. 1. Et ideo, si (ut proponis) instrumenta, quibus adseri possunt causae provocationis, etiam nunc hi quorum meministi apud se detinent, aditus praeses provinciae periculi sui eos admoneri praecipiet.

PP. XII k. Nov. Philippo A. et Titiano cons.

XXXXVIII Ubi Pupilli Educentur

[1] *Imp. Alexander A. Dionysodoro. pr.* Educatio pupillorum tutorum nulli magis quam matri eorum, si non vitricum eis induxerit, commitenda est. 1. Quando autem inter eam et cognatos et tutorem super hoc

unless particular provision was made in the judicial decree that the appointment was made at her risk.

Written December 1, in the consulship of Diocletian and Maximian Augusti (293).

Forty-Seventh Title A Tutor Has Been Appointed Against the Wishes of the Mother

[1] *Emperors SEVERUS and ANTONINUS Augusti to Tertius.* If you prove that Fuscinius was appointed *tutor* for the son you have in common against the last wishes of his mother, the Praetor will decree his removal from the tutelage without his incurring legal infamy (*damnum existimationis*). This rescript will not avail him if he is found guilty of fraud.

Posted February 17, in the consulship of Lateranus and Rufinus (197).

Forty-Eighth Title A Tutor Shall Assist with a Lawsuit after the Ward Reaches Adulthood

[1] *Emperor PHILIP Augustus to Dexter.* *pr.* It has often been laid down in rescripts that *tutores*, who have not yet transferred accounts of the management of the ward's estate to *curatores*, ought to assist in defending the ward's lawsuits. 1. And, for that reason, if, as you allege, those whom you mention are even now holding onto documents which can be used to launch an appeal, the governor of the province, once approached, will direct that they be admonished of the risks they are running.

Posted October 21, in the consulship of Philip Augustus and Titianus (245).

Forty-Ninth Title Where Wards Shall Be Raised²⁵¹

[1] *Emperor ALEXANDER Augustus to Dionysodorus.* *pr.* The rearing of your minor wards shall be entrusted to no one but their mother, if she does not introduce a stepfather into the household. 1. But whenever a dispute arises over this issue between her, the blood relatives of the children, and the *tutor*, the governor of the province, once approached, having enquired into the status of the parties and their degree of relationship to the wards, will weigh the question as to where the boy ought to be raised. 2. But if, moreover, he comes to a

²⁵¹ See D. 27.2.

orta fuerit dubitatio, aditus praeses provinciae inspecta personarum et qualitate et coniunctione perpendet, ubi puer educari debeat. 2. Sin autem aestimaverit, apud quem educari debeat, is necessitatem habebit hoc facere, quod praeses iusserit.

PP. VII id. Febr. Maximo II et Aeliano cons.

[2] *Imp. Diocletianus et Maximianus AA. et CC. Gratae.* Utrum nepos tuus ex filia apud te an patrum suum morari debeat, ex singulorum adfectione et qui magis ad suspicionem ex spe successionis propior sit, aestimabitur.

S. XVIII k. Nov.^{xvii} Nicomediae CC. cons.

L De Alimentis Pupillo Praestandis

[1] *Imp. Antoninus A. Faustino. pr.* Pupillus, si ei alimenta a tutore suo non praestantur, praesidem provinciae adeat, qui, ne in alimentorum praestatione mora fiat, partibus suis fungetur. 1. Idem est et si de statu pupilli seu adulti et de bonis eius controversia pendeat.

PP. VI id. Iul. Romae Laeto II et Cereale cons.

[2] *Imp. Alexander A. Aufidio. pr.* Quod plerumque postulatur, ut arbitrio praetoris alimenta pro modo facultatum pupillis vel iuvenibus constituentur, pro officio suo hi qui aliena negotia gerunt, ne apud iudicem controversiam habeant, faciunt. 1. Ceterum si bonus vir et innocens tutor arbitrio suo aluit pupillos (quod interdum etiam necesse est fieri, ne^{xviii} secreta patrimonii et suspectum aes alienum, quod melius est interim taceri quam, cum de modo bonorum quaeritur, ultro proferri et apud acta ius dicentis contra utilitatem pupillorum signari), non dubio accepto ferre debebunt ea, quae vir bonus arbitrat^{ur} merito ad exhibitionem educationis ministeria studiaque erogata esse. 2. Nec ferendus est iuvenis, qui, cum praesens esset studiisque^{xix}

^{xvii} XVIII k. Ian.

^{xviii} [ne] <propter>

^{xix} qui pro censu studiis

decision as to by whom the ward ought to be brought up, this person will be obligated to do what the governor has ordered.

Posted February 7, in the consulship of Maximus, for the second time, and Aelianus (223).

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Grata.* Whether your grandson through your daughter ought to reside with you or with his paternal uncle will be determined through consideration of the affection each has for him and of which is worthier of suspicion because of an expectation of succeeding to him.

Written December 15, at Nicomedia, in the consulship of the Caesars (294).

Fiftieth Title Providing Support to a Minor Ward²⁵²

[1] *Emperor ANTONINUS Augustus to Faustinus. pr.* If a minor ward does not receive material support (*alimenta*) from his tutor, he shall approach the governor of the province, who will play his role in seeing that there is no delay in furnishing support. 1. The same holds if a dispute is pending over the status of a minor or adult ward and his or her property.

Posted July 10, at Rome, in the consulship of Laetus, for the second time, and Cerealis (215).

[2] *Emperor ALEXANDER Augustus to Aufidius. pr.* Those who manage the property of another, as part of their responsibilities, avoid wrangling in court generally by requesting that the level of support for minor and adult wards be established, at the discretion of the Praetor, in a manner consistent with their resources. 1. But if a good man (*bonus vir*) and blameless tutor has provided support to minor wards at his own discretion – which sometimes even happens of necessity, because of undisclosed aspects of the estate and debts that are unproven, which it is better to be silent about in the meantime than, during a judicial enquiry into the value of the property, to produce them of one's own accord and register them in the records of the official with jurisdiction, to the disadvantage (*contra utilitatem*) of the minor wards – he should without doubt be credited with a amount which a respectable man (*bonus vir*) would think was justly paid out as expenses for upbringing in the form of servants and education. 2. Nor is the young person to be tolerated who, after he has been educated and maintained in a manner consistent with his resources, if he does not acknowledge that he attained those benefits through

²⁵² See D. 27.2.

eruditus atque alitus est, si ea per alium se consecutum non probet, sumptusque^{xx} recuset, quasi vento vixerit aut nullo liberi hominis studio imbui meruerit.

PP. non. Dec. Maximo II et Aeliano cons.

LI Arbitrium Tutelae

[1] *Imp. Antoninus A. Leoni.* Cum tutelae administratae ratio a te peti coeperit, neque veritati neque iustis probationibus officit, quod (ut dicis) testator modum patrimonii sui verbis testamenti ampliavit vel minuit.

PP. v k. Oct. Romae duobus Aspris cons.

[2] *Idem A. Praesentino.* Nomina paternorum debitorum si idonea fuerunt initio susceptae tutelae et per latam culpam tutorum minus idonea tempore tutelae esse coeperunt, iudex qui super ea re datus fuerit dispiciet: et si palam dolo tutoris vel manifesta neglegentia cessatur, tutelae iudicio damnum, quod ex cessatione accidisset, pupillo praestandum esse statuere curabit.

PP. non. Iul. Antonino A. IIII et Balbino cons.

[3] *Idem A. Vitalio.* Curator, qui post decretum praesidis, sublata pecunia, quae ad comparationem possessionis fuerat deposita, praedium sibi comparavit, elige, utrum malis in emptione tibi negotium eum gessisse, an, quia in usus suos conversae pecuniae sunt, legitimas usuras ab eo accipere: secundum quae iudex tutelae iudicio redditus partem religionis implebit.

PP. III k. Iul. Romae Laeto II et Cereale cons.

[4] *Imp. Alexander A. Aglao. pr.* Eum, qui bonis paternis secundum edicti formam abstentus est, hereditariis actionibus conveniri nulla

^{xx} sumptus

(the expenditure of) another, rejects the expenses claimed, as though he lived on wind or did not deserve to be educated in any manner consistent with the status of a free person.

Posted December 5, in the consulship of Maximus, for the second time, and Aelianus (223).

Fifty-First Title The Action on Tutelage²⁵³

[1] *Emperor ANTONINUS Augustus to Leo.* When an accounting is sought from you for a tutelage you have managed, the fact that, as you say, the testator either exaggerated or understated the value of the estate in the text of the will presents an obstacle neither to the truth nor to the presentation of the appropriate evidence.

Posted September 27, at Rome, in the consulship of the two Aspri (212).

[2]²⁵⁴ *The same Augustus to Praesentinus.* If your father's debtors had sufficient resources when you began to be in tutelage, and through the serious fault (*lata culpa*) of your *tutores* this changed during the period of tutelage, the judge appointed to hear the case will look into it. And if it is clear that such inactivity was due to the intentional fault (*dolus*) or the manifest negligence (*manifesta neglegentia*) of a *tutor*, he will see to it that the loss which came about from this idleness shall be made good to the minor ward through the action on tutelage.

Posted July 7, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[3] *The same Augustus to Vitalius.* If your *curator*, following a judicial decree of the provincial governor, appropriated money that had been deposited for the purchase of real estate, acquiring a property for himself with it, choose whether you prefer to treat him as though he had made the purchase on your account or, because the money was converted to his use, you prefer to receive lawful interest from him. Pursuant to what you decide, the judge who is appointed to hear the case on the action on tutelage will do his duty.

Posted June 29, in the consulship of Laetus, for the second time, and Cerealis (215).

[4]²⁵⁵ *Emperor ALEXANDER Augustus to Aglaus. pr.* No reason allows a person who has refused to enter upon his father's property according to the rules of

²⁵³ See D. 27.3.

²⁵⁴ Combine with C. 5.56.1.

²⁵⁵ Pr. = C. Greg. 6.18.

ratio suadet. 1. Nec ad rem facit, quod adversus curatores, si non consulte abstentus sit, actio competat: nihil quippe in ea quae ex officio gesta sunt vel geri debebunt veniet, sed culpa solum quantique interfuit eius non fuisse abstentum aestimatur. 2. Cui consequens est, ut, si propter eam causam transegeris cum curatoribus, nulla adversus te creditoribus patris tui petitio competat.

PP. III k. Mai. Alexandro A. cons.

[5] *Imp. Gordianus A. Victorino.* Omnes tutores seu heredes eorum, qui administraverunt tutelam, ad eundem iudicem ire debere iam pridem constitutum est. cum igitur patrem tuum cum alio tutelam administrasse adlegas, praeses provinciae eundem iudicem adversus te atque heredes contutorum patris tui dare debebit, quatenus quisque condemnari debeat, examinaturum.

PP. x k. Aug. Pio et Pontiano cons.

[6] *Imp. Diocletianus et Maximianus AA. Septimo et Cononi. pr.* Cum interdictae venditionis vitium etiam pretii fraude tutor vester cumulasse proponatur, non dubitabit praeses provinciae, quando venditionem confirmare voluistis, residuum pretium cum usuris venditae a tutore possessionis celeriter vobis restitui iubere. 1. Quod autem petitis ab heredibus eius qui vendidit pretium vobis exsolvi, superfluo a nobis desideratis, quia nec praesidis experientiam possit latere, tutores qui gesserint sive heredes eorum ob ea negotia, quae per eos administrata sunt, principali loco conveniri debere, ceteris ob culpa rationem non servati detrimenti periculo substitutis, vel, si pariter administrasse doceantur, etiam adversus unum liberum experiundi arbitrium competere, ita ut actiones, quas adversus alios habetis, ad electum transferantur.

PP. IIII k. Sept. ipsis IIII et III AA. cons.

[7] *Idem AA. et CC. Alexandro.* Quidquid tutoris dolo vel lata culpa vel levi culpa sive curatoris minores amiserint vel, cum possent, non

the Edict to be sued on actions that lie against the heir. 1. Nor does it make a difference that an action lies against his *curatores* if he refused imprudently, for nothing will be relevant regarding what they have done or ought to do in future in connection with their duties. Only (their) negligence (*culpa*) is taken into account, in that the calculation is made of the consequences (for the ward) of not entering upon the inheritance. 2. It follows from this that if you have settled with your *curatores*, no suit against you lies for your father's creditors.

Posted April 29, in the consulship of Alexander Augustus (222).

[5] *Emperor GORDIAN Augustus to Victorinus.* It has been for a long time settled law (*constitutum*) that all *tutores* who have managed a tutelage (with others), or their heirs, ought to go before the same judge. Since, then, you allege that your father managed, with another person, a tutelage, the governor of the province ought to appoint the same judge for you and the heirs of your father's fellow *tutores*, who will look into how much each of you ought to be condemned to pay.

Posted July 23, in the consulship of Pius and Pontianus (238).

[6] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Septimus and Conon. pr.* Since, on the facts put forward, your *tutor*, besides being guilty of making a sale that he was forbidden to make, has acted with fraud as to the price, the governor of the province will not hesitate, if you want to confirm the sale, to order that the remainder of the price of the property that was sold by the *tutor* be quickly returned to you with interest. 1. As far as concerns your suit, however, against the heirs of the man who sold the property, it is superfluous for you to ask Us that the (residual) price be paid to you, because it cannot have escaped an experienced governor that the *tutores* who have managed the tutelage or their heirs ought to be sued in the first place over the affairs that they have managed, with the others added in proportion to the liability they bore for negligence in not preventing the loss, or, if they are shown to have managed the property on an equal footing, the free right of suit lies against any one of them, so that the actions, which you have against the others, shall be transferred against the one who is chosen as defendant.

Posted August 29, in the consulship of the Augusti, for the fourth and third time, respectively (290).

[7] *The same Augusti and the Caesars to Alexander.* It is not an uncertain point of law (*incertum ius*) that whatever wards have lost or, when it would have been possible, failed to gain through the intentional wrong (*dolus*), gross negligence (*culpa lata*), or minor negligence (*culpa levis*) of a *tutor* or a *curator*

quaesierint, hoc etiam in tutelae sive negotiorum gestorum utile iudicium venire non est incerti iuris.

S. prid. id. April. AA. conss.

[8] *Idem AA. et CC. Dalmatio.* Tutores tutelae conveniri longi temporis praescriptio non prohibet. unde si his transactione vel novatione atque acceptilatione liberationem non praestitisti, apud rectorem provinciae quaecumque tibi debentur repetere non prohiberis.

S. xvi k. Mai. AA. conss.

[9] *Idem AA. et CC. Iuliano.* Tutorem quondam, ut tam rationem quam si quid reliquorum nomine debet reddat, apud praetorem convenire potes. quamvis enim matrem tuam susceptis bonis vestris indemnitate pro hac administratione tutorem se praestituram promississe proponatur, tamen adversus tutorem tibi tutelae, non adversus matris successores ex stipulatu competit actio.

S. prid. k. Ian. AA. conss.

[10] *Idem AA. et CC. Pomponio. pr.* Si defunctus tutelam vestram administravit, non rerum eius dominium vindicare vel tenere potes, sed tutelae contra eius successores tibi competit actio. 1. Debitum autem aliis indicibus probari oportet. nam quod neque ipse neque uxor eius quicquam ante administrationem habuerunt, non idoneum huius continet indicium: nec enim pauperibus industria vel augmentum patrimonii, quod laboribus ac multis casibus quaeritur, interdicendum est.

S. xi k. Febr. Sirmi CC. conss.

[11] *Idem AA. et CC. Chrysianae.* Tutor post puberem aetatem puellae si in administratione conexa perseveraverit, tutelae actione totius temporis rationem praestare cogitur. sin autem post finitam administrationem in isdem rebus minime se immiscuerit, temporis quod insequitur periculum ad eum non pertinet.

S. v k. Dec. Anghalo CC. conss.

comes too under an action on tutelage or an analogous action on the management of affairs (*negotia gesta*).

Written April 12, in the consulship of the Augusti (293).

[8] *The same Augusti and Caesars to Dalmatius.* The long-time prescription (*longi temporis praescriptio*) does not bar *tutores* from being sued on an action on tutelage. So if you have not released your *tutores* through settlement, novation, or formal discharge, you are not prevented from suing for whatever they owe you before the governor of the province.

Written April 16, in the consulship of the Augusti (293).

[9] *The same Augusti and Caesars to Julian.* You can sue your former *tutor* before the Praetor, both for an accounting and for whatever residue he owes you. For although it is put forward that your mother took over your property and promised your *tutor* that she would guarantee his freedom from liability in connection with its management, nevertheless an action on tutelage lies for you against the *tutor*, not an action on the stipulation against the heirs of your mother.

Written December 31, in the consulship of the Augusti (293).

[10] *The same Augusti and Caesars to Pomponius. pr.* If the decedent managed your tutelage, you cannot claim ownership of his property or hold it, but an action on tutelage lies for you against his heirs. 1. That something is owed, however, ought to be proved by other evidence (than what you have produced so far). That neither he nor his wife had anything before (the period of) his management is insufficient proof of this. For energy and an increase in wealth earned through effort and in many (varied) circumstances is not to be forbidden to persons of modest means.

Written January 22, at Sirmium, in the consulship of the Caesars (294).

[11] *The same Augusti and Caesars to Chrysiana.* If a *tutor* has continued without interruption to manage the property of a girl after she has reached adulthood, under an action on tutelage he is compelled to render an account for the entire time period. But if, however, after the conclusion of his management he had nothing at all to do with the property, he is not liable for the subsequent time period.

Written November 27,²⁵⁶ at Anchialus, in the consulship of the Caesars (294).

²⁵⁶ The precise month is uncertain: Mommsen prefers October 28, 294.

[12] *Idem AA. et CC. Quintillae.* Tutelae actio tam heredibus quam etiam contra successores competit.

S. x k. Dec. Sirmi CC. cons.

[13] *Imp. Iustinianus A. Iuliano pp. pr.* Veteris iuris dubitationem decedentes sancimus, si quidem tutor vel curator pro substantia pupilli vel adulti aliquid ubicumque dixerit ad maiorem quantitatem eam reducens, sive pro utilitate pupilli vel adulti sive per solam simplicitatem sive per aliam quamcumque causam, nihil veritati praeiudicare, sed hoc obtinere, quod ipsius rei inducit natura et mensura pupillaris vel adulti ostendit substantiae. 1. Sin autem inventario publice facto res pupillares vel adulti conscripserit et ipse per huiusmodi scripturam confessus fuerit ampliorem quantitatem substantiae, non esse aliud inspiciendum nisi hoc quod scripsit, et secundum vires eiusdem scripturae patrimonium pupilli vel adulti exigi: neque enim sic homo simplex, immo magis stultus invenitur, ut et in publico inventario contra se scribi aliquid patiatur.

2. Illo procul dubio observando, ut non audeat tutor vel curator res pupillares vel adulti aliter attingere vel ullam sibi communionem ad eas vindicare, nisi prius inventario publice facto secundum morem solitum res eis tradantur: nisi testatores qui substantiam transmittunt specialiter inventarium conscribi vetaverint. 3. Scituris tutoribus et curatoribus, quod, si inventarium facere neglexerint, et quasi suspecti ab officio removeantur et poenis legitimis, quae contra eos interminatae sunt, subiacebunt et postea perpetua macula infamiae notabuntur, neque ab imperiali beneficio absolutione huiusmodi notae fruituri.

D. k. Aug. Constantinopoli Lampadio et Oreste vv. cc. cons.

LII De Dividenda Tutela et pro Qua Parte Quisque Tutorum Conveniatur

[1] *Imp. Gordianus A. Optato.* Si post finitum administrationis officium collegae tui indemnitati praestandae idonei fuerunt posteaque, dum

[12] *The same Augusti and Caesars to Quintilla.* The action on tutelage lies not only for the heirs of the ward but also against those of the tutor.

Written November 22, at Sirmium, in the consulship of the Caesars (294).²⁵⁷

[13] *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect. pr.* Removing the hesitation of the ancient law (*vetus ius*), We lay down that if, in fact, a *tutor* or a *curator* has said something anywhere about the property of a minor or adult ward, exaggerating its size, whether he does this in the interest of the ward, or through sheer foolishness, or for any other reason at all, no prejudice shall be caused to the truth, but what the nature and measure of the ward's property itself shows to be its value shall be the determining factor. 1. But if, however, he made a public inventory, writing up the details of the minor or adult ward's property, and he himself, in producing a document of this kind, exaggerated the value of the property, nothing else shall be considered except what he wrote, and the estate of the ward shall be demanded from him in accordance with the valuation provided by this same document. For no person is so foolish, or rather downright stupid, as to allow something to be written down even in a public inventory against his own interest.

2. It is far from doubt that this rule shall be observed, that a *tutor* or a *curator* shall not dare to lay hold of a ward's property or claim any interest in it for himself before he makes a public inventory and the property is turned over to him in the customary way. An exception arises (only) if a will-maker in bequeathing the estate specifically forbids the writing up of an inventory. 3. All *tutores* and *curatores* will know that if they fail to make an inventory they shall be removed from their position on the ground of being suspected of misconduct, and they both will be subject to the legal penalties, which in their case are boundless, and afterwards will be marked by the permanent stain of legal infamy (*infamia*), without (ever) enjoying release from such infamy through a grant of imperial favor.

Given August 1, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

Fifty-Second Title Dividing a Tutelage and Deciding Which Part Is Appropriate for each Tutor

[1] *Emperor GORDIAN Augustus to Optatus.* If your colleagues possessed suitable resources for the purpose of shielding you from the financial impact of liability after laying down their responsibilities of management, and, during a

²⁵⁷ Mommsen dates to December 13, 294.

non conveniuntur, minus idonei effecti sunt, vitium alienae cessationis ad dispendium tuum pertinere iuris ratio non patitur.

PP. VI id. Mai. Gordiano A. II et Pompeiano cons.

[2] *Impp. Carus Carinus et Numerianus AAA. Primigenio. pr.* Si divisio administrationis inter tutores sive curatores in eodem loco seu provincia constitutos necdum fuit, licentiam habet adulescens et unum eorum eligere et totum debitum exigere, cessione videlicet ab eo adversus ceteros tutores seu curatores actionum ei competentium facienda. 1. In divisionem autem administratione deducta sive a praeside sive a testatoris voluntate unumquemque pro sua administratione convenire potest, periculum invicem tutoribus seu curatoribus non sustinentibus, nisi per dolum aut culpam suspectum non removerunt vel tardae suspicionis rationem moverunt, cum alter eorum non solvendo effectus sit, vel suspicionis causam agendo sua sponte iura pupilli prodiderunt. 2. Nec prodest eis dicentibus contutorem suum non administrasse pupillares res. 3. Sin vero ipsi inter se res administrationis dividerunt, non prohibetur adulescens et unum ex his in solidum convenire, ita ut actiones, quas adversus alios habet, ad electum transferat.

PP. Hemesae XV k. April. Carino II et Numeriano AA. cons.

[3] *Impp. Diocletianus et Maximianus AA. et CC. Zotico.* Licet tutorum conventionem mutuum periculum minime finiatur, tamen eum qui administravit, si solvendo sit, in primo loco eiusque successores conveniendos esse non ambigitur.

S. IIII k. Oct. CC. cons.

LIII De in Litem Iurando

[1] *Impp. Severus et Antoninus AA. Asclepiodoto.* Adversus heredem tutoris ad transferendam tutelam iudicem accipiens tempore litis ad puberem instrumenta pertinentia restitui desiderabis. quod si dolo non

delay in bringing suit against them, they became insufficiently wealthy (to do so), the accepted legal logic (*ratio iuris*) does not permit the fault of someone else's inaction to redound to your disadvantage.

Posted May 10, in the consulship of Gordian Augustus, for the second time, and Pompeianus (241).

[2] *Emperors CARUS, CARINUS, and NUMERIANUS Augusti to Primigenius. pr.* If there has not yet been a division of managing duties among the *tutores* or *curatores* appointed in the same place or province, the ward has the ability to choose one of them and demand the entire amount owed from him, clearly under the obligation of transferring (to him) the actions that lie against the remaining *tutores* or *curatores*. 1. When a division of management has been made, however, either by the governor or through the expressed preference of a testator, he (the ward) can sue each one (only) for his part of the management, since the *tutores* or *curatores* do not bear liability for each other, unless through intentional fault (*dolus*) or negligence (*culpa*) they have not removed someone suspected of misconduct, they made a request for removal tardily, so that one of them became insolvent, or in pursuing the removal of their own accord they betrayed the rights of the ward. 2. Nor does it avail them when they say that their fellow *tutor* did not manage the ward's property. 3. But if, however, they themselves divided the property to be managed among themselves, the ward is not forbidden to sue one of them for the whole, so that he transfers the actions that he has against the others to the one he has chosen.

Posted March 18,²⁵⁸ at Emesa, in the consulship of Carinus, for the second time, and Numerianus, Augusti (284).

[3] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Zoticus.* Although no agreement has been concluded about the respective liability of a group of *tutores*, nevertheless there is no doubt that he who took on the active management, as well as his heirs, should be sued first, if he is solvent.

Written September 28, in the consulship of the Caesars (294).

Fifty-Third Title A Plaintiff's Oath²⁵⁹

[1] *Emperors SEVERUS and ANTONINUS Augusti to Asclepiodotus.* When you receive a judge in a suit against the heir of a *tutor* for the purpose of transferring a tutelage, you will request, at the time of the suit, that the documents

²⁵⁸ The precise day is uncertain; the alternative is March 21.

²⁵⁹ See D. 12.3. Blume: "The assessment oath, here dealt with – *iuramentum in litem* – was an oath whereby the plaintiff assessed or taxed the damages he had suffered by the loss of any object, that is to say, he was permitted to estimate the extent of his damages and to swear that it [it] amounted to a certain sum."

exhibeantur, in litem iurandi tibi facultas erit, modo si quondam pupillo debitam adfectionem ad vincula quoque religionis extendere volueris.

PP. k. Aug. Geta II cons.

[2] *Imp. Antoninus A. Severo. pr.* Is, qui rationes tutelae seu curae reposcit, invitus in litem iurare compelli non potest. sed volens ita demum audiendus est, si heres per longam successionem tutoris instrumenta pupillaria dolo circumveniendi pupilli gratia exhibere non vult. 1. Sin vero neque dolus neque lata culpa neque fraus heredis convincetur, omissa iurisiurandi facultate iudex de veritate cognoscet, quae etiam argumentis liquidis investigari potest.

PP. XI k. Oct. duobus Aspris cons.

[3] *Idem A. Prisciano militi.* Summa sententia comprehensa, quam cessantibus curatoribus quondam tuis iudex secutus iurisiurandi a te prolati religionem in condemnationem deduxit, minui pacto non potuit.

PP. k. Iul. Laeto II et Cereale cons.

[4] *Imp. Gordianus A. Muciano. pr.* Alio iure est tutor, alio heres eius. tutor enim inventarium ceteraque instrumenta si non proferat, in litem iusiurandum adversus se potest admittere: at enim heres eius ita demum, si reperta in hereditate dolo malo non exhibeat. 1. Sed cum adversus ipsum tutorem litem contestatam esse dicatis, transferentibus in heredes eius actionem praeses provinciae partes suas exhibebit non ignorans, nisi exhibeantur instrumenta, quatenus iuxta formam constitutionum partes suas debeat moderari.

PP. VII k. Oct. Pio et Pontiano cons.

[5] *Impp. Diocletianus et Maximianus AA. et CC. Artemidoro.* Licet adversus heredes ob non factum inventarium iusiurandum in actione

relevant to the ward, now arrived at the age of legal majority, be turned over. But if, as a consequence of fraud, they are not produced, you will have the right to swear a plaintiff's oath assessing the damages, provided that you wish to elevate the affection you owe to the former minor ward to the bonds even of a sacred duty.

Posted August 1, in the consulship of Geta, for the second time (205).²⁶⁰

[2] *Emperor ANTONINUS Augustus to Severus. pr.* The person who demands an accounting of a tutelage or a curatorship cannot be forced to swear a plaintiff's oath against his will. And even if he is willing he shall be heard only to the extent that the distant heir of the *tutor* fraudulently (*dolo*) refuses to produce the ward's documents so as to cheat the ward. 1. But if, however, neither malicious intent to cause harm (*dolus*), serious fault (*culpa lata*), nor fraud (*fraus*) on the part of the heir is shown, the judge, dropping the possibility of a plaintiff's oath, will investigate the truth of the matter, which can also be scrutinized through clear proofs.

Posted September 21, in the consulship of the two Aspri (212).

[3]²⁶¹ *The same Augustus to Priscianus, a soldier.* The amount laid down in a judicial decree, which a judge, respecting the authority of the plaintiff's oath you swore, inflicted on your former *curatores* who were derelict in their duty, could not be diminished through private agreement (*pactum*).

Posted July 1,²⁶² in the consulship of Laetus, for the second time, and Cerealis (215).

[4] *Emperor GORDIAN Augustus to Mucianus. pr.* One set of rules (*ius*) applies to a *tutor*, another set to his heir. For if a *tutor* does not produce the inventory and the other relevant documents, a plaintiff's oath can be allowed against him. But this applies to his heir only if he finds the documents in his bequest and does not produce them out of fraud (*dolus malus*). 1. But since you say that there was joinder of issue (*litis contestatio*) with the *tutor* himself, the governor of the province will play his role as you transfer the action against his heirs, not unaware to what extent, unless the documents are produced, he ought to exercise his authority consistently with the content of imperial constitutions.

Posted September 25, in the consulship of Pius and Pontianus (238).

[5] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Artemidorus.* Although it is settled law that a plaintiff's oath for failure to make

²⁶⁰ So Krüger, but Geta's first consulship was in 205, his second in 208, while Caracalla's second was in 205, his third in 208.

²⁶¹ = (in part, with minor changes) Consultatio 9.8.

²⁶² The precise day is uncertain: the alternative is June 22.

tutelae praetermitti placuerit, iudicem tamen velut ex dolo tutoris aliis iudiciis instructum adversus eos ferre sententiam convenit.

S. VIII k. Ian. Nicomediae CC. cons.

LIIII De Heredibus Tutorum

[1] *Imp. Severus et Antoninus AA. Fusciano.* Heredes tutoris ob negligentiam, quae non latae culpa comparari possit, condemnari non oportet, si non contra tutorem lis inchoata est neque ex damno pupilli lucrum captatum aut gratiae praestitum sit.

PP. VI id. Mart. Laterano et Rufino cons.

[2] *Imp. Antoninus A. Valentiniano et Materno. pr.* Pater vester tutor vel curator datus si se non excusavit, non ideo vos minus heredes eius tutelae vel utili iudicio conveniri potestis, quod eum tutelam seu curam non administrasse dicitis: nam etiam cessationis ratio reddenda est. 1. Prius tamen propter actum suum eos conveniendos esse qui administraverint saepe rescriptum est.

PP. XI k. Mart. Antonino A. IIII et Balbino cons.

[3] *Idem A. Avitae.* Adversus heredes quondam tutoris tui tutelae actione consiste. in iudicium autem veniet etiam id, quod tibi tutor ex causa fideiussionis debuit.

PP. III non. Iul. Antonino A. IIII et Balbino cons.

[4] *Imp. Alexander A. Frontino.* Heredes eorum, qui tutelam vel curam administraverint, si quid ad eos ex re pupilli vel adulti pervenit, restituere coguntur: et in eo autem, quod tutor vel curator administrare debuit nec administravit, rationem reddere eos debere non est ambigendum.

PP. VIII k. Nov. Alexandro A. III et Dione cons.

an inventory does not lie in an action on tutelage against the heirs, nevertheless it is agreed that a judge, for example, when informed from other sources about the fraud (*dolus*) of the tutor, shall find against them.

Written December 25, at Nicomedia, in the consulship of the Caesars (294)

Fifty-Fourth Title The Heirs of Tutores²⁶³

[1] *Emperors SEVERUS and ANTONINUS Augusti to Fuscianus.* The heirs of a tutor ought not to be condemned for negligence (*neglegentia*) that does not amount to serious fault (*lata culpa*), unless the suit against the tutor has (already) begun and profit has been taken by the tutor himself or turned over to another as a favor (*gratia*), to the detriment of the minor ward.

Posted March 10, in the consulship of Lateranus and Rufinus (197).

[2] *Emperor ANTONINUS Augustus to Valentinianus and Maternus. pr.* If your father was appointed as a tutor or as a curator and did not excuse himself, the fact that you claim that he did not manage the tutelage or the curatorship does not mean that you, as his heirs, cannot be sued on an action on tutelage or on an analogous action. For an account must be rendered even of a failure to perform. 1. Nevertheless, it has often been laid down in rescripts that those who had active management shall be sued beforehand on account of their actions.

Posted February 19, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[3] *The same Augustus to Avita.* Bring an action on tutelage against the heirs of your deceased guardian. Moreover, that which your tutor owed you as a surety will also enter into the suit.

Posted July 5,²⁶⁴ in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[4] *Emperor ALEXANDER Augustus to Frontinus.* If the heirs of someone who has managed a tutelage or a curatorship have acquired anything from the property of the minor or adult ward, they are forced to return it. Moreover, there shall be no doubt that they must render an account even in a situation where a tutor or curator ought to have managed the estate but failed to do so.

Posted October 25, in the consulship of Alexander Augustus, for the third time, and Dio (229).

²⁶³ See D. 27.7.

²⁶⁴ The precise day is uncertain: the alternative is July 4.

LV Si Tutor Non Gesserit

[1] *Imp. Alexander A. Zotico. pr.* Certum est non solum eos qui gesserunt, sed etiam qui gerere debuerunt tutelam teneri etiam in ea, quae a contutoribus servari non potuerunt, si modo, cum suspectos facere deberent, id officium omiserunt. 1. Tu autem, etsi contra patronum tuum famosam actionem instituere non potuisti, providere tamen, ne quid tutelae deesset, necessariis postulationibus apud eum, cuius de ea re iurisdictio fuit, potuisti.

PP. prid. id. Mai. Maximo II et Aeliano cons.

[2] *Idem A. Iusto.* Qui se non immiscuerunt tutelae vel curae, ex persona eorum, qui gesserunt et idonei sunt, non onerantur. si qua vero sunt, quae, cum geri debuerunt, omissa sunt, latae culpa ratio omnes aequaliter tenet.

PP. VIII k. Mai. Iuliano et Crispino cons.

LVI De Usuris Pupillaribus

[1] *Imp. Antoninus A. Praesentino.* Tutorem vel curatorem pecuniae, quam in usus suos convertit, legitimas usuras praestare debere olim placuit.

PP. non. Iun. Antonino A. IIII et Balbino cons.

[2] *Imp. Alexander A. Ampliato.* Eius, quod ex causa tutelae debetur, usuras praestari oportere dubium non est, quamvis aliis pro partecipe muneris necessitas solutionis inrogetur, quia id non alias contingit, quam si cessatio contutoris in suspecto faciendo imputari possit.

PP. XIII k. Iul. Iuliano et Crispino cons.

Fifty-Fifth Title If a Tutor Fails to Manage

[1]²⁶⁵ *Emperor ALEXANDER Augustus to Zoticus. pr.* It is certain that not only those who have managed a tutelage, but also those who ought to have managed one, are liable even for that which could not be recovered from their fellow *tutores*, provided that, when they ought to have had them removed on the ground they were suspected of misconduct, they failed to do so. 1. You, however, even though you could not bring an action which involves infamy against your patron, nevertheless could have seen to it that nothing was lacking in (the management of) the tutelage, by making the necessary judicial requests to him who has jurisdiction in this matter.

Posted May 14, in the consulship of Maximus, for the second time, and Aelianus (223).

[2] *The same Augustus to Iustus.* Persons who did not involve themselves in the management of a tutelage or a curatorship are not burdened in the same way as those persons who assumed active management and have sufficient resources. But if there are some things which ought to have been managed and have not been, the principle of serious fault (*lata culpa*) makes all of them equally liable.

Posted April 24, in the consulship of Julian and Crispinus (224).

Fifty-Sixth Title Interest Due to Wards

[1]²⁶⁶ *Emperor ANTONINUS Augustus to Praesentinus.* It has for a long time been settled law that a *tutor* or a *curator* must pay lawful interest on the (ward's) money which he turns to his own uses.

Posted June 5, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2] *Emperor ALEXANDER Augustus to Ampliatus.* There is no doubt that interest ought to be paid on money which is owed in connection with a tutelage, although the obligation to pay may be imposed on some in place of a co-participant in the responsibility, which only occurs when a failure to perform on the part of a fellow *tutor* can be imputed to them for not asking for the removal of someone on the ground of suspected misconduct.

Posted June 19, in the consulship of Julian and Crispinus (224).

²⁶⁵ = (in part, with minor changes) C. 6.6.1.

²⁶⁶ Combine with C. 5.51.2.

[3] *Idem A. Vitalio*. Si pecuniam pupillarem neque idoneis hominibus credere neque in emptionem possessionum convertere potuisti, non ignorabit iudex usuras eius a te exigi non oportere.

PP. id. April. Modesto et Probo cons.

[4] *Impp. Diocletianus et Maximianus AA. et CC. Aurelio. pr.* Pupillus agere vobiscum actione tutelae compelli non potest. 1. Verum adversus futuram calumniam et ut, si quid ei debetis, cursus eius inhibeat usurarum, denuntiationibus frequenter interpositis ad iudicium eum provocate ac, si rem dissimulatione proferat, actis apud praesidem provinciae factis voluntatis vestrae rationem declarate: quo facto tam vobis ipsis quam securitati filiorum vestrorum consulatis. 2. Quod et in curatoribus locum habet.

PP. III id. Febr. Sirmi CC. cons.

LVII De Fideiussoribus Tutorum seu Curatorum

[1] *Imp. Alexander A. Felici*. Eligere debes, utrum cum ipsis tutoribus vel curatoribus heredibusve eorum an cum his, qui pro eis se obligaverunt, agere debeas vel, si ita malis, dividere actionem. nam in solidum et cum reo et cum fideiussoribus agi iure non potest.

PP. x k. Febr. Iuliano et Crispino cons.

[2] *Idem A. Prisco. pr.* Non est ambigui iuris electo reo et solvente fideiussorem liberari. 1. Et ideo si simpliciter acceptus est fideiussor in id, quod tutor seu curator debiturus esset, cum proponas tutorem seu curatorem condemnatum solvisse, quid dubium est liberatum esse fideiussorem? 2. Plane si stipulatio rem salvam fore interposita est vel cautum est in id, quod a tutore seu curatore servari non potest, manet fideiussor obligatus ad supplendam tibi indemnitate.

PP. VIII k. Aug. Fusco II et Dextro cons.

[3] *The same Augustus to Vitalius.* If you were unable to lend your minor ward's money to suitable persons nor to use it for the acquisition of real properties, the judge will not be unaware that payment of interest on this ought not to be required from you.

Posted April 13, in the consulship of Modestus and Probus (228).

[4] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Aurelius. pr.* A minor ward cannot be compelled to sue you on an action on tutelage. 1. But to guard against a malicious prosecution in the future and to keep down the cost of interest on any money you may owe, call him (the ex-ward) into court with frequent summonses. And if he deceitfully delays the matter, have a declaration of your intentions placed on the records of the provincial governor. By doing this you shall protect yourselves as well as the interests of your children. 2. This also applies to *curatores*.

Posted February 11,²⁶⁷ at Sirmium, in the consulship of the Caesars (294).

Fifty-Seventh Title Sureties of *Tutores* and *Curatores*²⁶⁸

[1] *Emperor ALEXANDER Augustus to Felix.* You must choose whether you ought to litigate with your *tutores* or *curatores* themselves, or (where relevant) their heirs, or with those who have obligated themselves on their behalf, or, if you so prefer, you ought to divide the action. For it is not possible to sue both the principals and the sureties (simultaneously) for the entire amount.

Posted January 23, in the consulship of Julian and Crispinus (224).

[2] *The same Augustus to Priscus. pr.* It is not a doubtful point of law (*ius ambiguum*) that, if a principal is sued and pays, the surety is released. 1. And, for that reason, if a surety is liable on the books for that which a *tutor* or *curator* is going to owe, since you claim that the *tutor* or *curator* has been condemned and paid, what doubt remains that the surety is released? 2. Clearly, if a stipulation was entered into that any loss was going to be made good by the surety or it was laid down that he would be liable for what could not be recovered from the *tutor* or *curator*, the surety remains obligated to make up any difference to you.

Posted July 25,²⁶⁹ in the consulship of Fuscus, for the second time, and Dexter (225).

²⁶⁷ The precise month and day are uncertain: the alternative is August 30.

²⁶⁸ See D. 27.7.

²⁶⁹ The precise day is uncertain: the alternative is July 26.

LVIII De Contrario Iudicio

[1] *Impp. Severus et Antoninus AA. Stratoni.* Si pro iudicato contutore pecuniam solvisti, nullum iudicium tibi contra pupillum competit, ut delegetur tibi adversus liberatum actio. quod si nomen emisti, in rem suam procurator datus heredes eius iudicati poteris convenire.

PP. vii k. Mart. Fabiano et Muciano cons.

[2] *Imp. Antoninus A. Primitivo.* Si non ex propria culpa solus pupillae condemnatus es, sed absens et indefensus adquevisti, cum ex causa iudicati satisfacere coeperis, actionem adversus contutores tuos mandari tibi a pupilla desiderabis vel utili actione uteris.

PP. prid. id. Oct. duobus Aspris cons.

[3] *Idem AA. et CC. Thesidi. pr.* Si pater tuus, quem et privigni sui tutelam administrasse proponis, testamento recte facto, pupillo etiam quondam suo herede instituto decessit, quoniam non nisi pro portione hereditaria tutelae petitionem confusione constet extingui, pro residua parte succedentem patri tutelae te convenit apud competentem iudicem reddere rationes. 1. Qui secundum bonam fidem, eorum etiam, quae patrem tuum in re eius erogasse dicis, admissa compensatione, reliqui (si quid amplius debetur) faciet condemnationem. 2. Quod si sciens amplius in rem suam erogatum agendum propterea tutelae non putaverit, eum contrario iudicio convenire potes.

S. xviii k. Ian. CC. cons.

LVIII De Auctoritate Praestanda

[1] *Impp. Diocletianus et Maximianus AA. et CC. Antoniano.* Neque tutoris neque curatoris absentia quicquam stipulationi pro pupillo habitae nocet.

Sine die et cons.

Fifty-Eighth Title Countersuit²⁷⁰

[1] *Emperors SEVERUS and ANTONINUS Augusti to Strato.* If you have paid out money on behalf of your fellow *tutor* against whom judgment has been rendered, no action lies for you against the minor ward in order to transfer an action to you against the man released by your payment. But if you have purchased title to the debt (*nomen*), after being appointed as procurator on your own behalf, you can sue the heirs of the judgment debtor.

Posted February 23, in the consulship of Fabianus ad Mucianus (201).

[2] *Emperor ANTONINUS Augustus to Primitivus.* If judgment was rendered for your minor female ward against you alone, through no fault (*culpa*) of yours, but, absent and undefended, you went along with this result, since you have begun to make payment on the judgment, you will ask the ward to assign you the right of action against your fellow *tutores* or make use of an analogous action (*actio utilis*).

Posted October 14, in the consulship of the two Aspri (212).

[3] *The same Augusti and the Caesars*²⁷¹ *to Thesis, pr.* If your father, who, you allege, managed the tutelage even of his stepson, made a proper will in which he named also the former ward as one of his heirs, and then died, because it is obvious that a claim on the tutelage cannot be extinguished by confusion except regarding the portion bequeathed, it is appropriate that you, as the heir of your father, render an account of the tutelage before the appropriate judge regarding the remainder. 1. The judge will, pursuant to the standard of good faith (*bona fides*), allow a set-off (*compensatio*) even for that which you say your father paid out in connection with the stepson's property and will give judgment for the remainder, if anything else is owed. 2. But if he (the stepson), knowing that more was paid out than what was owed in connection with his property, did not think he should sue on the tutelage, you can sue him in a countersuit.

Written December 15, in the consulship of the Caesars (294).

Fifty-Ninth Title Giving Authorization²⁷²

[1]²⁷³ *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Antonianus.* The absence of a *tutor* or *curator* does not prejudice in any way a stipulation given on the ward's behalf.

Without day or year.

²⁷⁰ See D. 27.4.

²⁷¹ The authors of this constitution are, in fact, Diocletian and Maximian, along with the Caesars.

²⁷² See D. 26.7; Inst. 1.21.

²⁷³ = (in part, with minor changes) C. 8.37.7 (to Antoninus). The *lex geminata* dates to January 16, 294.

[2] *Idem AA. et CC. Serenae.* Nec actiones sine tutoris auctoritate in aetate pupillari constituta remittendo quicquam amittere poteris.
S. xvii k. Mai. CC. cons.

[3] *Idem AA. et CC. Gaio.* Eum, qui a pupillo sine tutoris auctoritate distrahente comparavit, longi temporis spatium non defendit.
S. viii id. Dec. CC. cons.

[4] *Imp. Iustinianus A. Iuliano pp.* Clarum posteritati facientes sancimus omnimodo debere et agentibus et pulsatis in criminalibus causis minoribus viginti quinque annis adesse curatores vel tutores, in quibus casibus et pupillos leges accusari concedunt, cum cautius et melius est cum suasionem perfectissima et responsa facere minores et litem inferre, ne ex sua imperitia vel iuvenali calore aliquid vel dicant vel taceant, quod, si fuisset prolatum vel non expressum, prodesse eis poterat et a deteriore calculo eos eripere.

D. x k. Mart. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[5] *Idem A. Iohanni pp. pr.* Veterem dubitationem amputantes, per quam testamentarii quidem vel per inquisitionem dati tutoris et unius auctoritas sufficiebat, licet plures fuerant, non tamen diversis regionibus destinati, legitimi autem vel simpliciter dati omnes consentire compellebantur, sancimus, si plures tutores fuerint ordinati, sive in testamento paterno sive ex lege vocati sive a iudice vel ex inquisitione vel simpliciter dati, et unius tutoris auctoritatem omnibus tutoribus sufficere, ubi non divisa est administratio vel pro regionibus vel pro substantiae partibus: ibi etenim necesse est singulis pro suis partibus vel regionibus auctoritatem pupillo praestare, quia in hoc casu non absimiles esse testamentariis et per inquisitionem datis legitimos et simpliciter datos iubemus eo, quod fideiussionis onere praegravantur et subsidariae actionis adminiculum speratur.

[2] *The same Augusti and Caesars to Serena.* You cannot lose anything by putting off bringing actions without the authorization of a *tutor* while you are still a minor ward.

Written April 15, in the consulship of the Caesars (294).

[3]²⁷⁴ *The same Augusti and Caesars to Gaius.* Long-time prescription (*longi temporis spatium*) does not protect a person who has purchased something from a minor ward who was alienating (the property) without the authorization of a *tutor*.

Written December 6,²⁷⁵ in the consulship of the Caesars (294).

[4] *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect.* Making it clear to posterity, We ordain that *curatores* and *tutores* ought in every way to assist those less than 25 years old when they are plaintiffs or defendants in criminal cases where the laws allow even minor wards to be prosecuted, since it is more prudent and better that wards respond to suit and bring suit with the most seasoned counsel, so that they from inexperience or youthful impetuosity do not say or keep quiet about something which, if it were set forth or not expressed, could be of help to them and snatch them from a worse outcome.

Given February 20, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[5] *The same Augustus to John, Praetorian Prefect. pr.* We remove an ancient hesitation, in which the authorization of one *tutor* was sufficient if he was appointed in a will, certainly, or by a court after a hearing, even if there was more than one, as long as they were not appointed to different geographical areas; however, if they were appointed according to the statutory rules or simply appointed (by an official), all were compelled to give their consent. We lay down that, if more than one *tutor* is appointed, whether in a father's will, according to the statutory rules, or by a judge either after a hearing or without one, the authorization even of one *tutor* shall be sufficient for all *tutores*, where the management is not divided according to geographical area or portions of the estate. For in that case the authorization of a *tutor* must be given to the minor ward for each area or portion. We order that in this situation those appointed according to the statutory rules or simply appointed shall not be different from those appointed in a will or after a hearing for the reason that they labor under the weight of a surety and there is the possibility of a subsidiary action.

²⁷⁴ = (in part, with minor changes) C. 7.26.9.

²⁷⁵ The precise day is uncertain: the alternatives are December 7, 10, and 11.

1. Sed haec omnia ita accipienda sunt, si non res quae agitur solutionem faciat ipsius tutelae, ut puta si pupillus in adrogationem se dare desiderat. etenim absurdum est solvi tutelam nec consentiente, sed forsitan et ignorante eo, qui tutor fuerat ordinatus. 2. Tunc etenim, sive testamentarii sive per inquisitionem dati sive legitimi sive simpliciter creati sunt, necesse est omnes suam auctoritatem praestare, ut, quod omnes similiter tangit, ab omnibus comprobetur.

3. Quae omnia simili modo et in curatoribus observari oportet.

D. k. Sept. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

LX. Quando Curatores vel Tutores Esse Desinant

[1] *Imp. Antoninus A. Hermillae.* Si curatores tutoribus adiuncti sunt, pubertate pupilli tam tutorum quam curatorum adiunctorum officium finiri ideoque alios propter aetatis infirmitatem curatores esse dando manifestissimum est.

PP. IIII k. Aug. Romae Antonino A. IIII et Balbino cons.

[2] *Imp. Diocletianus et Maximianus AA. et CC. Menippo.* Tutoris officium ex sola voluntate pupilli non finiri certissimum est.

S. XIII k. Febr. CC. cons.

[3] *Imp. Iustinianus A. Menae pp.* Indecoram observationem in examinanda marum pubertate resecantes iubemus: quemadmodum feminae post impletos duodecim annos omnimodo pubescere iudicantur, ita et mares post excessum quattuordecim annorum puberes existimentur, indagazione corporis inhonesta cessante.

D. VIII id. April. Constantinopoli Decio vc. cons.

1. But all of these provisions must be understood to apply only if the matter in question does not involve the dissolution of the tutelage itself, for example, if the ward wants to give himself in adrogation. For it is absurd that the tutelage be dissolved when a person who has been appointed *tutor* does not consent to this, and perhaps does not even know about it. 2. For in that case, whether they are appointed in a will, after a hearing, according to the statutory rules, or simply appointed, it is necessary that all of them give their authorization so that something which touches them all in the same way is approved by all of them.

3. All of these rules ought in like manner also to apply to the case of *curatores*.

Given September 1, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Sixtieth Title Conclusion of Tutelage or Curatorship²⁷⁶

[1] *Emperor ANTONINUS Augustus to Hermilla*. It is very clear that, if *curatores* have been appointed to act in conjunction with *tutores*, with the minor ward reaching the age of adulthood the responsibilities of the *tutores* as well as of the *curatores* appointed with them are concluded, and for that reason other *curatores* must be appointed on account of the (young adult's) weakness of youth (*aetatis infirmitas*).

Posted July 29, at Rome, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Menippus*. It is very certain that the responsibilities of a *tutor* are not concluded through the mere wish of the minor ward.

Written January 20, in the consulship of the Caesars (294).

[3] *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect*. In terminating the indelicate practice of examining males to ascertain that they have reached adulthood (and so of legal majority), We order the following: in the same way that females, once they have completed 12 years of age, are deemed to have reached adulthood in every sense (and legal majority), so also males, after they have completed 14 years, shall be considered to sense be adults, and the dishonorable physical examination is abolished.

Given April 6, at Constantinople, in the consulship of the vir clarissimus Decius (529).

²⁷⁶ See Inst. 1.22.

LXI De Actore a Tutore seu Curatore Dando

[1] *Imp. Alexander A. Sebastiano. pr.* Neque tutores neque curatores ex sua persona in re pupilli vel adulescentis procuratorem facere possunt, sed actorem constituere debent. 1. Pupillus autem vel pupilla vel adultus vel adulta tam ad agendum quam ad defendendum, tutore seu curatore interveniente, procuratorem ordinare possunt. 2. Ipsi etiam tutores et curatores post litis contestationem a se factam ad exemplum procuratorum, qui litem contestati sunt, dare procuratores non prohibentur.

PP. prid. id. Mai. Alexandro A. III et Dione cons.

[2] *Impp. Diocletianus et Maximianus AA. et CC. Alphocrati.* Si sui iuris constituti filii tui matri successerunt, licet te tutorem eorum esse probetur, tamen non per procuratorem, sed actorem decreto constitutum a te res eorum te absente peti convenit.

S. non. Ian. Sirni CC. cons.

LXII De Excusationibus et Temporibus Earum

[1] *Impp. Severus et Antoninus AA. Aviole.* Falsa suasionem credis te propterea, quod spado sis, immunitatem a tutelis habere.

PP. k. Mai. Cilone et Libone cons.

[2] *Idem AA. Aventiano et Cosconio.* Si curatores dati estis generaliter nec decreto significatum est Italicarum tantum rerum vobis munus adiunctum, adire debetis competentem iudicem, ut vos a provinciali administratione liberet. quod si factum fuerit, petent sibi in provincia curatores adulescentes.

PP. VIII k. Sept. Cilone et Libone cons.

[3] *Idem AA. Crispino.* Excusationis quidem tuae, si ingenuus libertino tutor datus es, certa causa est. sed cum te praeses provinciae audiendum

Sixty-First Title A Manager Appointed by a Tutor or Curator

[1]²⁷⁷ *Emperor ALEXANDER Augustus to Sebastianus, pr.* Neither *tutores* nor *curatores* can, by virtue of their roles (*ex sua persona*), appoint a procurator for the affairs of their minor or adult ward; instead, they ought to appoint a manager (*actor*). 1. A minor or adult ward of either sex can, however, with the consent of a *tutor* or *curator*, appoint a procurator both for bringing and for defending an action. 2. Even the *tutores* and *curatores* themselves, after they effect a joinder of issue (*litis contestatio*), are not prevented from appointing a procurator (to complete the trial), on the analogy of procurators who have joined issue.

Posted May 14, in the consulship of Alexander Augustus, for the third time, and Dio (229).

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Alphocratio.* If your children are *sui iuris* and have succeeded to their mother, although it is shown that you are their *tutor*, nevertheless, it is appropriate that their property be claimed (in a lawsuit) by you in your absence not through a procurator, but through a manager (*actor*) appointed by a judicial decree.

Written January 5, at Sirmium, in the consulship of the Caesars (294).

Sixty-Second Title Excuses and Their Time-Limits²⁷⁸

[1] *Emperors SEVERUS and ANTONINUS Augusti to Aviola.* You are falsely persuaded that you enjoy immunity from managing a tutelage because you are a eunuch (*spado*).

Posted May 1, in the consulship of Cilo and Libo (204).

[2] *The same Augusti to Aventianus and Cosconius.* If you were given a general appointment as *curatores* and there was no mention in the judicial decree that your responsibility embraced only property in Italy, you ought to approach the appropriate judge in order that he frees you from the duty of managing property in the provinces. But if this is done, the young adult wards (*adulescentes*) will seek *curatores* for themselves in the provinces.

Posted August 25, in the consulship of Cilo and Libo (204).

[3] *The same Augusti to Crispinus.* If you, as a free-born person, were appointed as a *tutor* for a freedperson, you have a good reason, admittedly, to be excused. But since the governor of the province refused to hear your case because the

²⁷⁷ = (with a minor change) C. 2.12.11.

²⁷⁸ See D. 27.1.

non putaverit propter praescriptionem, quasi tardius adires, nec a decreto provocaveris, intellegis parendum esse sententiae.

PP. id. Mart. Albino et Aemiliano cons.

[4] *Imp. Antoninus A. Agathodaemoni. pr.* Amplissimi ordinis consulto, qui pupillam suam uxorem ducit, nuptias contrahere non intellegitur et tamen infamis constituitur. 1. Sed si tu Demetriae, cum eam in matrimonio haberes, absens et ignorans curator constitutus es, potes esse securus, dum tamen alius substituatur, non enim debet ignorantia maritorum amplissimi ordinis consulto fraus quaeri.

PP. xi k. Iul. Sabino et Anullino cons.

[5] *Imp. Alexander A. Bassiae.* Libertos a tutela vel cura liberorum patroni seu patronae nullam excusationem impetrare amplissimus ordo auctore divo Marco censuit, et ideo nec illud prodesse eis debet, quominus curatores etiam inviti patroni seu patronae liberis dentur, quod eorundem tutelam administraverunt.

[6] *Idem A. Maximo. pr.* Quinquaginta dies, qui praefiniti sunt ad professionem excusationis his qui tutores seu curatores dati sunt, ex eo die cedere, ex quo decretum praetoris aut testamentum parentis notum factum erit ei qui ad munus vocatus fuerit, ipsa constitutio quae hoc induxit sanxit. 1. Sed si quis in eius temporis computatione ab eo cuius de ea re notio fuit iniuriam passus non provocavit, adquiescere rebus iudicatis debet.

PP. III non. Mai. Iuliano et Crispino cons.

[7] *Idem A. Antonino.* Neque a tutela neque a cura ideo quis excusatur, quod creditor sive debitor eius est, cui tutor sive curator datus est, sed participem in munere habere debet, ut (si res exegerit) is qui alieno auxilio eget defendatur.

PP. III id. Iul. Iuliano et Crispino cons.

time limit had passed, which is to say you approached him too late, and you did not appeal this decision, you understand that it must be respected.

Posted March 15, in the consulship of Albinus and Aemilianus (206).

[4] *Emperor ANTONINUS Augustus to Agathodaemon. pr.* By a decree of the most-respected Senate, he who takes his female ward as his wife is not deemed to have contracted a lawful marriage and all the same is marked with legal infamy (*infamis*).²⁷⁹ 1. But if you, in your absence and without your knowledge, were appointed *curator* for Demetria when you were already married to her, you can be certain of being safe, provided, however, that someone else is substituted for you. For the ignorance of husbands ought not to count as a deliberate violation (*fraus*) of the senatorial decree.

Posted June 21, in the consulship of Sabinus and Anullinus (216).

[5] *Emperor ALEXANDER Augustus to Bassia.* The most-respected Senate, upon the proposal (*oratio*) of the deified Marcus (Aurelius), ordained that freedmen shall not at all be eligible to be excused from the tutelage or curatorship of the children of their male or female patron. And on this account the fact that they managed the children's tutelage ought not to benefit them by preventing them from being appointed *curatores* even against their will for a male or female patron's children.

[6] *The same Augustus to Maximus. pr.* The same constitution that fixed the period of fifty days in which those appointed *tutores* or *curatores* can offer an excuse (also) laid down that this period runs from the moment that the judicial decree of the Praetor or the contents of the male ascendant's will are made known to the person called to this responsibility. 1. And if anyone who has suffered harm from the person with jurisdiction in this matter has not appealed within that time-frame, he ought to abide by the court's decision.

Posted May 5, in the consulship of Julian and Crispinus (224).

[7] *The same Augustus to Antoninus.* No one is excused either from tutelage or from curatorship because he is a creditor or a debtor of the person for whom he has been appointed *tutor* or *curator*, but he ought to have someone as a colleague in this responsibility, so that, if the situation demands it, the person who has need of someone else's assistance shall have his or her interests protected.

Posted July 13,²⁸⁰ in the consulship of Julian and Crispinus (224).

²⁷⁹ This SC was passed under Marcus Aurelius and Commodus (176–180).

²⁸⁰ The precise day is uncertain: the alternative is July 10.

[8] *Idem A. Maximo.* Coloni (id est conductores) praediorum ad fiscum pertinentium hoc nomine excusationem a muneribus civilibus non habent ideoque iniunctae tutelae munere fungi debent.

PP. IIII k. Febr. Fusco et Dextro cons.

[9] *Idem A. Romano.* Frater tuus non ideo a tutela vel cura excusari debet, quod oculum amisit. proinde intellegis munus susceptum eum deserere non posse.

PP. k. Febr. Modesto et Probo cons.

[10] *Idem A. Crispino.* Exactores tributorum tanto tempore, quanto rationem tributariam tractaverunt, non solum ab oneribus, sed etiam a tutelis vacationem habere dubitare non debuisti.

D. id. Aug. Alexandro A. III et Dione cons.

[11] *Idem A. Hylae. pr.* Testamento tutor datus, ut a bonis his excuseris, quae pupilli tui in alia provincia quam unde es ubique moraris possident, intra quinquagesimum diem postulare debuisti. 1. Quod si facere cessasti, excusatio quidem temporis praescriptione submovetur, sed propter late diffusum patrimonium an tibi adiungi aliquos curatores oporteat, praeses provinciae, si te insufficientem deprehenderit, aestimabit.

PP. VIII id. Dec. Pompeiano et Peligno cons.

[12] *Imp. Gordianus A. Valentino.* Voluntaria tutelae munera privilegiis nihil derogant.

PP. XI k. Nov. Pio et Pontiano cons.

[13] *Idem A. Apollinari.* Nec senatorum quidem liberti, nedum ceterorum, propterea, quia patronorum negotia gerunt, a muneribus civilibus habent immunitatem. tantummodo etenim unus senatoris libertus, qui patroni negotia gerit, habet a tutela sive cura vacationem.

PP. x k. Febr. Gordiano A. et Aviola cons.

[8] *The same Augustus to Maximus.* Tenant farmers – that is, lessees – of properties owned by the Treasury are not under that title excused from civic responsibilities and on this basis ought to discharge the duty of a tutelage that is enjoined upon them.

Posted January 29, in the consulship of Fuscus and Dexter (225).²⁸¹

[9] *The same Augustus to Romanus.* Your brother ought not to be excused from managing a tutelage or a curatorship because he has lost an eye. So you understand that he cannot abandon the responsibility he has undertaken.

Posted February 1, in the consulship of Modestus and Probus (228).

[10] *The same Augustus to Crispinus.* You ought not to have doubted that collectors of the direct tax (*tributum*), for as long as they dealt with the workings of the tax, enjoyed a release not only from civic obligations (in general) but also from managing a tutelage.

Given August 13, in the consulship of Alexander Augustus, for the third time, and Dio (229).

[11]²⁸² *The same Augustus to Hylas, pr.* When you were appointed *tutor* in a will, in order to be excused from the responsibility for managing that property which your minor wards possess in a province other than where you are from and where you reside, you ought to have made a judicial application within fifty days. 1. But if you failed to do so, the excuse at any rate is not granted because of the lapse of time. Still, because the property is widely distributed, the governor of the province will decide, if he discovers that you are not able to act alone, whether some *curatores* ought to be added alongside you.

Posted December 6, in the consulship of Pompeianus and Pelignus (231).

[12] *Emperor GORDIAN Augustus to Valentinus.* The voluntary assumption of a tutelage does not abrogate any privileges.

Posted October 22, in the consulship of Pius and Pontianus (238).

[13] *The same Augustus to Apollinaris.* Not even the freedmen of senators, let alone those of everyone else, are excused from civic responsibilities on account of the fact that they conduct their patrons' business dealings. For only a single freedman of a senator, who manages his patron's affairs, is excused from managing a tutelage or curatorship.

Posted January 23, in the consulship of Gordian Augustus and Aviola (239).

²⁸¹ Other constitutions show that this was the second consulship for Fuscus.

²⁸² 1 *fm.* = (in part, with changes) C. 5.36.3.

[14] *Idem A. Heraclidae. pr.* Severiter praeses provinciae exsequetur, si animadverterit avunculum tuum propterea nominari tutorem, ut metu eiusmodi creationis a magistratibus iniuriam redimat. 1. Quin etiam si aliqua ei excusatio competit et non alia causa nominatus est, quam ut lite fatigetur, quod in eam rem absumptum fuerit, is qui eum nominavit iuxta formam constitutionum ei reddere cogetur.

PP. id. Sept. Gordiano A. et Aviola cons.

[15] *Idem A. Tauro.* Quamquam in tutela detentus eo, quod excusatio quam obiebas non est admissa, provocationis auxilium flagitares et in medio tempore hi quorum meministi in adulta aetate agere coeperunt, tamen non eo minus causa interpositae provocationis propter periculum administrationis eius temporis iudiciorum more examinanda est.

PP. VIII k. Nov. Arriano et Papo cons.

[16] *Imp. Philippus A. Theodoto.* Si, ut adlegas, his tutor datus es, cum quibus disceptationem hereditatis tibi esse proponis, et tempora antiquitus excusationibus praestituta etiam nunc opitulantur, adire praesidem provinciae potes, formae super ea re statutorum principalium obtemperari pro sua gravitate iussurum.

PP. x k. Aug. Peregrino et Aemiliano cons.

[17] *Impp. Valerianus et Gallienus AA. Epagatho.* Licet orationis sub divo Marco habitae verba deficiant, is tamen, qui post contractas nuptias nurui suae curator datur, excusare se debet, ne manifestam sententiam eius offendat et labem pudoris contrahat.

D. VI id. Ian. Valeriano II et Lucillo cons.

[18] *Impp. Diocletianus et Maximianus AA. et CC. Sabino. pr.* Tutores nominatos appellationem interponere necesse non habere certissimi iuris est. 1. Quapropter, licet non appellasti, si quam te excusationem habere confidis, intra tempus, quod divi Marci constitutione praescriptum est, hac apud praesidem provinciae uti non prohiberis. 2. Nam

[14] *The same Augustus to Heraclidas. pr.* The governor of the province will act with severity if he discovers that your maternal uncle was nominated as a *tutor* in order that he, out of fear over such an appointment, bribe the public officials to release him. 1. The same holds also if he is eligible for some excuse and he was nominated for no other reason than that he be harassed by a lawsuit; the person who nominated him will be compelled to reimburse him for the relevant expenses according to the rules of imperial constitutions.

Posted September 13, in the consulship of Gordian Augustus and Aviola (239).

[15] *The same Augustus to Taurus.* You were held (obligated) to manage a tutelage because the excuse you were offering was not accepted. Although you were demanding the right of an appeal, and in the meantime those whom you have made mention of began to reach the age of adulthood, nevertheless, the appeal shall be heard according to standard judicial usage, all the more because of the liability for management that exists during this time.

Posted October 25, in the consulship of Arrianus and Papus (243).

[16] *Emperor PHILIP Augustus to Theodotus.* If, as you allege, you were appointed *tutor* for those with whom you assert you have a dispute over an inheritance, and the time period long ago set for offering excuses is still now operative, you can approach the governor of the province, who will, consistently with his seriousness of character (*gravitas*), issue an order in compliance with the rules laid down in this matter by imperial laws (*statuta principalia*).

Posted July 23, in the consulship of Peregrinus and Aemilianus (244).

[17] *Emperors VALERIAN and GALLIENUS Augusti to Epagathus.* Although the words of the legislative proposal (*oratio*) of the deified Marcus (Aurelius) are lacking (i.e., do not expressly ordain this), nevertheless, a man who is appointed as *curator* for his daughter-in-law after the marriage between her and his son is contracted ought to excuse himself so as to avoid violating the manifest intent of that law and attracting blame for disgraceful conduct.

Given January 8, in the consulship of Valerian Augustus, for the second time, and Lucillus (265).

[18] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Sabinus. pr.* It is a very certain point of law (*ius certissimum*) that persons (merely) nominated as *tutores* are not obligated to make an appeal. 1. Therefore, although you did not make an appeal, if you are confident that you have a valid excuse, you are not prevented from offering this to the governor of the province within the time period set by the constitution of the deified Marcus (Aurelius). 2. As to the fact that you assert that the father of the minor

quod omnium bonorum patrem pupilli usum fructum reliquisse quondam uxori suae proponis, ad excusandos vos a tutela non est idoneum.

D. non. April. CC. cons.

[19] *Idem AA. et CC. Dionysio.* Inusitatam rem desideras, de tutela filii te dimitti postulans, quod te posse contrario tutelae iudicio matrem eius convenire contendis.

Sine die et cons.

[20] *Idem AA. et CC. Charitino.* Curator adultis nominatus, quorum tutor antea fueris, invitatus in administratione teneri non potes. proinde si dies excusationibus praefinitus nondum excessit, uti competenti defensione potes.

S. x k. Dec. Nicomediae CC. cons.

[21] *Idem AA. et CC. Paramono.* Quod res cum uterinis fratribus tibi communes esse profitearis, ad excusationem tutelae non est idoneum, cum harum divisio curatore dato fieri possit.

S. xviii k. Ian. Nicomediae CC. cons.

[22] *Idem AA. et CC. Hermodoro.* Si tutor nominatus decreto praesidis habens excusationem absolutus es, ad te non pertinere periculum administrationis manifestum est.

D. xiii k. Ian. Nicomediae CC. cons.

[23] *Idem AA. et CC. Neophyto. pr.* Humanitatis ac religionis ratio non permittit, ut adversus sororem vel filios sororis actionum necessitates tutelae occasione suscipias, cum ipsius etiam pupilli, cui tutor datus es, aliud exigere videatur utilitas, scilicet ut eum tutorem potius habeat, qui ad defensionem eius non inhibeat adfectu. 1. Iuxta formam igitur, quam consulti dedimus, praetorem adiri oportet, ut et iusto tuo desiderio et pupilli ipsius commodo consulatur.

S. vi k. Febr. Sirmi CC. cons.

ward left the usufruct of all his property to his former wife, this is not sufficient reason to excuse you from tutelage.

Given April 5, in the consulship of the Caesars (294).

[19] *The same Augusti and Caesars to Dionysius.* You ask for something unusual when you make a judicial application to be released from the tutelage of a (woman's) son because you assert that you have the possibility of suing his mother in a countersuit on (her) tutelage.

Without day and year (294).

[20] *The same Augusti and Caesars to Charittinus.* Though nominated as *curator* for the adult wards whose *tutor* you were previously, you cannot be held to the management of their property against your will. So if the time period established for offering excuses has not passed, you can raise the appropriate defense.

Written November 22, at Nicomedia, in the consulship of the Caesars (294).

[21] *The same Augusti and Caesars to Paramonus.* The fact that you acknowledge owning property in common with your uterine brothers is not a sufficient reason to be excused from managing their tutelage, since it is possible for a division to be made of the property after a *curator* has been appointed (for your brothers).

Written December 15, at Nicomedia, in the consulship of the Caesars (294).

[22] *The same Augusti and Caesars to Hermodorus.* If you were appointed *tutor* by a judicial decree of a governor and, having a valid excuse, you have been freed, it is clear that you have no liability for management.

Given December 20, at Nicomedia, in the consulship of the Caesars (294).

[23] *The same Augusti and Caesars to Neophytus. pr.* The principles of humane sympathy (*humanitas*) and devout scruple (*religio*) do not allow that you, by reason of a tutelage, undertake the obligation of suing your sister, or your sister's children, although the interest even of the minor ward himself, for whom you have been appointed *tutor*, seems to demand something else, clearly that he rather have that man as a *tutor* who is not constrained in protecting that interest by familial affection. 1. Pursuant, therefore, to the rules (*forma*) that We have laid down when consulted, the Praetor ought to be approached, so that both your wishes – appropriate as they are – and the interests of the ward himself are consulted.

Written January 27, at Sirmium, in the consulship of the Caesars (294).²⁸³

²⁸³ The precise year is uncertain: 294 or 295.

[24] *Imp. Arcadius et Honorius AA. Flaviano pp.* Excusationem naviculariis tutelae sive curae hactenus ipsis tribuimus, ut in huiusmodi officiis minoribus sui tantum corporis obligentur.

D. III non. Mart. Mediolani Stilichone et Aureliano cons.

[25] *Imp. Anastasius A. Antiocho praeposito sacri cubiculi.* Viros clarissimos sacri nostri palatii silentiarios circa latus nostrum militantes de tutelis et curationibus excusari sancimus.

D. k. Ian. Iohanne cons.

LXIII Si Falsis Adlegationibus Excusatus Sit

[1] *Imp. Alexander A. Lysimacho et Diotimo.* Si absentibus necessariis personis vel his, qui sua sponte vos defendere volebant, non competentibus adlegationibus, qui vobis tutores aut curatores dati erant, liberati esse a munere visi sunt, ne eis circumvenisse iudicis religionem prosit, praeses provinciae audiet vos et, si iniustum decretum extorsisse eos apparuerit, exinde ad eos periculum administrationis pertinere pronuntiabit, ex quo dati sunt.

PP. XII k. Mai. Maximo II et Aeliano cons.

[2] *Imp. Philippus A. et Philippus C. Auluzano.* Tutores, quos postea quam bona pupillorum administraverunt a praeside provinciae quasi re integra excusari se impetrasse adseveras, periculum administrationis evitare minime posse manifestum est.

PP. XIII k. Iun. Philippo A. et Titiano cons.

[3] *Idem A. et C. Otani.* Si, ut proponis, pars diversa administratione tutelae seu curae tuae itemque fratris tui ambitione potius quam iuris ratione se excusavit, periculo iniuncti muneris minime liberatus est.

Sine die et consule.

[24]²⁸⁴ *Emperors ARCADIUS and HONORIUS Augusti to Flavianus, Praetorian Prefect.* We excuse shipowners (*navicularii*) from tutelage and curatorship to the extent that they are obliged to perform such duties only for wards belonging to their association.

Given March 5, at Milan, in the consulship of Stilicho and Aurelianus (400).

[25] *Emperor ANASTASIUS Augustus to Antiochus, Head of the Imperial Quarters.* We ordain that *virii clarissimi* members of the imperial bodyguard (*silentiarii*) in Our imperial palace, who are on active service in Our presence, shall be excused from managing tutelage and curatorship.

Given January 1, in the consulship of John (499).

Sixty-Third Title Excuses Granted under False Pretenses

[1] *Emperor ALEXANDER Augustus to Lysimachus and Diotimus.* If your relatives and those who voluntarily wished to protect you were absent, while those who were appointed as your *tutores* or *curatores* seem to have been released from this responsibility through irrelevant assertions, in order that their deception of the judge in the scrupulous performance of his duty not benefit them, the governor of the province will grant you a hearing and, if it seems that they have wrangled an unjust judicial decree, he will thereupon lay down that the liability for management lies with them from the date of their appointment.

Posted April 20, in the consulship of Maximus, for the second time, and Aelianus (223).

[2] *Emperor PHILIP Augustus and PHILIP Caesar to Auluzanus.* It is clear that the *tutores*, who, you assert, after managing the property of their minor wards, succeeded in having themselves excused by the governor of the province as though nothing had been done by them, can in no way avoid liability for management.

Posted May 19, in the consulship of Philip Augustus and Titianus (245).

[3] *The same Augustus and Caesar to Otanes.* If, as you allege, your adversary at trial excused himself from the management of your tutelage or curatorship and likewise that of your brother through corrupt solicitation rather than in reliance on legal principles (*iuris ratio*), he has not at all been released from liability for the duty enjoined upon him.

Without day and year.

²⁸⁴ = C.Th. 3.31.1.

LXIII Si Tutor Rei Publicae Causa Aberit

[1] *Imp. Gordianus A. Guttio. pr.* Qui tutores vel curatores dati rei publicae causa afuturi sunt, ad tempus se excusare debent a tutela, ne etiam medii temporis periculo obstringantur. 1. Quod quidem et tu si fecisti, eius intervalli quo afuisti periculum non debes pertimescere. quod si id praetermisisti, ut priore loco is conveniatur qui administravit, de iure postulabis.

PP. id. Mart. Gordiano A. et Aviola cons.

[2] *Idem A. Reginio.* Certum est eos, qui rei publicae causa abesse desiderunt, ab omni nova tutela anno vacare debere.

PP. v k. Mart. Gordiano A. II et Pompeiano cons.

LXV De Excusatione Veteranorum

[1] *Imp. Antoninus A. Saturnino.* Qui causaria missione sacramento post viginti stipendia solvuntur, et integram famam retinent et ad publica privilegia veteranis concessa pertinent.

PP. VII id. Aug. Antonino A. IIII et Balbino cons.

[2] *Imp. Gordianus A. Celeri veterano.* Quod placuit veteranos tantummodo conveterani filiorum seu militum, et quidem unam tutelam seu curam eodem tempore administrare compelli, eo pertinet, ut, si aliis dati fuerint, intra sollemnia tempora causas excusationis apud competentem iudicem deferant.

PP. III k. Iul. Gordiano A. et Aviola cons.

Sixty-Fourth Title A Tutor Is Absent on Public Business

[1] *Emperor GORDIAN Augustus to Guttius. pr.* Those appointed as *tutores* or *curatores* who are going to be away on public business ought to excuse themselves temporarily from the management of the guardianship, so that they not be exposed to liability even during the period of their absence. 1. If you have, in fact, done this, you need not worry about liability for the period of your absence. But if you have failed to do so, you will correctly ask the court that the person who had the active management be sued first.

Posted March 15, in the consulship of Gordian Augustus and Aviola (239).

[2] *The same Augustus to Reginius.* It is certain that those who have ceased to be away for public business ought to be excused from every new tutelage for one year.

Posted February 25, in the consulship of Gordian Augustus, for the second time, and Pompeianus (241).

Sixty-Fifth Title Veteran Status as an Excuse

[1] *Emperor ANTONINUS Augustus to Saturninus.* Those who are discharged from military service after twenty years because of a disability both retain their good name (*fama*, i.e., they avoid legal infamy) and are eligible for the public privileges granted to veterans.²⁸⁵

Posted August 7, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2] *Emperor GORDIAN Augustus to Celer, a veteran.* With reference to the settled rule that veterans are compelled to manage the tutelage or curatorship only of the children of a fellow veteran or of active duty soldiers, and, to be sure, (are compelled to manage) only one (tutelage or curatorship) at the same time, it is relevant that, if they are appointed in other circumstances, they bring the reasons for their request to be excused before the appropriate judge within the established time frame.

Posted June 29, in the consulship of Gordian Augustus and Aviola (239).

²⁸⁵ On the *missio causaria* see *Iul. D.* 3.2.2.2.

LXVI Qui Numero Liberorum Se Excusant

[1] *Imp. Severus et Antoninus AA. Claudio Herodiano.* Qui ad tutelam vel curam vocantur, Romae quidem trium liberorum incolumium numero, quorum etiam status non ambigitur, in Italia vero quattuor, in provinciis autem quinque habent excusationem.

PP. non. April. Geta et Plautiano cons.

[2] *Imp. Antoninus A. Marcello.* Neque filia amissa in numero prodest ad declinanda municipalia munera neque nepotes numerantur, quorum pater superest, cum suo nomine patri prosunt.

D. id. Iun. Antonino A. IIII et Balbino cons.

LXVII Qui Aetate

[1] *Imp. Philippus A. et Philippus C. Severo.* Pater tuus si maior est annis septuaginta, ad tutelam seu curam devocatus excusare se sollemniter potest.

PP. XIII k. April. Praesente et Albino cons.

LXVIII Qui Morbo

[1] *Imp. Severus et Antoninus AA. Sabino.* Luminibus captus aut surdus aut mutus aut furiosus aut perpetua valitudine tentus tutelae seu curationis excusationem habent.

PP. v id. Sept. Cilone et Libone cons.

LXVIII Qui Numero Tutelarum

[1] *Imp. Severus et Antoninus AA. Pompeiano. pr.* Si tres tutelae vel curas eodem tempore non defunctorie susceptas administras, onere quartae tutelae vel curationis pupillorum seu adolescentium non gravaberis. 1. Finito autem officio pubertate pupillorum vel aetate

Sixty-Sixth Title Number of Children as an Excuse

[1]²⁸⁶ *Emperors SEVERUS and ANTONINUS Augusti to Claudius Herodianus.* Those who are called to manage a tutelage or a curatorship have a valid reason to be excused if they have, at Rome, at any rate, three thriving children whose status also is not open to doubt; (elsewhere) in Italy, on the other hand, four; but in the provinces, five.

Posted April 5, in the consulship of Geta and Plautianus (203).

[2] *Emperor ANTONINUS Augustus to Marcellus.* A daughter who is deceased does not help qualify for one to be excused from municipal duties, nor do grandchildren count, if their father is alive, since they serve to excuse the father himself.

Given June 13, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

Sixty-Seventh Title Age as an Excuse

[1] *Emperor PHILIP Augustus and PHILIP Caesar to Severus.* If your father is older than 70 years, he can formally excuse himself should he be called upon to manage a tutelage or a curatorship.

Posted March 20, in the consulship of Praesens and Albinus (246).

Sixty-Eighth Title Disability as an Excuse

[1] *Emperors SEVERUS and ANTONINUS Augusti to Sabinus.* Those who are sight-impaired, deaf, mute, insane, or permanently disabled are excused from managing a tutelage or curatorship.

Posted September 9, in the consulship of Cilo and Libo (204).

Sixty-Ninth Title Number of Tutelages as an Excuse

[1] *Emperors SEVERUS and ANTONINUS Augusti to Pompeianus. pr.* If you are managing three tutelages or curatorships at the same time, and not in a perfunctory way, you will not be weighed down with the burden of a fourth tutelage or curatorship of minor or adult wards. 1. But if a guardianship has

²⁸⁶ = (in part, with changes) FV 247.

adulescentium aliae substitui possunt, licet nondum ratio tutelae sive curae administratae reddita sit.

2. Sed imperfectae diversae species vacationis, licet permixtae, ad excusationem non proficiunt. scire igitur debes eum, qui duos filios habet et duas tutelas administrat, excusationem non mereri.

PP. IIII id. Oct. Antonino A. II et Geta II cons.

LXX De Curatore Furiosi vel Prodigii

[1] *Imp. Antoninus A. Marinianae.* Curatores impleta legitima aetate prodigis vel furiosis solent tribui.

PP. IIII k. Aug. Messala et Sabino cons.

[2] *Imp. Gordianus A. Anicio. pr.* Orationis divi Severi beneficium, quo possessiones rusticas sine decreto praesidis pupillorum seu adulescentium distrahi vel obligari prohibitum est, non iniuria etiam ad agnatum furiosi porrigitur. 1. Si igitur citra decretum praesidis fundus mente capti etiam ab agnato eius tibi pignori nexus est, vinculum pignoris in eo non consistit, utilem tamen adversus eum personalem actionem, si ob eius utilitatem pecunia mutua accepta est, poteris habere.

PP. k. Ian. Pio et Pontiano cons.

[3] *Idem A. Aureliano.* Si pater tuus mentis compos non est, pete ei curatores, per quos, si quid gestum est, quod revocari oporteat, possit causa cognita in pristinum statum restitui.

PP. VII id. April. Gordiano A. et Aviola cons.

concluded because the minor wards have reached adulthood or the young adult wards have attained that of full adult status, others can be substituted, even though an accounting has not been made of the tutelage or curatorship that was under management.

2. But different incomplete claims for release, although patched together, cannot suffice to grant an excuse. So you ought to know that he who has two children and manages two tutelages has not earned an exemption.

Posted October 12, in the consulship of Antoninus Augustus, for the second time, and Geta, for the second time (205).²⁸⁷

Seventieth Title *Curatores of Lunatics and Prodigals*²⁸⁸

[1] *Emperor ANTONINUS Augustus to Mariniana.* *Curatores* are customarily appointed for prodigals or the insane when they have reached adulthood (and are *sui iuris*).

Posted July 29, in the consulship of Messala and Sabinus (214).

[2] *Emperor GORDIAN Augustus to Anicius.*²⁸⁹ *pr.* The benefit of the legislative proposal (*oratio*) of the deified Severus, by which it is forbidden to alienate or place under lien rural properties owned by minor or adult wards without a judicial decree of the governor, is rightly extended also to the statutory (agnate) *curatores* of insane persons. 1. If, then, without such a decree a farm belonging to a mentally challenged person was pledged to you even by the agnate serving as *curator*, the pledge is invalid, and all the same you will be able to raise a personal analogous action (*actio personalis utilis*) against him, if the loan was made for his benefit.

Posted January 1, in the consulship of Plus and Pontianus (238).

[3] *The same Augustus to Aurelianus.* If your father is not in his right mind, apply for *curatores* to be appointed for him. They will bring it about that if anything has been done which ought to be rescinded, he can, after a judicial hearing, be restored to his prior position.

Posted April 7, in the consulship of Gordian Augustus and Aviola (239).

²⁸⁷ So Krüger, but Geta's first consulship was in 205, his second in 208, while Caracalla's second was in 205, his third in 208.

²⁸⁸ See D. 27.10; Inst. 1.23. In this title, *furius* is translated as "lunatic," "insane person," and the like, while *prodigus* is rendered as "prodigal," "spendthrift." Both represent categories of persons assigned to a *curator* by a public official.

²⁸⁹ Perhaps better attributed to the Emperor Maximinus.

[4] *Impp. Diocletianus et Maximianus AA. et CC. Asclepiodoto.* Cum repudiante furiosam sui iuris constitutam marito, qui solus repudiare potuit, quaedam matrem furiosae marito quondam eius instrumenta confecisse significas, intellegis nihil eam contra furiosam disponere potuisse, cum eius ad eam iure non pertinuerit defensio.

S. id. April. Byzantii AA. cons.

[5] *Imp. Anastasius A. ad populum.* Ne lucrum quidem antea indebitae successionis emancipato vel emancipatis deputasse, nihil vero de oneribus tutelae prospexisse videamur, curatores nihilo minus eos pro duodecim tabularum lege furiosis fratribus et sororibus utpote legitimos existere hac legis sanctione decernimus.

[6] *Imp. Iustinianus A. Iuliano pp. pr.* Cum aliis quidem hominibus continuum furoris infortunium accidit, alios autem morbus non sine laxamento ingreditur, sed in quibusdam temporibus quaedam eis intermissio pervenit, et in hoc ipso multa est differentia, ut quibusdam breves indutiae, aliis maiores ab huiusmodi vitio inducantur, antiquitas disputabat, utrumne in mediis furoris intervallis permanet eis curatoris intercessio, an cum furore quiescente finita iterum morbo adveniente redintegratur.

1. Nos itaque eius ambiguitatem decidentes sancimus, cum incertum est in huiusmodi furiosis hominibus, quando resipuerint, sive ex longo sive in propinquo spatio, et^{xxi} impossibile est et in confinio furoris et sanitatis eum saepius constitui et per longum tempus sub eadem esse varietate, ut quibusdam videatur etiam paene furor esse remotus, curatoris creationem non esse finiendam, sed manere quidem eum, donec talis furiosus vivit, quia non est paene tempus in quo huiusmodi morbus desperatur: sed per intervalla, quae perfectissima sunt, nihil

^{xxi} <non>

[4] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Asclepiodotus.* As you have given evidence that a husband, who had the power to divorce unilaterally, has divorced his insane wife, who is *sui iuris*, and that her mother has made some written agreements (about her daughter's property) with the ex-husband, you understand that she had no power to dispose over her insane daughter's property, since under law she plays no role in protecting her (daughter's) interests.

Written April 13, at Byzantium, in the consulship of the Augusti (293).

[5]²⁹⁰ *Emperor ANASTASIUS Augustus to the People.* So that We do not appear to have granted to one or more emancipated children the benefit of an inheritance that was not at all previously owed to them, while not making provision for the burdens of guardianship, We decree with this statutory provision (*legis sanctio*) that they nonetheless shall, inasmuch as they qualify, become *curatores* for their insane brothers and sisters in accordance with the statutory rules laid down by the Twelve Tables.²⁹¹

[6]²⁹² *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect, pr.* Since some persons to be sure are visited with the misfortune of continuous insanity, while others suffer the disability not without occasional relief, so that they experience a certain suspension of it for certain periods of time, and in this situation there are significant differences, so that for some the periods of remission from mental illness are brief, and for others longer, the ancients used to debate whether in the periods of respite from madness the authority of a *curator* remained valid, or whether it concluded with the remission of the illness and became valid again with its return.

1. Removing this doubt, We accordingly ordain that, since it is uncertain in cases of insane persons of this kind when (precisely) they have recovered their senses, whether this occurs over a long or a brief space of time, and it is not impossible for the person to find him- or herself rather often situated on the margin between sickness and health and to remain in this ambiguous situation for a long period, so that to some people the madness seems almost even to have lifted, the appointment of the *curator* shall not be concluded, but he shall, certainly, remain in place, as long as such a lunatic lives, because there is hardly any period of time in which this kind of disability is not in prospect. But in

²⁹⁰ Compare C. 5.30.4, 6.58.15.1b; Inst. 3.5.1. Lougheed *et al.* date this constitution to between 491 and 498.

²⁹¹ Blume: "Anastasius allowed emancipated brothers and sisters to succeed as agnates, subject, it seems, to deduction of a third if there were unemancipated persons of the same class ... Hence they were burdened with the same duty of guardianship as their unemancipated brothers." *zti Tab.* 5.7.

²⁹² Combine with C. 5.70.7, 6.22.9.

curatorem agere, sed ipsum posse furiosum, dum sapit, et hereditatem adire et omnia alia facere, quae sanis hominibus competunt: sin autem furor stimulis suis iterum eum accenderit, curatorem in contractus vocari, ut nomen quidem curatoris in omne tempus habeat, effectum autem, quotiens morbus redierit, ne crebra vel quasi ludibriosa fiat curatoris creatio et frequenter tam nascatur quam desinere videatur.

D. k. Sept. Lampadio et Oreste vv. cc. cons.

[7] *Idem A. Iuliano pp. pr.* Cum furiosus, quem morbus detinet perpetuus, in sacris parentis sui constitutus est, indubitate curatorem habere non potest, quia sufficit ei ad gubernationem rerum, quae ex castrensi peculio vel aliter ad eum pervenerint et vel ante furorem adquisitae sunt vel in furore obveniunt, vel in his, quorum proprietas ei tantummodo competit, paterna verecundia. 1. Quis enim talis adfectus extraneus inveniatur, ut vincat paternum? vel cui alii credendum est res liberorum gubernandas parentibus derelictis? 1a. Licet Tertullianus iuris antiqui interpres libro singulari, quem de castrensi peculio condidit, tali tractatu proposito videatur obscure eandem attingere sententiam, tamen nos hoc apertissime introduximus. 1b. Sin autem parentes ab hac luce decedere contigerit, nostra constitutio, quam promulgavimus de his quae in testamento furioso relinquenda sunt vel substitutione eorum, in suo robore maneat.

2. Sin autem perpetuus furiosus sui iuris sit, tunc in paterna quidem hereditate, quae quasi debita ad posteritatem suam devolvitur, nulla est iuris veterum dubitatio, cum ilico apparet et^{xii} suus heres suis extat parentibus.

3. Sin autem ex alia quacumque causa hereditas ad eum vel successio perveniat, tunc magna et inextricabilis vetustissimo iuri dubitatio exorta est, sive adire hereditatem vel bonorum possessionem petere

^{xii} [et] <quod>

the intervals which are absolutely unimpaired the *curator* shall take no action, and the insane person himself, while he has sense, shall be able to enter upon an inheritance and do all the other things which sane persons are entitled to do. But if, however, madness returns in its full force, the *curator* shall be summoned to authorize contracts. The point is that he possesses the title of *curator* the whole time, assuredly, but the power only as often as the illness returns, so that the appointment of a *curator* not become a frequent and almost humorous occasion, and they seem to come in as often as they go out.

Given September 1, in the consulship of viri clarissimi Lampadius and Orestes (530).

[7]²⁹³ The same Augustus to Julian, Praetorian Prefect. pr. When an insane person, afflicted by a permanent illness, is in the power (*sacra*) of a male ascendant, there is no doubt that he or she cannot have a *curator*, because the respectful affection (*verecundia*) of the male ascendant suffices for the management of his or her property, which arises from a *peculium castrense* or from other sources, whether he or she acquired it while insane or beforehand or of which he or she has mere ownership (and not the usufruct). 1. For what outsider shall be found of such an affection that it is superior to that of a male ascendant? Or to what other person should the management of the children's property be entrusted once the male ascendants have been abandoned? 1a. Although Tertullianus, expert in the ancient law (*ius antiquum*), in writing a monograph on the *peculium castrense* and treating this subject, seems to have reached the same position in an obscure fashion, nevertheless, We have brought it back very openly. 1b. But if, however, the male ascendants happen to pass away, Our constitution,²⁹⁴ which we enacted regarding what is to be left in a will to an insane person and the substitution (of heirs) for such property, shall remain valid.

2. But if, however, the permanently insane person is *sui iuris*, then, regarding the inheritance from a male ascendant, certainly, which devolves upon descendants as though it were owed to them, there is no doubt on the part of the ancient jurists (*iuris veteres*), since it is immediately clear that he or she is a privileged heir (*suus heres*) to his or her male ascendants.

3. But if, however, he or she acquires an inheritance or bequest in any other way, in that case a great and unresolvable dispute arose in the most ancient law (*vetustissimum ius*) as to whether or not an insane person could enter upon the inheritance or claim the right to possession of the property (*bonorum possessio*), and whether his or her *curator* ought to be allowed to claim the right

²⁹³ 5-6c = (in part, with changes) C. 1.4.27; combine with C. 5.70.6, 6.22.9.

²⁹⁴ C. 6.26.9.

furiosus possit, sive non, et si curator eius ad bonorum possessionem petendam admitti debeat. et iuris auctores ex utroque latere magnum habuere certamen.

3a. Nos itaque utramque aciem auctorum certo foedere compescentes sancimus furiosum quidem nullo modo posse vel hereditatem adire vel bonorum possessionem agnoscere: curatori autem eius licentiam damus, immo magis necessitatem imponimus, si utilem esse successionem existimaverit, eam bonorum possessionem agnoscere, quae antea ex decreto dabatur, et ad similitudinem bonorum possessionis habere, cum petito bonorum possessionis Constantiniana lege sublata est et ab ea introducta observatio pro antiqua sufficit petitione.

4. Sed cum antiquitas in curatore furiosi multas ambages constituit, quemadmodum ab eo vel cautio vel satisfactio detur, vel pro quibus rebus vel quibus personis, et si omnis curator talem praestabat cautelam, necessarium nobis visum est, ut humano generi consulentes omnem quidem obscuritatem et inextricabilem circuitum tollamus, compendioso autem et dilucido remedio totum complectamur. et prius de creatione curatoris, qui furiosis utriusque sexus datur, sancientes tunc et aliis certum finem imponimus.

5. Et si quidem parens curatorem furioso vel furiosae in ultimo elogio heredibus institutis vel exheredatis dederit (ubi et fideiussionem cessare necesse est paterno testimonio pro satisfactioe sufficiente), ipse qui datus est ad curationem perveniat, ita tamen, ut in hac florentissima civitate apud urbicariam praefecturam deducatur, in provincia autem apud praesidem eius, praesente ei tam viro religiosissimo locorum antistite quam tribus primatibus, et actis intervenientibus tactis sacrosanctis scripturis edicat omnia se recte et cum utilitate furiosi gerere neque praetermittere ea, quae utilia furioso esse putaverit, neque admittere, quae inutilia existimaverit. 5a. Et inventario cum omni subtilitate publice conscripto res suscipiat et eas secundum sui opinionem disponat sub hypotheca rerum ad eum pertinentium ad similitudinem tutorum et adulti curatorum.

6. Sin autem testamentum quidem parens non confecerit, lex autem curatorem utpote agnatum vocaverit, vel eo cessante aut non idoneo forsitan existente ex iudiciali electione curatorem ei dare necesse fuerit,

to possession. And the legal experts (*iuris auctores*) on both sides of the issue engaged in a great controversy over it.

3a. We, therefore, in pacifying the battle lines of jurists drawn on both sides of the issue through a final treaty, ordain that an insane person, certainly, can in no way either enter upon an inheritance or take possession of the estate (*bonorum possessio*). To the *curator*, however, We grant permission for this or rather We impose upon him the obligation, if he should deem the inheritance advantageous, to take the possession of the estate thereof, which previously used to be granted in a judicial decree, and to hold it on the analogy of possession of the estate (granted by decree), since the suit for possession of the estate (*petitio bonorum possessionis*) was abolished by a law of Constantine,²⁹⁵ and the procedure this (statute) introduced stands in place of the ancient suit.

4. But since antiquity established many roundabout usages regarding the *curator* of an insane person, regarding how a promise or a security (*cautio vel satisdatio*) is given by him or for what things and what persons, and if every *curator* should furnish such a guaranty, it seemed necessary to Us, in consulting the interests of the human race, to remove every, to be sure, unclear instance and unresolvable conundrum, embracing the whole, moreover, with a thorough and clear set of remedies. And after first making rules concerning the appointment of *curatores* for insane persons of both sexes, We then enact definite solutions as to other things.

5. And if, in fact, an ascendant male relative appoints a *curator* for an insane person of either sex in his last will, whether they have been appointed heirs or disinherited – in which case the giving of surety must also cease, since the father's testimony is security enough – the person appointed shall take up the curatorship, under this proviso, however, that in this most prosperous city (Constantinople) he shall be brought before the City Prefect, while in the provinces (he shall be brought) before the governor, and in the presence of the most pious local bishop as well as three of the leading men, he shall declare on official record while touching the sacred scriptures that he will conduct all business properly and to the advantage of the insane person, and will neither omit anything that he should deem advantageous to the insane person nor permit anything that he should deem detrimental. 5a. Once an inventory has been publicly drafted in every detail, he shall receive the property and dispose of it according to his judgment under a security arrangement on his property, on the analogy of *tutores* and *curatores* of an adult ward.

6. If, however, the male ascendant does not, to be sure, make a will and the law summons an agnate relative to be *curator*, or in default of such one or if one with sufficient property should not be available, and it is necessary that a

²⁹⁵ C. 6.9.9, which is actually of Constantius, not Constantine.

tunc secundum praefatam divisionem in hac quidem florentissima civitate apud gloriosissimam urbicariam praefecturam creatio procedat: sed si quidem nobilis sit furiosi persona, etiam florentissimo senatu convocando, ut ex inquisitione curator optimae atque integrae opinionis nominetur. sin vero non talis persona sit, etiam solo viro gloriosissimo praefecto urbis praesidente hoc procedat. 6a. Et si quidem curator substantiam idoneam possidet et sufficientem ad fidem gubernationis, et sine aliqua satisfatione nominationem eius procedere: sin autem non talis eius census inveniatur, tunc et fideiussio in quantum possibile est ab eo exploretur. 6b. Creatione quidem omnimodo sacris scripturis propositis in omni causa celebranda, ipso autem curatore, cuiuscumque vel substantiae vel dignitatis est, praefatum sacramentum pro utiliter rebus gerendis praestante et inventarium publice conscribente, quatenus possint undique res furiosi utiliter gubernari.

6c. In provinciis vero his omnibus observandis, ut apud praesidem cuiuscumque provinciae et virum religiosissimum episcopum civitatis nec non tres primates memorata creatio procedat, eadem observatione et pro iureiurando et pro inventario et satisfatione et hypotheca rerum curatoris modis omnibus adhibenda.

7. Tali itaque ordinatione in curatore furiosi disposita, si quid postea ad furiosum pervenerit sive ex hereditate vel successione vel legato vel fideicommisso vel alio quocumque modo, hoc furioso accedat et hoc cum alia eius substantia manibus curatoris tradatur, inventario etiam super his rebus scilicet faciendo: et sub eius cura constituatur, quatenus, si quidem resipuerit furiosus et acquisitionem admiserit, ipsi restituatur.

8. Sin autem in furore diem suum obierit vel in suam sanitatem perveniens eam repudiaverit, si quidem successio est, ad eos referatur, volentes tamen, id est vel substitutum vel ab intestato heredes vel ad nostrum aerarium: eo scilicet observando, ut hi veniant ad successionem, qui mortis tempore furiosi propinquiore existant ei ad cuius bona vocabantur, si non in medio erat furiosus, omni satisfatione vel cautione, quam per inextricabilem circuitum veteris iuris auctores induxerunt, radicitus excisa.

9. Legatis autem procul dubio vel fideicommissis ceterisque acquisitionibus furioso adquirendis et substantiae eius adgregandis: sin autem ipse resipuerit et noluerit ea admittere et aperte haec respuerit vel heres

curator be appointed for him by judicial nomination; then the appointment shall take place according to the aforesaid arrangement exclusively in this most prosperous city before the most renowned City Prefect. But if indeed the insane person is of aristocratic status, the most flourishing Senate also shall be convened, so that, after a hearing, a *curator* of excellent and unblemished reputation is named. But if, however, the (lunatic) is no such person, this shall proceed even under the sole authority of the most renowned City Prefect. 6a. And if in fact the *curator* possesses suitable means sufficient for faithful management (of the property of the insane person), his appointment shall take place even without requiring any security. But if his property assessment is not found sufficient, then as much security as possible shall be sought from him. 6b. The appointment certainly shall in every case entirely be made solemnly before the holy scriptures; the *curator* himself, whatever his property or rank is, shall take the aforementioned oath to conduct the affairs of the insane person advantageously, and shall publicly draft an inventory, so that the property of the insane person may be managed on every side as advantageously as possible.

6c. In the provinces certainly all these measures shall be observed, so that the aforesaid appointment also go forward, before the governor of each province and the most devout bishop of each city as well as three leading men, with the same procedure to be observed in every way with respect to the oath, the inventory, the security, and the hypothec of the property of the *curator*.

7. Therefore, after such an appointment of a *curator* for an insane person has been made, if afterwards anything comes to the lunatic, whether through inheritance, succession (intestate or under a will), legacy, trust, or in any other way, this shall accrue to him or her and with the rest of his or her property shall be handed over to the *curator*, and an inventory shall obviously be made for this property too. And it shall be placed under (the *curator's*) management, so that if, indeed, the insane person recovers his or her senses and approves the acquisition (of this property), it shall be restored to him or her.

8. But if, however, he or she ends life as a lunatic or, to be sure, becomes sane but refuses such acquisition, if it is indeed a succession, it shall accrue, if, however, they accept it, to the substitute heir, the heirs on intestacy, or Our Treasury. This rule clearly shall be observed, that those shall come to the succession who are, at the time of the lunatic's death, the closer relations (*propinquiore*s) to the person for whose property they would have been eligible had the lunatic never lived. Every security or guaranty, which the experts in the ancient law (*veteris iuris auctores*) introduced through an inextricably roundabout route, is utterly abolished.

9. It is far from doubtful, however, that legacies, trusts, and other acquisitions shall be acquired for the insane person and associated with his or her (other) property. But if, however, he or she recovers his or her senses, refuses

eius hoc fecerit, a substantia eius ilico separandis, quasi nec fuerant ab initio ad eum devoluta, et legitimum tramitem ambulantis, substantiam furiosi neque praegravantibus neque adiuvantibus.

10. Sin autem curator furiosi secundum nostram legem nominatus decesserit, sub eodem modo eademque observatione alius creabitur: quemadmodum et, si suspectus reperiatur, alter subrogatur. quod etiam veteribus legibus placuit.

11. Haec autem omnia, quae de creationibus curatorum cum per novam definitionem introducta sunt, futuris casibus imponantur et neque antea facti curatores removeantur neque aliquid novum eis accedat, sed antiquo ordine statuti in antiquos quantum ad creationem permaneant terminos: cautione videlicet vel satisfactione, quae antiquitus fuerat introducta, super postea venientibus ad furiosos successionibus minime praestanda.

D. k. Sept. Constantinopoli Lampadio et Oreste vv. cc. cons.

LXXI De Praediis vel Aliis Rebus Minorum sine Decreto Non Alienandis vel Obligandis

[1] *Imp. Antoninus A. Muciano. pr.* Venditio quidem praedii, quod iure pignoris vel in causa iudicati captum et distractum est, ad senatus consultum, quod de alienandis praediis pupillorum vel adolescentium auctore praetore vel praeside provinciae factum est, non pertinet. 1. Sed si etiam nunc in ea aetate es, cui subveniri solet, aditus competens iudex, an te in integrum restituere debeat, praesente diversa parte causa cognita dispiciet.

PP. XIII k. Dec. duobus Aspris cons.

[2] *Imp. Gordianus A. Clearcho et Aphrodisio. pr.* Non est vobis necessaria in integrum restitutio, si tutores vel curatores vestri possessionem, licet pignori nexam, vendiderunt. 1. Quod si creditores id fecerint, ita

to accept this property, and openly rejects it, or if his or her heir does so, it shall immediately be separated from his or her property, as if it had not come to him or her in the first place, and, following the path set forth by the law, it neither burdens nor increases the property of the lunatic.

10. But if, however, the *curator* of the insane person appointed according to Our law should pass away, another will be appointed in the same way and by the same procedure, with this proviso as well, that if he is suspected of misconduct, another is appointed in his place. This was also a settled principle of the ancient laws.

11. All of these rules, however, which have been introduced regarding the appointments of *curatores* under a recasting of regulations, shall apply (only) to future cases. Neither shall those *curatores* already appointed be removed, nor shall any new rule apply to them, but, being governed by the old rules, they shall remain within the old limits as far as their appointment is concerned. Clearly, the security or guaranty which was introduced in antiquity shall not at all be furnished regarding future successions accruing to insane persons.

Given September 1, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

**Seventy-First Title Real Properties and Other Property of
Wards Are Not to Be Alienated or Placed Under Lien without
a Judicial Decree²⁹⁶**

[1] *Emperor ANTONINUS Augustus to Mucianus. pr.* To be sure, the sale of a property which has been seized and sold because subject to a pledge or a court judgment is not covered by the decree of the Senate regarding the alienation of properties belonging to minor and adult wards which is accomplished on the authority of the Praetor or the provincial governor. 1. But if you are even now of an age for which it is customary to provide assistance, the appropriate judge, once approached, will look into whether he ought to restore your rights (*restituere in integrum*), having conducted a judicial hearing with your adversary present.

Posted November 19, in the consulship of the two Aspri (212).

[2] *Emperor GORDIAN Augustus to Clearchus and Aphrodisius. pr.* Restitution of your rights (*restituere in integrum*) is not necessary if your *tutores* or *curatores* have sold a property of yours although it is bound as a pledge. 1. But if it was your creditors who did this, you will enjoy the benefit provided by the

²⁹⁶ See D. 27.9. The SC in question was prompted by a legislative proposal (*oratio*) of Septimius Severus in 195.

demum iuxta formam edicti beneficium tibi impertietur, si fraudulenta venditione, participante consilium emptore, damnum tibi inflictum esse doceatur.

PP. III k. Febr. Gordiano A. et Aviola cons.

[3] *Impp. Valerianus et Gallienus AA. Theodosiano et aliis.* Cum emancipatis vobis praedium adquisitum foret, alienari a patre eodemque curatore sine praesidis auctoritate non potuit, maxime si, tamquam suum esset, non tamquam pupillare vendiderit, illibataque vobis persecutio eius manet.

PP. III non. Ian. Tusco et Basso cons.

[4] *Idem AA. Mithridati. pr.* Non solum per venditionem rustica praedia vel suburbana pupilli vel adulescentes alienare prohibentur, sed neque transactionis ratione neque permutatione et multo magis donatione nec alio quoquo modo ea transferre e dominio suo possunt. 1. Igitur et tu si fratribus tuis per transactionem fundum dedisti, vindicare eum potes. sed si quid invicem ab eis ex eodem pacto consecutus es, id mutuo restituere debebis.

PP. xv k. Mai. Saeculare II et Donato cons.

[5] *Idem AA. Sereno.* Etsi praeses decreverit alienandum vel obligandum pupilli suburbanum vel rusticum praedium, tamen actionem pupillo, si falsis adlegationibus circumventam religionem eius probare possit, senatus reservavit: quam exercere tu quoque non vetaris.

PP. III k. Mai. Saeculare II et Donato cons.

[6] *Imppp. Carus Carinus et Numerianus AAA. Varo.* Minorum possessionis venditio, per procuratorem delato ad praetorem vel praesidem provinciae libello, fieri non potuit, cum ea res confici recte aliter non potest, nisi apud acta causis probatis, quae venditioni necessitatem inferant, decretum sollemniter interponatur.

PP. non. Mart. Caro et Carino AA. cons.

[7] *Idem AAA. Isidoro.* Si ad resolvendam donationem, quam in emancipatum te pater contulerit, minor annis cautionem emisisti, cum

rules of the Edict (on restoration of rights) only if it is demonstrated that a loss was inflicted on you through a fraudulent sale made in collusion with the purchaser.

Posted January 30, in the consulship of Gordian Augustus and Aviola (239).

[3] *Emperors VALERIAN and GALLIENUS Augusti to Theodosianus and others.* Since a property was acquired for you after you were emancipated, it could not be alienated by your father, who was also your *curator*, without the authorization of the governor, especially if he sold it as though it was his own land, not that of his ward, and your ability to sue remains unimpaired for you.

Posted January 3, in the consulship of Tuscus and Bassus (258).

[4] *The same Augusti to Mithridates. pr.* Not only are minor and adult wards forbidden to alienate rural and suburban properties through sale, but they cannot transfer these properties from their ownership through settlement of a suit (*transactio*), barter (*permutatio*), much less gift, or in any other manner. 1. So too if you gave a farm to your brothers pursuant to a settlement, you can claim it back. But if you obtained something from them in turn according to the same agreement, you ought to return this in exchange.

Posted April 17, in the consulship of Saecularis, for the second time, and Donatus (260).

[5] *The same Augusti to Serenus.* Although the governor issued a judicial decree ordering the alienation or placing under lien of a minor ward's rural or suburban property, nevertheless the Senate has reserved an action for the ward, if he can show that the governor's scrupulous attention to duty (*religio*) was deceived by false allegations. You too are not forbidden from exercising this (action).

Posted April 29, in the consulship of Saecularis, for the second time, and Donatus (260).

[6] *Emperors CARUS, CARINUS, and NUMERIANUS Augusti to Varus.* The sale of real property belonging to wards, conducted through a procurator by a petition to the Praetor or a provincial governor, could not succeed. The reason is that this matter cannot properly be accomplished unless a judicial decree is formally issued, after a showing upon the public records (*apud acta*) of the reasons why the sale was necessary.

Posted March 7, in the consulship of Carus and Carinus Augusti (283).

[7] *The same Augusti to Isidorus.* If while you were an adult ward you sent a (written) guaranty (*cautio*) in order to renounce a gift which your father made to you after you were emancipated, since you issued a document of this kind

huiusmodi scriptura contra senatus consulti auctoritatem data sit, non oberit iuri tuo.

PP. vi id. Sept. Hemesae Caro et Carino AA. cons.

[8] *Imp. Diocletianus et Maximianus AA. Theodotae.* Praedia rustica, quae contra senatus consultum donata esse ante nuptias sponsaliorum nomine precum tuarum confessio ostendit, cum proprietas ad te propter iuris interdictum transire non potuerit, in dominio mariti mansisse palam est.

PP. III non. Nov. Diocletiano A. II et Aristobulo cons.

[9] *Idem AA. Muciano. pr.* Etsi is, quem praedium rusticum minoris distraxisse adfirmas, curatoris officio functus id fecit, venditio tamen contra divi Severi orationem facta praesidis sententia non immerito rescissa est. 1. Pignora sane, quae ob evictionis periculum idem curator ex rebus propriis tibi obligavit, non prohiberis persequi.

PP. non. Nov. Diocletiano A. II et Aristobulo cons.

[10] *Idem AA. Grato.* Praediorum, quae sine decreto alienata sunt, dominium tibi persequenti praeses opem feret. apud quem si illuxerit non universa pretia, quae curator tuo data sunt, in patrimonium tuum processisse, pro ea dumtaxat pecuniae parte conveniri te permittit, quam in facultates tuas erogata esse constiterit.

PP. v id. Aug. ipsis III et III AA. cons.

[11] *Idem AA. Trophimo. pr.* Si quidem sine decreto minor annis patronus tuus rusticum praedium venumdedit, supervacuum est de vili pretio tractare, cum senatus consulti auctoritas retento dominio alienandi viam obstruxerit. 1. Si vero iure interposito decreto venditionem

contrary to the authoritative rule laid down by the decree of the Senate, it will not prejudice your right.

Posted September 8,²⁹⁷ at Emesa, in the consulship of Carus and Carinus Augusti (283).

[8]²⁹⁸ *Emperors DIOCLETIAN and MAXIMIAN Augusti to Theodota.* In your petition you openly admit that rural properties were given before marriage, as an engagement gift in violation of the senatorial decree. Since ownership of this cannot pass to you because of the prohibition at law, it is clear that it has remained the property of your husband.

Posted November 3, in the consulship of Diocletian Augustus, for the second time, and Aristobulus (285).

[9] *The same Augusti to Mucianus. pr.* Even if he, whom you allege to have alienated the rural property of a ward, did so having discharged the responsibility of a *curator*, nevertheless, because the sale was accomplished in violation of the legislative proposal (*oratio*) of the deified Severus, it has, not unjustly, been rescinded by a judicial decree of the governor. 1. You are not prevented from suing for the recovery of the pledges, reasonably enough, which the same *curator* bound over to you from his own property as a hedge against the risk of eviction.

Posted November 5, in the consulship of Diocletian Augustus, for the second time, and Aristobulus (285).

[10] *The same Augusti to Gratus.* The governor will assist you in your suit to recover ownership of the properties that were alienated without a judicial decree. If it becomes clear in his court that the entire price which was paid to your *curator* did not wind up in your account, he will allow you to be sued only for that portion which, it is established, was paid over to you.

Posted August 9, in the consulship of the Augusti, for the fourth and third time, respectively (290).

[11] *The same Augusti to Trophimus. pr.* If, in fact, an adult ward, your patron, sold a rural property without a judicial decree, it is beside the point to be concerned about the low price received, since the authoritative rules of the senatorial decree have removed his ability to alienate it, reserving ownership for him. 1. But if after the proper issuance of a judicial decree, he sold the property for a low price, not knowing its worth, pursuant to the authoritative contents

²⁹⁷ The precise month is uncertain: September or December.

²⁹⁸ Combine with C. 2.29.1.

vili pretio eius possessionis, cuius vires ignorabat, fecit, iuxta perpetui edicti auctoritatem in integrum restitutio causa cognita ei praebetur.

PP. XII k. Dec. ipsis IIII et III AA. cons.

[12] *Idem AA. et CC. Leontio.* Ob aes alienum tantum causa cognita praesidali decreto praedium rusticum minoris provinciale distrahi permittitur.

S. prid. k. Mai. Heracliae AA. cons.

[13] *Idem AA. et CC. Zenonillae.* Etiam vectigale vel patrimoniale sive emphyteuticum praedium sine decreto praesidis distrahi non licet.

S. VIII k. Sept. Sirmi AA. cons.

[14] *Idem AA. et CC. Frontoni.* Utere viri prudentissimi Papiniani responso ceterorumque, quorum precibus fecisti mentionem, sententiis ac doli mali exceptionem oppone, pretium ob eorum debitum solutum probans, si sortem cum usuris, quae fisco deberentur, pupilli non offerentes fundos provinciales citra decretum praesidis venumdatos cum fructibus petant.

S. XVIII k. Dec. AA. cons.

[15] *Idem AA. et CC. Sabinae.* Si minor viginti quinque annis praedium rusticum, cum aliud deberes, sine decreto in solutum dedisti, dominium a te discedere non permisit senatus consulti auctoritas.

S. VIII k. Dec. AA. cons.

[16] *Idem AA. et CC. Eutychie. pr.* Si praedium rusticum vel suburbanum, quod ab urbanis non loco, sed qualitate secernitur, in pupillari aetate constituta tutore auctore vel adulta sine decreto praesidis provinciae in qua situm est venumdedisti, secundum sententiam senatus

of the Perpetual Edict he will be awarded, after a judicial hearing, restoration of his rights (*restituere in integrum*).

Posted November 20, in the consulship of the Augusti, for the fourth and third time, respectively (290).

[12] ²⁹⁹ *The same Augusti and the Caesars to Leontius.* A provincial rural property belonging to a ward is allowed to be alienated only for debt, after a judicial hearing, and upon issuance of a judicial decree by the governor.

Written April 30, at Heraclea, in the consulship of the Augusti (293).

[13] *The same Augusti and Caesars to Zenonilla.* It is not permitted to alienate without a governor's judicial decree even a property which is leased by the state or by local government (*vectigale*), or which belongs to the Emperor (*patrimoniale*), or which is tied to a long-term lease arrangement (*emphyteuticum*).

Written August 25,³⁰⁰ at Sirmium, in the consulship of the Augusti (293).

[14] *The same Augusti and Caesars to Fronto.* Make use of the response (*responsum*) of the most learned Papinian and the opinions of the others whom you mention in your petition, and offer an affirmative defense of fraud (*exceptio doli mali*) by showing the amount paid in satisfaction of the minor wards' debt, if, without offering to repay the principal with interest, which they owed to the Treasury, they should sue to recover the provincial lands, along with their income (*fructus*), that were sold without a judicial decree of the governor.

Written November 14,³⁰¹ in the consulship of the Augusti (293).

[15] *The same Augusti and Caesars to Sabina.* If as an adult ward you paid off a debt by alienating a rural property without a judicial decree, the authoritative rule of the decree of the Senate does not permit ownership to be transferred from you.

Written November 24, in the consulship of the Augusti (293).

[16] *The same Augusti and Caesars to Eutychia, pr.* If, while a minor or adult ward, you sold a rural or suburban property, which is distinguished from urban real estate not by location but by type, with the approval of your tutor (as a minor ward) but without a judicial decree of the governor of the province in which the land is situated, according to the rules of the decree of the Senate your ownership and rights over it continue in force, and it is established that a

²⁹⁹ Combine, probably, with C. 5.34.6, received on the same day.

³⁰⁰ Mommsen dates to September 24, 293.

³⁰¹ The precise day is uncertain: the alternative is November 23.

consulti dominium eius sive ius a te discedere non potuit, sed vindicationem eius et fructuum, vel his non existentibus conditionem competere constitit. 1. Emptor autem si probare potuerit ex ceteris facultatibus oboedire te muneribus sive honoribus non potuisse, ad utilitates praeterea tuas cessisse pecuniam, quam pretii nomine sumpseras, doli exceptionis auxilio pretium cum usuris, quas praestatura esses, et sumptus meliorati praedii servare tantummodo potest.

S. VI id. April. Anchialo CC. cons.

[17] *Idem AA. et CC. Philippo.* Inter omnes minores nec commune praedium sine decreto praesidis sententia senatus consulti distrahi patitur. nam ad divisionis causam provocante tantum maiore socio eius alienationem et sine decreto fieri iam pridem obtinuit.

S. VII id. Dec. CC. cons.

[18] *Imp. Constantinus A. et Constantius C. ad Severum.* Si minores vel ex patris nomine vel ex suo, debitis dumtaxat fiscalibus ingruentibus, vel ex privatis contractibus reperiantur obnoxii, decreti interpositio a Constantiniano praetore celebranda est, probatis examussim causis, ut patefacta rerum fide firma venditio perseveret.

D. xv k. Ian. Serdicae Probiano et Iuliano cons.

LXXII Quando Decreto Opus Non Est

[1] *Imp. Antoninus A. Valenti militi.* Si probare potes patrem pupilli, cuius tutorem convenisti, consensisse, ut reddito tibi praedio pretium reciperaret, id quod convenit servabitur. neque enim in ea re auctoritas praesidis necessaria est, ut tutorum sollicitudini consulatur, si voluntati defuncti pareant.

claim of ownership (*vindicatio*) lies for you regarding the land and its income (*fructus*), or a claim for restitution (*condictio*) for the latter if it no longer exists.
 1. But if the buyer can show that out of the remainder of your property you were unable to meet the demands imposed by your civic duties and the obligations of positions in public life, and that, moreover, you used the money you received as a price for your own benefit, he can, with the assistance of the affirmative defense of fraud (*exceptio doli*), recover only the price with interest which you would have paid, as well as expenses for the improvement of the property.

Written April 8,³⁰² at Anchialus, in the consulship of the Caesars (294).

[17] *The same Augusti and Caesars to Philippus.* The rule of the senatorial decree does not permit even a property owned in common by wards (i.e., all of the joint owners are wards) to be alienated without a judicial decree of the governor. For it has long been the rule that only when a partner who has passed the age of full legal majority (i.e., 25 years) requests a division does this happen even without a decree.

Written December 7, in the consulship of the Caesars (294).

[18]³⁰³ *Emperor CONSTANTINE Augustus and CONSTANTIUS Caesar to Severus.*³⁰⁴ If wards are shown to be liable, either under their father's name or their own, for debts, provided they are owed to the Treasury or under private contracts, a decree must be issued by the Constantinian Praetor, after the reasons have been proved with precision, so that the sale shall be validated after the trustworthiness of the facts has been rendered transparent.

Given December 18, at Serdica, in the consulship of Probianus and Julian (322).³⁰⁵

Seventy-Second Title When a Judicial Decree Is Not Needed

[1] *Emperor ANTONINUS Augustus to Valens, a soldier.* If you can prove that the father of the minor ward, whose *tutor* you have sued, had given his agreement that the property would be returned to you and he would recover the price, the agreement will be upheld. For in this matter the authorization of the governor is not necessary to protect *tutores* from anxiety if they obey the wishes of the decedent.

³⁰² The precise day and month are uncertain; the alternative is October 28.

³⁰³ = (in part, with minor changes) C.Th. 3.32.2. Combine with C. 7.62.17.

³⁰⁴ The identification of the recipient is uncertain.

³⁰⁵ The year is perhaps 326: Proiet Volterra. Seeck gives December 31, 326.

PP. IIII k. Ian. Antonino A. II et Geta II cons.

[2] *Imp. Aurelianus A. Pulchro.* Illud requirendum est, an adito principe Saturninus vir clarissimus specialiter ius venditionis acceperit. ad instar enim praesidialis decreti concessio principalis accedit.

PP. Byzantii id. Ian. sine cons.

[3] *Imp. Diocletianus et Maximianus AA. et CC. Stratoniciano.* Praedium rusticum vel suburbanum a minore viginti quinque annis alienari sine decreto praesidis, nisi parentis voluntas seu testatoris, ex cuius bonis ad minorem pervenit, super alienando eo aliquid mandasse deprehendatur, nulla ratione potest.

PP. xv k. April. Nicomediae Tusco et Anullino cons.

[4] *Imp. Constantinus A. ad populum.* Et sine interpositione decreti tutores vel curatores quarumcumque personarum vestes detritas et supervacua animalia vendere permittimus.

D. id. Mart. Sirmi Constantino A. VII et Constantio C. cons.

LXXIII Si Quis Ignorans Rem Minoris Esse sine Decreto Comparavit

[1] *Imp. Gordianus A. Felici.* Si ea, quae in iura tutoris hereditario titulo successit, possessionem tuam vendidit, si ut pupillarem distraxit, emptor, qui sciens a tutoris herede mercatus est, cum officium morte finiat, alienam rem comparando de temporis intervallo nullam potuit acquirere defensionem: si vero ut suam distraxit ignoransque rem alienam emptor comparavit, neque statim per traditionem possessionis

Posted December 29,³⁰⁶ in the consulship of Antoninus Augustus, for the second time, and Geta, for the second time (205).³⁰⁷

[2] *Emperor AURELIANUS Augustus to Pulcher.* It shall be determined whether *vir clarissimus* Saturninus approached the Emperor and received a special right to sell (landed property). For imperial permission operates on the analogy of a judicial decree issued by the governor.

Posted January 13, at Byzantium, without year.

[3] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Stratonicianus.* A rural or suburban property can in no way be alienated by a ward less than 25 years of age without a judicial decree of a governor, unless the (last) wishes (i.e., will) of a male ascendant or the testator whose property accrues to the ward are discovered to have given some instructions regarding the alienation of this property.

Posted March 18, at Nicomedia, in the consulship of Tuscus and Anullinus (295).³⁰⁸

[4]³⁰⁹ *Emperor CONSTANTINE Augustus to the People.* We allow the *tutores* and *curatores* of anyone whatsoever to sell, even without the issuance of a judicial decree, clothing that is worn with use and animals that are not needed.

Given March 15, at Sirmium, in the consulship of Constantine Augustus, for the seventh time, and Constantius Caesar (326).³¹⁰

Seventy-Third Title If Someone, While Unaware, Has Bought a Ward's Property Without a Judicial Decree

[1] *Emperor GORDIAN Augustus to Felix.* If the woman who succeeded to the estate of your *tutor* by inheritance sold a property of yours as if she were (in fact) alienating a minor ward's property, the buyer, who knowingly bought from the heir of a *tutor*, when the duty (of management of the tutelage) was ended by his death, could not, in purchasing a property belonging to someone else (i.e., other than the seller), use the defense of lapse of time. If indeed she sold it as her own and the buyer purchased property not the

³⁰⁶ The precise day is uncertain: the alternatives are December 27 and 28.

³⁰⁷ So Krüger, but Geta's first consulship was in 205, his second in 208, while Caracalla's second was in 205, his third in 208.

³⁰⁸ The precise year is uncertain: 295 or 293.

³⁰⁹ = (in part, with changes) C. 5.37.22.6-7. Combine with C. 2.27.2; perhaps also C. 4.32.25.

³¹⁰ The year is more likely to be March 15, 329: Seeck and Projet Volterra.

dominus effectus est, sed tantummodo adversus te statuti temporis, cum te legitimae aetatis esse non diffitearis, potest uti praescriptione.

PP. v id. Sept. Pio et Pontiano cons.

[2] *Idem A. Crispinae.* Si contra amplissimi ordinis decretum possessiones tuae distractae sunt, conveni earum possessorem, ut, si ita probaveris gestum, et possessio retrahatur et fructus universi revocentur, si non bona fide emptorem fuisse qui emit constiterit.

PP. XVI k. Ian. Gordiano A. II et Pompeiano cons.

[3] *Impp. Diocletianus et Maximianus AA. et CC. Agathae.* Possessiones rusticae vel suburbanae sine causae cognitione et interpositione decreti contra senatus consultum alienatae nec a secundo emptore recte tenentur, nisi statutum temporis spatium intercesserit.

PP. id. Febr. Nicomediae CC. cons.

[4] *Idem AA. et CC. Alexandro.* Quoniam adversus emptorem, ad quem ex persona eius, cui contra senatus consultum donata res est, iusto titulo interveniente ea res de qua lis est transitum fecit, requirere oportebit, an praesente priore domino et maiore effecto sine controversia bonae fidei decennio vel absente viginti annis qui quaestionem patitur possessor fuisse monstretur. quod si apud gravitatem tuam manifeste constiterit, sine ulla cunctatione habita longi temporis praescriptione petito rem oportebit excludi.

D. VI id. Iun. Dorostolo Diocletiano VIII et Maximiano VII AA. cons.

seller's in ignorance, he or she was not made owner of the property immediately through its (informal) conveyance (*traditio*), but can only make use of the defense of the lapse of the prescribed time (*praescriptio statuti temporis*) against you, since you do not deny that you are (now) of the age of full legal majority (i.e., 25 years or older).

Posted September 9, in the consulship of Pius and Pontianus (238).

[2] *The same Augustus to Crispina.* If your real properties were alienated in violation of the decree of the most distinguished Senate, sue their possessor, so that, if you prove that this happened, the properties shall be returned to you as well as all of their income (*fructus*) recovered, unless it is established that the purchaser acted in good faith (*bona fides*).

Posted December 17,³²¹ in the consulship of Gordian Augustus, for the second time, and Pompeianus (241).

[3] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Agatha.* Rural or suburban properties are not lawfully held even by a subsequent purchaser when, in violation of the senatorial decree, they have been alienated without a hearing and the issuance of a judicial decree, unless the fixed prescriptive period has elapsed.

Given February 13,³²² at Nicomedia, in the consulship of the Caesars (294).

[4] *The same Augusti and Caesars to Alexander.* Because (a suit has been raised) against the buyer to whom the property at the center of the suit has passed with just ground (*iustus titulus*) from the hands of the person to whom it was given as a gift in violation of the decree of the Senate, it ought to be looked into whether the person whose title is questioned is shown to have been a good faith (*bona fide*) possessor without challenge after the prior owner reached the full legal age of majority (i.e., 25 years) and ten years have passed with him or her present or twenty in his or her absence. If this is clearly established before your respected court, the plaintiff will have to be denied without any delay on the ground that the prescriptive period has elapsed.

Given June 8, at Dorostolum, in the consulship of the Augusti, for the eighth and seventh time, respectively (303).³²³

³²¹ The precise month is uncertain: December or June.

³²² Mommsen dates to December 13, 294.

³²³ The precise year is uncertain: 303 or 294.

**LXXIII Si Maior Factus sine Decreto Factam Alienationem
Ratam Habuerit**

[1] *Impp. Diocletianus et Maximianus AA. Liciniae.* Cum proponas curatorem patris tui non interposito praesidis decreto praedium rusticum heredi creditoris seu tutori eius destinasse venumdare eamque venditionem deceptum patrem tuum ratam habuisse, si minore pretio distractum praedium est et inconsulto errore lapsum patrem tuum perperam venditioni consensum dedisse constiterit, non ab re erit superfluum pretii in compensationem deduci: quod praesidis provisione fieri convenit, cuius sollertiae congruum est, si diversa pars bonam fidem non amplectatur, in arbitrio eius ponere, an velit possessionem cum fructibus restituere, ita ut fenebris pecunia cum competentibus usuris restituatur.

PP. non. Oct. ipsis IIII et III AA. cons.

[2] *Idem AA. et CC. Alexandro.* Si sine decreto praesidis praedia tua a tutore tuo alienata sunt nec speciali confirmatione vel, si bona fide possessor fuisset, statuti temporis excursu id quod perperam est actum fuerat stabilitum, praeses provinciae possessionem in ius tuum retrahet.

D. k. Ian. Sirmi AA. cons.

[3] *Imp. Iustinianus A. Menae pp. pr.* Si quando sine decreto minorum vel adhuc sub curatoribus constitutorum vel per veniam aetatis eorum curam excedentium res alienantur vel supponuntur, et ad perfectam aetatem idem minores provecti longo silentio querellam huiusmodi tradiderint, ut inutilis alienatio vel suppositio diuturno silentio roboretur, certum tempus ad talem confirmationem praefinitum esse censemus.

1. Ideoque praecipimus, si per quinque continuos annos post impletam minorem aetatem (id est viginti quinque annos) connumerandos

**Seventy-Fourth Title Confirmation by an Adult Ward Who Has
Reached the Age of Full Legal Majority of an Alienation Made
without Issuance of a Judicial Decree**

[1]³⁴⁴ *Emperors DIOCLETIAN and MAXIMIAN Augusti to Licinia.* Since you allege that your father's *curator* had chosen to sell a rural property, without issuance of a judicial decree by the governor, to the heir of a creditor or to his or her *tutor*, and that your father, deceived, confirmed this sale (when he was 25 or older), if the property was alienated at too low a price and it is established that your father, having fallen into an injudicious mistake, wrongly gave his approval to the sale, it will not be inappropriate that the difference in price be made up for. It is fitting that this be accomplished through the diligent oversight of the governor, with whose shrewdness it is consistent that, if your opponent in the suit does not embrace the standard of good faith (*bona fides*), he give him or her the option (of paying the difference in price) or of returning the property together with its income (*fructus*), against repayment of the price – which has been lent out – along with the relevant interest.

Posted October 7, in the consulship of the Augusti, for the fourth and third time, respectively (290).

[2] *The same Augusti and the Caesars to Alexander.* If your properties were alienated by your *tutor* without a judicial decree of the governor and this has neither been confirmed in an apposite manner (by you) nor been rendered valid by the lapse of the prescribed period of time which ratifies that which has been wrongly done provided the possessor has acted in good faith (*bona fides*), the governor of the province will restore the property to you.

Given January 1, at Sirmium, in the consulship of the Augusti (293).

[3]³⁴⁵ *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect, pr.* Whenever the property of adult wards, both those still under the supervision of a *curator* and those who have been released from curatorship though under age (i.e., received the *venia aetatis*), is alienated or placed under lien without a judicial decree, and the wards, having reached the age of full legal entitlement (i.e., 25), maintain a long silence about such a ground for complaint, the result is that the invalid alienation or encumbrance is confirmed by their lengthy silence. We ordain that a fixed time period shall be established in advance for such validation.

1. On that account, We instruct that if for five continuous years that are to be reckoned after attaining full legal entitlement – that is, age 25 – the person

³⁴⁴ Combine with C. 4.10.4.

³⁴⁵ Combine with C. 2.44.3.

nihil conquestus est super tali alienatione vel suppositione is qui eam fecit vel heres eius, minime retractari eam occasione praetermissionis decreti, sed sic tenere, quasi ab initio legitimo decreto fuisset alienata res vel supposita.

2. Cum autem donationes a minoribus nec cum decreto celebrari possunt, si minor vel post veniam aetatis rem immobilem donationis titulo in alium (excepta propter nuptias donatione) transscripserit, non aliter hoc firmitatem habebit, nisi post viginti quinque annos impletos inter praesentes quidem decennium, inter absentes autem vicennium donatore adquiescente effluxerit: ut tamen in heredis persona illud tantummodo tempus accederet, quod post eiusdem heredis minoris aetatem silentio transactum sit.

D. VIII id. April. Constantinopoli Decio vc. cons.

LXXV De Magistratibus Conveniendis

[1] *Imp. Antoninus A. Muciano. pr.* Si magistratus a tutoribus seu curatoribus, quos tibi dederunt seu nominaverunt, stipulati sunt se eo nomine indemnes futuros inque eam rem fideiussores acceperunt extra rem salvam fore satisfactionem, actio, quam adversus tutores seu curatores tuos instituisti, alienam obligationem non resolvit. 1. Sed adversus magistratus qui curatorem dederunt actio utilis ita demum competit, si universis bonis excussis revocatisque, quae eum in fraudem alienasse constiterit, indemnitati tuae in solidum satisfieri non potuit. 2. Quam si exercueris, mandatis tibi ab eis actionibus adversus fideiussores quos acceperunt consistere potes, licet utilem actionem sine cessione habeas.

Accepta non. Ian. duobus Aspris cons.

[2] *Imp. Alexander A. Paterno.* In heredes magistratus, cuius non lata culpa idonee cautum pupillo non est, non solet actio dari.

PP. III non. Iul. Iuliano et Crispino cons.

who made the alienation or encumbrance or his or her heir has made no complaint about it, it shall not at all be rescinded on the ground that no judicial decree was issued, but it shall hold as if the property in question was alienated or encumbered under a lawful decree from the start.

2. Since, moreover, gifts cannot be made by wards even with a judicial decree, if a ward or a person granted the *venia aetatis* signs over immovable property to another – with the exception of a prenuptial gift – this will only be validated if, having turned 25, the giver acquiesces for a ten-year period, while present, assuredly, but for twenty years, if he or she is absent. Nevertheless, (this happens) with this proviso in the case of an heir, that only that period of time would accrue, which has passed in silence after he or she reaches the age of full legal entitlement (i.e., 25 years).

Given April 6, at Constantinople, in the consulship of the vir clarissimus Decius (529).

Seventy-Fifth Title Suing Public Officials³¹⁶

[1] Emperor ANTONINUS Augustus to Mucianus. *pr.* If public officials have made stipulations with the *tutores* or *curatores* they have appointed or nominated for you, that they (the public officials) would sustain no claims for loss arising from that appointment or nomination, and they have accepted sureties for this purpose, distinct from the surety guaranteeing the security of your property, the action which you have raised against your *tutores* or *curatores* does not release the obligation borne by another (i.e., the public officials). 1. But an analogous action (*actio utilis*) lies against public officials who have appointed a *curator* only if all of the property, which it is established he alienated fraudulently, has been searched out and reclaimed and this has not been able to make you whole. 2. If you bring that action, you can rely on those actions they have assigned to you against the sureties whom they received, although you have an analogous action even without a formal assignment.

Received January 5, in the consulship of the two Aspri (212).

[2] Emperor ALEXANDER Augustus to Paternus. It is not customary to grant an action against the heirs of a public official who, without serious fault (*lata culpa*), failed to take adequate precautions for (protecting) a minor ward.

Posted July 5, in the consulship of Julian and Crispinus (224).

³¹⁶ See D. 27.8.

[3] *Imp. Gordianus A. Aproniano*. Si tu et collega tuus, cum magistratu fungeremini, minus idoneum tutorem dedistis cautionemque idoneam non exegistis nec alias servari pupillo indemnitas potest et utrique solvendo estis, pro virili parte in vos actionem dari non iniuria postulabis.

D. VIII k. Nov. Pio et Pontiano cons.

[4] *Idem A. Arruntiano*. Adversus nominatorem tutoris vel curatoris minus idonei non ante perveniri potest, quam si bonis nominati itemque fideiussoris eius nec non collegarum quoque, ad quorum periculum consortium administrationis spectat, excussis non sit indemnitati pupilli vel adulti satisfactum.

PP. id. Mart. Attico et Praetextato cons.

[5] *Imp. Diocletianus et Maximianus AA. et CC. Eugeniae*. In magistratus municipales tutorum nominatores, si administrationis finito tempore non fuerint solvendo nec ex cautione fideiussionis solidum exigi possit, pupillis quondam in subsidium indemnitis nomine actionem utilem competere ex senatus consulto, quod auctore divo Traiano parente nostro factum est, constitit.

D. VII id. Dec. ipsis et cons.

[6] *Imp. Zeno A. Aeliano pp. pr.* Cum sit adiecta praetoris sententia generalem curatori administrationem mandantis et, quod eam pro more sequitur, decretum pariter sit compositum, manifestum est non curatoris dationem fuisse invalidam, sed in aestimanda adultae substantia scribae vitium, qui, tamquam non amplius ducentis libris auri patrimonium valeret, fideiussorem acceperat, intercessisse. 1. In quo casu non curatoris erit ratio^{xxiii} reprehendenda, si qua laesio rebus minoris illata fuisse adversus legum ordinem comprobetur, sed super negligentia vel dolo scribae, qui veram substantiae taxationem passus est occultari, legibus erit agendum.

D. v k. Ian. Bastilio vc. cons.

^{xxiii} datio

[3] *Emperor GORDIAN Augustus to Apronianus.* If you and your colleague, while serving as public officials, appointed a man insufficiently wealthy as a *tutor* while not demanding an adequate guaranty (*cautio*), nor could the minor ward otherwise be protected from loss, and you are both solvent, you will not be in the wrong to make a judicial request that an action be given against you for an equal share (of the loss, i.e., that you each pay only half).

Given October 25, in the consulship of Pius and Pontianus (238).

[4] *The same Augustus to Arruntianus.* Against someone who nominated a *tutor* or *curator* of insufficient means a lawsuit cannot be launched until the property of the person nominated, his surety, and his colleagues, for whom liability arises from their joint management of the property, has been thoroughly investigated and there was not enough to make whole the minor or adult ward.

Posted March 15, in the consulship of Atticus and Praetextatus (242).

[5] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Eugenia.* It is established that, pursuant to a senatorial decree passed on the proposal of the deified Trajan,³²⁷ Our predecessor (*parens*), an analogous action (*actio utilis*) lies for former minor wards, as an aid to making them whole, against municipal officials who have nominated *tutores* if, at the conclusion of the period for management of the estate, they (the *tutores*) are not solvent, and a sufficient amount cannot be derived from the guaranty (*cautio*) given as a surety (*fideiussio*).

Given December 7, in the consulship of the Caesars and ... (294?).

[6] ³²⁸ *Emperor ZENO Augustus to Aelianus, Praetorian Prefect. pr.* When the Praetor has made a formal appointment entrusting general management (of a ward's property) to a *curator* and the customary practice ensues of issuing an apposite judicial decree, it is clear that the appointment of the *curator* is not invalid, but that the clerk (*scriba*) had made an error in estimating the value of the female adult ward's property when he accepted a surety as though the estate was not worth more than 200 pounds of gold. 1. In this situation, the appointment of the *curator* is not to be faulted if any loss is shown to have been inflicted on the property of the ward contrary to the rules laid down in statutes, but legal action shall be taken regarding the negligence (*neglegentia*) or fraud (*dolus*) of the clerk who allowed the true value of the property to be concealed.

Given December 28, in the consulship of the vir clarissimus Basilius (480).

³²⁷ See Ulp. D. 27.8.2.

³²⁸ Combine with C. 2.21.9, 5.12.28.

Liber Sextus

I De Fugitivis Servis et Libertis Mancipiisque Civitatum Artificibus et ad Diversa Opera Deputatis et ad Rem Privatam vel Dominicam Pertinentibus

[1] *Impp. Diocletianus et Maximianus AA. Aemiliae.* Servum fugitivum sui furtum facere et ideo non habere locum nec usucapionem nec longi temporis praescriptionem manifestum est, ne fuga servorum dominis suis ex quacumque causa fiat damnosa.

PP. v id. Dec. Maximo II et Aquilino cons.

[2] *Idem AA. et CC. Pompeiano.* Requirendi fugitivos potestatem fieri dominis praesidialis officii est.

PP. III k. Mai. CC. cons.

[3] *Imp. Constantinus A. et Licinius C. ad Probum.* Si fugitivi servi deprehendantur ad barbaricum transeuntes, aut pede amputato debilitentur aut metallo dentur aut qualibet alia poena adficientur.

Sine die et consule.

Sixth Book

edited by Simon Corcoran,
Michael Crawford, and Benet Salway; and by Bruce W.
Frier, Dennis P. Kehoe, and Thomas A. J. McGinn¹

First Title Runaway Slaves and Runaway Freedmen and Slave
Craftsmen of Cities, Both Those Assigned to Various Jobs and
Those Belonging to the Privy Purse or the Imperial Domain²

[1] *Emperors* **DIOCLETIAN** and **MAXIMIAN Augusti** to *Aemilia*. It is manifest that a runaway slave (*servus fugitivus*) commits a theft of himself and that, therefore, usucapion and long-time prescription do not apply, so that the flight of slaves does not cause loss to their masters for any reason.

Posted December 9, in the consulship of Maximus, for the second time, and Aquilinus (286).

[2] *The same Augusti and the Caesars* to *Pompeianus*.³ It is the governor's duty to give masters the right to search for their runaway slaves.

Posted April 29, in the consulship of the Caesars (294).

[3] *Emperor* **CONSTANTINE Augustus** and **LICINIUS Caesar**⁴ to *Probus*.⁵ Whenever fugitive slaves are seized while going over to the barbarians, they are either to be mutilated by the amputation of a foot or condemned to the mines or inflicted with some other punishment at will.

Without day or consul (310/324?).

¹ Titles 1–20 were translated by Corcoran, Crawford, and Salway; the remainder by Frier, Kehoe, and McGinn.

² See D. 11.4.

³ It is not clear if this is a private rescript or a letter to a governor (Corcoran, *Empire of the Tetrarchs* (2000), 141).

⁴ Since Licinius is never mentioned in Theodosian Codex headings, the origin of this text is generally attributed to the Hermogenian Codex. It is one of only four such texts in Justinian's Codex (with C. 3.1.8, 7.16.41, and 7.22.3). See Corcoran, "Hidden from History" (1993), 105–107; Corcoran, *Empire of the Tetrarchs* (2000), 280. Krüger followed the *Summa Perusina* in identifying in the heading Licinius *filis* as Caesar, rather than his father as Augustus, and so proposed the date range 317/323 (i.e., from Licinius junior becoming Caesar to the older date accepted for the fall of Licinius).

⁵ The issuer of the letter is often supposed to be Licinius, rather than Constantine, and the recipient identified as Licinius' Praetorian Prefect, Pompeius Probus (consul in 310). See *PLRE* 1, p. 740, Probus 6. The recipient may (or may not) be the same as the Probus of C.Th. 4.12.1 (April 1, 314). See Corcoran, "Hidden from History" (1993), 114–115; Corcoran, *Empire of the Tetrarchs* (2000), 287–288. Seeck dates the constitution to April 1, 314.

[4] *Imp. Constantinus A. ad Valerianum. pr.* Quicumque fugitivum servum in domum vel in agrum inscio domino eius susceperit, eum cum pari alio vel viginti solidis reddat. 1. Sin vero secundo vel tertio eum susceperit, praeter ipsum duos vel tres alios vel praedictam aestimationem pro unoquoque domino repraesentet: in minorum persona tutoribus vel curatoribus poena simili imminente. 2. Quod si ad praedictam poenam solvendam is qui susceperit minime sufficiat, aestimatione competentis iudicis castigatio in eum procedat. 3. Quod si servus ingenuum se esse mentitus sub mercede apud aliquem fuerit, nihil is qui eum habuit poterit incusari. 4. Sane mancipium torqueri oportet, ut manifestetur, utrum propter lucrum capiendum callide a domino ad domum vel agrum eius qui suscepit immissus est, an non. 5. Quod si maligne factum esse ex servi interrogatione patuerit, servo etiam suo eum qui hoc fecerit privari oportet et ad fiscum pertinere mancipium.

D. v k. Iul. Thessalonicae Gallicano et Basso cons.

[5] *Idem A. ad Ianuarium.* Mancipia diversis artibus praedita, quae ad rem publicam pertinent, in isdem civitatibus placet permanere, ita ut, si quis tale mancipium sollicitaverit vel avocandum crediderit, cum servo altero sollicitatum restituat, duodecim solidorum summa inferenda rei publicae illius civitatis, cuius mancipium abduxit: libertis quoque artificibus, si sollicitati fuerint, cum eadem forma civitati reddendis: ita ut pro fugitivo servo, si sollicitudine defensoris non fuerit requisitus et revocatus, idem defensor duo vicaria mancipia exigatur, nec beneficio principali nec venditione in eius persona iam de cetero valituris.

D. xvi k. Mart. Constantino A. v et Licinio C. cons.

[4] *Emperor CONSTANTINE Augustus to Valerianus. pr.* Whoever, without knowledge of the master, receives a runaway slave into his house or land is to return him, together with another comparable slave or 20 solidi. 1. But if he has taken him in a second or third time, he is, besides returning him, to give the master two or three others, or the aforesaid amount for any one of them. *Tutores* or *curatores*, on behalf of minors, are subject to the same punishment. 2. If the property of the person who took the slave does not suffice for the payment of the aforesaid penalty, he is to be chastised at the discretion of the proper judge. 3. But if the slave has falsely claimed that he is free-born and is hired by another, that person who had him cannot be incriminated. The slave must, of course, be subjected to torture, to find out whether or not he was craftily sent by his master to the house or land of the person, who took him in, for the purpose of gain. If it appears from interrogation of the slave that this was indeed done maliciously, he who did this is to be deprived of his slave and the slave is to pass to the Treasury.

Given June 27 (December 28?), at Thessalonica, in the consulship of Gallicanus and Bassus (317).⁶

[5] *The same Augustus to Ianuarius.⁷* It is decided that slaves skilled in various trades, who belong to a public authority, must remain in these same cities, on the basis that, if anyone entices away such a slave or supposes that he may be called away, he is to restore him together with another slave and pay the sum of 12 solidi to the public authority of that city, whose slave he abducted; freedmen craftsmen, too, if enticed away, must be restored to the city under the same rule; with the proviso regarding a runaway slave that if he is not demanded back or recalled through the care of the defender (of the city); that defender is to be liable to provide two replacement slaves; in such a case from now onwards neither an imperial grant nor the sale (of the runaway slave) will any longer have any validity in his favor.⁸

Given February 14, in the consulship of Constantine Augustus, for the fifth time, and Licinius Caesar (319).

⁶ Date as emended hesitantly (*Iun. to Ian.*) by Barnes, *New Empire* (1982), 73 n. 117. Seeck, *Regesten* (1919), 180 emended the consulship to that of Gallicanus and Symmachus (330), followed by *PLRE* 1, p. 938, Valerianus 4. Seeck gives June 27, 330.

⁷ Generally identified as Ianuarinus, Vicar of the Moesias (*PLRE* 1, p. 453, Ianuarinus 1; Barnes, *New Empire* (1982), 142–143; Corcoran, *Empire of the Tetrarchs* (2000), 309).

⁸ This last clause is not entirely clear, but the translation here reflects also the interpretation of the *Basilika* (60.7.10, Scheltema, *A vol. VIII*, p. 2804), as well as of the Dutch Codex version (Spruit *et al.*, *Corpus Iuris Civilis VIII* (2005), 409).

[6] *Idem A. ad Tiberianum comitem Hispaniarum. pr.* Cum servum quispiam repetit fugitivum et alius vitandae legis gratia, quae in occultantes mancipia certam poenam statuit, proprietatem opponet, vel in vocem libertatis eum animaverit, ilico nequissimus verbero super quo ambigitur tormentis subiciatur, ut aperta veritate disceptationi terminus fiat. 1. Quod non solum utrisque iurgantibus proderit, sed etiam servorum animos a fuga poterit detertere.

D. xv k. Sept. Constantinopoli Pacatiano et Hilariano cons.

[7] *Imppp. Valentinianus Valens et Gratianus AAA. ad Felicem consularem.* Si quis servum fiscalem putaverit occultandum, non solum eum restituere, sed etiam duodecim libras argenti poenae nomine fisci viribus dependere compellatur.

D. ii id. April. Gratiano A. ii et Probo cons.

[8] *Imppp. Valentinianus Theodosius et Arcadius AAA. Albino pu. Romae.* Si qui publicorum servorum fabricis seu aliis operibus deputati tamquam propriae condicionis immemores domibus se alienis et privatarum ancillarum consortiis adiunxerint, tam ipsi quam uxores eorum et liberi confestim condicioni pristinae laborique restituantur.

D. viii k. Aug. Timasio et Promoto cons.

II De Furtis et de Servo Corrupto

[1] *Impp. Severus et Antoninus AA. Theogeni.* Si pecunia tua mandantibus servis quidam praedia comparaverunt, eligere debes, utrum furti actionem et conditionem an mandati potius inferre debeas. neque enim aequitas patitur, ut et criminis causam persequaris et bonae fidei contractum impleri postules.

D. xi k. Mai. Severo A. ii et Victorino cons.

[6] *The same Augustus to Tiberianus, Count of the Spains.*⁹ If anyone seeks to reclaim a runaway slave, and another opposes his ownership, for the purpose of evading the law which imposes a fixed penalty on those hiding slaves, or incites the slave to claim that he is free, the wicked whipping-fodder, whose status is in doubt, is to be immediately subjected to torture, so that there may be an end to the dispute upon the discovery of the truth. This will not only benefit the two in dispute, but will also deter the minds of slaves from flight.

*Given August 18 (or October 27), at Constantinople, in the consulship of Pacatianus and Hilarianus (332).*¹⁰

[7] *Emperors VALENTINIAN, VALENS, and GRATIAN Augusti to Felix, the Consular.*¹¹ If anyone should think to hide a fiscal slave, he is not only to be compelled to restore him, but also to pay to the Treasury 12 pounds of silver by way of penalty.

Given April 12, in the consulship of Gratian Augustus, for the second time, and Probus (371 [366]).

[8]¹² *Emperors VALENTINIAN, THEODOSIUS, and ARCADIUS Augusti to Albinus, City Prefect of Rome.* If any public slaves assigned to state factories or other public works, as though unmindful of their proper status, should go to the houses of others and join themselves in unions to the female slaves of private persons, both they and their wives and children are to be returned immediately to their former condition and work.

Given July 25, in the consulship of Timasius and Promotus (389).

Second Title Thefts and the Corruption of a Slave¹³

[1] *Emperors SEVERUS and ANTONINUS Augusti to Theogenes.* If certain persons have bought lands with your money upon the order of your slaves (who took your money), you must choose whether you prefer to bring an action for theft and claim for restitution or an action on the mandate. For equity does not permit you both to pursue an action for the crime and also to ask that a good faith contract be performed.

Given April 21, in the consulship of Severus Augustus, for the second time, and Victorinus (200).

⁹ See PLRE 1, pp. 911–912, Tiberianus 4; Barnes, *New Empire* (1992), 145.

¹⁰ Haloander gives the August date, L the October date.

¹¹ For the identification of Felix as *consularis* of Macedonia and the redating of the text to 366, see Seeck, *Regesten* (1919), 228; PLRE 1, p. 332, Felix 4; Schmidt-Hofner, "Regesten" (2008), 543–544, 574 and 591.

¹² Part of the same law as C.Th. 11.30.49; Honoré, *Crisis of Empire* (1998), 59 n. 4 and *Palingenesia* 2, E280–1.

¹³ See D. 11.3, 47.2.

[2] *Idem AA. negotiatoribus.* Incivilem rem desideratis, ut agnitas res furtivas non prius reddatis, quam pretium fuerit solutum a dominis. curate igitur cautius negotiari, ne non tantum in damna huiusmodi, sed etiam in criminis suspicionem incidatis.

PP. III k. Dec. Cilone et Libone cons.

[3] *Imp. Antoninus A. Secundo.* Si nondum rem templo divino dedicatam vitricus tuus furto abstulit, habes adversus eum furti actionem.

PP. VI id. Sept. Laeto II et Cereale cons.

[4] *Imp. Alexander A. Aurelio Herodi.* Adversus eum dumtaxat, quem servum tuum sollicitasse dicis, si eum deterioris animi fecit, servi corrupti agere potes. quod si sollicitatum occultavit, etiam furti cum eo agere potes. quas actiones etiam per procuratorem exercere minime prohiberis.

PP. id. Sept. Alexandro A. cons.

[5] *Idem A. Cornelio.* Civile est, quod a te adversarius tuus exigit, ut rei, quam apud te fuisse fatearis, exhibeas venditorem. nam a transeunte etiam ignoto emisse dicere non convenit volenti evitare alienam boni viri suspicionem.

PP. III k. Mai. Maximo II et Aeliano cons.

[6] *Idem A. Pythodoro.* Alienum servum sine voluntate domini qui sciens vendidit seu donavit vel alio modo alienavit, nihil domino diminueri potest: et si contractet vel apud se detinuerit, furtum facit.

PP. VI k. Ian. Maximo II et Aeliano cons.

[7] *Idem A. Dato.* Si is, cui te pecuniam ad matrem tuam perferendam dedisse proponis, parva quantitate numerata reliquam in usus suos convertit, furtum fecit.

PP. prid. id. Iun. Modesto et Probo cons.

[2] *The same Augusti to the men of business* (negotiatores). You demand something not in accordance with Civil Law, when you do not want to return property acknowledged as stolen until the price has been paid by the owners. Take care, therefore, to conduct your business with more caution, lest you not only sustain a loss of this kind, but also fall under the suspicion of a crime.

Posted November 29, in the consulship of Cilo and Libo (204).

[3] *Emperor ANTONINUS Augustus to Secundus*. If your stepfather stole and carried away property not yet dedicated to a god's temple, you have an action for the theft against him.

Posted September 8, in the consulship of Laetus, for the second time, and Cerealis (215).

[4] ¹⁴ *Emperor ALEXANDER Augustus to Aurelius Herodes*. You may sue the person, who you say has enticed your slave, in an action for corruption of a slave, only if he made his character worse. But if he has hidden the slave so enticed, you may sue him also in an action for theft. You are not at all forbidden from exercising these rights of action even through a procurator.

Posted September 13, in the consulship of Alexander Augustus (222).

[5] *The same Augustus to Cornelius*. The demand of your adversary, that you produce the seller of the property which you acknowledge to have been in your possession, is in accordance with Civil Law. For it is not fitting for someone wishing to avoid the suspicion alien to an honest man to say that he has purchased from a person passing through, indeed unknown.

Posted April 29, in the consulship of Maximus, for the second time, and Aelianus (223).

[6] *The same Augustus to Pythodorus*. Whoever knowingly sells, gives away, or in any other manner alienates the slave of another without the consent of the master, cannot diminish the latter's right; and if he seizes or detains him with him, he commits theft.

Posted December 27, in the consulship of Maximus, for the second time, and Aelianus (223).¹⁵

[7] *The same Augustus to Datus*. If the person to whom, as you state, you gave money, for the purpose of carrying it to your mother, delivers a smaller quantity, and converts the remainder to his own use, he commits theft.

Posted June 12, in the consulship of Modestus and Probus (228).

¹⁴ Part of the same rescript as C. 4.14.3: Honoré, *Emperors and Lawyers* (1994), 95 n. 285.

¹⁵ Haloander's edition gives the date very differently as May 1, 224.

[8] *Idem A. Valenti.* Etiam furti actione tributorum exactor tenetur, si non cessante te in tributaria exactione sciens, quod nihil deberetur, ancillam tui iuris abduxit aut vendidit. quae res facit, ut nec emptor usucaperet vindicatioque tibi ipsius competat.

PP. x k. Mart. Pompeiano et Peligno cons.

[9] *Impp. Diocletianus et Maximianus AA. et CC. Aedesio.* Subtracto furto vel vi abrepto mancipio, quamvis hoc rebus humanis non oblatum fuerit exemptum, tam ad raptorem quam ad furem periculum redundabit et uterque eorum poena legitima coercebitur.

S. vii id. Febr. Sirmi AA. cons.

[10] *Idem AA. et CC. Valerio.* Si abducta mancipia furto vel plagio venundata praeses provinciae perspexerit, cum nec ab emptore propter cohaerens vitium, antequam ad dominum possessio revertatur, usucapi possunt, et te ei cuius fuerunt successisse repperit, restitui tibi providebit.

Sine die et cons.

[11] *Idem AA. et CC. Demostheni.* De his, quae subtraxisse novercam pupilli tui precibus significas, rectorem adi provinciae, qui si eam, posteaquam dominus rerum is pro quo supplicas factus est, aliquid furatam cognoverit, non ignorat in quadruplum manifesti, nec manifesti vero dupli actione furti constituta condemnationem formare.

D. vii k. Sept. Viminacio AA. cons.

[12] *Idem AA. et CC. Quintillae. pr.* Ancillae subtractae partus apud furem editi, priusquam a domino possideantur, usucapi nequeunt: matris furem etiam eorum causa furti teneri convenit actione. 1. Quapropter furti actione et conditione vel adversus possidentem vindicatione de mancipiis uti non prohiberis, cum altera poenam continens alterius electione minime tolli possit. 2. Nam extra poenam rei

[8] *The same Augustus to Valens.* A tax collector is also liable to an action for theft, if, knowing that you were not in default in paying tax, because nothing was owing, he abducted or sold your female slave. The result is that the purchaser cannot become owner by usucapion and a suit for ownership of her is available to you.

Posted February 20, in the consulship of Pompeianus and Paelignus (231).

[9] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Aedesius.* When a slave is taken by theft or abducted by force, although he left the mortal world before he was offered back, the risk will fall upon both the abductor and the thief, and each of them will be punished by the legal penalty.

Subscribed February 7, at Sirmium, in the consulship of the Augusti (293).

[10] *The same Augusti and Caesars to Valerius.* If the provincial governor learns that slaves stolen or kidnapped have been sold – since the right of usucapion cannot be enjoyed by the purchaser, because of the inherent defect, before the stolen slaves are returned to their master – and that you are the successor to him whose slaves they were, he will take care that they are restored to you.

Without day and consuls (April 13, 293?).¹⁶

[11] *The same Augusti and Caesars to Demosthenes.* As to the things which you indicate in your petition were carried off by the stepmother of your ward, go before the governor of the province, who, if he learns that she stole anything, after he for whom you bring your supplication became the owner of his property, will not overlook to formulate a condemnation in an action brought for theft, with a fourfold penalty for theft detected in the act, and twofold if not so detected.

Given August 26, at Viminacium, in the consulship of the Augusti (293).

[12] *The same Augusti and Caesars to Quintilla. pr.* The offspring of a stolen female slave, born at the home of the thief, cannot become the property of anyone by usucapion before coming into the possession of the master. It is the case that the thief of the mother is liable to an action for theft on account of the offspring as well. 1. Therefore you are not prohibited from bringing an action for theft and a claim for restitution, or a suit for ownership of the slaves against the possessor, as the action which carries a penalty cannot be barred by the choice to bring the other. 2. For the law is not in question that the property itself can

¹⁶ This date is that of C. 7.32.6 (given at Byzantium), which should probably be combined with this rescript: Honoré, *Emperors and Lawyers* (1994), 140 n. 10.

persecutionem esse nulla iuris quaestio est, cum etiam hi qui aliena mancipia comparaverunt, si hanc causam non ignorant, furti actione tenentur.

D. id. Oct. Sirmi AA. cons.

[13] *Idem AA. et CC. Domno.* Post decisionem furti leges agi prohibent. quod si non transegisti, sed de sublati partem tantum accepisti, residuam vindicare vel condicere et actione furti apud praesidem agere potes.

D. k. Dec. Sirmi AA. cons.

[14] *Idem AA. et CC. Dionysio.* Eos, qui a servo furtim ablata scientes susceperint, non tantum de susceptis convenire, sed etiam poenali furti actione potes.

D. VIII k. Ian. Sirmi AA. cons.

[15] *Idem AA. et CC. Socratiae.* Furti actione minime teneri successores ignorare non debueras. de instrumentis autem ablati in rem actione tenentem convenire potes.

D. III k. Ian. Sirmi AA. cons.

[16] *Idem AA. et CC. Artemidoro et aliis.* Si servum vestrum nutriendum qui susceperat venumdedit, furtum commisit.

D. k. Oct. Viminacii CC. cons.

[17] *Idem AA. et CC. Cononi.* Quamvis etiam hereditatis expilatae crimine promiscuus usus exemplo actionis furti ream uxorem fieri non patiat, tamen heredes idemque filii super his, quae de patris bonis possidet, adversus eam in rem actione experiri non prohibentur.

D. id. Dec. CC. cons.

[18] *Idem AA. et CC. Dionysodoro.* In eum, qui ex naufragio vel incendio cepisse vel in his rebus damni quid dedisse dicitur, infra annum utilem ei cui res abest quadrupli, post in simplum actionem proditam praeter poenam olim statutam edicti forma perpetui declarat.

S. III k. Ian. Nicomediae CC. cons.

be pursued separately from the penalty (i.e., the fine for theft), since even those who have bought the slaves of others may, if the facts were not unknown to them, be sued in an action for theft.

Given October 15, at Sirmium, in the consulship of the Augusti (293).

[13] *The same Augusti and Caesars to Domnus.* After a settlement as to theft, the laws forbid action in court. But if you made no compromise, but only received part of the stolen property, you may bring a suit for ownership of the remainder or claim restitution, or sue by an action for theft before the governor.

Given December 1, at Sirmium, in the consulship of the Augusti (293).

[14] *The same Augusti and Caesars to Dionysius.* You may sue those, who knowingly received things taken away in theft by a slave, not only for the things received, but also with a penal action for theft.

Given December 25, at Sirmium, in the consulship of the Augusti (293).

[15] *The same Augusti and Caesars to Socratia.* You ought not to have been unaware that heirs cannot be held liable in an action for theft. But you can sue the holder of stolen documents in an action *in rem* (i.e. for recovery).

Given December 30, at Sirmium, in the consulship of the Augusti (293).

[16] *The same Augusti and Caesars to Artemidorus and others.* If he, who took in your slave for the purpose of raising him, then sold him, he committed theft.

Given October 1, at Viminacium, in the consulship of the Caesars (294).

[17] *The same Augusti and Caesars to Conon.* Although common usage does not permit a wife to become a defendant for the crime of despoiling an inheritance, any more than in an action for theft, however the heirs, being also the children, are not forbidden to bring an action *in rem* against her to recover the property of their father, which she has in her possession.

Given December 13, in the consulship of the Caesars (294).

[18] *The same Augusti and Caesars to Dionysodorus.* The rule of the Perpetual Edict declares that an action for fourfold damages is available for a year to him, whose property is lost, against him, who is said to have taken or caused any loss to property from a shipwreck or fire, and after that time an action lies for the simple value, apart from the existing statutory penalty.

Subscribed December 30, at Nicomedia, in the consulship of the Caesars (294).

[19] *Idem AA. et CC. Mnesitheo.* Falsus procurator depositum recipiendo vel aes alienum exigendo citra domini voluntatem furtum facit ac praeter rei restitutionem actione dupli furti nec manifesti convenitur.

Sine die et consule.

[20] *Imp. Iustinianus A. Iuliano pp. pr.* Si quis servo alieno suaserit aliquam rem domini sui subripere et ad se deducere, servus autem hoc domino manifestaverit et domino concedente res eius ad iniquum huiusmodi suasionis auctorem pertulerit, et ipse inventus fuerit rem detinere, quali tenetur actione is qui res suscepit, utrumne pro occasione furti an pro servo, quia eum corrumpere voluit, ut non solum furti, sed etiam servi corrupti is obligetur, veteres dubitaverunt. 1. Nobis itaque eorum altercationes decidentibus placuit non solum furti actionem, sed etiam servi corrupti contra eum dare. licet enim servus deterior minime factus est, tamen consilium corruptoris ad perniciem probitatis servi introductum est: et quemadmodum secundum iuris regulas furtum quidem non est commissum, quia is videtur furtum committere, qui contra domini voluntatem res eius contractat, ipse autem furti actione propter dolum suum tenetur, ita et servi corrupti contra eum actio propter suum vitium non ab re extendatur, ut sit ei poenalis actio imposita, tamquam re ipsa fuisset servus corruptus, ne ex huiusmodi impunitate et in alium servum, qui possit corrumpi, hoc facere pertemptet.

D. k. Aug. Lampadio et Oreste vv. cc. cons.

[21] *Idem A. Iuliano pp. pr.* Apud antiquos quaerebatur, si servus, quem aliquis bona fide possidebat, furtum commiserit alienarum rerum vel ipsius apud quem constitutus est, si ipse qui bona fide eum detinet noxalem furti actionem adversus verum dominum habet, vel ipse ab eo qui

[19] *The same Augusti and Caesars to Mnesitheus.* A pretended procurator commits theft by receiving a deposit or collecting a debt without the consent of the owner, and, aside from the restitution of the property, may be sued for double its value in an action for non-manifest theft.

Without day and consul.

[20]¹⁷ *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect. pr.* If someone has tried to persuade another's slave to steal and bring to him any property of the slave's master, and the slave made this known to the master and, with the master's consent, took his (the master's) property to the wicked author of this type of persuasion, and he was discovered holding the property, the ancients were in doubt under what action he, who received the property, was held liable, whether for the instance of the theft or in regard to the slave, because he wished to corrupt him, so that he was answerable not only for the theft, but also for the corruption of the slave. 1. Therefore, it has pleased Us, making a decision about their dispute, to grant against him not only an action for theft, but also one for the corruption of the slave. For, although the slave was not made worse, still the plan of the corrupter intended to destroy the probity of the slave. And just as no theft was actually committed according to the rules of law, since it is a person who handles the property of an owner against his will who is considered as committing a theft, nevertheless he is liable in an action for theft on account of his evil intention. So too on account of his depravity, an action is not unjustly given against him for corruption of a slave, so that he is to be subject to a penal action, as though the slave had in fact been corrupted, lest from impunity of this sort he should attempt to do this again to another slave, who could be corrupted.

Given August 1, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[21]¹⁸ *The same Augustus to Julian, Praetorian Prefect. pr.* It was questioned among the ancients, in the case of a slave, possessed by someone in good faith, who committed a theft of the property of another or of him, with whom he resided, whether he who held him (the slave) in good faith had a noxal action

¹⁷ Part of a series of constitutions issued on August 1, 530: Lounghis *et al.*, *Regesten* (2005), 200–202. The use of the term *decidentibus* in section 1 makes it likely that this is one of the Fifty Decisions, settling the disputes of the ancients.

¹⁸ Part of a series of constitutions issued on October 1, 530: Lounghis *et al.*, *Regesten* (2005), 203–205. Possibly also one of the Fifty Decisions.

furtum passus est praedicta convenitur actione. 1. Cumque generalis regula ab antiqua prudentia exposita est huiusmodi hominis gratia, pro quo noxalem furti actionem suscipere aliquis compellitur, adversus alium furti actionem habere non concedens, quidam ita eam per coniecturam interpretati sunt, adversus bona fide quidem possessorem nullo modo furti actionem extendi, ipsi autem, si furtum fuerit passus, adversus verum dominum furti actionem noxalem recte decerni: tunc autem bona fide possessorem furti nomine quod passus est noxalem actionem contra dominum habere posse, quando servus sub domini sui fuerit constitutus possessione: et pro his rebus posse eum adversus dominum habere actionem, non solum quas servus subtraxerit iam apud eum constitutus, sed et pro his quas furatus est, quando fugit quidem a bona fide possessore, adhuc autem nondum sub domini sui manibus fuerit constitutus.

2. Quam interpretationem prisca quidem iura per coniecturam introducebant: nos autem altius et verius ad eam respicientes generalem regulam sic ab initio esse prolatam accipimus. 3. Cum igitur bona fide possessor domini cogitatione furem possidet, merito, donec apud eum constitutus est, et aliis tenetur noxali actione, si extranei furtum a servo fuerint passi, et ipse adversus verum dominum non habet actionem secundum regulam dicentem: qui habet adversus alium furti actionem, ipse ea teneri non potest. sin autem desinat in servi retentione et ille apud verum dominum fuerit inventus, tunc ipse quidem noxali furti actione minime potest teneri, adversus verum autem dominum habet ipse furti noxalem actionem, id est pro rebus, quas vel nunc furatus est, cum est apud verum dominum, vel antea, postquam bona fide possessoris retentionem excesserit necdum apud verum dominum factus.

4. Et sic iterum regulae generali casus evenit consentaneus: qui enim habet tunc furti actionem adversus dominum, ipse aliis teneri furti actione non potest. sic ex tempore omnibus discretis vetustissima dubitatio nostro foedere conquiescat et bona fide possessor in parte certa temporis et habeat actionem et non teneatur, et ipse dominus in alio tempore non teneatur actione et in alio sub actione constituatur.

5. De eo autem, qui liber constitutus ab alio bona fide tenetur, si furtum commiserit, recte et sine aliqua dubitatione dicitur posse eum, qui liber est cognitus, et ab ipso qui bona fide eum detinet pro furto conveniri, et bona fide possessorem, si ab extraneo furtum liber commiserit,

for theft against the true owner, or whether he himself might be sued under the aforesaid action by the party who suffered the theft. 1. And since ancient jurisprudence adopted a general rule that anyone forced to submit to a noxal action for theft on account of a slave of this sort, was not allowed an action for theft against another, some therefore through conjecture interpreted this to mean that in no way was an action for theft extended against a possessor in good faith, but to him, if he suffered theft, was rightly granted a noxal action for theft against the true owner; but then the possessor in good faith, under the name of the theft he had suffered, could bring a noxal action against the owner, once the slave was settled in the possession of his (true) owner; and he could bring the action against the owner not only for those things, which the slave took while he was settled with him, but also for that which he stole, when he ran away indeed from the possessor in good faith and while he was still not yet settled under the power of his (true) owner.

2. The early law indeed brought in this interpretation through conjecture; but We, considering this general rule more deeply and truly, starting from scratch accept it as meaning this: 3. since the possessor in good faith possesses the thief, thinking that he is the owner, he is justly liable to others in a noxal action, if outsiders should suffer theft by the slave, while he is settled with him; and he himself has no action against the true owner according to the rule which says: he who has an action for theft against another cannot himself be liable to such an action.¹⁹ But if he ceases in his retention of the slave and the latter is found with the true owner, then he himself cannot at all be liable to a noxal action for theft; but has himself a noxal action for theft against the true owner: that is to say, for the property, which he (the slave) stole either now when he is with the true owner, or previously after he left the control of the possessor in good faith, though not yet placed with the true owner.

4. In this manner, the case becomes once again consistent with the general rule; for he, who has an action for theft against the owner, cannot himself be held liable to others in such an action. Thus, by making a distinction as to time, let the ancient doubt be stilled by Our settlement, and during a defined period of time the possessor in good faith both has an action and is not liable to one, and during the rest of the time the owner himself is not liable to an action, but is allowed to bring an action against the other (i.e., the bona fide possessor).

5. But if a person who is free, although held as slave by another in good faith, commits a theft, it is held rightly and without any doubt, that he, who has been recognized as free, can be sued for theft even by him who kept him in good faith, and the latter cannot be sued, if the free man commits theft against an outsider,

¹⁹ This rule (i.e., that one able to bring a noxal action could not be subject to one) is logically different from that stated above (i.e., that one liable to a noxal action could not himself bring one). However, they can be regarded as having the same effect, since the basic rule is still that only one person at any time can be noxally liable for theft.

non posse conveniri, sed ipsum pro suo furto respondere, quia generalis regula de servo prolata est, et pro eo, qui non servus, sed liber et suae potestatis est, noxalem moveri actionem impossibile nostrisque legibus incognitum est.

D. k. Oct. Constantinopoli Lampadio et Oreste vv. cc. cons.

[22] *Idem A. Iuliano pp. pr.* Manifestissimi quidem iuris est furto perpetrato ei competere furti actionem, cuius interest, ne furtum committatur. 1. Sed quaerebatur apud antiquos legum interpretes, si quis commodavit alii rem ad se pertinentem et ipsa res subtracta est, an furti actio adversus furem institui possit ab eo qui rem utendam accepit, idoneo scilicet constituto, quia et ipse commodati actione a domino pro ea re conveniri potest. 1a. Et hoc quidem paene iam fuerat concessum, ut habeat ipse actionem, nisi inopia noscitur laborare: tunc enim furti actionem domino competere dicebant.

1b. Sed ea satis increbuit dubitatio, si tempore quo furtum committabatur idoneus erat is qui rem commodandam accepit, postea autem ad inopiam pervenit, antequam moveatur actio quae ei antea competebat, an debeat actio quae semel ei acquisita est firmiter apud eum manere vel ad dominum reverti, cum et hoc quaerebatur, an in hoc casu furti actio ambulatoria sit nec ne. 1c. Sed omnem talem tractatum alia sequitur subdivisio, si ex parte solvendo sit is qui rem utendam accepit, ut possit non in totum, sed particularem solutionem ei facere, an habeat furti actionem vel non. 1d. Tales itaque ambiguitates veterum, immo magis, quod melius dicendum est, ambages nobis decidentibus in tanta rerum difficultate simplicior sententia placuit, ut in domini sit voluntate, sive commodati actionem adversus res accipientem movere desiderat sive furti adversus eum qui rem subripuit, et alterutra earum electa dominum non posse ex paenitentia ad alteram venire. 1e. Sed si quidem furem elegerit, illum qui rem utendam accepit penitus liberari: sin autem quasi commodator veniat adversus eum qui rem utendam accepit, ipsi quidem nullo modo competere posse adversus furem furti actionem, eum autem, qui pro re commodata convenitur, posse adversus furem furti habere actionem, ita tamen, si dominus sciens rem esse subreptam adversus eum qui eam accepit perveniat.

but he himself must answer for his theft; for the general rule was adopted only as to slaves, and bringing a noxal action is impossible and unknown to Our laws, where the thief is not a slave, but is free and his own master.

Given on October 1, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[22]²⁰ *The same Augustus to Julian, Praetorian Prefect. pr.* The law is very clear that, when a theft is perpetrated, an action for theft lies in favor of the party, in whose interest it is that the theft not be committed. 1. But it used to be questioned among the ancient interpreters of the laws, in the case where anyone loaned an item of his property to another and the thing loaned was stolen, whether an action for theft against the thief might be instituted by the party who received the property for use, when indeed he was solvent, because he himself could be sued for the property by the owner in an action on the loan. 1a. And this has virtually now been granted, so that he has an action, unless he is known to be struggling with insolvency; for then they held that the owner had an action for theft.

1b. But in the case when, at the time the theft was committed, the borrower of the property was solvent, but afterwards became impoverished before the commencement of the action, which was previously open to him, a considerable doubt arose as to whether a right of action, which he had once acquired, ought to remain firmly open to him or to revert to the owner; since it was also asked whether or not in this case the right of action could pass from the one to the other. 1c. And there follows on another subdivision in the treatment of this subject: If the borrower of the property is only partially solvent, so that he cannot make a total but only partial payment to him (the owner), has he the right of action for theft or not? 1d. So, We, deciding the differences of the ancients, or what We may better call their vagaries, have decreed a simpler rule in such a difficult situation; that is to say, it shall be in the discretion of the owner, whether he wishes to commence an action on the loan against the borrower of the property, or an action for theft against the party who stole it, and whichever course the owner chooses, he cannot change his mind and have recourse to the other. 1e. But if he elects to pursue the thief, the person who received the property for use is to be entirely released; but if he proceeds as lender against him, who received the property for use, he indeed in no way can have a right of action for theft against the thief, but he, who is sued for the loan, can have a right of action for theft against the thief, provided that the owner sues the borrower in the knowledge that the property has been stolen.

²⁰ Part of a series of constitutions issued on November 17, 530: Lounghis *et al.*, *Regesten* (2005), 206–208. This law is one, in fact probably more than one, of the Fifty Decisions as indicated by Inst. 4.1.16 (= 1c–1d below).

2. Sin autem nescius et dubitans rem non esse apud eum commodati actionem instituit, postea autem re comperta voluit remittere quidem commodati actionem, ad furti autem pervenire, tunc licentia ei concedatur et adversus furem venire, nullo obstaculo ei opponendo, quoniam incertus constitutus movit adversus eum qui rem utendam accepit commodati actionem, (nisi domino ab eo satisfactum est: tunc etenim omnimodo furem a domino quidem furti actione liberari, suppositum autem esse ei, qui pro re sibi commodata domino satisfecit), cum manifestissimum est, etiam si ab initio dominus actionem instituit commodati ignarus rei subreptae, postea autem hoc ei cognito adversus furem transivit, omnimodo liberari eum qui rem commodatam suscepit, quemcumque causae exitum dominus adversus furem habuerit: eadem definitione obtinente, sive in partem sive in solidum solvendo sit is qui rem commodatam accepit.

3. Sed cum in secunda dubitatione incidebat, quid statuendum sit, si quis rem commodatam habuerit, quam aliquis furto subtraxerat et lite pulsatus condemnationem passus fuerat non tantum in rem furtivam, sed etiam in poenam furti, et postea dominus rei venerit omnem condemnationem accipere desiderans utpote ex suae rei occasione ortam, alia dubitatio incidit veteribus, utrumne rem tantummodo suam vel eius aestimationem consequatur, an etiam summam poenalem. 3a. Et licet ab antiquis variatum est et ab ipso Papiniano in contrarias declinante sententias, tamen nobis haec decidentibus Papinianus, licet variavit, eligendus est, non in prima, sed in secunda eius definitione, in qua lucrum statuit minime ad dominum rei pervenire: ubi enim periculum, ibi et lucrum collocetur, nec sit damno tantummodo deditus qui rem commodatam accepit, sed liceat ei etiam lucrum sperare.

4. Cum autem in confinio earum dubitationum tertia exorta est, quare non et eam decidimus? cum enim apertissimi iuris est non posse maritum constante matrimonio furti actionem contra suam uxorem habere, quia lex ita atrocem actionem dare in personas ita sibi coniunctas erubuit, huiusmodi incidit veterum sensibus quaestio. 4a. Quidam etenim re sibi commodata huiusmodi rei furtum a sua muliere passus est: et dubitabatur, utrumne domino rei furti actio contra mulierem praestatur, an propter necessitatem causae et maritus eius utpote commodati actioni suppositus potest habere furti actionem. 4b. Et auctores quidem iuris satis et in hac specie contra se iurgium exercuerunt: ex praesente autem lege et anterioribus nostris decisionibus, quae in ista positae sunt constitutione, potest et haec species apertius dirimi. 4c. Si

2. But if he (the lender) has instituted an action on the loan, unaware or uncertain that the property is not with him (the borrower), but afterwards, discovering the facts, wanted to abandon the action on the loan and proceed to that for theft, then he is to be granted licence to proceed also against the thief, without any obstacle being put in his way, since he commenced the action on the loan against the receiver of the property, while in a position of uncertainty; unless that is the borrower has already compensated the owner; for then the thief is entirely free indeed from an action for theft by the owner, but he, who compensated the owner for the property loaned to him, is substituted (in the action against the thief). It is also very clear that if the owner initially instituted an action on the loan, without knowing the item had been taken, but afterwards, when this became known to him, changed to proceed against the thief, he who received the loan is entirely released, whatever outcome of the case the owner has against the thief. The same rule applies whether the person who received the loan is solvent in whole or in part.

3. But a second doubt arose as to what the rule should be in the case when a person had borrowed property which another had then taken by theft, and the thief, beaten in a suit (by the borrower), was condemned not only for the thing stolen but also for the fine for theft, and thereupon the owner of the property came wishing to take the whole amount of the condemnation by reason of the fact that it arose in connection with his property: so this other doubt arose among the ancients, whether he should get only his property or its value, or in addition the penal sum. 3a. And although different ideas existed among the ancients, with Papinian himself changing between contradictory opinions, We however, in deciding the dispute, have chosen Papinian, despite his inconsistency, not for his first but his second decision, in which he ruled that the gain should not belong to the owner; for where the risk is located, there also the gain; and the person receiving the property as a loan should not be subject to loss only, but must also be permitted to hope for gain.

4. Since, moreover, in the same area of these doubts a third has arisen, why do We not decide that as well? For since the law is quite clear that a husband cannot sue his wife in an action for theft while the marriage continues, because the law blushed to give such an atrocious action between persons so joined to each other, a question of this type arose in the minds of the ancients: 4a. For a man borrowed property, and suffered theft of this thing at the hands of his wife. And there was doubt whether the owner of the thing had an action for theft against the woman, or whether her husband, on account of the interrelation of the matter, since he was subject to an action on the loan, could bring an action for theft. 4b. And the authorities of law greatly disputed among themselves as to the law in such case. And this situation can obviously be solved by the present law and Our earlier decisions placed in this constitution. 4c. For We gave

enim domino dedimus electionem ad quem voluit pervenire, sive ad eum qui rem commodatam accepit, sive contra eum qui furtum commisit, et in hac specie maritus quidem propter matrimonii pudorem non furti, sed rerum amotarum actionem habeat, si ipsum dominus elegerit, dominus autem omnem licentiam possideat sive adversus maritum commodati sive adversus mulierem furti actionem extendere: ita tamen ut, si ipse qui rem commodatam accepit solvendo sit, nullo modo adversus mulierem furti actio extendatur, ne ex huiusmodi occasione inter maritum et uxorem, qui non bene secum vivunt, aliqua machinatio oriatur, et forsitan marito volente uxor eius et trahatur et furti patiatur poenalem condemnationem.

D. xv k. Dec. Lampadio et Oreste vv. cc. cons.

III De Operis Libertorum

[1] *Imp. Severus et Antoninus AA. Romano.* Si tempore manumissionis operae tibi impositae sunt, scis te eas praestare debere. solet autem inter patronos et libertos convenire, ut pro operis aliquid praestetur, licet pretium non possit, nisi quando propter inopiam pro alimentis id extra ordinem peti necessitas suaserit, cum, etsi operae non erant impositae, defectis tamen facultatibus patroni alere eum cogebaris.

PP. III k. Ian. Cilone et Libone cons.

[2] *Idem AA. Eutyheti.* Manumissionis causa traditus neque in servitutem deduci a manumissore potest neque impositas operas praestare cogitur.

PP. vi k. Mai. Geta II cons.

[3] *Idem AA. Quintiano.* Qui nummis acceptis ab extraneo servum suum manumisit et pro operis pecuniam ab eo accepit, sive fuerant operae impositae sive non fuerant, ut indebita soluta reddere cogitur.

PP. k. Nov. Albino et Aemiliano cons.

[4] *Imp. Antoninus A. Valeriano.* Si quam pecuniam tibi a liberto tuo ex venditione operarum deberi probaveris, restitui tibi a liberto tuo praeses iubebit (ex hoc enim liberam testamenti factionem libertus

a choice to the owner against whom he wished to proceed, whether against the party in receipt of the loan or the party who committed the theft. And, if the owner has chosen the husband, in this case the husband, on account of matrimonial delicacy, is not to have an action for theft, but one for the removal of property. The owner, however, is to have complete liberty to bring either an action on the loan against the husband or one for theft against the wife; provided that, if the husband who received the loan is solvent, in no way is an action for theft to be brought against the woman, lest from this sort of situation between husband and wife, who do not live happily together, some trickery should arise, through which perhaps, at her husband's wish, the wife might both be dragged into court and suffer penal condemnation for theft.

Given on November 17, in the consulship of the viri clarissimi Lampadius and Orestes (530).

Third Title The Services (*Operae*) of Freedmen²¹

[1] *Emperors SEVERUS and ANTONINUS Augusti to Romanus.* If the performance of services was imposed on you at the time of manumission, you know that you must provide them. However, it is customary for patrons and freedmen to agree that instead of the services something else is to be provided, although this cannot be a monetary amount, except when necessity has persuaded that this be sought extraordinarily for sustenance on account of (the patron's) poverty; since, even if services were not imposed, when, however, your patron's means failed, you were compelled to maintain him.

Posted December 30, in the consulship of Cilo and Libo (204).

[2] *The same Augusti to Eutyches.* A slave delivered to another for the purpose of manumission cannot be led back into slavery by the manumitter, nor is he compelled to perform services imposed on him.

Posted April 26, in the second consulship of Geta (205).

[3] *The same Augusti to Quintianus.* If a man manumitted his slave upon receiving payment from an outsider and accepted money from him (the slave) in place of services, he is compelled to return the payment as not owing, whether services were or were not imposed.

Posted November 1, in the consulship of Albinus and Aemilianus (206).

[4] *Emperor ANTONINUS Augustus to Valerianus.* If you prove that money is owing you from your freedman, by virtue of the sale (to him) of his services, the governor will order it to be restored to you by your freedman, for as a result

²¹ See D. 38.1.

habet), modo si non onerandae libertatis gratia emissam cautionem probabitur.

PP. XIII k. Mai. duobus Aspris cons.

[5] *Idem A. Terentio.* Mater tua ab eo, quem ex causa fideicommissi manumisit, operas impositas petere non potest, nisi eius tantummodo temporis, quo eum ante manumisit, quam dies fideicommissae libertatis existeret. sed nisi ei honorem patronis debitum exhibuerit, adeat competentem iudicem pro modo admissi vindicaturum.

PP. III id. Mai. duobus Aspris cons.

[6] *Imp. Alexander A. Caecilio.* Liberti libertaeque defunctorum operas neque extraneis heredibus patronorum debent neque maritis patronarum.

PP. k. Nov. Alexandro A. cons.

[7] *Idem A. Minicio. pr.* Nec patronis pro operis mercedem accipere licet, quamvis, si indictae operae praestitae non sint, ad pecuniae exactionem obsequii non praestiti aestimatio convertatur. 1. Qui autem duos filios in potestate vel diversis temporibus habuit, lege Iulia de maritandis ordinibus obligatione operarum liberatur.

D. XII k. Iun. Iuliano et Crispino cons.

[8] *Idem A. Augustino.* Si tuis nummis emptus es ab eo a quo manumissus es, nec operas ei debes neque puniri ab eo utpote ingratus potes: patronum tamen tuum esse negari non oportet.

D. III id. Sept. Iuliano et Crispino cons.

[9] *Idem A. Laetorio.* Libertae tuae ducendo eam uxorem dignitatem auxisti, et ideo non est cogenda operas tibi praestare, cum possis legis beneficio contentus esse, quod invito te iuste non possit alii nubere.

D. x k. Mart. Fusco et Dextro cons.

of this the freedman has freedom in making a will;²² but only if it is proved that the promise was not issued for the sake of burdening his liberty.

Posted April 18, in the consulship of the two Aspri (212).

[5] *The same Augustus to Terentius.* Your mother cannot claim imposed services from him, whom she manumitted on the basis of a testamentary trust, except only for the period when she manumitted him before the date specified for freedom under the trust. But, unless he shows her the honor due to patrons, she may go before a suitable judge to have him punished according to the measure of his crime.

Posted May 13, in the consulship of the two Aspri (212).

[6] *Emperor ALEXANDER Augustus to Caecilius.* Freedmen and freedwomen of deceased persons owe services neither to outside heirs of patrons nor to husbands of patronesses.

Posted November 1, in the consulship of Alexander Augustus (222).

[7] *The same Augustus to Minicius, pr.* Patrons are not permitted to receive money in place of services, although, if the specified services have not been provided, a valuation of the duty not performed is to be converted into a money payment. 1. But if someone had two sons in his power, even at different times, he is released from the obligation of services under the *lex Iulia de Maritandis Ordinibus*.²³

Given May 21, in the consulship of Julianus and Crispinus (224).

[8] *The same Augustus to Augustinus.* If you were bought with your own money by the person by whom you were manumitted, you neither owe him services nor can you be punished by him as ungrateful. However, it must not be denied that he is your patron.

Given September 11, in the consulship of Julianus and Crispinus (224).

[9] *The same Augustus to Laetorius.* You have increased the dignity of your freedwoman by marrying her and, therefore, she is not to be compelled to render you services, since you could be content with the benefit of the law, that she could not legally marry another man without your consent.

Given February 20, in the consulship of Fuscus and Dexter (225).

²² See also D. 38.2.37.

²³ For this law (18 BCE), which in the legal writers is usually subsumed under the consolidating rubric "*lex Iulia et Papia*," along with the *lex Papia Poppaea* (9 CE), see *Acta Divi Augusti* I, pp. 166–98, esp. p. 177; Crawford, *Roman Statutes*, vol. II (1996), 801–809; Treggiari, "Social Status" (1996), 887–889.

[10] *Idem A. Herculiano.* Titius si, cum testamentum faceret, servo suo libertatem cum condicione hac dedit: 'Gaium servum meum a die mortis meae annis tribus peractis manumitti volo, ita ut praestet heredibus meis, sicut me vivo praestabat', et cum idem servus testatori diurnum quiddam praestabat et post mortem eius usque ad diem praestandae libertatis etiam heredibus praestiterat, manifestum est, quod adeptus libertatem ad eandem praestationem compelli non possit.

D. VII id. Aug. Fusco et Dextro cons.

[11] *Imp. Gordianus A. Africano. pr.* Quod ex liberta muliere nascitur, ingenuum est. 1. Is autem, qui libertae suae nubenti commodavit adsensum, quamvis operas ab ea exigere non possit, iura patronatus non amittit.

PP. III non. Aug. Pio et Pontiano cons.

[12] *Imp. Diocletianus et Maximianus AA. et CC. Veneriae.* Qui manumittuntur, liberum ubi voluerint commorandi arbitrium habent nec a patronorum filiis, quibus solam reverentiam debent, ad serviendi necessitatem redigi possunt, nisi ingrati probentur, cum neque cum patrono habitare liberos iura compellunt.

S. VIII k. Iun. ipsis AA. cons.

[13] *Imp. Valentinianus Valens et Gratianus AAA. ad Probum pp.* In redhibitione operarum maneat poena eum, qui alienum libertum recipiendum esse duxerit.

D. III id. Iul. Gratiano A. II et Probo cons.

III De Bonis Libertorum et de Iure Patronatus

[1] *Imp. Severus et Antoninus AA. Secundae. pr.* Multum interest, utrum quis suis nummis emptus ac manumissus sit ab emptore, an a

[10] *The same Augustus to Herculianus.* If Titius,²⁴ when he made his will, gave freedom to his slave with this condition: "I want Gaius, my slave, to be manumitted three years after the date of my death, provided he gives service to my heirs as he gave service to me while I lived," and, since the same slave used to perform some daily work for the testator and after his death also did this for his heirs up to the date for his freedom to be given, it is clear that, having acquired his liberty, he cannot be compelled to continue the same services.

Given August 7, in the consulship of Fuscus and Dexter (225).

[11] *Emperor GORDIAN Augustus to Africanus. pr.* What is born of a freedwoman is free-born. 1. But he, who granted consent to his freedwoman marrying, although he cannot exact services from her, does not lose his rights as a patron.

Posted August 3, in the consulship of Pius and Pontianus (238).

[12] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Veneria.* Those who are manumitted have a free choice of where to live, nor can they be reduced back to the necessity of servitude by the sons of patrons, to whom they owe reverence alone, unless they are shown to be ungrateful, since the laws do not compel freedmen to live with a patron.

Subscribed May 24, in the consulship of the Augusti themselves (293).

[13]²⁵ *Emperors VALENTINIAN, VALENS, and GRATIAN Augusti to Probus, Praetorian Prefect.* For him, who considered receiving a freedman belonging to another, there should await the penalty of paying compensation for the (freedman's) services.

Given July 13, in the consulship of Gratian Augustus, for the second time, and of Probus (371).²⁶

Fourth Title The Property of Freedmen and the Right of Patronage²⁷

[1] *Emperors SEVERUS and ANTONINUS Augusti to Secunda. pr.* There is a great deal of difference whether a slave is bought with his own money and

²⁴ Titius is one of the John Does or Richard Rowses of Roman legal writing, so might have replaced the true name in this text.

²⁵ This constitution is adapted from a clause in the fuller version at C. 11.53.1, which concerns *coloni* not freedmen. However, that constitution ends by saying that the same provisions are to apply to freedmen, which Justinian's commissioners have used as their guide in editing. Seeck, *Regesten* (1919), 240, associates also with C.Th. 9.3.5 and C. 11.48.8; but against this, see Schmidt-Hofner, "Regesten" (2008), 577.

²⁶ The date here is preserved by Haloander, but is otherwise missing at the parallel C. 11.53.1.

²⁷ See D. 37.14, 38.2.

domino suo data pecunia mereatur libertatem. priore enim casu ad contra tabulas admitti patronum non placet, posteriore omnia iura patronatus retinet. 1. Et ideo cum Sabiniani patroni filii, qui plenum ius habuit, ut hostis publici bona fisco vindicata sunt, secundum ea, quae divo Pertinaci placuerunt et nos secuti sumus, in iura libertorum eius fiscus noster successit.

PP. v non. Iul. Faustino et Rufino cons.

[2] *Imp. Valentinianus et Valens AA. ad Florianum comitem rerum privatarum.* Si liberti coniventibus patronis consortium cum ancillis colonisve nostris elegerint, sciant illi se deinceps commoda patronatus amissuros.

D. III id. Oct. Treveris Lupicino et Iovino vv. cc. cons.

[3] *Imp. Iustinianus A. Demostheni pp. pr.* Si quis patronorum in posterum huiusmodi narrationem conceperit vel in libertatibus, quae inter vivos actitantur, vel in his, quae ex testamento vel codicillis scriptis vel sine scriptis habitis proficiscuntur, ut liberti eorum a iure patronatus liberentur, antiqua interpretatione semota non dubitet etiam patronatus ius ex sola tali verborum conceptione libertis esse remittendum nec successionibus quae ab intestato descendunt, quas veteres et post huiusmodi actus servari in libertorum bonis decreverunt, a nobis patronis integris reservandis. 1. Sed quemadmodum in natalium restitutione omne ius tollitur patronatus, ita et in huiusmodi verbis eandem esse vim observandam omnes non ignorent. 2. Idemque iuris est, si inter vivos manumissione imposita in ultimis voluntatibus concessio data fuerit patronatus: ita tamen, ut in omnibus natalium restitutiones, ex quibus paene solis ingenuitas mera libertis competit, tam obtineant quam in nostra re publica polleant, cum nobis cordi est ingenuis magis hominibus quam libertis eam frequentari. 3. Reverentia tamen, quae a libertis debetur, et iure, quod adversus ingratos liberos patronis competit, integris reservandis, et si per verborum conceptionem secundum a nobis inductum modum ius patronatus fuerit amissum, cum etiam haec ingenuitatis praemio

manumitted by the purchaser, or whether he earned freedom from his master upon the payment of money. For in the first case the patron is not allowed to be admitted to the inheritance (of the freedman) contrary to a will; in the latter case he retains all the rights of patronage. 1. And, therefore, since the property of Sabinianus, the patron's son who possessed the full rights of patronage, was confiscated to the Treasury, as that of a public enemy, our Treasury has succeeded to the rights in respect of his freedmen, according to the orders which pleased the divine Pertinax²⁸ and which We have followed.

Posted July 2, in the consulship of Faustinus and Rufinus (210).

[2]²⁹ *Emperors VALENTINIAN and VALENS Augusti to Florianus, Count of the Privy Purse.* If freedmen, with the connivance of their patrons, have chosen to have relationships with Our female slaves or bound tenants (*coloniae*), let them (the patrons) know that they will thereafter lose all the benefits of patronage.

Given October 13, at Trier, in the consulship of Lupicinus and Jovinus (367).

[3] *Emperor JUSTINIAN Augustus to Demosthenes, Praetorian Prefect. pr.* If any patron hereafter frames this sort of scenario, either in connection with manumissions enacted during life or those declared by will or by written or unwritten codicils, that his freedmen are to be released from the right of patronage, he need not doubt also that, the ancient interpretation being removed, the right of patronage is to be released to his freedmen by such a framing of the words alone; and the rights of succession, which arise on intestacy and which the ancients decided were preserved in regard to freedmen's property even after acts of this sort, are by Our ruling not to be reserved intact to the patrons. 1. But just as with the restoration of status of free-birth all right of patronage is removed; thus all are not to be ignorant that the same force must be given to statements of this kind also. 2. The law is the same if a cession of patronage is made in a last will, manumission having been granted during life; provided, however, that restitutions of birth-rights, which are almost the only way for the pure condition of free birth to be bestowed on freedmen, are to have as full force as possible in our state, since we sincerely wish it to be inhabited by free-born men rather than by freedmen. 3. Nevertheless, the duty of reverence, which is owed by freedmen, and the right, which patrons have against ungrateful freedmen, are to be kept intact, even though by the framing of the words the right of patronage is lost according to the limits introduced by us; for these also (reverence and action for ingratitude) are removed by the gift of free birth,

²⁸ Aside from this allusion, only three legal rulings from the brief reign of Pertinax are known (C. 4.28.1, 6.27.1; D. 50.6.6.2).

²⁹ Probably part of the same constitution as C. 11.68.4. See Seeck, *Regesten* (1919), 230; Schmidt-Hofner, "Regesten" (2008), 574 and 581.

tolluntur, quam paene sola natalium restitutio inducit. 4. His videlicet casibus, per quos poenalibus modis ius patronatus quasi ab indignis patronis eripitur, in suo robore durantibus.

Recitata septimo miliario in novo consistorio palatii Iustiniani. D. III k. Nov. Decio vc. cons.

[4] (Ὁ αὐτὸς βασιλεὺς.) **pr.** Μέλλουσα διδόναι τύπον καινὸν ἐπὶ τοῖς πατρωνικοῖς δικαίοις ἢ διάταξις διηγεῖται πρότερον τὰ ἀπὸ τοῦ δυοκαίδεκαδέλτου καὶ ἀπὸ τοῦ πράιτωρος καὶ ἀπὸ τοῦ Παπίου νόμου κρατοῦντα τὰ παλαιὰ πατρωνικά δίκαια καὶ οὕτως ἄρχεται τῆς νομοθεσίας. 1. Καὶ πρῶτον μὲν ἐξαριθμεῖται τοὺς μὴ ὑποκειμένους πατρωνικοῖς δικαίοις. ὅπερ συμβαίνει, ἥνικα ὁ ἐλευθερῶν ἐν ζωῇ, ἢ ἐν τελευταίᾳ βουλήσῃ εἴπη συγχωρεῖν τῷ ἀπελευθερῶ τὸ πατρωνικὸν δίκαιον· τότε γὰρ πρόδηλον, ὥς οὔτε αὐτῷ τῷ πατρίωνι οὔτε τοῖς ἐκ τοῦ γένους αὐτοῦ, πολλῶν δὲ μᾶλλον οὐδὲ ἐξωτικοῖς αὐτοῦ κληρονόμοις ἀρμόζει κατ' αὐτοῦ πατρωνικὸν δίκαιον. καὶ ὅτε δὲ ὁ δεσπότης ὁρῶν τὸν οἰκέτην αὐτοῦ στρατευσάμενον ἢ ἀξίας ἐπιτυγχάνοντα μὴ ἀντιλέγει, οὐ μόνον ἐλεύθερος γίνεται διὰ τούτου ὁ οἰκέτης, ἀλλὰ καὶ ἀπήλλακται παντὸς πατρωνικοῦ δικαίου.

2. Εἰ δὲ καὶ τις τὴν ἑαυτοῦ θεράπαιναν προστήσῃ ἐπὶ τὸ πορνεύεσθαι, πάλιν καὶ αὐτὴ ἢ θεράπαινα ἐλευθεροῦται καὶ ἀποστερεῖται παντὸς πατρωνικοῦ δικαίου ὁ δεσπότης ὥσπερ ὁ νοσοῦντα τὸν οἰκέτην περιορῶν καὶ μήτε αὐτὸς ἐπιμελόμενος αὐτοῦ μήτε εἰς ξενῶνα πέμπων αὐτὸν μήτε τὴν συνήθη χορηγῶν αὐτῷ σίτησιν παντὸς ἀποστερεῖται δικαίου κατὰ τῆς τούτου περιουσίας. 3. Εἰ δὲ καὶ προσπαθῶν τις θεραπαίνει αὐτοῦ καὶ μὴ ἔχων νόμιμον γαμετὴν παλλακτὴν αὐτὴν σχοίῃ καὶ μείνῃ μέχρι τελευτῆς ἐπὶ τῆς αὐτῆς προαιρέσεως μηδὲν εἰπὼν περὶ τῆς τύχης αὐτῆς, οὐ μόνον ἐλευθέρᾳ γίνεται καὶ αὐτὴ καὶ οἱ παῖδες, οὓς ἔτεκεν ἐκ τοῦ δεσπότη, ἀλλὰ καὶ εἰς εὐγένειαν ἀφαρπάζονται, κερδαίνοντες καὶ τὸ ἴδιον πεκούλιον· καὶ εἰκότως οὐδὲν πατρωνικὸν δίκαιον ἔχουσιν ἐπὶ αὐτοῖς οἱ τοῦ δεσπότη κληρονόμοι, εἴτε παῖδές εἰσιν εἴτε ἐξωτικοί.

which is brought in almost only by the restitution of birth-rights. 4. However, these cases are to keep their validity, through which the right of patronage is as it were stripped from unworthy patrons in a penal manner.

Recited at the seventh milestone in the New Consistory of the Palace of Justinian. Given October 30, in the consulship of the vir clarissimus Decius (529).³⁰

[4]³¹ [*The same Emperor.*]³² pr. This constitution, which is going to give a new form to the rights of patronage, first explains the old rights of patronage which existed according to the Twelve Tables, the Praetorian law and the Papian law, and commences its legislation thus: 1. It first enumerates those not subject to patronal rights; this happens when the manumitter while alive or by his last will states that he cedes the right of patronage to the freedman; for then it is clear that in such cases the right of patronage does not apply against him (the freedman) in favor of the patron himself, nor those descended from him, and much less so in favor of his external heirs. Likewise, if the master sees his slave perform state service or acquire a rank and does not object, not only does the slave become free by reason of this, but he is also released from every right of patronage.

2. Likewise, if anyone puts his female slave to prostitution, this again makes her free and the master is deprived of every right of patronage; just as a master, who overlooks a sick slave, and neither himself takes care of him nor sends him to a hospital, nor furnishes him with the victuals accustomed from an employer, loses every right in the slave's property. 3. Likewise, if anyone, who both has a passion for his female slave and does not have a legal wife, should take her as his concubine and remain with that same decision till his death, saying nothing about her status, not only does she become free, both herself and the children which she bore to the master, but they are raised up to free birth, gaining in addition their own *peculium*; and naturally the heirs of the master, whether they are the children or external heirs, have no right of patronage against them.

³⁰ This constitution formed part of a major and ceremonial promulgation of legislation, marking the new legal order with Tribonian in charge as quaestor: Bianchini, "La Subscriptio" (1999), 47-54.

³¹ The concluding part (from the middle of section 23) of this Greek constitution is preserved in the Verona palimpsest (Fig. 2, in vol. 1, clx above), but it is otherwise known mainly from a Greek summary in the *Basilika* (49.1.28, Scheltema A, vol. VI, pp. 2274-2281). There is also a partial Latin summary, known from marginalia to the medieval *Institutes* (Krüger *ad loc.*). Justinian states that this constitution was composed in Greek "to be accessible to all" (Inst. 3.7.3).

³² The heading is inferred from the context. The Latin version names Julian, Praetorian Prefect, as recipient, but this cannot be true, since he left office early in 531 (PLRE III, pp. 729-30, Julianus 4), thus at odds with the subscript date. Krüger suggested the addressees could be the Senate, the people of Constantinople, or the provincials more generally.

4. Εἰ δὲ καὶ τις ὑπὲρ τινος τὴν περὶ ἐλευθερίας δίκην ἀγωνισάμενος ἡττηθῇ τῷ δεσπότη καὶ τὸ τίμημα ὑπὲρ τῆς τοῦ δούλου διατιμήσεως καταβάλῃ, ἐλευθεροῦται μὲν ὁ οἰκέτης, ὑπὲρ οὗ τὸ τίμημα δέδοται τῷ δεσπότη, οὐκ ἔχει δὲ ἐπ' αὐτῷ πατρωνικὸν δίκαιον ὁ δεσπότης, ὥσπερ οὐδὲ ἐπὶ ἐκείνῳ τῷ κατὰ τοὺς παλαιούς νόμους ἰδίοις ἀργυρίοις ἀγορασθέντι κατὰ τούτου γὰρ καὶ οἱ παλαιοὶ τὰ ἀπὸ τοῦ πραίτωρος πατρωνικά δίκαια ἠνοῦντο τῷ ἐλευθερώσαντι.

5. Εἰ δὲ καὶ ἀργύρια ἀντὶ τῶν ὑπηρεσιῶν ἐπερωτήσῃ ὁ πάτρων τὸν ἀπελεύθερον ἢ τὴν ἀπελευθέραν ἢ ὀρκώσῃ αὐτούς μὴ γῆμαι μηδὲ παιδοποιήσασθαι, καὶ οὗτος πάντων ἐκπίπτει τῶν πατρωνικῶν, ἐπειδὴ καὶ τὸ παλαιὸν καὶ τῶν ἀπὸ τοῦ δυοκαιδεκαδέλτου καὶ τῶν ἀπὸ τοῦ πραίτωρος πατρωνικῶν δικαίων ἐξέπιπτεν. 6. Εἰ δὲ καὶ ἀναφωνήσαντος ἀπελευθέρου πρὸς εὐγένειαν συμπαιγνίᾳ χρησάμενος ὁ πάτρων συγχωρήσῃ αὐτὸν εὐγενῇ ἀποφανθῆναι, ἐλεγχομένης τῆς πρὸς τὸν ἀπελεύθερον συμπαιγνίας πάντων ἐκπίπτει τῶν πατρωνικῶν δικαίων καὶ οὗτος ὁ πάτρων.

7. Εἰ δὲ καὶ ὁ τιμηθεὶς fideicommissarij ἐλευθερίᾳ, ἀγνωμόνως πειρασθεὶς τοῦ ὀφειλοντος ἐπιθεῖναι αὐτῷ τὴν ἐλευθερίαν, προσελθὼν τῷ ἄρχοντι τὴν ἀπουσίαν αὐτοῦ ἢ τὸ λανθάνειν αὐτόν, διελέγξει, καὶ ἀρπάζεται ἀπὸ δογμάτων συγκλήτου εἰς ἐλευθερίαν καὶ οὐδενὶ πατρωνικῷ δικαίῳ ὑπόκειται. 8. Εἰ δὲ καὶ υἱὸς πάτρωνος ἢ κεφαλικὴν κατηγορίαν κατὰ τοῦ πατρός ἀπελευθέρου ἐνστήσῃ ἢ πρὸς δουλείαν ἐλκύσαι περαθεῖν, ἀπαλλάττεται καὶ οὗτος ὁ ἀπελεύθερος παντὸς πατρωνικοῦ δικαίου, ἐπειδὴ καὶ τὸ παλαιὸν τῶν ἐκ τοῦ πραίτωρος πατρωνικῶν δικαίων ἀπηλλάττετο.

9. Τούτων τοίνυν ἀπάντων τοῦ πατρωνικοῦ δικαίου ἀτέλειαν ἔχόντων νομοθετεῖ λοιπὸν μετὰ τὴν τούτων ὑπεξαίρεσιν, ποῖα βούλεται εἶναι πατρωνικά δίκαια κατὰ τῶν ἄλλων ἀπελευθέρων. 9a. Καὶ εἰ μὲν ἐλάττονα τῶν ἑκατὸν νομισμάτων σχοίῃ περιουσίαν ἀπελεύθερος ἢ ἀπελευθέρα, οὐ περιεργάζεται ταύτην τὴν ποσότητα ἢ διάταξις, ἀλλὰ ἐπιτρέπει αὐτοῖς διατίθεσθαι, καθάπερ ἂν βουλευθείσαν· ἀδιαθέτων δὲ καὶ ἀπαιδίων τελευτώντων τῶν ἔχόντων τὴν ἐλάττονα τῶν ἑκατὸν νομισμάτων περιουσίαν δίδωσι τοῖς πάτρωσι τὴν ἐξ ἀδιαθέτου διαδοχὴν. 10. Τῶν δὲ ὑπὲρ τοὺς ἑκατὸν χρυσίνους καταλιμπανόντων οὐσίαν εἰ μὲν εἴησαν παῖδες ἢ ἔγγονοι ἢ προέγγονοι ἢ ἀπέγγονοι, ἄρρενες ἢ θήλειαι, δι' ἄρρένων ἢ διὰ θήλεων προσώτων κατιόντες ὅσοιδήποτε, εἴτε προελευθερωθέντες τῶν γονέων εἴτε συνελευθερωθέντες αὐτοῖς εἴτε καὶ μετ' αὐτοὺς ἐλευθερωθέντες ἢ καὶ μετὰ τὴν ἐλευθερίαν τεχθέντες, αὐτοὺς καλεῖ πρὸς τὴν τῶν ἀπελευθέρων διαδοχὴν, ἐπειδὴ καὶ τῇ φύσει δίκαιόν ἐστι τοὺς παῖδας τὰ τῶν γονέων διαδέχεσθαι. 10a. Καὶ ὁ δυοκαιδεκάδελτος γὰρ ὑπεξουσίους εὐρών τοῦ ἀπελευθέρου παῖδας οὐδὲν παρεῖχε τοῖς πάτρωσι, ὁ μὲντοι προίτωρ

4. Likewise, if anyone, bringing a suit involving the question of someone's freedom, is defeated by the master, and pays the estimate of the value of the slave, the slave, for whom the price is paid to the master, becomes free, nor has the master any rights of patronage over him, just as he does not have over one who, according to the ancient laws, was bought with his own money; for against him (i.e., the slave bought with his own money) the ancient laws also denied to the manumitter the rights of patronage given by the Praetor.

5. Likewise, if a patron has a freedman or freedwoman stipulate to pay him money instead of services, or binds them by an oath not to enter into matrimony or procreate children, he too loses all patronal rights, since even formerly he lost the rights of patronage both under the Twelve Tables and from the Praetor. 6. Likewise, if a freedman proclaims himself free-born, and the patron, employing collusion, agrees that he be pronounced free-born, if the collusion with the freedman is proved, this patron also loses every right of patronage.

7. Likewise, if any one, honored with freedom from a testamentary trust, senselessly suffers delays from him who ought to give him his freedom, and goes before the governor and proves that the trustee is absent or hiding, under the senatorial decrees he also is brought to freedom; and he is not subject to any right of patronage. 8. Likewise, if the son of a patron institutes a capital accusation against a freedman of his father or attempts to drag him back into slavery, this freedman also is released from every right of patronage, since formerly also he was released from the Praetorian rights of patronage.

9.³³ All these are exempt from the rights of patronage and after this exclusion it (the constitution) next lays down what sort of rights of patronage it wishes there to be over the other freedmen. 9a. If a freedman or freedwoman has property of less than 100 solidi,³⁴ the constitution takes no account of such an amount, but permits them to leave this by will as they wish; but if those having property less than 100 solidi die intestate and without children, it gives the right of intestate succession to the patrons. 10. For those leaving property of more than 100 solidi, if there are children or grandchildren or great-grandchildren or great-great-grandchildren, male or female, descending through the male or female line, of whatever number, whether manumitted before their parents, or manumitted with them or manumitted after them, or whether born after the manumission (of their parents), these are called to the succession of the freedmen, because it is by nature just that the children should succeed to the property of the parents. 10a. For the Twelve Tables also, if they find children in the power of a freedman, give nothing to the

³³ With 9-16, compare the summary in Inst. 3.7.3.

³⁴ "Nomisma" in Greek, used to denote the standard gold coin, the solidus. See Avotins, *On the Greek of the Code* (1989), 113.

καὶ ὑπεξουσίων καὶ αὐτεξουσίων ὑπόντων τῷ ἀπελευθέρῳ παίδων οὐκ ἐκάλει τὸν πάτρωνα πρὸς τὴν ἐναντίωσιν τῆς διαθήκης. **10b.** Τούτοις τοίνυν ἀκολουθήσασα καὶ ἡ προκειμένη διάταξις, ὅταν εὖρη παῖδας τοῦ ἀπελευθέρου ἢ τῆς ἀπελευθέρας, οὐδὲ ἐν δίκαιον τοῖς πάτρωσιν ἢ τοῖς παισὶν αὐτῶν ἐκ τῶν ἐξ ἀδιαθέτου δικαίων χαρίζεται, ἀλλὰ καλεῖ τοὺς τῶν ἀπελευθέρων παῖδας εἰς τὴν αὐτῶν διαδοχὴν. εἰ καὶ ἐν δουλείᾳ τεχθέντες συνελευθερώθησαν.

11. Καὶ τὸ μείζον οὐ τότε μόνον αὐτοὺς καλεῖ, ὅτε μόνοι ὑπείσιν οἱ ἐν δουλείᾳ τεχθέντες καὶ τῷ πατρὶ ἢ καὶ τῇ μητρὶ συνελευθερωθέντες, ἀλλ' εἰ καὶ ἑτέρους ἔχοι παῖδας ὁ ἀπελεύθερος ἢ ἡ ἀπελευθέρα μετὰ τὴν ἐλευθερίαν τεχθέντας ἢ ἐκ τῶν αὐτῶν γάμων ἢ ἐξ ἑτέρων, κοινῶς ἀπαντας καλεῖ. **11a.** Καὶ τὸ ἐτι τοῦτου παραδοξότερον καὶ αὐτοὺς τοὺς παῖδας εἰς τὴν ἀλλήλων κληρονομίαν καλεῖσθαι βούλεται ἡ διάταξις, χαρίζεται δὲ καὶ τῷ ἀπελευθέρῳ καὶ τῇ ἀπελευθέρᾳ τὴν τῶν ἰδίων παίδων διαδοχὴν, ὥσπερ ἐπὶ τῶν εὐγενῶν οἱ πατέρες καὶ αἱ μητέρες καλοῦνται πρὸς τὴν τῶν παίδων κληρονομίαν, καὶ βούλεται ἐπὶ τούτων τῶν θεμάτων τὸ πατρωνικὸν δίκαιον ἀργεῖν, ὥστε καὶ ἀπελευθέρους καὶ ἀπελευθέρας ὑπὸ τῶν παίδων κληρονομεῖσθαι καὶ αὐτοὺς τοὺς παῖδας ὑπ' ἀλλήλων καὶ ὑπὸ τῶν γονέων αὐτῶν, καὶ μηδαμοῦ χώραν εἶναι τῇ πατρωνικῇ διαδοχῇ τῶν τοιούτων προσώπων ὑπόντων.

12. Ταῦτα περὶ τῶν τελευτώντων ἐξ ἀδιαθέτου νομοθετήσασα μεταβαίνει καὶ πρὸς τοὺς διατιθεμένους ἀπελευθέρους καὶ παρακελεύεται, εἰ τοὺς ἰδίου παῖδας γράψοιεν κληρονόμους οἱ ἀπελεύθεροι ἢ αἱ ἀπελεύθεραι, πάντως ἀργεῖν τὴν πατρωνικὴν κλησιν. **13.** Εἰ δὲ ἀποκληρονόμους ποιήσαιεν τοὺς παῖδας, εἰ μὲν ἀδίκως, ὥστε καὶ ἀνατραπῆναι τὴν διαθήκην διὰ τῆς μέμψεως (δίδωσι γάρ καὶ ταύτην τοῖς οἰοισδήποτε τῶν ἀπελευθέρων παισὶν ἢ διάταξις), πάλιν ἀργεῖν βούλεται τὴν πατρωνικὴν διαδοχὴν, ὡς ἀδιαθέτου τελευτώντος τοῦ ἀπελευθέρου καὶ ὑπὸ τῶν παίδων ἐξ ἀδιαθέτου κληρονομουμένου. **14.** Εἰ δὲ εὐλόγως τοὺς παῖδας ἀποκλήρους ἐποίησαν τοὺς ἰδίους οἱ ἀπελεύθεροι, καλεῖσθωσαν οἱ πάτρωνες, ὡς αὐτῶν μὴ ἐσχηκότων παῖδας. **14a.** Ἐπειδὴ δὲ δοκοῦσι συγγενεῖς εἶναι τῶν ἐλευθερουμένων οἱ ἐλευθεροῦντες αὐτούς, διὰ τοῦτο καὶ καλοῦνται ἐκ τῆς νομίμου διακατοχῆς,¹ ὥσπερ ἐπὶ τῶν εὐγενῶν οἱ κατὰ βαθμὸν ἐγγύτεροι καλοῦνται, οὕτως καὶ ἐπὶ τῶν ἀπελευθέρων. **14b.** Ὅθεν εἰ μὲν παῖδας ἔχουσιν οἱ ἀπελεύθεροι καὶ κληρονομοῦσιν αὐτούς, ἀποκλείουσι τὸν πάτρωνα. **14c.** Εἰ δὲ μὴ ὄντων παίδων ἢ ἀποκληρονόμων γενομένων οἱ πάτρωνες ἔλθωσι, κατὰ βαθμὸν καλεῖσθωσαν εἰς τὴν οὐσίαν τῶν ἀπελευθέρων τῶν κεκτημένων οὐσίαν ὑπερβαίνουσιν τὴν ποσότητα τῶν ἑκατὸν νομισμάτων,

¹ διαδοχῆς

patrons, while the Praetor, when children of a freedman are living, both those "in power" and those emancipated, does not permit the patron to oppose the will. 10b. The present constitution also, therefore, follows these examples, and whenever it finds children of a freedman or freedwoman, it grants no right out of the rights under intestacy to the patrons or their children, but calls the children of freedmen to the succession to them, even if, born in slavery, they were manumitted along with them.

11. And, even more, not only does it then call the children when there exist only those who were born in slavery and were manumitted along with their father or even mother, but also, if the freedman or freedwoman has other children born after manumission whether from the same or another marriage, it calls them all jointly. 11a. And even more incredible than this, the constitution wants these same children to be called to the inheritance from each other, and grants also to the freedman and freedwoman the succession to their own children, just as the fathers and mothers of the free-born are called to the inheritance of their children, and it wants the right of patronage to be ineffective in these cases, so that both freedmen and freedwomen are succeeded by their children, and these same children by each other and by their parents, and there is no place for patronal succession, while such persons survive.

12. Having laid down these rules concerning those who die intestate, it passes on to the freedmen who have made a will and orders that, if the freedmen or freedwomen should appoint their own children as heirs, the patronal right of succession is entirely void. 13. If they have disinherited their children, and that unjustly, so that the will is overturned by the complaint of an undutiful will (for the constitution grants this also to freedmen's children of any sort), again it wants patronal succession to be void, as if the freedman had died intestate and the inheritance went to the children by intestate succession. 14. But if the freedmen disinherited their children for just cause, the patrons may be called just as if they (the freedmen) had not left children. 14a. Since, moreover, manumitters seem themselves to be cognate relatives of freedmen, for this reason also they are called under lawful succession;³⁵ just as those nearest in degree among the free-born are called (to the succession), so also in the case of freedmen. 14b. Hence, if freedmen have children and the latter inherit from the former, they exclude the patron. 14c. But if there are no children or they are disinherited, the patrons enter and are called according to degree to take the property of those freedmen possessing property exceeding 100 aurei, so that in the first place patrons and patronesses are called, then after them

³⁵ Reading διαδοχῆς (so Reitz, Scheltema), which makes better sense than the manuscript διακατοχῆς (= *bonorum possessio*) printed by Krüger.

ἵνα πρῶτοι αὐτοὶ οἱ πατρῶνες καὶ αἱ πατρώνισσαι καλῶνται, εἴτα μετ' αὐτοὺς οἱ παῖδες αὐτῶν, καὶ ἔαν μὴ ὑπείσι παῖδες αὐτῶν, οἱ ἔγγονοι αὐτῶν οἱ κατιόντες ἐξ ἀρρένων ἢ ἀπὸ θηλειῶν. **14d.** Τοῦτο γὰρ εἴρηται καὶ ἐπὶ τῶν εὐγενῶν, ὥστε κατὰ βαθμὸν καλεῖσθαι πάντας τοὺς συγγενεῖς πρὸς τὴν κληρονομίαν, καὶ τῶν πρώτων ἀπονούντων τότε τοὺς μετὰ ταῦτα ἔρχεσθαι καὶ κληρονομεῖν. **14e.** Εἰ δὲ μηδένας ἔχει κατιόντας ὁ πατρῶν ἥτοι ἡ πατρώνισσα, τότε καὶ τοὺς ἐκ πλαγίου αὐτῶν καλοῦμεν κατὰ βαθμὸν, ἵνα οἱ ἐγγύτεροι συγγενεῖς προτιμῶνται τῶν ὄντων ἐν μακροτέρῳ βαθμῷ. **14f.** Ἔως δὲ πέμπτου βαθμοῦ οἱ ἐκ πλαγίου συγγενεῖς τοῦ πατρῶνος καὶ οἱ κατιόντες αὐτοῦ κληρονομεῖτωσαν τὸν ἀπελευθέρων.

15. Ταῦτα μὲν πάντα εἴρηται, ἔαν οἱ ἀπελευθεροὶ παῖδας ἔχωσιν. ἔαν δὲ παντελῶς οὐκ ἔχωσι παῖδας, ἀλλὰ ποιήσωσι διαθήκην καὶ γράψωσιν ἑξωτικούς κληρονόμους, οὐδὲ κατὰ τὸν δυοκαιδεκάδελτον λέγομεν, ἐπειδὴ γέγονε διαθήκη, τοὺς πατρῶνας ἀποκλείεσθαι παντελῶς, οὐδὲ κατὰ τὸν Πάτριον δεχόμεθα αὐτούς, ἵνα καὶ ἐνὸς παιδὸς γραφέντος κληρονόμου τὸ ἥμισυ λάβωσιν ἢ δύο παιδῶν γραφέντων κληρονόμων τὸ τρίτον λάβωσιν, ἀλλὰ καλοῦμεν αὐτούς, ἵνα μόνον τὸ τρίτον τῆς τοῦ ἀπελευθέρου κληρονομίας δυνηθῶσι λαβεῖν, οὐ πάντες οἱ καλούμενοι πρὸς τὴν πατρωνικὴν κληρονομίαν, ἀλλὰ πατρῶν καὶ πατρώνισσα καὶ παῖδες αὐτῶν καὶ ἔγγονοι καὶ ἀπέγγονοι, τουτέστιν οἱ ἕως πέμπτου βαθμοῦ κατιόντες τῶν πατρῶνων καὶ μόνοι. **15a.** Οἱ οὖν περαιτέρω αὐτῶν κατιόντες ἢ ἐκ πλαγίου οὐκ ἔχουσι τὴν ἐναντίωσιν τῆς διαθήκης ἑξωτικῶν γραφομένων κληρονόμων ἐπὶ τὸ λαβεῖν τὸ τρίτον τῆς οὐσίας. **16.** Ὡς περ γὰρ ἐπὶ τῶν εὐγενῶν τριούγκιον ἐν τοῖς χρόνοις τούτου τοῦ κώδικος ὠρισμένον ἦν τοῖς δυναμένοις κινῆσαι τὴν κατὰ τῆς διαθήκης μέμψιν, οὕτως, ἔαν ἀπελευθέρως τελευτήσῃ τετραούγκιον καθαρὸν καὶ ἀπηλλαγμένον ληγάτων καὶ *fiduciariarum* τῷ πατρῶνι καταλείψας, ἀποκλείει αὐτόν. **16a.** Κἂν γὰρ παισὶν ἰδίῳις κατέλειπεν ὁ ἀπελευθέρως ἀπὸ τοῦ πατρῶνος λήγατον, οὐκ ἔχει καθαρὸν τὸ τρίτον. ὥς περ γὰρ ἐπὶ τῆς μέμψεως ζητοῦμεν, ἵνα καθαρὸν ἔσθι πάντων τῶν ληγάτων τὸ τριούγκιον, οὕτως καὶ ἐνταῦθα ἀπαιτοῦμεν, ἵνα καθαρὸν ἔσθι πάντων τῶν ληγάτων τὸ πατρωνικὸν τετραούγκιον. **16b.** Ἐλευθερίαις δὲ ὑπόκειται καὶ τὸ τετραούγκιον τοῦ πατρῶνος. τὸ γὰρ παλαιὸν παῖδες μὲν κινοῦντες τὴν κατὰ τῆς διαθήκης μέμψιν ἐδίδουν τὰς ἐλευθερίας, πατρῶνες δὲ κινοῦντες εἰς ἥμισυ τὴν ἐναντίωσιν τῆς διαθήκης κατὰ τῆς τοῦ ἀπελευθέρου διαθήκης οὐκ ἐπεγίνωσκον τὰς ἐλευθερίας. **16c.** Πάντα δὲ τὰ λήγατα, ὧν ὁ πατρῶν ἀπήλλακται, διδόντων οἱ κληρονόμοι τοῦ ἀπελευθέρου, δηλονότι πρότερον παρακατέχοντες ἑαυτοῖς ἐκ τῆς οὐσίας τὸν Φαλκίδιον τῶν περιλιμπανομένων αὐτοῖς ὀκταουγκίων, ἵνα μηκέτι τριούγκιον, ἀλλὰ μόνον διούγκιον παρακατάσχουσιν. **17.** Εἴτε οὖν ὁ πατρῶν παντελῶς μηδὲν ἔχει, λαμβάνει τὸ τετραούγκιον, εἴτε

their children, and if their children do not survive, their grandsons in the male or female line. 14d. For it is said as to free-born persons also, that all blood relatives are called to the inheritance according to degree, and when the first in degree fail, then those next in line enter and become heirs. 14e. But if the patron or patroness has no descendants, then we also call their collateral relatives according to degree, so that the relatives of nearer degree have preference over those of remoter degree. 14f. The collateral relatives of the patron and his descendants inherit from the freedman up to the fifth degree.

15. All these things are stated for cases when freedmen have children. If they do not have children at all, but make a will and appoint external heirs, then we do not agree with the Twelve Tables that, when a will has been made, the patrons are entirely excluded, nor do we accept according to the *lex Papia* that, when one child is appointed heir, they (the patrons) take half or, if two children are appointed heirs, they take a third, but we call them on the basis that they can take only a third of the freedman's inheritance; not all those are called to the patron's inheritance, but only the patron, patroness, their children, grandchildren, great-grandchildren, and great-great-grandchildren, that is to say, those who descend from the patron to the fifth degree and only those. 15a. Therefore descendants of remoter degree and collateral relatives have no claim against the will to take a third of the estate, when external heirs are appointed. 16. And just as with free-born men at the time of this Codex a fourth part (lit. "3 ounces" out of 12)³⁶ was the minimum portion for those entitled to bring a complaint about an (undutiful) will, so, if a freedman dies leaving a third part (lit. "4 ounces" out of 12) to his patron, free and clear of legacies and trusts, he excludes him (i.e., the patron, from the rest). 16a. But if the freedman bequeathes a legacy to his own children due from the patron, the latter does not have his third unencumbered. For just as in cases of complaint (of undutiful will) we expect that the quarter part be free of all legacies, so we also require here that the patron's third part be free of all legacies. 16b. But even the patron's third is subject to manumissions. For, of old, children, who instituted complaint concerning a will, granted manumissions, whereas patrons, who brought a testamentary challenge for one-half against the freedman's will, did not recognize manumissions. 16c. But all legacies from which a patron is released must be paid by the heirs of a freedman, first retaining for themselves from the estate the Falcidian portion out of the two-thirds ("8 ounces") left to them, so that they no longer keep a quarter ("3 ounces"), but only a sixth ("2 ounces"). 17. Therefore, if the patron has nothing at all (under the will), he

³⁶ For full exposition of Latin and Greek terms for the parts of an estate, see Theophilus, *Paraphrasis* 2.14.5 (Lokin *et al.*, *Paraphrasis Institutionum* (2010), 340–341); also Avotins, *On the Greek of the Code* (1989), 158 and 160–161.

ἐγράφη κληρονόμος εἰς ἥττον τοῦ τετραουγκίου, ἀναπληροῦται καθαρὸν τὸ τετραούγκιον πάσης αἰρέσεως καὶ πάσης ὑπερθέσεως ἀπηλλαγμένον, τουτέστιν ἵνα, κὰν γράψῃ αὐτὸν ὁ ἀπελευθερὸς κληρονόμον ὑπὸ αἵρεσιν, περιέλωμεν τὴν μνήμην τῆς αἰρέσεως. 17a. Εἰ δὲ καὶ ἡ αἵρεσις τῶν πάντως ἐξερχομένων ἐστίν, ὑπέρθεσιν δὲ ἔχει, τυχὸν "ἐὰν φθάσῃ ὁ τῶν καλανδῶν καιρὸς" καὶ ταύτην τὴν αἵρεσιν περιαιροῦμεν, φυλάττοντες αὐτοῖς τὸ τετραούγκιον, εἴτε εἰς ἐστὶν εἴτε πλείονες.

18. Εἰ δὲ γραφῶσι κληρονόμοι ὑπὲρ τὸ τετραούγκιον καὶ βαρηθῶσι ληγάτοις, ἐὰν αὐτοὶ μόνοι ὥσι κληρονόμοι, παράσχωσι τὰ ληγάτα καὶ τὰ fideicommissa, δηλονότι μὴ βλαπτομένου τοῦ τετραουγκίου αὐτῶν ὁ γὰρ Φαλκίδιος ἐπὶ αὐτοῦ τετραουγκίου ἐστίν. 18a. Ἐὰν δὲ μὴ εἰς ὁλόκληρον, εἰς πλέον μέντοι τοῦ τετραουγκίου, τυχὸν εἰς ἕξ ἢ εἰς ὀκτώ οὐγκίας ἐγράφησαν κληρονόμοι καὶ ἐβαρῆθησαν ληγάτοις, τότε τὸ περισσὸν ὑπὲρ τὸ τετραούγκιον διδότησαν τοῖς ληγαταρίοις καὶ fideicommissariis, τὸ δὲ λοιπὸν παρεχέτωσαν οἱ κληρονόμοι, φυλάττοντες ἑαυτοῖς ἐκ τῆς ἰδίας ἐνστάσεως τὸν Φαλκίδιον.

19. Ὅσοι δὲ ἂν εἴησαν πάτρωνες, κὰν ἐξ ἀνίσων μερῶν ἦσαν δεσπόται τοῦ οἰκέτου, μεθ' ὃ γένωνται πάτρωνες, ἐξ ἴσου κληρονομοῦσιν. 19a. Ἐὰν δὲ τελευτήσωσιν οἱ πάτρωνες, καὶ ὁ μὲν ἔχει παῖδας, ὁ δὲ ἐγγόνους, οἱ ἐγγύτεροι περὶ τὸν βαθμὸν, τουτέστιν οἱ παῖδες τοῦ ἐνὸς πάτρωνος, ἀποκλείουσι τοὺς ἐγγόνους τοῦ ἄλλου πάτρωνος. 19b. Καὶ γινέσθω ἡ κλῆσις οὐχὶ κατὰ σειράν, ἀλλὰ προσωπικῶς, τουτέστιν ἵνα πρὸς τὸν ἀριθμὸν τῶν παιδῶν τοῦ πάτρωνος τὸ μέρος διαιρῇται. καὶ τυχὸν ἐὰν δύο πάτρωνες τελευτήσωσιν ἐπὶ παισίν, ὁ μὲν ἐπὶ δύο, ὁ δὲ ἐπὶ τέττασι, εἰς ἕξ μέρη γίνεται ἡ κληρονομία, οὐκέτι εἰς δύο, ἐπειδὴ καὶ δύο πατρῶνων παῖδές εἰσιν. 19c. Ἐὰν δὲ εἰς τῶν δύο πατρῶνων τὸ μέρος τὸ ἴδιον παραιτήσῃται, τότε τὸ μέρος αὐτοῦ οἱ λοιποὶ πάτρωνες λαμβανέτωσαν. 20. Εἰ δὲ καὶ ὁ προλαμβάνων βαθμὸς παραιτήσῃται, τότε πάλιν ὁ μετὰ ταῦτα βαθμὸς καλεῖσθω· δεχόμεθα γὰρ τὰς κατὰ συγγένειαν διαδοχὰς ἐπὶ πᾶν ἀπελευθέρων, τουτέστιν ἵνα τοῦ πρώτου παραιτουμένου ὁ μετὰ ταῦτα βαθμὸς ὑπείσέρχῃται. 20a. Τοῦτο γὰρ καὶ ἐπὶ τῶν εὐγενῶν κρατεῖ, ἐπειδὴ καὶ τὸ παλαιόν, ὅτε ἐπὶ κληρονομίας οὐκ ἦν ὑπείσέλους τῶν μετὰ ταῦτα, ἐπὶ τῆς ἐπιτροπῆς ἐφυλάττετο, καὶ τοῦ πρώτου τυχὸν καλουμένου ἐξκουσατεύοντος ἑαυτὸν ὁ μετὰ ταῦτα ἐκαλεῖτο.

21. Καλεῖσθωσαν δὲ μὴ μόνον οἱ ἐν φύσει κατιόντες τῶν πατρῶνων, ἀλλὰ καὶ οἱ κυοφορούμενοι αὐτῶν καὶ οἱ εἰς θέσιν παρ' αὐτῶν δεδομένοι. ἢ οὖν παλαιὰ ὑπόκρισις καὶ παρατήρησις, ὅτε ἐπλαττόμεθα τὴν θυγατέρα τοῦ πάτρωνος υἱὸν πάτρωνος εἶναι, ἀνηρεῖσθω· σήμερον γὰρ καὶ αὕτη καλεῖται πρὸς τὴν κληρονομίαν. 21a. Καὶ καλεῖσθωσαν μὴ μόνον διακατοχὴν αἰτοῦντες, ἀλλὰ καὶ ὡς νόμιμοι κληρονομοῦντες,

takes a third ("4 ounces"), and if he is appointed as heir for less than a third, the third is made up free and clear of every condition and every delay; that is to say, that if the freedman should appoint him an heir upon a condition, we remove the terms of the condition. 17a. But even if the condition is one of those which absolutely will happen, but entails a delay, for instance "if the time of the Kalends shall come," this condition too we remove, preserving the third for them, whether that goes to one or more.

18. But if they (the patrons) were appointed heirs for more than a third and are burdened with legacies, if they are sole heirs, they are to pay the legacies and trusts, except that their third is not to be touched; for the Falcidian portion relates to that third. 18a. If they are appointed heirs not to the entire estate, but to more than a third, say to a half ("6 ounces") or two-thirds ("8 ounces"), and are burdened with legacies, then they are to pay to the legatees and trustees the amount in excess of the third, while the (other) heirs pay the remainder, they (the patrons) keeping for themselves the Falcidian portion from their own inheritance.

19. However many patrons there are, even if they were masters of the slave in unequal shares, after they become patrons, they inherit equally. 19a. But if the patrons are dead, and one has children, but another grandchildren, the nearer in degree, that is to say the children of the first patron, exclude the grandchildren of the other patron. 19b. And the succession is not to be *per stirpes* (by lines of agnatic descent), but *per capita* (by individuals); that is to say, the share is to be divided according to the number of the patron's children. And if it happen that two patrons die leaving children, one of them two, the other four, the inheritance is to be divided into six parts, no longer into two, because there are children of two patrons. 19c. If one of the patrons repudiates his share, then the other patrons are to take his share. 20. And if those of the degree that takes first repudiate (the inheritance), then again those of the next degree are to be called; for we accept cognate succession in relation to freedmen; that is, when the first degree refuses, the next degree succeeds in their place. 20a. This is also true among the free-born, and while under the ancient rule there was no substitution in inheritance of those of remoter degrees, this was observed in tutorship, and if it happen that the first to be called excused himself, the next one was called.

21. Moreover, not only are already living descendants of patrons to be called, but also posthumous children and those given by them in adoption. And let the ancient pretence and rule be abolished, whereby we used to feign that a daughter of a patron was son of a patron; for today she herself also is called to the inheritance. 21a. And they are to be called not only as claimants to the possession of an inheritance (*bonorum possessio*), but also as statutory heirs,

καὶ κληρονόμοι δὲ γραφόμενοι ὠμολογημένως ἐχέτωσαν τὴν ἐκ τῆς διαθήκης βοήθειαν· αἱ δὲ λοιπαὶ πατρωνικαὶ διακατοχαὶ ἡσυχάζετωσαν. **22.** Ἐάν δὲ θετοὺς παῖδας ἔχωσιν οἱ ἐλευθερωθέντες ἢ οἱ πατρῶνες, τούτους, εἰ καὶ ὑπεξουσίους ἔχωσιν, οὐ δεχόμεθα ἐν τάξει υἱῶν, ἀλλὰ ἐν τάξει ἐξωτικῶν. εἰ δὲ καὶ τελευτήσωσιν οἱ πατρῶνες ἐπὶ ἐξωτικοῖς κληρονόμοις, οὐ καλοῦνται πρὸς τὴν τοῦ ἀπελευθέρου κληρονομίαν· συγγενικῶ γὰρ δικαίῳ κληρονομοῦνται οἱ ἀπελεύθεροι. **23.** Ἐπειδὴ δὲ ἡ παλαιὰ διακατοχὴ ἡρμοξε καὶ ὅτε ἐτελεύτησεν υἱὸς ἀπελευθέρου γεννηθεὶς μετὰ τὴν ἐλευθερίαν διαθήκης καὶ συγγενείας χωρὶς, καὶ ἐκάλει τὸν ἐλευθερώσαντα τὸν πατέρα καὶ τοὺς ἐξ ὀρρενογονίας αὐτοῦ συγγενεῖς, εἴτε ἔμειναν συγγενεῖς εἴτε ἔπαθον καταστάσεως ἐναλλαγὴν, ἐκέλευσε δέ, ἵνα, ἐάν ὁ πατρῶν τούτου τοῦ ἀπελευθέρου καὶ αὐτὸς ἀπελευθερὸς ἦν ἑτέρου τινός, καὶ ὁ τοῦ πατρῶνος πατρῶν καὶ ἡ συγγένεια αὐτοῦ καλῆται, κελεύει ἡ διάταξις, ἵνα, ἐάν μετὰ τὴν ἐλευθερίαν γεννηθέντες τοῦ ἀπελευθέρου παῖδες τελευτήσωσιν ἀδιάθετοι καὶ μηδένα παντελῶς ἔχοντες συγγενῇ, καλῶνται ὁ πατρῶν καὶ ἡ πατρῶνισσα μόνοι. ἔστιν οὖν τοῦτο τὸ δίκαιον ἐπὶ μόνων υἱῶν τοῦ ἀπελευθέρου ἢ θυγατέρων, πατρῶνος ἢ πατρῶνισης περιόντων, ἵνα δόξωσι μηκέτι κληρονομεῖν ἀπελεύθερον, (πῶς γὰρ ἔστιν ἀπελεύθερος ὁ τεχθεὶς μετὰ τὴν ἐλευθερίαν;) ἀλλ' ἔχειν τὸ κέρδος ἀπὸ τούτου τοῦ νόμου.

... χωρὶς συγγενείας ἀπάσης τελευτώντων μόνοις τὸν πατρῶνα καὶ τὴν πατρῶνισσαν τοὺς τε αὐτῶν υἱοὺς καὶ θυγατέρας καλεῖσθαι, καὶ μέχρι τούτου ταύτην ἴστασθαι τὴν διαδοχὴν, οὐκ ἀπελευθερικῆς τῆς κλήσεως αὐτοῖς, ἀλλ' ἐκ τῆς παρούσης ἡμῶν διατάξεως διδομένης.

24. Κάκεινο δὲ τῷ νόμῳ προσθεῖναι καλὸν τε καὶ ἀναγκαῖον ᾧ ἡγήθημεν, ὥς, εἰ συμβαίῃ τοὺς ἐλευθερωτὰς ἀπὸ κληρονόμων ποιήσασθαι τοὺς ἑαυτῶν παῖδας καὶ μηδὲν αὐτοῖς τῆς ἑαυτῶν περουσίας καταλιπεῖν, μὴ δυνηθῆναι δὲ αὐτοὺς μάτην ὕβρισμένους ἀποδείξαι μηδὲ τούτους ἔξειν κατὰ τῶν διαθηκῶν τῶν ἀπελευθέρων πατρωνικά δίκαια. ἀδιαθέτων μέντοι καὶ ἀπαίδων τελευτώντων τῶν ἀπελευθέρων κάκεινους, ἴσως μὲν οὐκ ἀξίως διὰ φιланθρωπίαν δὲ ὁμῶς καλοῦμεν, καὶ μάλιστα ἐπεὶ παρὰ πάντα τὸν ἡμέτερον νόμον πρὸς τὴν φύσιν ἡρμόσαμεν. **25.** Σώζεσθαι γὰρ μὴν καὶ τῷ τὸν ὑπεξούσιον ἢ τὴν ὑπεξουσίαν ἔχοντι καὶ τοῦτον ἢ

and when appointed as heirs they are to have the right to possession according to the will (*secundum tabulas*). But let the other patronal rights of possession fall silent. 22. If the freedmen or patrons have adopted children, even if they have them in their power (*in potestate*), we do not treat them as being in the category of children, but in the category of external persons. And if the patrons die leaving external heirs, these are not called to the inheritance of the freedman; for the inheritance from freedmen is by virtue of the rights of relationship. 23. And since the ancient right of possession also accrued (to the patron), when the son of a freedman, born after manumission, died without will and blood-relatives, and it (the right) called the manumitter of the father and his blood-relatives in the male line (agnates), whether they remained relatives or had suffered a change in status, and ordered that, if the patron of this freedman was himself the freedman of someone else, the patron of the patron and his relatives should be called, the constitution ordains that if the children of a freedman born after manumission die intestate and having no blood-relatives at all, the patron and patroness alone are to be called. Now this right relates only to the sons and daughters of the freedman, when the patron or patroness survive them, so that the latter no longer seem to inherit from a freedman – for how can a person born after manumission be a freedman? – but they receive gain (only) by virtue of this law.

[If the free-born children of a freedman] die³⁷ [intestate] and without any blood-relatives at all, only the patron and patroness (of the freedman patron) and their sons and daughters are called, and only this far does the same right of succession exist, not by their being called in relation to freedmen, but from being given by our present constitution.

24. We also think it becoming and necessary to add to this law, that if it happens that the manumitters have disinherited their own children and left them nothing of their property, and it cannot be shown that they have been mistreated without reason, neither do these (the children) have patronal rights against wills of freedmen. However, if such freedmen die intestate and childless, nevertheless out of humanity we call those (children), although probably not deserving, since most of all we have in every way tailored our law to nature. 25. Now we rule indeed that, when someone, having a son or daughter in their power (*in potestate*), has emancipated him or her, the patronal right, which he also had previously, is preserved for him, so that if the emancipated child dies intestate and childless or appoints external heirs, the emancipator is to be called either to the whole estate on intestacy or to the third share ("4 ounces") in complaint against the will, as if the emancipation (*emancipatio*) appeared

³⁷ The Verona palimpsest preserves the full text of the constitution from this point on (Fig. 2 in vol. 1, clx above). The words in brackets attempt to fill out the missing sense. It seems clear that this section is parallel to the end of section 23 in the *Basilika* and deals with the free-born children of freedmen, not with freedmen patrons of freedmen, as Blume thought.

ταύτην ἡλευθερωκότι τὸ πατρωνικὸν δίκαιον, ὅπερ καὶ πρόσθεν εἶχεν, θεσπίζομεν, ὅπως εἰ ἀδιάθετος καὶ ἄπαις ὁ ἡλευθερωθεὶς τελευτήσῃεν ἢ γράψας ἐξωτικούς κληρονόμους, ἢ εἰς τὸ πᾶν ἐξ ἀδιαθέτου ἢ πρὸς τὸ τετραοῦγκιον κατὰ τῆς διαθήκης ὁ ἡλευθερώσας κληθεῖη, ὥσανεὶ δοκούσης *contracta fiducia* τῆς *emancipationis* γεγενῆσθαι. 26. Ταῦτα μέντοι κρατεῖν ἐπὶ τῶν τὴν ἡλευθερίαν ἐπιθέντων θεσπίζομεν, οὓς δὴ καὶ μόνους χρῆσθαι τῇ τοῦ πατρωνος προσηγορίᾳ συγχωροῦμεν. τοὺς γὰρ δὴ κατὰ τινα περίνοιαν νομισθέντας ἐν τοῖς παλαιοῖς βιβλίοις πατρωνας εἶναι, καίτοι γε οὐκ ἡλευθερώσαντας, ὁποῖον δὴ τὸν ἐλέγξαντα τὴν συμπαιγνίαν τοῦ ἀπελευθέρου, τὸν οὐκ ὄντα μετὰ τε ἀληθείας πατρωνα, ἐξ ὧν δὲ ὤμοσεν ψευδῶς, πειρώμενον ἑαυτῷ πατρωνικὰ περιτιθέναι δίκαια, εἰ καὶ τις ὅλως ἕτερος τοιοῦτος ἐν τοῖς βιβλίοις ἐστίν, τοῦτον παντελῶς παντὸς κέρδους ἐκ πατρωνικοῦ δικαίου χωρίζομεν, μόνην αὐτῷ τὴν βεβερντίαν φυλάττεσθαι παρὰ τῶν τοιούτων δῆθεν ἀπελευθέρων συγχωροῦντες, ἐκείνους εἶναι μόνους πατρωνας ταῖς ἀληθείαις κρίνοντες, ὅσοι ταῖς ἀληθείαις τὴν ἡλευθερίαν ἐπιτιθέασιν. 27. Τὰ αὐτὰ δὲ δίκαια δίδομεν καὶ τοῖς κατιούσιν καὶ τῇ λοιπῇ φασιλίᾳ τῶν ἐν διαθήκαις ἢ τελευταίαις ὅλως βουλήσεσιν ἡλευθερωσάντων τινὰς κατὰ τῶν καλουμένων ὀρκίων ἀπελευθέρων, ὥσανεὶ παρ' αὐτῶν τοῦτων ἡλευθερωμένων.

PP. k. Dec. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

V Si in Fraudem Patroni Alienatio Facta Est

[1] *Impp. Diocletianus et Maximianus AA. et CC. Claudio.* Si in fraudem patroni libertus aliquid alienaverit, quatenus legitima pars deminuta est, revocandi tributam convenit esse potestatem.

S. xvi k. Nov. Sirmi CC. cons.

[2] *Idem AA. et CC. Iuliae. pr.* Defuncto quidem liberto patronus intestato succedens per actionem Calvisianam in eius fraudem alienata revocare potest. 1. Verum cum patronum post liberti sui mortem ab eo fundi collatam donationem habuisse ratam adseveras, manumissoris factum infirmare successores eius minime possunt.

S. viii k. Ian. Sirmi CC. cons.

to have been made *contracta fiducia* (under a fiduciary agreement).³⁸ 26. However, we rule that these things have force for those granting freedom, and for them and them alone we agree the use of the name of patron. For regarding those who were considered patrons by some clever thinking in the old books, although they did not in fact manumit, such as one who proved (his claim) in collusion with the freedman, or who, while not being in truth the patron, attempted by swearing false oaths to gain patronal rights for himself, and if there is anyone else at all of this type in the books, him we bar absolutely from all profit from patronal rights, agreeing to keep for him only the *reverentia* due indeed from such freedmen, judging only those to be real patrons, who have granted real freedom. 27. We give the same rights both to descendants and to the rest of the family of those who manumit in their wills or through any last wishes at all any persons in the category of those freedmen called *orcini*, as though they had been manumitted by themselves.

Posted December 1, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Fifth Title If an Alienation (of Property) Has Been Made in Fraud of a Patron³⁹

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Claudius.* If a freedman has alienated anything in fraud of a patron, in so far as the statutory portion (of the latter)⁴⁰ has been diminished, it is proper for the power to revoke (the alienation) to be granted.

*Subscribed October 17, at Sirmium, in the consulship of the Caesars (294 [293]).*⁴¹

[2] *The same Augusti and Caesars to Julia. pr.* When a freedman has died, the patron who inherits from him on intestacy may recover property fraudulently alienated by means of a Calvisian action. 1. But since you allege that the patron, after the death of his freedman, ratified the gift of a farm conveyed by him (the freedman), the heirs of the manumitter can in no way invalidate the act.

*Subscribed December 25, at Sirmium, in the consulship of the Caesars (294 [293]).*⁴²

³⁸ See Inst. 1.12.6 and 3.2.8; C. 8.48.6.

³⁹ See D. 38.5.

⁴⁰ Under Justinianic law, probably the third share of the estate under a will as described under C. 6.4.4.

⁴¹ Based on Diocletian's movements, Mommsen, *Gesammelte Schriften II* (1905), 231 and 276, emended the consulship to that of the Augusti (293), which is reflected in Krüger's chronological list (vol. 3, p. 3127 below), but not the text of his edition proper of the Codex.

⁴² See the previous note (with Mommsen, *Gesammelte Schriften II* (1905), 277; vol. 3, p. 3129 below).

VI De Obsequiis Patronis Praestandis

[1] *Imp. Alexander A. Zotico.* Contra patronum tuum famosam actionem instituere non potes.

PP. prid. id. Mai. Maximo II et Aeliano cons.

[2] *Idem A. Leontogono.* Libertae, quae voluntate patroni aut iure nuptae sunt, non coguntur officium patronis suis praestare.

PP. xvii k. Aug. Maximo II et Aeliano cons.

[3] *Idem A. Xantho.* Etiam qui pactione data a dominis manumittuntur, mero iure omne obsequium patronis debent.

PP. k. Nov. Maximo II et Aeliano cons.

[4] *Idem A. Victorino. pr.* Si manumissori tuo vim et audaciam obiecisti ei, qui te beneficio suo ex servitute liberando, ut adversarium haberet, fecit, praeses provinciae, quatenus coercere eiusmodi temerariam licentiam debeat, aestimabit. 1. Nam si qua tibi pecunia debebatur sive de rebus adversus patronum disceptatio fuerat, non protinus ad litigandum currere debueras: maxime autem si hoc facere auderes, sine atrocitate certe verborum aequitatem petitionis tuae commendare iudici potuisti, omni honore patrono debito reservato.

PP. prid. k. Oct. Iuliano et Crispino cons.

**Sixth Title Respectful Conduct (*Obsequium*) to be Shown
to Patrons⁴³**

[1]⁴⁴ *Emperor ALEXANDER Augustus to Zoticus.* You cannot bring an action which involves infamy⁴⁵ against your patron.

Posted May 14, in the consulship of Maximus, for the second time, and Aelianus (223).

[2] *The same Augustus to Leontogonus.*⁴⁶ Freedwomen, who are with the patron's consent or otherwise⁴⁷ legally married, are not compelled to render service to their patrons.

Posted July 16, in the consulship of Maximus, for the second time, and Aelianus (223).

[3] *The same Augustus to Xanthus.* Even those who are manumitted by masters by means of an agreement⁴⁸ owe every respect to patrons according to basic law.

Posted November 1, in the consulship of Maximus, for the second time, and Aelianus (223).

[4] *The same Augustus to Victorinus. pr.* If you used force and insolence against your manumitter, who in liberating you from slavery by his kindness has made it possible that he should have you as an adversary (in court),⁴⁹ the governor of the province will weigh up to what extent to repress your unbridled temerity. 1. For, if any money was due you, or you had a dispute with your patron concerning property, you should not have rushed straight to litigation; but especially, if you dared to do this, you might at least have submitted the equity of your claim to the judge without insulting words, maintaining all the honor due to a patron.

Posted September 30, in the consulship of Crispinus and Julian (224).

⁴³ *Obsequium* was the respect intrinsically owed to his patron and patron's heirs by a freedman. See D. 37.15; Mouritsen, *Freedman* (2011), 53–58.

⁴⁴ A fuller version of this rescript appears at C. 5.55.1; Honoré, *Emperors and Lawyers* (1994), 99, n. 327.

⁴⁵ That is, bringing a case against the patron, which would brand the patron with *infamia* (involving a severe diminution of status and civil rights), if he lost.

⁴⁶ This name is otherwise unattested and should perhaps be Leontogenes.

⁴⁷ "or otherwise" translates *aut*; this is omitted in the Greek of the *Basilika* (49.2.11, Scheltema A, vol. VI, p. 2283), which perhaps gives more straightforward sense: "legally married with the patron's consent."

⁴⁸ The *Basilika* (49.2.12, Scheltema A, vol. VI, p. 2283) reference to "money" makes the point clearer. While payment at manumission would usually preclude the rendering of future services (*operas*), *obsequium* was invariable.

⁴⁹ That is, a manumitting master, by creating a free person, also creates someone with the ability to go to court.

[5] *Imp. Gordianus A. Sulpiciae*. Etiam liberis damnatorum consuetum obsequium liberos paternos praestare debere in dubium non venit. proinde si non agnoscunt reverentiae debitae munus, non immerito videntur ipsi adversus se provocare severitatem.

PP. III non. Sept. Sabino II et Venusto cons.

[6] *Idem A. Cornelio*. Liberos sive libertas, maxime quibus impositae operae non sunt, consuetum potius obsequium quam servile ministerium manumissoribus exhibere debere neque vincula perpeti non est opinionis incertae.

PP. III k. April. Attico et Praetextato cons.

[7] *Imp. Diocletianus et Maximianus AA. Metrodoro. pr.* Neque libertis novercae inferendae iniuriae privignis eius libera facultas esse debet: paternos etiam liberos, sicuti dicis, iniuriosos tibi fuisse ferendum non est. 1. Praeses igitur provinciae vindictam tibi personarum conditioni congruentem impertiri non dubitabit.

PP. v id. Mai. Maximo II et Aquilino cons.

[8] *Idem AA. Hermiae*. Nec patronae tuae obsequiis refragari te fas est.

PP. XII k. Febr. Diocletiano III et Maximiano AA. cons.

VII De Libertis et Eorum Liberis

[1] *Imp. Antoninus A. Daphno*. Non est ignotum, quod ea, quae ex causa fideicommissi manumisit, ut ingratum libertum accusare non potest, cum id iudicium extra ordinem praebeatur ei, qui voluntate servo suo libertatem gratuitam praestitit, non qui debitam restituit.

PP. v k. Mai. Messala et Sabino cons.

[5] *Emperor GORDIAN Augustus to Sulpicia.* Even towards the children of the condemned there is no doubt that the father's freedmen must show the accustomed respect. Therefore, if they do not acknowledge the duty of due reverence, they are not undeservedly seen to call a severe punishment upon themselves.

Posted September 3, in the consulship of Sabinus, for the second time, and Venustus (240).

[6] *The same Augustus to Cornelius.* There is no uncertainty of opinion that freedmen and freedwomen, especially those on whom no services (*operae*) have been imposed, ought rather to show the accustomed respect towards their manumitters than perform servile labor; nor ought they to endure being chained.

Posted March 30, in the consulship of Atticus and Praetextatus (242).

[7] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Metrodorus. pr.* Freedmen of a stepmother should not be permitted the free right of inflicting harm (*iniuria*) on her stepsons; nor is it to be tolerated that freedmen of your father also should be causing you harm, as you state. 1. The governor of the province, therefore, will not hesitate to grant you the retribution fitting these persons' status.

Posted May 11, in the consulship of Maximus, for the second time, and Aquilinus (286).

[8] *The same Augusti to Hermia.* It is not lawful for you to refuse respect towards your patroness.

Posted January 21, in the consulship of Diocletian, for the third time, and Maximian, Augusti (287).

Seventh Title Freedmen and Their Children

[1] *Emperor ANTONINUS Augustus to Daphnus.*⁵⁰ It is not unknown that she, who manumitted a slave pursuant to a testamentary trust, cannot accuse a freedman as ungrateful, since that extraordinary procedure is only open to one who voluntarily extended gratuitous liberty to his slave, not to one who fulfilled what was due.

Posted April 27, in the consulship of Messala and Sabinus (214).

⁵⁰ In the manuscripts, the name is either Daphus or something incomprehensibly reduplicated like Daphideponus. Daphnus is the most likely emendation.

[2] *Imp. Constantinus A. ad Maximum pu. pr.* Si manumissus ingratus circa patronum suum extiterit et quadam iactantia vel contumacia cervices adversus eum erexerit aut levis offensae contraxerit culpam, a patronis rursus sub imperia dicionemque mittatur, si in iudicio vel apud pedaneos iudices patroni querella exserta ingratum eum ostendat: filiis etiam qui postea nati fuerint servituris, quoniam illis delicta parentium non nocent, quos tunc ortos esse constiterit, dum libertate illi potirentur. 1. Sane si is, qui in nostro consilio vindicta liberatus est, post coercionem ex paenitentia dignum se praestiterit, ut ei civitas Romana reddatur, non prius fruetur beneficio libertatis, quam si hoc patronus eius oblati precibus impetraverit.

PP. id. April. Romae Constantino A. VII et Constantio C. cons.

[3] *Impp. Honorius et Theodosius AA. ad senatum.* Liberti non modo adversus patronos non audientur, verum etiam eandem quam patronis ipsis reverentiam praestent heredibus patronorum, quibus ingrati actio sicut ipsis manumissoribus deferetur, si illi datae sibi libertatis immemores nequitiam receperint servilis ingenii.

D. VIII id. Aug. Ravennae Mariniano et Asclepiodoto cons.

[2]⁵¹ *Emperor CONSTANTINE Augustus to Maximus, City Prefect. pr.* If a manumitted slave acts ungratefully to his patron and boastfully and contumaciously carries his head high in front of him, or becomes guilty of a slight offense, he is to be again subjected to the power and control of the patron,⁵² if a complaint by the patron is brought and proves him ungrateful in court or before delegated judges; in addition the children born subsequently shall be slaves; but the wrongs of their parents do not prejudice those who, it is established, were born at the time during which they (the parents) possessed freedom. 1. And if a freedman who was liberated in our council⁵³ by the rod, shows himself through penitence after punishment (i.e., re-enslavement) worthy of having Roman citizenship restored to him, he is not to enjoy the grant of liberty until his patron obtains it by presenting a petition.⁵⁴

*Posted April 13, at Rome, in the consulship of Constantine Augustus, for the seventh time, and Constantius Caesar (326? [320]).*⁵⁵

[3]⁵⁶ *Emperors HONORIUS and THEODOSIUS Augusti to the Senate.*⁵⁷ Freedmen will not only be refused a hearing against their patrons, but the same reverence shown by them to their patrons must also be shown to the patrons' heirs, to whom is granted the same action for ingratitude as the manumitters themselves, if they (the freedmen), unmindful of the liberty given them, revive the perverse disposition of a slave.

Given August 6, at Ravenna, in the consulship of Marinianus and Asclepiodotos (423).

⁵¹ Combine also with C.Th. 2.22.1 and C. 7.1.4.

⁵² The constitution up to this point derives from C.Th. 4.10.1 (Constantine to the Council of the Byzaceni, given at Cologne, July 332), which must have been merged into the longer constitution to Maximus, whose Theodosian original is missing from the incomplete Theodosian Book 4. Krüger restores C. 6.7.2 to the same title at his C.Th. 4.11.1a.

⁵³ This is one of two references (with the associated C. 7.1.4) to the continued existence of the imperial *consilium* under Constantine, which was superseded by the more formal and ceremony-bound consistory at the latest under Constantius II. Note that "in consistorio" (C. 9.47.12: Diocletian and Maximian) is most likely an anachronistic expansion of "in consilio"; Crook, *Consilium Principis* (1955), 96–97; Corcoran, *Empire of the Tetrarchs* (2000), 255–256.

⁵⁴ Judging by the mention of Latin status in C.Th. 2.22.1, the original constitution may have given Latin status to re-freed freedmen, with special rules, as here, for "up-grade" to full citizenship. Justinian's abolition of Latin status (C. 7.6.1) necessitated the excision of references to Latins from the second edition of his *Codex*; Falchi, "Osservazioni" (1990); Corcoran, "Softly and Suddenly" (2011), 142.

⁵⁵ On the basis of the other parts of this constitution, the year should be 320 (Constantine for the sixth time with Constantine II as Caesar), being issued by Constantine from Serdica (January 30), and posted at Rome (April 13). See Seeck, *Regesten* (1919), 169; Barnes, *New Empire* (1982), 74; Corcoran, *Empire of the Tetrarchs* (2000), 311.

⁵⁶ Derived from C.Th. 4.10.2, as is C. 9.1.21. Part of a larger constitution reconstructed by Honoré, *Crisis of Empire* (1998), 247 n. 308 and *Palingenesis* 8, W560–564, as follows: C.Th. 9.1.19 (C. 9.2.17 and 9.46.10), C.Th. 2.1.12, 1.6.11, 4.10.2 (C. 6.7.3 and 9.1.21), C.Th. 9.6.4 (C. 4.20.12).

⁵⁷ The parallel Theodosian texts have the fuller address "to the Consuls, Praetors, Tribunes of the People and the Senate greeting." See also Corcoran, "After Krüger" (2009), 439.

[4] *Impp. Theodosius et Valentinianus AA. Basso pp.* Libertinae conditionis homines vel eorum filii si militantes docebuntur ingrati, ad servitutis nexum procul dubio reducentur.

D. III k. April. Ravennae Theodosio XII et Valentiniano II AA. conss.

VIII De Iure Aureorum Anulorum et de Natalibus Restituendis

[1] *Impp. Diocletianus et Maximianus AA. et CC. Philadelpho.* Natales antiquos et ius ingenuitatis non ordo praestare decurionum, sed a nobis peti potuit.

D. xv k. April. Ravennae ipsis AA. conss.

[2] *Idem AA. et CC. Eumeni.* Aureorum usus anulorum beneficio principali tributus libertinitatis^a quoad vivunt imaginem non statum ingenuitatis praestat, natalibus autem antiquis restituti liberti ingenui nostro beneficio constituuntur.

D. XIII k. ... Sirmi CC. conss.

VIII Qui Admitti ad Bonorum Possessionem Possunt et intra Quod Tempus

[1] *Impp. Severus et Antoninus AA. Macrinae.* Bonorum possessio filio familias delata cum ignorante quoque patre possit peti, emolumentum et patri adlatura, si ratam petitionem pater habuerit, amittitur transacto tempore.

Sine die et conss.

^a libertinis

[4]⁵⁸ *Emperors THEODOSIUS and VALENTINIAN Augusti to Bassus, Praetorian Prefect.* There is no question that men of freed status or their children, if they are shown to be ungrateful while in the imperial service, will be reduced to the bonds of slavery.

Given March 30, at Ravenna, in the consulship of Theodosius, for the twelfth time, and Valentinian, for the second time, Augusti (426).

Eighth Title The Right of Gold Rings and the Restoration of Free Birth⁵⁹

[1]⁶⁰ *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Philadelphus.* The order of decurions could not grant ancient birth rights and the right of free birth, but this could only be sought from us.

Given March 18, at Ravenna, in the consulship of the Augusti themselves (293?).⁶¹

[2] *The same Augusti and Caesars to Eumenes.* The right to the use of gold rings given by imperial grant to freedmen bestows, while they live, the appearance but not the actual status of free-birth. But freedmen restored to their ancient birth rights (*natalibus antiquis restitutus*) are by our grant made free-born.

Given at Sirmium, in the consulship of the Caesars (294).⁶²

Ninth Title Who Can Be Admitted to the Possession of an Estate and Within What Time

[1] *Emperors SEVERUS and ANTONINUS Augusti to Macrina.* Since the possession of an estate granted to a son in his father's power can be claimed also without the father's knowledge, bringing a usufruct to the father as well, if the father should ratify the claim,⁶³ it is lost when the time (for claiming it) has elapsed.

Without day or consul.

⁵⁸ Derived from C.Th. 4.10.3. To be combined with C. 11.48.18: Honoré, *Crisis of Empire* (1998), 249; possibly to be associated also with C.Th. 4.6.7 and C. 5.4.21.

⁵⁹ See D. 40.10–11.

⁶⁰ Combine with C. 7.9.3: Honoré, *Emperors and Lawyers* (1994), 164 n. 317.

⁶¹ If the place of issue is correct (Mommsen, *Gesammelte Schriften II* (1905), 279 preferred emendation to Heraclea), this is a rescript of Maximian rather than Diocletian: Barnes, *New Empire* (1982), 59; Corcoran, *Empire of the Tetrarchs* (2000), 79; Wieling, "Die Gesetze der Herculier" (1995), 623. The year is generally taken as 293, but 290 is possible.

⁶² The exact day is unknown as the month is not preserved by Haloander, the only source for the subscript.

⁶³ The Basilika version (Bas. 40.1.17, Scheltema, A, vol. v, p.1787) is clearer, as it sets out two situations, the first with subsequent parental ratification, which gave the father a usufruct in the property acquired, the second without ratification, which gave the father nothing. The legal point of the text is that the father's knowledge or actions were irrelevant to the time-limit that the son had to make a claim, since it was valid either way. This represents the Justinianic legal situation (cf. C. 7.61.8). This seems to have differed from the original text of the rescript, before Justinianic editing, according to which the father's ratification was essential (Bas. Schol. 40.1.17.3, Scheltema, B, vol. vi, p. 2361).

[2] *Idem AA. Crispino.* Si bonorum possessio dumtaxat tibi competit proximitatis nomine, habuisti spatium centum dierum utilium, ex quo eum defunctum scisti, ad bonorum possessionem amplectendam.

PP. III non. Nov. Geta II cons.

[3] *Impp. Diocletianus et Maximianus AA. Crescentino.* Infantis nomine agnitam bonorum possessionem et antequam loqueretur diem functi recte competere nulla dubitatio est.

PP. v k. Ian. Maximo II et Aquilino cons.

[4] *Idem AA. et CC. Marcello.* Emancipata si non agnovit intra annum unde liberi bonorum possessionem, nullam ad heredes vindicationem successionis transmittere potuit.

D. XIII k. Mai. Heracliae CC. cons.

[5] *Idem AA. et CC. Maximo.* Quamdiu per facti quaestionem incertum est, utrumne secundum tabulas an ab intestato, et ex quo capite possessio sit delata, ne tibi tempus agnoscendae bonorum possessionis praefinitum cedat, superstitiosam geris sollicitudinem.

[6] *Idem AA. et CC. Frontinae.* Iuris ignorantiam nec mulieribus prodesse in edicti perpetui cursum de agnoscenda bonorum possessione manifestum est.

D. III k. Mai. Sirmi CC. cons.

[7] *Pars epistulae Constantii et Maximiani AA. et Severi et Maximini nobilissimorum CC. pr.* Bonorum quidem possessionem pupilli nomine

[2]⁶⁴ *The same Augusti to Crispinus.* If you are entitled to the possession of the estate only on the basis of being close kin,⁶⁵ you had 100 available court days from the time you knew he had died, in which to take possession of the estate.

*Posted November 3, in the consulship of Geta for the second time*⁶⁶ (205).

[3] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Crescentinus.* There is no doubt that claim of possession of an estate in the name of an infant is legally effectual, even if it died before it could speak.

Posted December 28, in the consulship of Maximus, for the second time, and Aquilinus (286).

[4] *The same Augusti and the Caesars to Marcellus.* If an emancipated daughter did not claim the possession of an inheritance under *unde liberi*⁶⁷ within a year, she could not transmit to her heirs any claim to the succession.

Given April 18, at Heraclea, in the consulship of the Caesars (294 [293]).⁶⁸

[5] *The same Augusti and Caesars to Maximus.* As long as the question of fact is undecided, upon which grounds the possession of an estate is due, whether according to a will or as a result of intestacy, you are needlessly anxious lest the time fixed for you to claim possession of the estate has passed.

[undated; 293 or 294].

[6] *The same Augusti and Caesars to Frontina.* It is clear that ignorance of the law cannot help even women as to the time fixed in the Perpetual Edict for accepting the possession of an estate.

Given April 29 at Sirmium, in the consulship of the Caesars (294).

[7] *Part of the letter of the Emperors CONSTANTIUS and MAXIMIANUS*⁶⁹ *Augusti and of SEVERUS and MAXIMINUS, the most noble Caesars.*⁷⁰ *pr.* It is

⁶⁴ This is part of the same rescript as at C. 6.55.1, but there addressed to Crispina; Honoré, *Emperors and Lawyers* (1994), 81 n. 65.

⁶⁵ According to C. 6.55.1, Crispinus (or Crispina) was sibling to the deceased, thus able to claim as an agnate (*proximus agnatus*) entitled under *unde legitimi*. A direct descendant would have had a year to claim (C. 6.9.4).

⁶⁶ The consular iteration numeral is not preserved in the manuscripts, but the year is confirmed by C. 6.55.1.

⁶⁷ That is, the Praetorian action which allowed all the children, in the first instance, to lay claim to the estate under intestacy (C. 6.14).

⁶⁸ Diocletian's movements necessitate emending the consular year to 293. See Mommsen, *Gesammelte Schriften II* (1905), 274; Barnes, *New Empire* (1982), 52.

⁶⁹ Maximianus is more generally referred to in modern works as Galerius (Caesar 293-305; Augustus 305-311).

⁷⁰ This letter, which lacks any addressee, is one of only three constitutions of the Second Tetrarchy present in the Codex (with C. 3.12.1 and 5.42.5; perhaps also C. 7.16.40 although more probably Diocletianic). They may have emanated from the court of the Caesar Maximinus, but this is not certain. See Corcoran, *Empire of the Tetrarchs* (2000), 142-143.

agnoscere tutorem potuisse aperte declaratur. 1. Ipse autem pupillus bonorum possessionem sine tutoris auctoritate amplecti non potest, nisi etiam impuberi sine tutoris auctoritate hoc postulanti sciens hoc competens iudex dedit bonorum possessionem: tunc enim emolumentum successionis videtur praetorio iure quaesitum esse.

VI id. Sept. Constantio et Maximiano cons.

[8] *Imp. Constantinus A. ad Dionysium.* Quicumque res ex parentum vel proximorum successione iure sibi competere confidit, sciat sibi non obesse, si per rusticitatem vel ignorantiam facti vel absentiam vel quamcumque aliam rationem intra praefinitum tempus bonorum possessionem minime petisse noscatur, quoniam haec sanctio huiusmodi consuetudinis necessitatem mutavit.

PP. prid. id. Mart. Heliopoli Constantino A. et Constant. C. cons.

[9] *Idem A. ad populum.* Ut verborum inanium excludimus captiones, ita haec observari decernimus, ut apud quemlibet iudicem vel etiam apud duumviros qualiscumque testatio amplectendae hereditatis ostendatur, statutis prisco iure temporibus coartanda, eo addito, ut, etiamsi intra alienam vicem, id est prioris gradus, properantius exseratur, nihilo minus tamen efficaciam parem, quasi suis sita curriculum, consequatur.

plainly declared that a *tutor* can claim possession of an estate in the name of a ward. 1. The ward himself, moreover, cannot take possession of the estate without the *tutor's* consent, unless a proper judge in full knowledge of this gives possession of the estate to one under the age of puberty, who requests it without the *tutor's* consent; for then the profit from the succession is seen to have been sought under Praetorian law.

September 8, in the consulship of Constantius and Maximianus (305?).⁷¹

[8]⁷² *Emperor CONSTANTINE Augustus to Dionysius.*⁷³ Whoever is confident in lawfully seeking for himself property on the grounds of succession from parents or relatives is to know that there is no impediment for him, if, through his rusticity or ignorance of the facts or absence or any other reason, he is known not to have claimed possession of the estate within the time-limit, since this ordinance has changed the compulsion of such a custom.

Given (Posted?) March 14, at Heliopolis (Baalbek), in the consulship of Constantius Augustus and Constantius Caesar (329 or 339?).⁷⁴

[9]⁷⁵ *The same Augustus to the people.* In order to banish the sophistry of empty words, we order the following to be observed, that any sort of declaration accepting an inheritance may be made before any judge or even before *duovirs* (*duumviri*), but kept within the times fixed by the former law; with this added, that, even if exercised too hastily and during another's turn, that is of a nearer degree of relationship, it is nonetheless to have the same efficacy as if made within its proper time-schedule.

⁷¹ No consular iteration is given, so that the year could be 305 or 306, although the other Second Tetrarchy texts seem to belong to 305. See Corcoran, "The Tetrarchy: Policy and Image" (2006), 46.

⁷² Combine with C.Th. 8.18.4.

⁷³ Identified as governor of Phoenice in 328–9: *PLRE* I, pp. 259–60, Dionysius 11; Barnes, *New Empire* (1982), 153.

⁷⁴ The date translated is that of Haloander's Code edition (Krüger prints *Constantino* not *Constantio*). The associated Theodosian text gives the date as that of posting in the second consulship of Constantius and Constans (thus 339). Seeck, followed by Barnes (see previous note), attributed the text to Constantine in 329 (consuls: Constantine Aug. VIII and Constantine Caes. IV), posted up at Heliopolis (*Regesten* (1919), 179). Cuneo, *La Legislazione* (1997), 42–45, attributes it to Constantius II as issued in 339 at Heliopolis, which could match that emperor's movements: Barnes, *Athanasius and Constantius* (1993), 219.

⁷⁵ This is often taken as part of a long edict reforming the law of succession issued by Constantine at Sardica on January 31, 320, and posted at Rome on April 1 (thus, Seeck, *Regesten* (1919), 169; Corcoran, *Empire of the Tetrarchs* (2000), 194 n. 47; Matthews, *Laying Down the Law* (2000), 236–240), supported also by a reference to this ruling as a *lex Constantianiana* by Justinian himself (C. 5.70.7.3). Others, however, prefer to keep the date and place, and attribute this and two other Code texts (C. 6.23.15, 6.37.21) to a separate measure of Constantius II in 339: Cuneo, *La Legislazione* (1997), 31–36). The pertinent C.Th. texts are 3.2.1, 4.12.3, 8.16.1, 11.7.3.

D. k. Febr. Laodiceae Constantio A. II et Constante A. cons.

X Quando Non Petentium Partes Petentibus Adcrescunt

[1] *Imp. Gordianus A. Marcianae.* Quotiens pluribus liberis cessante legitima successione bonorum possessio defertur, beneficium edicti perpetui quibusdam omittentibus his solis qui bonorum possessionem agnoverunt portionem non petentium adcrescere in dubium non venit.

D. id. Ian. Peregrino et Aemiliano cons.

XI De Bonorum Possessione Secundum Tabulas

[1] *Imp. Alexander A. Vitali.* Pendente appellatione a sententia, qua falsum testamentum pronuntiatum est, incerto adhuc, an defunctus intestatus decesserit, proximitatis nomine bonorum possessioni locus non est.

D. III k. Mai. Maximo II et Aeliano cons.

[2] *Imp. Gordianus A. Cornelio. pr.* Bonorum quidem possessionem ex edicto praetoris non nisi secundum eas tabulas, quae septem testium signis signatae sunt, peti posse in dubium non venit. 1. Verum si eundem numerum adfuisse sine scriptis testamento condito doceri potest, iure civili testamentum factum videri ac secundum nuncupationem bonorum possessionem deferri explorati iuris est.

PP. XII k. Mart. Attico et Praetextato cons.

Given February 1, at Laodicea, in the consulship of Constantius, for the second time, and Constans, Augusti (339).⁷⁶

Tenth Title When the Shares of Non-Claimants Accrue to the Benefit of Claimants

[1] *Emperor GORDIAN Augustus to Marciana.* There is no doubt that, whenever statutory succession does not apply and possession of the estate is available to several children, if some of them fail to claim the benefit of the Perpetual Edict, the portion of those not claiming accrues to those alone who have claimed possession of the estate.

Given January 13, in the consulship of Peregrinus and Aemilianus (244).

Eleventh Title Possession of an Estate According to a Will⁷⁷

[1]⁷⁸ *Emperor ALEXANDER Augustus to Vitalis.*⁷⁹ Pending an appeal from a verdict by which a will has been declared a forgery, and it being still uncertain whether the deceased died intestate, there is no room for the claim to the possession of an estate by reason of close-kin status.

Given April 29, in the consulship of Maximus, for the second time, and Aelianus (223).

[2] *Emperor GORDIAN Augustus to Cornelius. pr.* There is no doubt that the possession of an estate under the Praetor's Edict cannot be claimed according to a will unless it has been sealed by the seals of seven witnesses, 1. But if it can be shown that this same number was present when a will not in writing was made, it is the considered law that the will is seen to have been made according to the Civil Law and that the possession of the estate is granted according to the verbal declaration.

Posted February 18, in the consulship of Atticus and Praetextatus (242).

⁷⁶ The subscript is partially preserved only by Haloander, with the consular year taken by Krüger from the associated C. 6.23.15 and 6.37.21. The place of issue is preserved in C. 6.23.15 as Serdica. If Haloander is correct, the city could be one of several Laodiceas. There were two in Syria alone. Constantius was based in Antioch and Syria in and around 339 (Barnes, *Athanasius and Constantius* (1993), 219).

⁷⁷ See D. 37.11.

⁷⁸ Combine with C. 6.24.3; Honoré, *Emperors and Lawyers* (1994), 99 n. 327.

⁷⁹ According to C. 6.24.3, Vitalis was a soldier, named as substitute heir in the will of a cavalryman, Alexander. The question of forgery is not mentioned in that rescript.

XII De Bonorum Possessione Contra Tabulas Quam Praetor Liberis Pollicetur

[1] *Imp. Alexander A. Rufo*. Liberi contra tabulas parentium bonorum possessione admissa solis parentibus et liberis legata praestare debent secundum edictum.

PP. IIII id. Oct. Maximo II et Aeliano cons.

[2] *Idem A. Hilarae*. Postumo nato, qui neque heres institutus a patre neque nominatim exheredatus est, testamentum rumpitur: et si contra tabulas bonorum possessio infanti a tutore petita est, secundum tabulas possessio locum habere non potest.

D. k. Mart. Iuliano et Crispino cons.

XIII De Bonorum Possessione Contra Tabulas Liberti, Quae Patronis vel Liberis Eorum Datur

[1] *Imp. Gordianus A. Herculiano*. Licet ex causa fideicommissi manumissus sit, quem ex voluntate patris cum sorore te manumisisse proponis, tamen, si extraneos scripsit heredes, partis legitimae contra tabulas eius bonorum possessionem petendo, vel contra nuncupationem, si testamentum sine scriptis conditum est, intra tempora edicto praestituta eam partem poteris obtinere.

PP. VI k. Dec. Gordiano A. et Aviola cons.

[2] *Imp. Theodosius A. Asclepiodoto pp.* Patronus liberti muneribus electis et operis contra tabulas bonorum possessione repellitur.

D. XIII k. Mart. Constantinopoli Victore cons.

XIII Unde Liberi

[1] *Imp. Diocletianus et Maximianus AA. Sarpedoni*. Si avus tuus relictis tribus emancipatis filiis decessit hique bonorum possessionem unde liberi acceperunt, pro portione heredes eos extitisse palam est.

Twelfth Title Possession of an Estate Contrary to a Will, Which the Praetor Promises to Children⁸⁰

[1] *Emperor ALEXANDER Augustus to Rufus.* When children are admitted to the possession of an estate contrary to their parents' will, according to the Edict they are compelled to pay the legacies only to parents and children.

Promulgated October 12, in the consulship of Maximus, for the second time, and Aelianus (223).

[2] *The same Augustus to Hilara.⁸¹* When a posthumous child is born, one who has neither been appointed an heir nor been expressly disinherited, the will is broken; and if possession of the estate contrary to the will has been sought by a tutor for the infant, possession in accordance with the will can have no place.

Given March 1, in the consulship of Julian and Crispinus (224).

Thirteenth Title Possession of an Estate Contrary to the Will of a Freedman, Which Is Given to Patrons or Their Children⁸²

[1] *Emperor GORDIAN Augustus to Herculanus.* Although he, whom you state you with your sister manumitted in accordance with your father's will, was manumitted on the basis of a trust, however, if he has written (into his will) external heirs, you can within the time fixed in the Edict obtain your share, by claiming possession of the statutory portion of the estate contrary to the will, or contrary to the verbal declaration, if the will was made without writing.

Posted November 26, in the consulship of Gordian Augustus and Aviola (239).

[2]⁸³ *Emperor THEODOSIUS Augustus to Asclepiodotus, Praetorian Prefect.* The patron of a freedman, by having chosen to have gifts and services, is excluded from the possession of the estate contrary to a will.

Given February 17, at Constantinople, in the consulship of Victor (424).

Fourteenth Title "Whereby Children" (*Unde Liberi*)⁸⁴

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Sarpedon.* If your grandfather died leaving three emancipated children and they have taken possession of the estate under the rules of *unde liberi*, it is clear that they became heirs in equal portions.

⁸⁰ See D. 37.4.

⁸¹ The name is given as Clara in the *Summa Perusina*: Patetta, *Adnotationes Codicum* (1900/2008) 177.

⁸² See D. 37.14.

⁸³ This short text is an extract from the longer text at C.Th. 4.4.7, whence also C.Th. 2.19.7 and C. 6.36.8.

⁸⁴ *Unde liberi* refers to the clause in the Praetor's Edict, which allowed children, in the first instance, to claim the inheritance under Praetorian rather than Civil intestacy rules.

PP. IIII non. Mart. Maximo II et Aquilino cons.

[2] *Idem AA. et CC. Zosimo.* Ex testamento vel ab intestato existente filio vel nepote suo herede nemo potest intestato heres existere.

D. VII id. Mai. AA. cons.

[3] *Imp. Constantius A. ad Leontium comitem Orientis.* Qui se patris post avum intestatum defuncti negat heredem, mortui avi paterni suscipere facultates non potest, maxime emancipatus, nisi per bonorum possessionem ad huiusmodi beneficium pervenerit.

D. VIII id. April. Limenio et Catulino cons.

XV Unde Legitimi et Unde Cognati

[1] *Imp. Alexander A. Ulpio.* Consobrinorum tuorum intestatorum bona, si ad prioris necessitudinis neminem iure pertinuerunt, tuque eorum possessionem agnovisti, persequi non prohiberis.

D. IIII id. Ian. Iuliano et Crispino cons.

[2] *Impp. Diocletianus et Maximianus AA. Sozioni.* Cum propiorem sobrinum, id est natum a consobrina, rebus humanis intestatum defunctum proponas, intellegis sine auxilio bonorum possessionis eius te successionem vindicare non posse.

Posted March 4, in the consulship of Maximus, for the second time, and Aquilinus (286).

[2] *The same Augusti and the Caesars to Zosimus.* If there survives a son or grandson as *suus heres* under a will or on intestacy, there can be no other heir on intestacy.

Given May 9, in the consulship of the Augusti (293).

[3]⁸⁵ *Emperor CONSTANTIUS Augustus to Leontius, Count of the East.* He, who repudiates the inheritance of his father, who died after his grandfather had died intestate, cannot take over the property of his deceased paternal⁸⁶ grandfather, especially if emancipated, unless he comes to this benefit through the right of possession of the estate.

Given April 6, in the consulship of Limenius and Catulinus (349).

Fifteenth Title “Whereby Statutory Heirs and Whereby Cognates” (*Unde Legitimi et Unde Cognati*)⁸⁷

[1] *Emperor ALEXANDER Augustus to Ulpian.* You are not forbidden to acquire the property of your intestate maternal cousins,⁸⁸ if it does not legally belong to anyone of nearer relationship and if you have applied for possession of it.

Given January 10, in the consulship of Julian and Crispinus (224).

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Sozon.*⁸⁹ Since you state that your second cousin,⁹⁰ that is the son of your female maternal cousin, died intestate, you realize that you cannot claim to succeed him without the grant of possession of the estate.

⁸⁵ This derives from C.Th. 8.18.5, as does C. 6.30.15.

⁸⁶ This is not stated explicitly in C.Th. 8.18.5, whose focus is on the maternal grandfather.

⁸⁷ This title refers to two actions under the Praetor's Edict (cf. D. 38.7–8). Under the Praetorian rules of succession, next in line after the children came the Civil Law heirs (agnates, those in the male line) and after them cognate relatives (through the female line). For the grades of relationship, see Inst. 3.5–6; D. 38.10.1.

⁸⁸ Strictly “consobrinus/-a” means the child of a maternal aunt, but the term could be used loosely for all first cousins, who belonged to the “fourth grade” of relationship (D. 38.10.1.6; Inst. 3.6.4; Theophilus, *Paraphrasis* 3.6.4).

⁸⁹ The name, variously transmitted, is printed by Krüger as Sozion, but this is an otherwise unattested name, in contrast to the fairly common Sozon; e.g., Osborne and Byrne, *LGPN* II, pp. 411–412.

⁹⁰ Correctly “propior sobrino,” succeeding in the “fifth grade” of relationship; so D. 38.10.1.7 (corrected in the Florentine manuscript); Festus, *De Verborum Significatu*, s.v. propior sobrino (ed. Lindsay, 260.25f, 261.7p); Moreau, “Le lexique de Festus” (2007). Almost all manuscripts write this vulgarly as “proprior sobrinus”; e.g., Inst. 3.6.5 and also Theophilus, *Paraphrasis* 3.6.5 (so the manuscripts, but corrected at Lokin *et al.*, *Paraphrasis Institutionum* (2010), 548–549).

D. VII k. Iun. Laodiceae AA. cons.

[3] *Idem AA. et CC. Felici.* Nepotibus avi materni pro virili portione etiam iure honorario successio defertur.

D. id. Oct. Sirmi AA. cons.

[4] *Idem AA. et CC. Syriscae.* Non hoc, an tenuerit quis res hereditarias nec ne, sine voluntate acquirendae sibi hereditatis, quaerendum est, sed an admisit hereditatem vel bonorum possessionem.

D. XI k. Ian. Sirmi AA. cons.

[5] *Idem AA. et CC. Platoni.* Certum est quidem cognationis iure citra admissionem bonorum possessionis neminem posse succedere: defuncti vero cognati succedere nolentes petere bonorum possessionem non urgentur.

D. XII k. Mart. Sirmi CC. cons.

XVI De Edicto Successorio

[1] *Imp. Alexander A. Iulio.* Si mater tua propter furorem suum patru sui bonorum possessionem non accepit, tu filius eius ad eorundem bonorum patru magni possessionem ex edicto, quo prioribus non petentibus sequentibus permittitur, admissus es.

PP. IIII id. Dec. Maximo II et Aeliano cons.

[2] *Imp. Diocletianus et Maximianus AA. et CC. Firmo.* Si aviae frater eorum, de quorum successione agitur, velut ex testamento adiit hereditatem, quos intestatos decessisse ac falsum testamentum prolatum contendis, et ab intestato non petita bonorum possessione vita functus est, ac tu licet quinto gradu constitutus ex successorio capite petisti bonorum possessionem vel necdum exclusus petas, eorum successionem potes vindicare. nam si is, quem quarto gradu constitutum non ambigitur, ex edicto petiit nec hoc te latuit, frustra nobis supplicasti.

Given May 26, at Laodicea, in the consulship of the Augusti (290).⁹¹

[3] *The same Augusti and the Caesars to Felix.* Succession to a maternal grandfather is granted also by Praetorian law to the grandchildren in equal portions.

Given October 15, at Sirmium, in the consulship of the Augusti (293).

[4] *The same Augusti and Caesars to Syrisca.* The question is not whether or not someone held the property of an inheritance without the intention of acquiring the inheritance, but whether he claimed the inheritance or possession of the estate.

Given December 22, at Sirmium, in the consulship of the Augusti (293).

[5] *The same Augusti and Caesars to Plato.* It is certain that no one can succeed by right of cognate relationship without claiming possession of the estate. Cognate relatives of someone deceased, who do not wish to succeed, are not compelled to seek possession of the estate.

Given February 18, at Sirmium, in the consulship of the Caesars (294).

Sixteenth Title The Edict Relating to the Order of Succession⁹²

[1] *Emperor ALEXANDER Augustus to Julius.* If your mother failed, on account of her insanity, to take possession of the estate from her paternal uncle, you, as her son, are admitted to possession of the same estate of your great-uncle on the basis of the Edict, whereby this is allowed to those of remoter degree of relationship, when those of nearer degree make no claim.⁹³

Posted December 10, in the consulship of Maximus, for the second time, and Aelianus (223).

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Firmus.* If the brother of the paternal grandmother of those, the succession to whom is in question, entered on the inheritance as if on the basis of a will, when you assert that they died intestate and a forged will was produced, and if he (the grandmother's brother) died without having claimed possession of the estate on intestacy, and you, although placed in the fifth degree of relationship, have sought possession of the estate under the clause relating to the order of succession, or seek it while not yet barred from so doing, you can legally take over the succession to them. But if he (the grandmother's brother), who, there is no doubt, is placed in the fourth degree, claimed under the Edict and this was not unknown to you, you have petitioned Us to no purpose.

⁹¹ Diocletian's movements mean that the year is best identified as 290. See Barnes, *New Empire* (1982), 51.

⁹² See D. 38.9.

⁹³ Julius' mother was an agnate (descendant in the male line) of her paternal uncle, but since she did not claim, Julius could, but only on the basis of belonging to the next category of claimants (cognates, in the female line).

S. vi id. April. Sirmi CC. cons.

XVII De Carboniano Edicto

[1] *Impp. Diocletianus et Maximianus AA. et CC. Florae.* Si tibi ac filio tuo status ab his contra quos supplicas movetur quaestio, perspicis praemature rerum, quas velut de patris successione filius tuus vindicat, restitutionem postulari, cum, si in pupillari permaneat aetate, secundum formam edicti Carboniani data bonorum possessione satisfactione impleta tunc demum in possessionem eum constitui conveniat vel hac non oblata portionem ab omnibus quam vindicat possideri, servitutis vero quaestionem in tempus differri pubertatis.

S. xii k. Nov. Sirmi AA. cons.

[2] *Imppp. Valentinianus Theodosius et Arcadius AAA. ad Rufinum pp.* Carbonianum edictum sub personis legitimis indubitato matrimonio, custodito partu et probata legitima successione defertur, scilicet ut in possessione novus heres constitutus usque ad pubertatis annos sine inquietudine rebus utatur interdum alienis.

D. iiii k. Oct. Constantinopoli Theodosio A. iii et Abundantio cons.

XVIII Unde Vir et Uxor

[1] *Impp. Theodosius et Valentinianus AA. Hierio pp.* Maritus et uxor ab intestato invicem sibi in solidum pro antiquo iure succedant, quotiens deficit omnis parentum liberorum seu propinquorum legitima vel naturalis successio, fisco excluso.

Subscribed April 8, at Sirmium, in the consulship of the Caesars (294).

Seventeenth Title The Carbonian Edict⁹⁴

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Flora.* If a question as to the status of yourself and your son is raised by those against whom you direct your petition,⁹⁵ you notice that the demand for the restitution (to them) of the property which your son claims as if as an inheritance from his father is premature, since, if he is still of age to be a ward, under the rules of the Carbonian Edict, with possession of the estate granted and security supplied, it is then fitting for him to be established in possession, or, if this (security) is not provided, for the part, which he claims, to be in the possession of all (the claimants); but the question of his slavery is to be deferred to the time of his reaching puberty.

Subscribed October 21, at Sirmium, in the consulship of the Augusti (293).

[2]⁹⁶ *Emperors VALENTINIAN, THEODOSIUS, and ARCADIUS Augusti to Rufinus, Praetorian Prefect.* The Carbonian Edict is granted in the case of legitimate persons, from an undoubted marriage, where childbirth was monitored⁹⁷ and a legal right to succession shown, so that the new (i.e. posthumous) heir, established in possession, may in the meantime have the use of property not his own without molestation until the age of puberty.

Given September 28, at Constantinople, in the consulship of Theodosius Augustus, for the third time, and Abundantius (393).

Eighteenth Title "Whereby Husband and Wife" (*Unde Vir et Uxor*)⁹⁸

[1]⁹⁹ *Emperors THEODOSIUS and VALENTINIAN Augusti to Hierius, Praetorian Prefect.* A husband and wife inherit from each other the whole of the property on intestacy according to ancient law, whenever the entire statutory or natural succession of parents, children or relatives fails, with the Treasury excluded.

⁹⁴ Cf. D. 37.10.

⁹⁵ Identified in the *Basilika* (40.5.17, Scheltema A, vol. v, p. 1808) as the father's brother, claiming that Flora and thus her son were slaves.

⁹⁶ This derives from C.Th. 4.3.1. Part of a larger constitution, reconstructed by Honoré, *Crisis of Empire* (1998); *Palingenesia* 2, E420-3, in this order: C.Th. 11.30.52, 2.12.5, 4.3.1 (C. 6.17.2), C.Th. 4.8.9.

⁹⁷ That is, to ensure that a child really was born (and born alive) without substitution.

⁹⁸ Another action reflecting the form of the Praetor's Edict; cf. D. 38.11.

⁹⁹ This derives from C.Th. 5.1.9. Part of a larger constitution, reconstructed by Honoré, *Crisis of Empire* (1998); *Palingenesia* 4, E854-9, in this order: C.Th. 3.7.3 (C. 5.4.22), C.Th. 3.5.13 (C. 5.3.17), C.Th. 4.6.8, C.Th. 5.1.9 (C. 6.18.1), C.Th. 2.3.1 (C. 2.57.2), C. 6.61.2.

D. x k. Mart. Constantinopoli Felice et Tauro cons.

XVIII De Repudianda Bonorum Possessione

[1] *Imp. Diocletianus et Maximianus AA. et CC. Theodotiano.* Emancipatus repudiata bonorum possessione absentiae patroni causae velamento rursum ad eandem redire quaestionem frustra conatur.

Sine die et cons.

[2] *Idem AA. et CC. Theodoro.* Filio delatam bonorum possessionem patri ad fraudem filii repudiare non licet.

S. vi k. Dec. Nicomediae CC. cons.

XX De Collationibus

[1] *Imp. Alexander A. Deuteriae.* Emancipatos liberos testamento heredes scriptos et ex eo successionem obtinentes a patre donata fratri conferre non oportere, si pater, ut hoc fiat, supremis iudiciis non cavit, manifesti iuris est.

PP. III id. Iul. Iuliano et Crispino cons.

[2] *Idem A. Primo.* Si pater intestato decessit relictis duobus filiis et filia, cuius nomine dotem promiserat, portiones hereditatis aequae sunt et dos nihilo minus ita conferenda est, ut pro portionibus fratres eius a necessitate praestandae eius liberentur.

PP. III id. Sept. Iuliano et Crispino cons.

Given February 20, at Constantinople, in the consulship of Felix and Taurus (428).¹⁰⁰

Nineteenth Title The Repudiation of Possession of the Estate

[1]¹⁰¹ *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Theodotianus.* An emancipated son, who has repudiated the possession of an estate, tries in vain to use the absence of his legal representative (*patronus*) for a case as a basis to return again to the same question.

Without day or consuls ([294]).

[2] *The same Augusti and Caesars to Theodorus.* A father is not permitted, in fraud of his son, to decline possession of an estate available to his son.

Subscribed November 26, at Nicomedia, in the consulship of the Caesars (294).

Twentieth Title Hotchpot (*Collatio*)¹⁰²

[1] *Emperor ALEXANDER Augustus to Deuteria.* It is plainly the law that emancipated children, named as heirs in a will and from that obtaining the succession, need not bring into hotchpot with their brother gifts from their father, if the father did not require that to be done by his last wishes.

Posted July 13, in the consulship of Julius and Crispinus (224).

[2] *The same Augustus to Primus.* If a father has died intestate, leaving two sons and a daughter, in whose name he had promised a dowry, the portions of the inheritance are equal, and the dowry nonetheless must be brought into hotchpot, so that the portions of the brothers may be freed from the necessity of furnishing it (the dowry).

Posted September 10, in the consulship of Julius and Crispinus (224).

¹⁰⁰ The consulship is taken from the Theodosian Codex. The Verona palimpsest reads "Hierio et Tauro," probably a contamination from the name of the recipient. Krüger (*ad loc.*) suggests that a similar erroneous subscript was incorrectly emended in Haloander's edition to read "Hierio et Ardaburio" (= 427).

¹⁰¹ For a slightly different version of this rescript (dated to December 294 at Nicomedia), see C. 2.6.4. Combine also with C. 6.31.3 (dated "sine die" 294) (cf. different version at 2.4.38, dated December 294) addressed to the same recipient. It appears that there were two divergent versions of the same rescript (this one perhaps deriving from the Gregorian, the other from the Hermogenian Codex?).

¹⁰² Hotchpot or collation principally arose on intestacy, when emancipated children, technically excluded as outside the *familia* and, therefore, not being *sui heredes* in Civil Law, applied for their share under Praetorian law. They were required to bring their property into account for the purposes of equalization with the unemancipated children, who were unable to hold property in their own name. See also D. 37.6–7.

[3] *Idem A. Alexandro.* Pactum dotali instrumento comprehensum, ut contenta dote quae in matrimonio collocabatur nullum ad bona paterna regressum haberet, iuris auctoritate improbatur nec intestato patri succedere filia ea ratione prohibetur. dotem sane quam accepit fratribus qui in potestate manserunt conferre debet.

D. XIII k. Iul. Agricola et Clemente cons.

[4] *Imp. Gordianus A. Marino.* Filiae dotem in medium ita demum conferre coguntur, si vel ab intestato succedant vel contra tabulas petant: nec dubium est profecticiam seu adventiciam dotem a patre datam vel constitutam fratribus qui in potestate fuerunt conferendam esse. his etenim, qui in familia defuncti non sunt, profecticiam tantummodo dotem post varias prudentium opiniones conferri placuit.

PP. III id. Mart. Gordiano A. et Aviola cons.

[5] *Idem A. Alexandrae.* Dotis quidem petitio perseverante matrimonio tibi non competebat: quamvis enim eam intestato patre defuncto fratri conferre debueras, non tamen eo nomine adversus maritum tibi actio potuit esse, cum eo minus in partem tibi delatae successionis patris auferre potueris.

D. non. Sept. Gordiano A. et Aviola cons.

[6] *Idem A. Claudio.* Ea demum ab emancipatis fratribus his qui manserunt in potestate conferri consueverunt, quae in bonis eorum fuerunt eo tempore, quo pater fati munus implevit, exceptis videlicet quae ab ipsis aliis debentur.

D. VII k. Mai. Peregrino et Aemiliano cons.

[7] *Imp. Philippus A. Tyranniae.* Filiam testamento patris institutam heredem fratribus isdemque coheredibus dotem conferre non oportere, nisi pater hoc ipsum specialiter designavit, explorati iuris est.

PP. VI k. Mai. Praesente et Albino cons.

[3] *The same Augustus to Alexander.* The agreement contained in the dotal document, that the woman should be content with the dowry, which was given in connection with the marriage, and should have no further claim on her father's property, is not supported by the authority of the law, nor is the daughter on that basis prohibited from the succession to her intestate father. Obviously, she must bring the dowry, which she received, into hotchpot with her brothers, who had remained under their father's power.

Given June 18, in the consulship of Agricola and Clemens (230).

[4] *Emperor GORDIAN Augustus to Marinus.* Daughters must bring dowry into hotchpot only if they inherit on intestacy or claim contrary to a will; nor is it doubtful that the dowry given or set up by the father, either from his own or another's property, must be brought into hotchpot for the benefit of brothers who were in the power (of their father). And indeed, for those, who are not in the *familia* of the deceased, it was decided, after the varying opinions of the experts, that only the dowry coming from the father's property need be brought into hotchpot.

Posted March 12,¹⁰³ in the consulship of Gordian Augustus and Aviola (239).

[5] *The same Augustus to Alexandra.* You certainly had no right to reclaim dowry during continuance of the marriage. For, although you must bring it into hotchpot with your brother on the death of your intestate father, there could not on that basis, however, be an action for you against your husband, since you would simply take that much less in the portion of your father's inheritance given to you.

Given September 5, in the consulship of Gordian Augustus and Aviola (239).

[6] *The same Augustus to Claudius.* Only those things, which were part of their property at the time when their father fulfilled the duty of fate, have customarily been put into hotchpot by emancipated brothers with those who remained in the power (of their father), with the exception, that is, of what is owed by them (sc. the emancipated brothers) to others.

Given April 25, in the consulship of Peregrinus and Aemilianus (244).

[7] *Emperor PHILIP Augustus to Tyrannia.* The law is clear that a daughter appointed as heir in her father's will need not bring her dowry into hotchpot with her brothers also co-heirs, unless the father specifically required this very thing.

Posted April 26, in the consulship of Praesens and Albinus (246).

¹⁰³ So Haloander's edition; May 10 in the manuscripts.

[8] *Impp. Diocletianus et Maximianus AA. Callippo.* Si soror tua in paternorum bonorum divisione te fefellit nec dotem, quam acceperat a patre vestro intestato diem functo, contulit, praeses provinciae examinatis partium adlegationibus cum bonis dotem confundi iubebit et, quod deducta ratione plus apud eam esse animadverterit, restitui tibi iubebit. idem est et si arbitro dato divisio celebrata est.

S. vi id. Iul. ipsis AA. cons.

[9] *Idem AA. et CC. Onesimo.* Si emancipati utrique fuistis a patre, collatio cessat, si autem frater tuus in potestate mortis tempore fuerat nec ullum testamentum relictum vel novissimum iudicium communis patris teque emancipatum probatum fuerit, ab intestato te ad successionem paternam venientem ad collationem forma edicti perpetui certo iure provocat.

S. vi k. Mai. Heracliae AA. cons.

[10] *Idem AA. et CC. Irenaeae.* A patre verbis precariis in codicillis relictum extero iure capiens filia ad collationem dotis urgueri non potest.

S. vi k. Dec. Sirmi AA. cons.

[11] *Idem AA. et CC. Artemiae.* Postumo praeterito patris testamentum rumpenti atque intestato succedenti emancipatum petita bonorum possessione conferre debere bona sua perpetuo edicto cavetur, cum his etiam, qui sui futuri essent, si vivo patre nati fuissent, conferri manifeste significatur, et emancipatis, si legi datae collationi non pareatur, denegandas actiones non est ambigui iuris.

PP. v k. Ian. ipsis AA. cons.

[8] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Callippus.* If your sister cheated you in the division of your father's property, by not bringing into hotchpot the dowry, which she had received from your father who died intestate, the governor of the province, having examined the allegations of the parties, will order the dowry to be included in the property, and he will order her to restore to you the excess which he finds her to have, when he has made the appropriate deduction. This is the same even if the division was made by an appointed arbitrator.

Subscribed July 10, in the consulship of these same Augusti (290).

[9] *The same Augusti and the Caesars to Onesimus.* If both of you were emancipated by your father, hotchpot does not happen. But if your brother was in his father's power at the time of his death, and it is shown that the father you have in common left no will nor last wishes and that you were emancipated, the rule of the Perpetual Edict by clear law requires you to carry out hotchpot, when coming into the succession to your father under intestacy.

Subscribed April 26, at Heraclea, in the consulship of the Augusti (293).¹⁰⁴

[10] *The same Augusti and Caesars to Irenaea.* Since a daughter takes property bequeathed by her father at his discretion in a codicil under the rules for outsiders, she cannot be compelled to bring her dowry into hotchpot.

Subscribed November 26, at Sirmium, in the consulship of the Augusti (293).¹⁰⁵

[11] *The same Augusti and Caesars to Artemia.* When a posthumous child, passed over in a testament, breaks it and succeeds on intestacy, an emancipated son must, as provided by the Perpetual Edict, bring his property into hotchpot when seeking the possession of the estate, since it is clearly required to bring property into hotchpot also with those, who would be *sui heredes*, if they had been born while their father lived, and the law is not uncertain that rights of action are to be denied to emancipated children, if they do not comply with hotchpot as provided by the law.¹⁰⁶

Posted December 28, in the consulship of the Augusti (293).

¹⁰⁴ Haloander's edition, the only source for the subscript, gives the Caesars as consuls (294), but this is emended by Krüger, since the rescript must come chronologically before the subsequent constitutions. Numerous others attest Diocletian's presence at Heraclea at this period (Mommson, *Gesammelte Schriften* II (1905), 274; Barnes, *New Empire* (1982), 52).

¹⁰⁵ Haloander's edition is the only source for the consulate and records the Caesars, but this is emended by Krüger as with the previous constitution. See Mommson, *Gesammelte Schriften* II (1905), 276; Barnes, *New Empire* (1982), 53.

¹⁰⁶ Taking "collationi" with "pareatur" and following the sense of the Greek *kata podas* translation (Basilika scholia 41.7.27, Scheltema B, vol. VI, p. 2489).

[12] *Idem AA. et CC. Nilanthiae. pr.* Filiae, licet maneat in sacris, si dotem non conferat, quam mortis tempore communis patris habuit, fratribus in eadem familia constitutis, actiones hereditarias negari non ambigitur. 1. Unde consulte ac pro iuris ratione collationem fratribus tuis, quos in patris communis mortis tempore fuisse potestate proponis, offers. 2. Quin autem fratres tui durantes in familia patris peculium, si hoc neque castrense neque relictum eis doceatur, praecipuum habere non possint, sed in divisione paternae veniat hereditatis, nec quicquam mutet, penes quem res ex hoc proficiscentes et in eadem causa durantes constitutae reperiantur, absoluti manifestique iuris est.

D. XI k. Febr. Sirmi CC. cons.

[13] *Idem AA. et CC. Antistiae.* Si donatione tibi post mortem patris quaesisti fundum, soror tua portionem eius vindicare non potest. nam si is filiae familias constitutae tibi a patre donatus est, cum sorore patri communi succedens eum praecipuum habere contra iura postulas.

D. VI id. Febr. Sirmi isdemque CC. cons.

[14] *Idem AA. et CC. Stratonicae.* Si maritus quondam tuus ab intestato patri suo heres extitit et ei postumus editus successit, actionem hereditariam amitae filii vestri, quam habuit patris sui mortis tempore dotem non conferenti, denegare praeses non dubitabit.

PP. VII k. Mart. Trimontii Tusco et Anullino cons.

[15] *Idem AA. et CC. Philippo.* Nec emancipati post mortem communis patris quaesita conferre coguntur, sed haec retinentes eius bona pro hereditaria dividunt portione.

D. id. Dec. ipsis CC. cons.

[12] *The same Augusti and Caesars to Nilanthia. pr.* There is no doubt that actions for an inheritance are to be denied to a daughter who, although she remained in her father's power, does not bring into hotchpot with her brothers, who were part of the same *familia*, the dowry, which she had at the time of their common father's death. 1. It is, therefore, advisable and in accordance with the law that you participate in hotchpot with your brothers, whom you state to have been in the power of your common father at the time of his death. 2. It is, moreover, absolute and clear law that your brothers, as members of their father's *familia*, cannot keep as their own their *peculium*, if it is shown to be neither their military *peculium* nor bequeathed to them, but it must come into the division of the paternal inheritance. Nor does it make a difference with whom the property, which arose from this and has continued in the same condition, is found placed.

Given January 22, at Sirmium, in the consulship of the Caesars (294).

[13] *The same Augusti and Caesars to Antistia.* If you acquired a farm by gift after the death of your father, your sister cannot claim a portion of it. But if it was given to you by your father while you were a *filiafamilias*, and you are succeeding your father in common with your sister, you are asking contrary to law to keep it as your own property.

Given February 8, at Sirmium, in the consulship of the same Caesars (294).

[14] *The same Augusti and Caesars to Stratonica.* If your former husband was heir to his intestate father, and a posthumous son succeeded him, the governor will not hesitate to deny to the paternal aunt of your son the action for the inheritance, which she had at the time of her father's death, if she does not bring her dowry into hotchpot.

Posted February 23, at Trimontium, in the consulship of Tuscus and Anullinus (295).¹⁰⁷

[15] *The same Augusti and Caesars to Philippus.* Emancipated children are not compelled to bring into hotchpot what they acquired after the death of their common father, but they retain that and divide his property in accordance with their hereditary shares.

Given December 13, in the consulship of the Caesars (294).

¹⁰⁷ The subscript is only known from Haloander's edition, and the year is out of sequence. Trimontium, not a rare place-name, is most plausibly Philippopolis (Plovdiv). As Diocletian was still at Nicomedia in March 295 (C. 5.72.3), emendation of the year would be required (thus Mommsen). Connolly suggests "Tricornium" near Sirmium in 294. For the possibilities of date and place, see Mommsen, *Gesammelte Schriften II* (1905), 288; Barnes, *New Empire* (1982), 54 n. 33; Corcoran, *Empire of the Tetrarchs* (2000), 80; Connolly, *Lives Behind the Laws* (2010), 204.

[16] *Idem AA. et CC. Socrati.* Filiam cum fratribus suis heredibus intestato patri succedentem ultra relictum codicillis non conferentem dotem iudicio familiae erciscundae nihil posse consequi summa cum ratione placuit.

D. v k. Ian. ipsis CC. cons.

[17] *Imp. Leo A. Erythrio pp.* Ut liberis tam masculini quam feminini sexus, iuris sui vel in potestate constitutis, quocumque iure intestatae successionis, id est aut testamento penitus non condito vel, si factum fuerit, contra tabulas bonorum possessione petita vel inofficiosi querella mota rescisso, aequa lance parique modo prospici possit, hoc etiam aequitatis studio praesenti legi credidimus inserendum, ut in dividendis rebus ab intestato defunctorum parentum tam dos quam ante nuptias donatio conferatur, quam pater vel mater, avus vel avia, proavus proavia paternus vel maternus dederit vel promiserit pro filio vel filia, nepote vel nepte aut pronepote sive pronepte, nulla discretione intercedente, utrum in ipsas sponas pro liberis suis memorati parentes donationem contulerint, an in ipsos sponso earum, ut per eos eadem in sponas donatio celebretur: ut in dividendis rebus ab intestato parentis, cuius de hereditate agitur, eadem dos vel ante nuptias donatio ex substantia eius profecta conferatur: emancipatis videlicet liberis utriusque sexus pro tenore praecedentium legum, quae in ipsa emancipatione a parentibus suis (ut adsolet fieri) consequuntur vel post emancipationem ab isdem adquisierint, collaturis.

D. v k. Mart. Marciano cons.

[18] *Imp. Anastasius A. Constantino pp.* Liberos, qui nostrae legis auctoritate per oblationem precum et imperiale rescriptum sui iuris effecti fuerint, ad similitudinem ceterorum, qui emancipati ex antiquo iure

[16]¹⁰⁸ *The same Augusti and Caesars to Socrates.* It has been decided by the best reasoning that a daughter, who succeeds her intestate father together with her brothers as heirs, cannot receive anything in an action to divide the inheritance beyond that left by codicil, if she does not bring her dowry into hotchpot.

Given December 28, in the consulship of the Caesars (294).

[17]¹⁰⁹ *Emperor LEO Augustus to Erythrius, Praetorian Prefect.* In order that for children of the male or female sex, whether *sui iuris* or established in another's power, there may be protection by a fair balance and equal measure under any law of intestate succession, that is to say either where no will at all has been made, or, if it was made, where it is rescinded by a claim for possession of the estate contrary to a will or by a complaint of undutiful will, in the desire for equity We have deemed it best to insert in the present law this also, that, in dividing the property of deceased parents on intestacy, there is to be brought into hotchpot both the dowry and the prenuptial gift, which the father or mother, grandfather or grandmother, great-grandfather or great-grandmother whether paternal or maternal, has given or promised for a son or daughter, grandson or granddaughter or great-grandson or great-granddaughter, with no distinction made as to whether the aforesaid relatives made the gift to the betrothed women as being their children, or made it to their fiancés, in order that the same gift be bestowed through them (the fiancés) on the betrothed women; so that in dividing the property of an intestate parent, whose inheritance is the subject of legal action, the dowry or prenuptial gift derived likewise from his (the deceased's) property is to be brought into hotchpot. Clearly emancipated children of either sex will bring into hotchpot, according to the tenor of the preceding laws, what they receive from their parents, as usually happens, at the time of their emancipation, or what they acquire from the same persons after emancipation.

Given February 26, in the consulship of Marcianus (472).

[18]¹¹⁰ *Emperor ANASTASIUS Augustus to Constantinus, Praetorian Prefect.* We order that children, who have been made *sui iuris* by the authority of Our law¹¹¹ through the presentation of a petition and an imperial rescript, just as in the case of those, who are emancipated under the ancient law, be compelled

¹⁰⁸ Combine with C. 3.36.24.

¹⁰⁹ Combine with C. 5.9.6, 6.24.12, 6.61.4; Seeck, *Regesten* (1919), 417. C. 5.9.6 and 6.61.4 include Anthemius as Emperor in the heading.

¹¹⁰ Associated with C. 6.58.11 and 8.48.5; Lounghis et al., *Regesten* (2005), 105.

¹¹¹ C. 8.48.5.

sunt, collationes facere iubemus compelli secundum ea, quae super ceteris emancipatis statuta sunt.

D. XII k. Aug. Constantinopoli Probo et Avieno iuniore cons.

[19] *Imp. Iustinianus A. Menae pp. pr.* Illam merito dubitationem amputare duximus, quae super collatione dotis vel ante nuptias donationis inter certas personas satis iam ventilata est. 1. Nam si intestatus quis defunctus esset filio vel filiis vel filia vel filiabus relictis et ex mortua filia cuiuscumque sexus aut numeri nepotibus, vel si qua intestata defuncta esset filio quidem vel filiis similiter relictis, ex mortuo vero filio vel filia itidem nepotibus cuiuscumque sexus, de modo quidem successionis minime dubitabatur, sed palam erat, quod huiusmodi nepotes duas partes maternae vel paternae portionis tantummodo haberent, tertiam partem patruis suis vel avunculis vel amitibus vel materteris pro iam posita constitutione concedentes.

2. De collatione vero dotis vel ante nuptias donationis, quam defuncta persona pro filio vel filia superstitibus et pro mortuo vel mortua filio vel filia dedisset, multa dubitatio orta est, superstitibus quidem filiis defunctae personae non debere se dotem et ante nuptias donationem pro se datam a suo patre vel matre conferre filiis mortui fratris sui vel mortuae sororis suae contententibus eo, quod nulla constitutio super huiusmodi collatione posita est, nepotibus vero mortuae personae non tantum huic resistentibus, sed etiam illud adserentibus, quod onus collationis constitutione Arcadii et Honorii divinae memoriae sibi impositum in personis tantummodo suorum avunculorum, non etiam patruorum vel amitarum vel matertrarum locum habere potest.

3. Talem igitur subtilem dubitationem amputantes praecipimus tam filios vel filias defunctae personae dotem vel ante nuptias donationem a parentibus suis sibi datam conferre nepotibus vel neptibus mortuae personae, quam eosdem nepotes vel neptes patruis suis aut avunculis, amitibus et materteris dotem et ante nuptias donationem patris sui vel matris, quam pro eo vel ea mortua persona dedit, similiter conferre, ut commixtis huiusmodi collationibus cum bonis mortuae personae

to carry out hotchpot according to what has been laid down regarding other emancipated children.

Given July 21, at Constantinople, in the consulship of Probus and Avienus the younger (502).

[19]¹³² *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect. pr.* We have justly thought of removing the doubts, much discussed among certain persons, concerning bringing dowry and prenuptial gifts into hotchpot. 1. For if a man has died intestate, leaving a son or sons or a daughter or daughters, as well as any number of grandchildren, of either sex, from a deceased daughter, or if a woman has died, similarly leaving a son or sons, and likewise grandchildren of either sex born of a deceased son or daughter, there was indeed no doubt as to the manner of succession, but it was clear that these grandchildren would have only two parts of their mother's or father's portion, conceding the third part to their paternal or maternal uncles or paternal or maternal aunts in accordance with a constitution already laid down.¹³³

2. Much doubt has arisen as to the bringing into hotchpot of a dowry or prenuptial gift, which a deceased person had given for a surviving son or daughter or a deceased son or daughter, with the surviving children of the deceased person contending that they should not put dowry and prenuptial gifts given for them by their father or mother into hotchpot for the children of their deceased brother or their deceased sister, for this reason, that no constitution had been issued about this sort of hotchpot. But the grandchildren of the deceased person not only resisted that, but also claimed this, that the burden of bringing into hotchpot, imposed on them by the constitution of Arcadius and Honorius, of divine memory,¹³⁴ only applied as to the persons of their maternal uncles and not of their paternal uncles or paternal or maternal aunts.

3. Removing such subtle doubts, We direct both that the sons or daughters of a deceased person are to bring into hotchpot with the grandsons or granddaughters of the dead person the dowry or prenuptial gift given to them by their parents, and also that the same grandsons or granddaughters are similarly to bring into hotchpot with their paternal or maternal uncles and also paternal and maternal aunts the dowry and prenuptial gift of their father or mother, which the dead person gave for him or her (the father or mother), so that, when what is brought into hotchpot is mingled with the property of the dead person, the grandsons or granddaughters are to have, indeed, two parts of that portion,

¹³² This is one of numerous constitutions addressed to Menas on June 1, 528: Lougblis *et al.*, *Regesten* (2005), 160–164.

¹³³ C. 6.55.9 (deriving from C.Th. 5.1.4).

¹³⁴ C.Th. 5.1.5.

duas quidem partes nepotes vel neptes habeant illius portionis, quae patri vel matri eorum, si superesset, deferebatur, tertiam vero eiusdem portionis partem una cum sibi competentibus portionibus filii vel filiae defunctae personae, cuius de hereditate agitur, capiant.

D. k. Iun. Constantinopoli dn. Iustiniano A. pp. II cons.

[20] *Idem A. Menae pp. pr.* Illud sine ratione a quibusdam in dubietatem deductum plana sanctione revelamus, ut omnia, quae in quarta portione ab intestato successionis computantur his, qui ad actionem de inofficioso testamento vocantur, etiam si intestatus is decesserit, ad cuius hereditatem veniunt, omnimodo coheredibus suis conferant. 1. Quod tam in aliis quam in his, quae occasione militiae uni heredum ex defuncti pecuniis acquisitae lucratur is qui militiam meruit, locum habebit, ut lucrum, quod tempore mortis defuncti ab eum pervenire poterat, non solum testamento condito quartae parti ab intestato successionis computetur, sed etiam ab intestato conferatur.

2. Haec autem regula, ut omnia quae portioni quartae computantur etiam ab intestato conferantur, minime e contrario tenebit, ut possit quis dicere etiam illa quae conferuntur omnimodo in quartam partem his computari, qui ad de inofficioso querellam vocantur: ea enim tantummodo ex his quae conferuntur memoratae portioni computabuntur, pro quibus specialiter legibus, ut hoc fieret, expressum est. 3. Ad haec, cum ante nuptias donatio vel dos a patre data vel matre vel aliis parentibus pro filio vel filia, nepote vel nepte ceterisque descendantibus conferatur, si unus quidem vel una liberorum ante nuptias tantummodo donationem vel dotem, non etiam simplicem donationem accepit vel acceperit, alter vero vel altera neque dotem neque donationem ante nuptias a parente suo suscepit vel suscepit, sed simplicem tantummodo donationem, ne ex eo iniustum aliquid oriatur, ea quidem persona, quae ante nuptias donationem vel dotem suscepit, conferre eam cogenda, illa vero, quae simplicem tantummodo donationem meruit, ad collationem eius minime coartanda: si quid huiusmodi accidit vel acciderit, iubemus ad similitudinem eius, qui ante nuptias donationem

which would have been passed to their father or mother, if they had survived, but the sons or daughters of the deceased person, whose inheritance is the subject of legal action, are to take the third part of the same portion together with the portions proper to them.

Given June 1, at Constantinople, in the consulship of Our Lord Justinian, Ever Augustus, for the second time (528).

[20] *The same Augustus to Menas, Praetorian Prefect. pr.* We hereby clarify by a plain sanction a point which has without reason been brought into doubt by some persons; as a result everything, which is counted as part of the quarter portion on intestate succession, for those who are summoned to an action on an undutiful will, is to be brought into hotchpot with their co-heirs, even if the person, to whose property they succeed, has died intestate.¹⁵ 1. This will apply not only to other things, but also to those things, which he, who has purchased an office, gains by virtue of a post acquired for one of the heirs out of the deceased's resources, so that the gain, which could have come to him at the time of the deceased's death, is not only to be counted towards the quarter portion on intestate succession, when a will has been made, but is also to be brought into hotchpot in case of intestacy.

2. But the rule, that everything counting towards the quarter portion is also to be put into hotchpot in case of intestacy, does not hold in the converse case, that anyone could say that those things, which are brought into hotchpot, are in every way to be counted towards the quarter portion, for those who are summoned to a complaint of an undutiful will; for of the things, which are brought into hotchpot, those only, for which it is specifically stated in law that it be so, will be counted towards the abovementioned portion. 3. Further, since a prenuptial gift or dowry, given by a father or mother or other ascendants for a son or daughter, grandson or granddaughter and other descendants comes into hotchpot, if one male or one female child has or shall have received only a prenuptial gift or dowry, but not a straight gift as well, but another male or female has or shall have taken from their parent not a dowry nor a prenuptial gift, but only a straight gift, lest some injustice arise from this, that indeed this person, who took a prenuptial gift or dowry, is compelled to bring it into hotchpot, while that person, who acquired only a straight gift, is not constrained to bring it into hotchpot, We order that, if anything of this sort has or will have arisen, on the model of him, who is compelled to bring a prenuptial gift or dowry into hotchpot, that person also, who has received no dowry or prenuptial gift from

¹⁵ A will could be broken, if the testator did not leave his *sui heredes* the legal minimum one-quarter of what they would have received on intestacy (see title C. 3.28). In this constitution, the same rules regarding which property to include in calculating that one-quarter are to be applied also to hotchpot, irrespective of whether there is a will.

vel dotem conferre cogitur, etiam illam personam, quae nulla dote vel ante nuptias donatione data solam simplicem donationem a parentibus suis accepit, conferre eam nec recusare collationem eo, quod simplex donatio non aliter confertur, nisi huiusmodi legem donator tempore donationis suae indulgentiae imposuerit.

D. VIII id. Aug. Constantinopoli Decio vc. cons.

[21] *Idem A. Iohanni pp. pr.* Ut nemini super collatione de cetero dubietas oriatur, necessarium duximus constitutioni, quam iam favore liberorum fecimus, hoc addere, ut res, quas parentibus acquirendas esse prohibuimus, nec collationi post obitum eorum inter liberos subiaceant. 1. Ut enim castrense peculium in communi conferre in hereditate dividenda ex prisci iuris auctoritate minime cogeantur, ita et alias res, quae minime parentibus adquiruntur, proprias liberis manere censemus.

D. xv k. Nov. Lampadio et Oreste vv. cc. cons. anno secundo.

XXI De Testamento Militis

[1] *Imp. Antoninus A. Floro militi.* Frater tuus miles si te specialiter bonis quae in paganico habebat heredem fecit, bona quae in castris reliquit petere non potes, etiamsi is qui eorum heres institutus est adire ea noluerit: sed ab intestato succedentes veniunt, modo si in eius loco substitutus non estⁱⁱⁱ et liquido probatur fratrem tuum castrensia bona ad te pertinere noluisse. nam voluntas militis expeditione occupati pro iure servatur.

Accepta v id. Sept. duobus Aspris cons.

[2] *Idem A. Septimo militi.* Miles si castrensiarum tantummodo bonorum commilitonem suum instituit heredem, cetera bona eius ut intestati

his parents, but only a straight gift, is to bring it into hotchpot and not to refuse hotchpot on the grounds that a straight gift is not otherwise brought into hotchpot, unless the donor should have imposed this sort of condition at the time of his grant of the gift.

Given August 6 [April 6], at Constantinople, in the consulship of the vir clarissimus Decius (529).¹¹⁶

[21] *The same Augustus to John, Praetorian Prefect. pr.* So that no doubt may in the future arise regarding hotchpot, We have deemed it necessary to add this to the constitution, which we have already made in favor of children,¹¹⁷ so that property, which We forbade being acquired in the parents' name, is not to be subject to hotchpot between the children after their (the parents') death. 1. For as they were not, according to the authority of ancient law, compelled to pool their military *peculium* in hotchpot in dividing an inheritance, so we decree that other property also, which is not acquired in the parents' name, remains the children's own.

Given October 18, in the second post-consulate of the viri clarissimi Lampadius and Orestes (532).¹¹⁸

Twenty-First Title A Soldier's Will¹¹⁹

[1] *Emperor ANTONINUS Augustus to Florus, a soldier.* If your brother, a soldier, made you heir specifically to the property he had as a civilian (*in paganico*), you cannot claim the property he left "in camp" (*in castris*) even if the designated heir to it declines to accept it. Rather, his intestate successors receive it if you were not substituted for him (should the named heir decline) and it is (also) clearly shown that your brother did not wish his camp property to belong to you. For the disposition of a soldier who is on campaign is enforced as law (*pro iure*).

Accepted September 9, in the consulship of the two Aspri (212).

[2] *The same Augustus to Septimus, a soldier.* If a soldier designated his fellow soldier as heir only of his camp property, his mother rightfully possesses his remaining property as having died intestate. But if he named a non-family

¹¹⁶ The date should probably be April 6 (*vili id. Apr.*), the date of the last constitutions added to the first edition of the Codex (Lounghis *et al.*, *Regesten* (2005), 176–178). There are no further Codex constitutions until September 529, by which time Menas had been replaced as Praetorian Prefect by Demosthenes.

¹¹⁷ C. 6.51.6.

¹¹⁸ Adapting the consular formula to that of C. 6.21.18, which is probably to be associated with this constitution.

¹¹⁹ See D. 29.1; Inst. 2.11.

defuncti mater eius iure possedit. quod si extraneum scripsit heredem isque adiit hereditatem, bona eius in te transferri non iure desideras.

PP. XI k. Mart. Antonino A. IIII et Balbino cons.

[3] *Idem A. Vindiciano. pr.* Quamquam militum testamenta iuris vinculis non subiciantur, cum propter simplicitatem militarem quomodo velint et quomodo possint ea facere his concedatur, tamen in Valeriani quondam centurionis testamento institutio etiam iure communi accepit auctoritatem. 1. Nam cum pater familias filiam ex duabus unciiis, uxorem ex uncia heredem scripserit nec de residuis portionibus quicquam significaverit, in tres partes divisisse eum apparet hereditatem, ut duas habeat quae sextantem accepit, tertiam quae ex uncia est heres instituta.

PP. k. Nov. Antonino A. IIII et Balbino cons.

[4] *Imp. Alexander A. Iunio. pr.* Si Rufinus vir clarissimus tribunus lativivus maior annis lege definitis faciens testamentum te manumisit, iustam tibi libertatem competisse scire debes. 1. Quod si minor annis ex lege constitutis fuerit, cum faceret testamentum, lege impediens nullam libertatem adeptus es, quae in hac parte nec militibus remissa est. 2. Quod si idem testator causam manumittendi te habuit, quae probabilis vivo manumittente consilio futura esset, quia per fideicommissum data libertas a quolibet minore annis ei, cuius causa probari potuit, praestari debet, et ex testamento militis eiusmodi servis iustam libertatem competere consequens est.

PP. XVI k. Dec. Alexandro A. cons.

[5] *Idem A. Sozomeno.* Ex testamento militis, sive adhuc in militia sive intra annum missus honeste decessit, hereditas et legata omnibus quibus relicta sunt debentur, quia inter cetera, quae militibus concessa sunt, liberum arbitrium quibus velint relinquendi supremis suis concessum est, nisi lex specialiter eos prohibuerit.

PP. XVII k. Febr. Iuliano et Crispino cons.

member (*extraneus*) as heir and that person entered into the inheritance, you wrongfully seek transfer of his property to you.

Posted February 19, in the consulship of Antoninus, for the fourth time, and Balbinus (213).

[3] *The same Augustus to Vindicianus. pr.* Although soldiers' wills are not subject to legal restrictions since, on account of their soldierly naïveté, they are allowed to make them in whatever way they wish and are able to, nevertheless the designation (of an heir) in the will of Valerianus the former centurion has validity also in the common law. 1. For when a *paterfamilias* names his daughter as heir to two-twelfths and his wife to one-twelfth, but indicates nothing about the remaining shares, it appears that he had divided the inheritance into three shares, with the woman who received a sixth getting two of them, and the one designated heir to a twelfth (getting) the third.

Posted November 1, in the consulship of Antoninus, for the fourth time, and Balbinus (213).

[4] *Emperor ALEXANDER Augustus to Junius. pr.* If the *vir clarissimus* Rufinus, a (military) tribune of Senatorial rank (*laticlavus*) who is above the age fixed by statute,¹²⁰ in making his will manumitted you, you should know that freedom is legally yours. 1. But if he was below the statutory age, by this statutory impediment you received no freedom; the law in this area is not relaxed even for soldiers. 2. But if the same testator had a reason for manumitting you and this would have been approved by a (manumission) council while the manumitter was alive, (then) because freedom that is granted through a trust (*fideicommissum*) by any below-age person ought to be provided to a person whose cause can be proven, it follows that also from a soldier's will slaves of this kind receive legally valid freedom.

Posted November 16, in the consulship of Alexander Augustus (222).

[5] *The same Augustus to Sozomenus.* From the will of a soldier who died either while in service or within a year after honorable discharge, an inheritance or legacies are owed to all to whom they are left, because among the things that are granted to soldiers there is granted the free determination of leaving to whom they wish in their last will, unless the law specifically prohibits them (from doing so).

Posted January 16, in the consulship of Julian and Crispinus (224).

¹²⁰ The *lex Aelia Sentia* of 4 CE required manumitters to be at least 20 years old, unless they showed cause to a special *consilium* appointed by the competent magistrate.

[6] *Idem A. Valenti. pr.* In testamento quidem eius, qui non miles fuit, si duobus heredibus institutis, altero, cui potuit usque ad tempus pubertatis parens facere testamentum, altero, cui posteaquam heres extitit substituere non potuit, invicem substitutio eisdem verbis facta esset, in eum solum casum eam locum habere et sententiis prudentium virorum et constitutionibus divorum parentum meorum placet, quo utrique pari ratione potuit substitui.

1. Sed cum ex testamento militis controversiam esse proponas, defuncta parvula eius filia, posteaquam heres extitit patri, cum qua simul aequis partibus heres institutus eras substitutione invicem facta, et mater quidem intestatae filiae sibi successionem defendat, tu autem ex substitutione ad te pertinere contendas, iuris quidem ratio manifesta est licere militibus proprio privilegio etiam heredibus extraneis, posteaquam heredes extiterint, mortuis substituere. 2. Sed tibi probandum est, an ita frater tuus senserit.

PP. XII k. Mai. Fusco et Dextro cons.

[7] *Idem A. Fortunato. pr.* Ex his verbis: 'Fortunato liberto meo do lego' vindicare tibi libertatem non potes, si pagani testamentum proponatur. 1. At enim cum testatorem militem fuisse proponas, si non errore ductus libertum te credidit, sed dandae libertatis animum habuit, libertatem, et quidem directam, competere tibi, sed et legati vindicationem habere praerogativa militaris privilegii praestat.

PP. XII k. Iul. Alexandro A. III et Dione cons.

[8] *Imp. Gordianus A. Aeterno militi.* Certi iuris est militem ad tempus etiam heredem instituere posse.

PP. III k. Oct. Pio et Pontiano cons.

[6] *The same Augustus to Valens. pr.* Indeed, in the will of a man who was not a soldier, if he designated two heirs – one for whom (he as) a male ascendant could make a will up to the age of puberty; the other for whom, after that person becomes an heir, he cannot appoint a substitute heir – and a reciprocal substitution was (nonetheless) made with identical words, both the opinions of the learned men (jurists) and the constitutions of my deified parents hold that this is effective only for the case in which substitution was possible for each of the two (the pupillary and the ordinary substitution) with the same reasoning.

1. But you declare that the dispute arose from a soldier's will: his young daughter died after she became heir to her father, and you had been simultaneously designated heir to equal shares with her, with each substituted for the other reciprocally; and the mother of the intestate daughter (now) claims succession to her (as her intestate heir), while you contend that it comes to you through the substitution. The rule of law is clear that soldiers, by a unique privilege, are permitted to name a substitute heir even for third-party heirs after they become heirs. 2. But you must show that your brother wanted it thus.¹²¹

Posted April 20, in the consulship of Fuscus and Dexter (225).

[7] *The same Augustus to Fortunatus. pr.* On the basis of these words (in a will): "I give and bequeath to my freedman Fortunatus," you cannot claim your liberty if a civilian's will is in question. 1. But since you state that the testator was a soldier, if he was not (just) mistaken in thinking you a freedman, but intended to bestow freedom, the prerogative of military privilege gives you (not only) freedom, and that directly, but also a claim for the legacy.

Posted June 20,¹²² in the consulship of Alexander Augustus, for the third time, and Dio (229).

[8] *Emperor GORDIAN Augustus to Aeternius, a soldier.* It is established law that a soldier can designate an heir even for a period of time.

Posted September 29, in the consulship of Pius and Pontianus (238).

¹²¹ If Valens can prove this, he wins because his dead brother was a soldier. Blume: "In this case a soldier made a testament and appointed his daughter below the age of puberty, as heir to part of this property and his brother Valens as heir for another part, and further provided that they should be substituted as heirs for each other reciprocally; that is to say, that if one died, the other should be substituted as heir. The daughter accepted her part of the inheritance through a guardian. She thereupon died – intestate while still under the age of puberty. Valens then contended that he, being substituted for her as heir, should have the property; but the mother claimed it as the daughter's heir on intestacy." Blume discusses this intricate situation at length.

¹²² Haloander has December 21.

[9] *Idem A. Valerio.* Sicut certi iuris est militem, qui scit se filium habere aliosque scripsit heredes, tacite eum exheredare intellegi, ita si ignorans se filium habere alios scribat heredes, non esse filio ademptam hereditatem, sed minime valente testamento, si sit in potestate, eum ad successionem venire in dubiis non habetur.

PP. v non. Oct. Pio et Pontiano cons.

[10] *Imp. Philippus A. et Philippus C. Iustino militi.* **pr.** Si, cum vel in utero haberetur filia inscio patre milite, ab eo praeterita sit, vel cum in rebus humanis eam non esse falso rumore prolato pater putavit, nullam eius testamento fecit mentionem, silentium huiusmodi exheredationis notam nequaquam infligit. 1. Is autem miles, qui testamento filiam appellavit eique legatum dedit, non instituendo eam heredem exheredavit.

PP. xii k. Iun. Praesente et Albino cons.

[11] *Idem A. et C. Aemilio militi.* Captatorias institutiones et in militis testamento nullius esse momenti manifestum est.

PP. vii k. Iul. Praesente et Albino cons.

[12] *Idem A. et C. Domitiae.* In testamento militis legem Falcidiam et in legatis et in fideicommissis cessare explorati iuris est. sane si quid ultra vires patrimonii postulatur, competenti defensione tueri te potes.

PP. vi non. Iul. Praesente et Albino cons.

[13] *Impp. Valerianus et Gallienus AA. Claudiae.* Et militibus nostris, centurionibus quoque ob flagitium militare damnatis non aliarum quam castrensiarum rerum testamenta facere permittitur et intestatis iure proprio succeditur a fisco.

PP. non. Aug. Valeriano et Gallieno AA. cons.

[14] *Impp. Diocletianus et Maximianus AA. et CC. heredibus Maximae.* Si a fratre suo militante mater vestra scripta heres successionem eius sibi quaesiit, quamvis testamenti scriptura non continet iuris observationem, hanc hereditatem fratrem testatoris vel eius filios ab intestato evincere non potuisse iure constitit.

[9] *The same Augustus to Valerius.* Just as it is established law that a soldier, if he knows he has a son and has named others as heirs, is understood to disinherit him tacitly, so also, if he is unaware he has a son and names others as heirs, it is not considered doubtful that the inheritance is not taken away from the son, but, since the will is invalid (because it passes over the son), the son succeeds if he is in (his father's) power.

Posted October 3, in the consulship of Pius and Pontianus (238).

[10] *Emperor PHILIP Augustus and the Caesar PHILIP to Justin, a soldier. pr.* If a daughter, when still in the womb without her soldier father's knowing this, was passed over by him (in his will), or on the basis of a false rumor he thought her no longer living and did not mention her in his will, such silence hardly inflicts the stigma of disinheritance. 1. But a soldier who named his daughter in his will and gave her a legacy disinherited her by not designating her as heir.

Posted May 21, in the consulship of Praesens and Albinus (246).

[11] *The same Augustus and Caesar to Aemilius, a soldier.* It is obvious that "estate hunter" designations¹²³ are ineffectual also in a soldier's will.

Posted June 25, in the consulship of Praesens and Albinus (246).

[12] *The same Augustus and Caesar to Domitia.* It is settled law that for a soldier's will the *lex Falcidia* does not apply to both legacies and trusts. But if a demand is made beyond the estate's resources, you can protect yourself with an applicable defense.

Posted July 2, in the consulship of Praesens and Albinus (246).

[13] *Emperors VALERIAN and GALLIENUS Augusti to Claudia.* Our soldiers, including centurions, condemned for some military crime, are not permitted to make wills for property other than that in camp (*bona castrensia*); and when they are intestate, the Treasury succeeds under its own right.

Posted August 5, in the consulship of Valerian and Gallienus Augusti (254).¹²⁴

[14] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to the heirs of Maxima.* If your mother was named heir by her brother while he was a soldier, and she claimed succession to him for herself, even if the will's language did not observe the law (for writing wills), it is settled that the testator's brother or his sons could not claim this inheritance on (the basis of) intestacy.

¹²³ *Designationes captatoriae*, in which the testator names an heir on condition that this person reciprocates. But see C. 2.3.19.

¹²⁴ Haloander dates this constitution to 255.

S. v non. Mai. Aurris CC. cons.

[15] *Imp. Constantinus A. ad populum. pr.* Milites in expeditione degentes, si uxores aut filios aut amicos aut commilitones suos, postremo cuiuslibet generis homines amplecti voluerint supremæ voluntatis adfectu, quomodo possint ac velint testentur, nec uxorum aut filiorum eorum, cum voluntatem patris reportaverunt, meritum aut libertas dignitasque quaeratur. 1. Proinde sicut iuris rationibus licuit ac semper licebit, si quid in vagina aut in clipeo litteris sanguine suo rutilantibus adnotaverint, aut in pulvere inscripserint gladio sub ipso tempore, quo in proelio vitæ sortem derelinquunt, huiusmodi voluntatem stabilem esse oportet.

D. III id. Aug. Nicomediae Optato et Paulino cons.

[16] *Imp. Anastasius A. Hierio pp.* Scriniarios vel apparitores, qui virorum magnificorum magistrorum militum iussionibus vel actibus obtemperant, etsi nomina eorum matriculis militaribus referri videantur, nullatenus in ultimis a se conficiendis voluntatibus iuris militaris habere facultatem decernimus.

D. id. Febr. Constantinopoli Paulo vc. cons.

[17] *Imp. Iustinianus A. Menae pp.* Ne quidam putarent in omni tempore licere militibus testamenta quomodo voluerint componere, sancimus his solis, qui in expeditionibus occupati sunt, memoratum indulgeri circa ultimas voluntates conficiendas beneficium.

D. III id. April. Constantinopoli Decio vc. cons.

[18] *Idem A. Iohanni pp.* Licet antiquis legibus permittebatur pupillis, si tribunatum numeri mereantur, ultimum elogium conficere posse, attamen indignum nostris temporibus esse videtur eum, qui stabilem mentem nondum adeptus est, propter privilegia militum sapientium hominum iura pertractare et in tenera aetate ex tali licentia parentibus

Written May 3, at Aurri,¹²⁵ in the consulship of the Caesars (294).

[15] *Emperor CONSTANTINE Augustus to the people. pr.* If soldiers on a campaign wish that their wives or children or friends or fellow soldiers, or indeed persons of any sort, be embraced through an expression of their final wish, they may make a will in whatever way they can and wish, nor should inquiry be made as to the merits or the freedom and status of their wives and children, when they have achieved the father's wish. 1. And such an (expression of) intent ought to be enduring, just as, for reasons of law, it has been and always will be permitted if they note anything on a scabbard or shield in letters running red with their blood, or they write with a sword in the dust at the very time they are losing their life in battle.

Given August 11, at Nicomedia, in the consulship of Optatus and Paulinus (334).¹²⁶

[16] *Emperor ANASTASIUS Augustus to Hierius, Praetorian Prefect.* We decree that the secretaries and subordinates who submit to the orders or acts of the *virī magnifici* Masters of the Soldiers, even if their names seem to be inscribed in the military rolls, have no privilege whatsoever of military law in writing out their last wills.

Given February 13, at Constantinople, in the consulship of *vir clarissimus* Paul (496).

[17]¹²⁷ *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect.* In order that no one think soldiers are allowed to write their wills at any time (and) however they wish, We ordain that the aforementioned (right) of making last wills be extended only to those who are engaged in a campaign.

Given April 10, at Constantinople, in the consulship of *vir clarissimus* Decius (529).

[18] *The same Augustus to John, Praetorian Prefect.* Although ancient laws allowed minor wards (*pupilli*; boys under 14), if they obtained the position of (military) tribune, to be able to write a final will, still it seems unworthy of our times that a person, not yet of steady mind, enjoy the rights of mature men because of military privileges, and, at a tender age, because of such a permission perhaps do injury to his male ascendants or other relatives by leaving his

¹²⁵ Unidentified, perhaps Mons Aureus near Sirmium (Connolly); compare C. 4.51.5, 4.7.6 (dated just before and just after this one; both from Sirmium).

¹²⁶ Haloander has Paulinus and Julian as Consuls (325). Seeck gives August 11, 325.

¹²⁷ Combine with C. 2.50.8 (dated April 8, which Krüger prefers), 7.35.8 (April 1). Lounghis *et al.* date to April 6, 529.

forte suis vel aliis propinquis nocere propriam substantiam extraneis relinquentem. ideoque hoc fieri nullo modo concedimus.

D. XII k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc. anno II.

XXII Qui Facere Testamentum Possunt vel Non Possunt

[1] *Imp. Gordianus A. Petronio militi. pr.* Quamquam omnium bonorum socer tuus itemque frater eius socii fuerunt, tamen non eo minus idem frater eius, cum fati munus impleret, testamento suo potuit sibi heredem instituere quem vellet. 1. Item non idcirco minus is testamenti factionem habet, quod indivisam successionem cum sorore sua dicatur habuisse.

PP. XII k. Aug. Arriano et Papo cons.

[2] *Imp. Diocletianus et Maximianus AA. et CC. Viatori et Pontiae. pr.* Si is, qui tecum uxorem tuam heredem scripsit, quando testamentum ordinavit, sanae mentis fuerit nec postea alicuius sceleris conscientia obstrictus, sed aut impatiens doloris aut aliqua furoris rabie constrictus se praecipitem dedit, eiusque innocentia liquidis probationibus commendari potest a te, adscitae mortis obtentu postremum eius iudicium convelli non debet. 1. Quod si futurae poenae metu voluntaria morte supplicium antevenit, ratam voluntatem eius conservari leges vetant.

PP. k. Dec. ipsis IIII et III AA. cons.

[3] *Idem AA. et CC. Licinio. pr.* Senium quidem aetatis vel aegritudinem corporis sinceritatem mentis tenentibus testamenti factionem certum est non auferre. 1. Filiam autem, quae in potestate est, testamentum facere non posse indubitati iuris est.

S. IIII non. April. Sirmi CC. cons.

[4] *Idem AA. et CC. Rhodoni. pr.* Si frater patruelis tuus ante quartum decimum aetatis annum suae decessit, cum facere non potuit testamentum, nihil ex eius postremo recte postulatur iudicio. 1. Nam si hanc aetatem egressus, licet vigoris necdum emersissent vestigia, suum ordinavit sollemniter iudicium, hoc convellere frustra conaris.

own property to non-family members (*extranei*). And so we do not permit this being done in any way.

Given October 21, at Constantinople, in the second post-consulate of the viri clarissimi Lampadius and Orestes (532).

**Twenty-Second Title Who Can Make a Will,
and Who Cannot¹²⁸**

[1] *Emperor GORDIAN Augustus to Petronius, a soldier. pr.* Although your father-in-law and his brother were partners as to all their property (*socii omnium bonorum*), nonetheless his brother, when he felt his end approaching, could by his will designate whom he wished as heir. 1. Nor does he have diminished right to make a will (*testamenti factio*) because (at his death) he is said to have held along with his sister an undivided inheritance.

Posted July 21, in the consulship of Arrianus and Papus (243).

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Viator and Pontia. pr.* If a person named your wife heir along with you, and he was of sound mind when he drew up his will, and he subsequently hurled himself down (and committed suicide) while not compelled by consciousness of some crime, but (rather) was either intolerant of pain or driven by some mad frenzy, and his innocence can be vouched for by clear proofs, his final wish may not be overthrown in light of his allegedly having committed suicide. 1. But if through fear of future punishment he anticipated punishment by a voluntary death, the laws forbid his will being enforced as valid.

Posted on December 1, in the consulship of the Augusti themselves, for the fourth and third time, respectively (290).

[3] *The same Augusti and Caesars to Licinius. pr.* It is certain that weakness of age or physical ill-health does not take away the right to make a will from those retaining mental soundness. 1. But (also) it is undisputed law that a daughter who is in (a father's) power cannot make a will.

Written April 2, at Sirmium, in the consulship of the Caesars (294).¹²⁹

[4] *The same Augusti and Caesars to Rhodo. pr.* If your paternal cousin died before reaching age 14, since he could not make a will, nothing is rightly claimed on the basis of his final wish. 1. For if he passed this age even though visible traces of adulthood were lacking, and he drew up his will in proper form, your attempt to overturn it is of no avail.

¹²⁸ See D. 28.1; Inst. 2.12.

¹²⁹ Other manuscripts date this constitution to 293.

S. III id. Nov. Pantichi CC. cons.

[5] *Imp. Constantius A. ad Rufinum pp.* Eunuchis liceat facere testamentum, componere postremas exemplo omnium voluntates, conscribere codicillos salva testamentorum observantia.

D. v k. Mart. Sirmi Constantio A. v et Constantio C. cons.

[6] *Idem A. ad Volusianum pu.* Si quis imperatorem forte heredem instituerit, habeat mutandi iudicii facultatem, et quemcumque voluerit secundum leges in testamento suo heredem scribendi.

D. XII k. Mart. Mediolani Arbitione et Lolliano cons.

[7] *Imppp. Valentinianus Valens et Gratianus AAA. ad Maximum.* Cum heredes instituuntur imperator seu Augusta, ius commune cum ceteris habeant: quod et in codicillis vel fideicommissariis epistulis iure scriptis observandum erit, et sicuti priscis legibus cautum est, imperatori quoque vel Augustae testamentum facere liceat et mutare.

D. VII id. Aug. Contionaci Gratiano A. II et Probo cons.

[8] *Imp. Iustinus A. Demostheni pp. pr.* Hac consultissima lege sancimus, ut carentes oculis seu morbo vel ita nati per nuncupationem suae condant moderamina voluntatis, praesentibus septem testibus, quos aliis quoque testamentis interesse iuris est, tabulario etiam: ut cunctis ibidem collectis primum ad se convocatos omnes, ut sine scriptis testentur, edoceat, deinde exprimat nomina specialiter heredum et dignitates singulorum et indicia, ne sola nominum commemoratio quicquam ambiguitatis pariat, et ex quanta parte vel ex quotis uncis in successionem admitti debeant et quod unumquemque legatarium seu fideicommissarium adsequi velit: omnia denique palam edicat, quae ultimarum capit dispositionum series lege concessa. 1. Quibus omnibus ex ordine peroratis uno eodemque loco et tempore, sed et tabularii manu conscriptis sub obtentu septem (ut dictum est) testium et eorundem testium manu subscriptis, dehinc consignatis tam ab isdem testibus quam a tabulario, plenum obtinebit robur testantis arbitrium.

Written November 11, at Pantichium, in the consulship of the Caesars (294).

[5] *Emperor CONSTANTIUS Augustus to Rufinus, Praetorian Prefect.* Eunuchs may, with due observance of testamentary rules, make a will, compose their last wishes like everyone (else), and add codicils.

Given February 26, at Sirmium, in the consulship of Constantius Augustus, for the fifth time, and Constantinus Caesar (352).

[6] *The same Augustus to Volusianus, Urban Prefect.*¹³⁰ If someone happens to designate the Emperor as his heir, he has the power to change his mind and name in his will whomever he wishes as heir, in accord with the laws.

Given February 18, at Milan, in the consulship of Arbitio and Lollianus (355).

[7] *Emperors VALENTINIAN, VALENS, and GRATIAN Augusti to Maximus.*¹³¹ When the Emperor or the Augusta are designated as heirs, they shall have rights in common with others (heirs), and this (rule) shall be observed also for codicils or for legally executed letters creating trusts (*epistulae fideicommissariae*). And as was provided in ancient laws, also the Emperor or the Augusta may make and change a will.

Given August 7, at Contionacum, in the consulship of Gratian Augustus, for the second time, and Probus (371).

[8] *Emperor JUSTIN Augustus to Demosthenes, Praetorian Prefect. pr.* In this most carefully considered statute We ordain that those lacking eyesight, whether by disease or at birth, may set down the directives of their desire through an oral declaration (*nuncupatio*) in the presence of the seven witnesses, who by law are present also for other (kinds of) wills, along with a notary (*tabularius*). When all are gathered together, he should first tell them they are summoned to him to bear witness without writings, then state specifically the names of the heirs and the ranks and characteristics of each, so that the memory of the names alone not give rise to some ambiguity, and (also state) for what portion or for how many twelfths they should be admitted into succession, and what he wishes each legatee or trust beneficiary to receive. In short, let him say openly that which the legally permissible sequence of final dispositions embraces. 1. If all this is properly stated in one place and time, but also written out in the notary's hand before the seven aforementioned witnesses, and signed by the hand of these witnesses, and then sealed by these same witnesses as well as the notary, the testator's judgment will have full

¹³⁰ C. 7.62.22 and C.Th. 11.36.1, also from 355, are addressed to Volusianus as Praetorian Prefect (in Gaul).

¹³¹ Krüger emends to Maximinus.

1a. Quae in eundem modum erunt observanda, quamvis non heredes instituere, sed legata solum vel fideicommissa et in summa quae codicillis habentur congrua duxerit ordinanda.

1b. At cum humana fragilitas mortis praecipue cogitatione turbata minus memoria possit res plures consequi, patebit eis licentia voluntatem suam sive in testamenti vel in codicilli tenore compositam cui velint scribendam credere, ut in eodem postea collocatis testibus et tabulario, re etiam (ut dictum est) patefacta, cuius causa convocati sunt, et chartula prometur, quam susceptam testatori recitabit tabularius simul et testibus, ut, ubi tenor eorum^{iv} cunctis innotuerit, elogium ipse suum profiteatur agnoscere et ex animi sui quae lecta sunt disposuisse sententia, et in fine subscriptio sequatur testium nec non omnium signacula tam testium (prout dictum est) quam tabularii.

2. Sed quia tabulariorum copia non in omnibus locis datur quaerentibus, iubemus, ubi tabularius reperiri non possit, octavum adhiberi testem, ut, quod tabulario pro supra dicto modo commisimus, id per octavum testem effectum capiat: libera potestate concedenda suas voluntates in praedictum modum ordinantibus chartulam ita subscriptam, ita denique consignatam, ut antelatae formae declarant, cui velint ex testibus custodiendam mandare. sic fieri namque confidimus, ut non recipiat se tantum in caecis testandi licentia, sed ne locum quidem ullum relinquat insidiis tot oculis spectata, tot insinuata sensibus, tot insuper in tuto locata manibus.

D. k. Iun. Constantinopoli Iustiniano et Valerio cons.

[9] *Imp. Iustinianus A. Iuliano pp. pr.* Furiosum in suis indutiis ultimum condere elogium posse, licet ab antiquis dubitabatur, tamen et retro principibus et nobis placuit: nunc autem hoc decidendum est, quod simili modo antiquos animos movit, si coepto testamento furor eum invasit. 1. Sancimus itaque tale testamentum hominis, qui in ipso actu testamenti adversa valetudine tentus est, pro nihilo esse. sin vero voluerit in dilucidis intervallis aliquod condere testamentum vel ultimam voluntatem et hoc sana mente et inceperit facere et consummaverit nullo tali morbo interveniente, stare testamentum sive quamcumque ultimam voluntatem censemus, si et alia omnia accesserint, quae in huiusmodi actibus legitima observatio sequitur.

^{iv} coram

strength. 1a. These provisions shall be observed to the same extent even if he wanted not to name heirs, but only to bequeath legacies or trusts, and in sum what are considered fitting for codicils.

1b. But since human weakness, especially when troubled by thoughts of death, cannot hold in memory numerous things, they (the blind) shall have permission to entrust the writing of their will – whether set out in the form of a testament or codicils – to whom they wish, so that afterwards, when the witnesses and the notary are assembled and the reason for their gathering also set out as described, the document shall be produced, and the notary shall take it up and recite it simultaneously to the testator and the witnesses, so that, when the content is openly known to all, he himself (the testator) may declare recognition of his will and to have disposed of what was read according to the intention of his mind; and at the end the signature of the witnesses shall follow, as well as the seals both of the witnesses, as mentioned, and the notary.

2. But since notaries are not everywhere available to those who seek them, We order that when a notary cannot be found, an eighth witness be summoned, so that what in the process set forth above We entrusted to the notary can be effected through the eighth witness. To those arranging their wishes in the aforesaid manner, free power shall be granted to entrust for safekeeping, to whichever witness they wish, the document signed and sealed as the instructions set out above. For in this way We trust that not only is testamentary permission granted for the blind, but it – having been examined by so many eyes, impressed on so many senses, and further entrusted to so many hands – leaves no room for fraud.

Given June 1, in Constantinople, in the consulship of Justinian and Valertius (521).

[9]¹³² *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect. pr.* Although it was doubted by the ancients whether a mad person can conclude a final will during his quiet intervals, nonetheless this was accepted by prior emperors and by Us. Now this must be determined, something that similarly stirred ancient attention: what if madness overcame him after a will was begun? 1. We ordain that if a man who in the very act of making a will was struck by bad health, such a will is void. But if, during lucid intervals, he wished to establish a testament or last will, and he began to do this and completed it with no such disease intervening, We think that a testament or such a last judgment stands, provided that all other things occur which statutory observance requires for such acts.

¹³² Combine with C. 1.4.27, 5.70.6–7.

D. k. Sept. Constantinopoli Lampadio et Oreste vv. cc. cons.

[10] *Idem A. Iuliano pp. pr.* Discretis surdo et muto, quia non semper huiusmodi vitia sibi concurrunt, sancimus, si quis utroque morbo simul laborat, id est ut neque audire neque loqui possit, et hoc ex ipsa natura habeat, neque testamentum facere neque codicillos neque fideicommissum relinquere neque mortis causa donationem celebrare concedatur nec libertatem sive vindicta sive alio modo imponere: eidem legi tam masculos quam feminas oboedire imperantes. 1. Ubi autem et in huiusmodi vitiis non naturalis sive masculo sive feminae accedit calamitas, sed morbus postea superveniens et vocem abstulit et aures conclusit, si ponamus huiusmodi personam litteras scientem, omnia, quae priori interdiximus, haec ei sua manu scribenti permittimus.

2. Sin autem infortunium discretum est, quod^v ita raro contingit, et surdis, licet naturaliter huiusmodi sensus variatus est, tamen omnia facere et in testamentis et in codicillis et in mortis causa donationibus et in libertatibus et in aliis omnibus permittimus. 3. Si enim vox articulata ei a natura concessa est, nihil prohibet eum omnia quae voluit facere, quia scimus quosdam iuris peritos et hoc subtilius cogitasse et nullum esse exposuisse, qui penitus non exaudit, si quis supra cerebrum illius loquatur, secundum quod Iuventio Celso placuit. 4. In eo autem, cui morbus superveniens auditum tantummodo abstulit, nec dubitari potest, quin possit omnia sine aliquo obstaculo facere.

5. Sin vero aures quidem apertae sint et vocem recipientes, lingua autem penitus praepedita, licet a veteribus auctoribus saepius de hoc variatum est, attamen si et hunc peritum litterarum esse proponamus, nihil prohibet et eum scribentem omnia facere, sive naturaliter sive per interventum morbi huiusmodi infortunium ei accessit.

6. Nullo discrimine neque in masculis neque in feminis in omni ista constitutione servando.

D. x k. Mart. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[11] *Idem A. Iohanni pp. pr.* Nemo ex lege, quam nuper promulgavimus, in rebus, quae parentibus adquiri non possunt, existimet aliquid esse innovandum, et permissum fuisse filiis familias cuiuscumque gradus vel sexus testamenta facere, sive sine patris consensu bona possideant secundum nostrae legis distinctionem, sive cum eorum voluntate.

^v quod <non>

Given September 1, in Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[10] *The same Augustus to Julian, Praetorian Prefect. pr.* Distinguishing “deaf” and “mute,” since such defects do not always coexist, We ordain that if anyone suffers simultaneously from both illnesses, that is, can neither hear nor speak, and is so innately (from birth), he is not allowed to make a will, nor to leave codicils nor a trust, nor to make known a gift in contemplation of his death (*mortis causa*), nor to grant freedom by rod (*vindicta*) or otherwise. We order that both males and females obey the same rule. 1. But also for such defects when a disaster befalling a male or female is not natural (innate), but rather afterwards a supervening disease both took away speech and closed ears, (then,) presuming such a person is literate, all the things that we forbade the first person We permit to this one if he writes in his own hand.

2. But if the misfortune is divided, which not so rarely occurs, and a person is deaf (but not mute) – although the degree of disability of such a person has been altered by nature – nevertheless We allow him to do everything with respect to both wills and codicils and gifts in contemplation of death and (granting) freedom and all other things. 3. For if nature granted him articulate speech, nothing stops him doing whatever he wishes, since we know that some jurists, having considered this matter more precisely, explained that there is no one who is altogether deaf if someone speaks above his cranium, according to the view of Juventius Celsus. 4. As for a person whose hearing is only removed by a supervening illness, there can be no doubt that he can do everything without any obstacle.

5. If, indeed, the person’s ears are open and receive speech, but his own speech is entirely precluded, although there was quite frequent debate about this among ancient authors (the jurists), still, presuming that his person too is literate, nothing forbids him also doing everything by writing, whether the misfortune occurred naturally or by intervention of such a disease.

6. In this entire constitution no distinction is to be made among males and females.

Given February 20, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[11]¹³³ *The Same Augustus to John, Praetorian Prefect. pr.* Let no one think that there was any innovation through the statute We recently promulgated concerning property that cannot be acquired for male ascendants, and that it was permitted to children in a father’s power, of whatever rank or sex, to make

¹³³ Combine with C. 6.61.8. The law referred to in the *principium* is C. 6.61.6. For the “ancient law” in section 1, see C. 6.22.3.1.

1. Nullo etenim modo hoc eis permittimus, sed antiqua lex per omnia conservetur, quae filiis familias nisi in casibus certis testamenta facere nullo concedit modo, et in his personis, quae huiusmodi facultatem habere iam concessae sunt.

D. IIII k. Aug. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[12] *Idem A. Iohanni pp.* Omnes omnino, quibus quasi castrensia peculia habere ex legibus concessum est, habeant licentiam in ea tantummodo ultimas voluntates condere secundum nostrae constitutionis tenorem, quae talibus testamentis de inofficiosi querella immunitatem praestavit.

D. k. Sept. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

XXIII De Testamentis: Quemadmodum Testamenta Ordinantur

[1] *Imp. Hadrianus A. Catonio Vera.* Testes servi an liberi fuerunt, non oportet in hac causa tractari, cum eo tempore, quo testamentum signabatur, omnium consensu liberorum loco habiti sunt nec quisquam eis usque adhuc status controversiam moverit.

Sine die et cons.

[2] *Imp. Alexander A. Expedito.* Publicati semel testamenti fides, quamvis ipsa materia, in qua primum a testatore scriptum relictum fuit, casu qui probatur intercidit, nihilo minus valet.

PP. k. Iun. Fusco II et Dextro cons.

[3] *Idem A. Antigono.* Ex imperfecto testamento nec imperatorem hereditatem vindicare saepe constitutum est. licet enim lex imperii sollemnibus iuris imperatorem solverit, nihil tamen tam proprium imperii est, ut legibus vivere.

PP. XI k. Ian. Lupo et Maximo cons.

wills, whether, following the distinction in Our statute, they possess property without a father's consent or by their (fathers') wish. 1. For in no respect do We permit this to them, but in every respect the ancient law remains in force; it in no way allows children in a father's power to make wills except in certain cases and in the case of those persons who are now allowed to have a power of this kind.

Given July 29, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[12] ¹³⁴ *The same Augustus to John, Praetorian Prefect.* All of those who are allowed by statutes to have "quasi-camp" *peculia*, shall have permission to establish their last wishes for it alone, following the sense of Our constitution that gave such wills immunity from the complaint of undutifulness.

Given September 1, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Twenty-Third Title Wills: How Wills Are Drawn Up¹³⁵

[1] *Emperor HADRIAN Augustus to Catonius Verus.* Whether witnesses (to a will) were slave or free should not be considered in this case, when at the time when the will was sealed they were considered as free by general agreement and no one thus far has raised a dispute as to their status.¹³⁶

Without date and consul.

[2] *Emperor ALEXANDER Augustus to Expeditus.* Once a will is published, even if the material on which it was first left written by the testator (then) perished by a demonstrated accident, nonetheless its validity remains.

Posted June 1, in the consulship of Fuscus, for the second time, and Dexter (225).

[3] *The same Augustus to Antigonus.* Constitutions have often stated that not even the Emperor can claim an inheritance from a deficient testament. For although the statute granting sovereignty (*lex imperii*) releases the Emperor from legal formalities, still nothing is as becoming of sovereignty as living by the laws.

Posted December 22, in the consulship of Lupus and Maximus (232).

¹³⁴ This law epitomizes C. 3.28.37.10–f; combine with C. 1.3.49, 1.5.22. Justinian refers to C. 3.28.37.1f.

¹³⁵ See D. 28.1; Inst. 2.10.

¹³⁶ This constitution (the oldest in the Codex) is referred to by Inst. 2.10.7

[4] *Imp. Gordianus A. Rufino.* Si in nomine praenomine seu cognomine testator erravit nec tamen de quo senserit incertum sit, error huiusmodi nihil officit veritati.

PP. XII k. Aug. Gordiano A. et Aviola cons.

[5] *Impp. Valerianus et Gallienus AA. Lucillo.* Neque professio neque adseveratio nuncupantium filios, qui non sunt, veritati praeiudicant: et quae ut filiis testamento relinquuntur, iuxta ea quae a principibus statuta sunt non deberi certi iuris est.

Accepta IIII non. Iul. Valeriano II et Gallieno AA. cons.

[6] *Impp. Diocletianus et Maximianus AA. Terentiae.* Verba testamenti, quibus mater vestra decedens nihil se cuiquam donasse significavit, si res se aliter habet, fidem veri non perfringunt.

PP. III non. Nov. Diocletiano A. II et Aristobulo cons.

[7] *Idem AA. Rufinae.* Errore scribentis testamentum iuris sollemnitas mutilari nequaquam potest, quando minus scriptum, plus nuncupatum videtur. et ideo recte testamento facto, quamquam desit 'heres esto', consequens est existente herede legata sive fideicommissa iuxta voluntatem testatoris oportere dari.

PP. XVII k. Febr. ipsis IIII et III AA. cons.

[8] *Idem AA. Marcellino. pr.* Casus maioris ac novi contingentis ratione adversus timorem contagionis, quae testes deterret, aliquid de iure laxatum est: non tamen prorsus reliqua etiam testamentorum sollemnitas perempta est. 1. Testes enim huiusmodi morbo oppresso eo tempore iungi atque sociari remissum est, non etiam conveniendi numeri eorum observatio sublata.

[4] *Emperor GORDIAN Augustus to Rufinus.* If a testator makes a mistake on a nomen or praenomen or cognomen, and yet it is not uncertain what he meant, a mistake of this sort does not obstruct the truth (and so can be corrected).

Posted July 21, in the consulship of Gordian Augustus and Aviola (239).¹³⁷

[5] *Emperors VALERIAN and GALLIENUS Augusti to Lucillus.* Neither enrolment (on public registers), nor an affirmation by persons declaring children who are not (their children), can sway the truth. And it is settled law that things left by will (to them) "as children" are not owed, in accord with imperial ordinances.¹³⁸

Received July 4,¹³⁹ in the consulship of Valerian, for the second time, and Gallienus. Augusti (254).

[6] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Terentia.* The words of the will whereby your (plural) dying mother made known that she had made no gift to anyone cannot break down the credibility of the truth if the matter is otherwise.

Posted November 3, in the consulship of Diocletian Augustus, for the second time, and Aristobulus (285).

[7] *The same Augusti to Rufina.* A legal formality can hardly be undermined by a mistake of the will's writer, since it (the will) seems less written than orally declared (*nuncupatio*). So, when the will is correctly made even though (the phrase) "let him be my heir" is missing, the result is that, when the heir emerges, the legacies or trusts must be given as the testator wished.

Posted January 16, in the consulship of the Augusti themselves, for the fourth and third time, respectively (290).

[8] *The same Augusti to Marcellinus. pr.* Because of a greater and newly arising adversity, there was some legal relaxation in response to witnesses being deterred by fear of contagion; but the remainder of the formality of wills was not wholly removed. 1. Relaxed was (the requirement) that such witnesses, overwhelmed by (their fear of) disease, be linked and associated at that time (when the will is formalized); but observance of the number of them to be gathered was not removed.

¹³⁷ Haloander gives July 2, 255.

¹³⁸ Blume: "Here the gift of property to one as to a child, when the beneficiary was not in fact a child, was void. Ordinarily a misdescription made no difference. C. 6.44.2 ... But the instant rescript is confirmed by the Syrian Law Book ... which shows that a testator could leave any part of his estate to an illegitimate child only in the manner in which he would leave anything to a stranger. In the same way a bequest to one named as brother who was not such was void."

¹³⁹ Haloander has July 10.

S. k. Iul. ipsis IIII et III AA. cons.

[9] *Idem AA. Patrocliae.* Si non speciali privilegio patriae tuae iuris observatio relaxata est et testes non in conspectu testatoris testimoniorum officio functi sunt, nullo iure testamentum valet.

PP. k. Iul. ipsis IIII et III AA. cons.

[10] *Idem AA. et CC. Menophiliano.* Si testamentum iure factum sit et heres sit capax, auctoritate rescripti nostri rescindi non oportet.

S. xv k. ... AA. cons.

[11] *Idem AA. et CC. Zetho.* Non idcirco minus iure factum testamentum suas obtinet vires, quod post mortem testatoris subtractum probatur.

S. prid. non. Iul. AA. cons.

[12] *Idem AA. et CC. Matroniae. pr.* Si unus de septem testibus defuerit vel coram testatore omnes eodem loco testes suo vel alieno anulo non signaverint, iure deficiat testamentum. 1. De his autem, quae interleta sive supra scripta dicis, non ad iuris sollemnitatem, sed ad fidei pertinet quaestionem, ut appareat, utrum testatoris voluntate emendationem meruerunt, vel ab altero inconsulte deleta sunt, an ab aliquo falso haec fuerint commissa.

S. prid. non. Iul. Philippopoli AA. cons.

[13] *Idem AA. et CC. Euripidi.* Testandi causa de pecunia sua legibus certis facultas, non iurisdictionis mutare formam vel iuri publico derogare cuiquam permissum est.

S. vi k. Dec. CC. cons.

[14] *Idem AA. et CC. Achilleo.* Non codicillum, sed testamentum aviam vestram facere voluisse institutio et exhereditatio facta probant evidenter.

S. id. Dec. CC. cons.

Written July 1,¹⁴⁰ in the consulship of the Augusti themselves, for the fourth and third time, respectively (290).

[9] *The same Augusti to Patroclia.* If observance of law was not relaxed by a special privilege (conferred) on your homeland, and witnesses did not perform the duty of witnessing in the testator's sight, under no rule of law is the will valid.

Posted July 1, in the consulship of the Augusti themselves, for the fourth and third times, respectively (290).

[10] *The same Augusti and the Caesars to Menophilianus.* If the will was made legally and the heir is competent to take, it ought not to be annulled on the authority of a rescript from Us.

Written on the fifteenth day before the kalends¹⁴¹ ... in the consulship of the Augusti (293).

[11] *The same Augusti and Caesars to Zethus.* A legally made will does not lose its force because it is shown to have been purloined after the testator's death.

Written July 6,¹⁴² in the consulship of the Augusti (293).

[12] *The same Augusti and Caesars to Matronia. pr.* If one of the seven witnesses was absent, or all the witnesses, in the same place and in the testator's presence, did not seal it with their own or another's ring, the will shall be legally defective. 1. But regarding what you say are erasures or interlineations, this goes not to a legal formality, but to the issue of (the will's) credibility, so that it be apparent whether they merited change with the testator's consent, or were carelessly deleted by someone else, or were fraudulently perpetrated by someone.

Written July 6, at Philippopolis, in the consulship of the Augusti (293).

[13] *The same Augusti and Caesars to Euripides.* To each person is granted the power to use definite rules for disposing of their assets (*pecunia*) by will, but not to alter the rules of the (Perpetual) Edict or to deviate from public law.

Written November 26, in the consulship of the Augusti (293).

[14]¹⁴³ *The same Augusti and Caesars to Achilleus.* Her making a designation (of an heir) and disinheritance clearly show that your grandmother wished to make, not a codicil, but a will.

Written December 13, in the consulship of the Caesars (294).

¹⁴⁰ Haloander has "Given June 16."

¹⁴¹ Haloander: "July 18."

¹⁴² Haloander: November 12.

¹⁴³ Combine with C. 2.4.36 (possibly) and 6.42.29, with slightly different dates.

[15] *Imp. Constantinus A. ad populum. pr.* Quoniam indignum est ob inanem observationem irritas fieri tabulas et iudicia mortuorum, placuit ademptis his, quorum imaginarius usus est, institutioni heredis verborum non esse necessariam observantiam, utrum imperativis et directis verbis fiat an inflexa.^{vi} 1. Nec enim interest, si dicatur 'heredem facio' vel 'instituo' vel 'volo' vel 'mando' vel 'cupio' vel 'esto' vel 'erit', sed quibuslibet confecta sententiis, quolibet loquendi genere formata institutio valeat, si modo per eam liquebit voluntatis intentio, nec necessaria sint momenta verborum, quae forte seminecis et balbutiens lingua profudit. 2. Et in postremis ergo iudiciis ordinandis amota erit sollemnium sermonum necessitas, ut, qui facultates proprias cupiunt ordinare, in quacumque instrumenti materia conscribere et quibuscumque verbis uti liberam habeant facultatem.

S. d. k. Febr. Serdiceae Constantio A. et Constante C. cons.

[16] *Imppp. Gratianus Valentinianus et Theodosius AAA. Eutropio pp. pr.* Non dubium nec incertum est, sicut imperatoribus, ita qualibet dignitate vel potestate decoratis viris tam hereditatem quam legatum seu fideicommissum relinqui posse. 1. Illud adiciendum est, ut, qui ex testamento vel ab intestato heres extiterit, etsi voluntas defuncti circa legata seu fideicommissa seu libertates legibus non sit subnixa, tamen, si sua sponte agnoverit, implendi eam necessitatem habeat.

S. d. k. Iul. Thessalonicae Gratiano v et Theodosio AA. cons.

[17] *Impp. Arcadius et Honorius AA. Aeternali proconsuli Asiae.* Testamentum non ideo infirmari debet, quod diversis hoc deficiens nominibus appellavit, cum superflua non noceant, namque necessaria praetermissa imminuunt contractus et testatoris efficiunt voluntati, non abundans cautela.

D. XII k. April. Arcadio IIII et Honorio III AA. cons.

[18] *Idem AA. Africano pu.* Testamenta omnia ceteraque, quae apud officium censuale publicari solent, in eodem reserventur nec usquam

^{vi} inflexis

[15]¹⁴⁴ *Emperor CONSTANTINE Augustus to the people. pr.* Since it is unworthy that the wills and judgments of the dead become invalid through empty technicality, and with those whose value is nominal having been removed, it is determined that no particular words are required for designating an heir, whether this is done by imperative, direct, or indirect words. 1. For it makes no difference whether it is worded "I make an heir," or "I designate," or "I wish," or "I charge," or "I desire," or "Let him be," or "He will be"; but a designation shall be valid by whatever wording it is accomplished and in whatever mode of speech it is formed, provided only that the intended disposition is comprehensible through it; nor shall there be required weighty words that, perchance, the stammering tongue of a moribund man poured out. 2. And thus in drawing up final wishes the necessity of formal words will be taken away, so that those who wish to dispose of their own resources have free rein to write on a document of any material and to use whatever words they want.

Written and given February 1, at Serdicea, in the consulship of Constantius Augustus and Constans the Caesar (339).

[16]¹⁴⁵ *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS Augusti to Eutropius, Praetorian Prefect. pr.* It is neither doubtful nor uncertain that both an inheritance and a legacy or trust can be left to men adorned with any rank or power, just as to emperors. 1. This should be added, that a person who becomes heir through a will or on intestacy, even if the wishes of the deceased as to legacies or trusts or grants of freedom are not supported by legal formalities, is nevertheless obliged to carry them out if he voluntarily recognizes them.

Written and given July 1, at Thessalonica, in the consulship of Gratian, for the fifth time, and Theodosius, Augusti (380).

[17]¹⁴⁶ *Emperors ARCADIUS and HONORIUS Augusti to Aeternalis, Proconsul of Asia. A* will should not be invalidated because the decedent called it by different names, since trivial matters are not prejudicial. For (only) the omission of necessary things subverts contracts or thwarts the testator's wishes, (but) not an abundance of caution.

Given March 21, in the consulship of Arcadius, for the fourth time, and Honorius, for the third time, Augusti (396).

[18]¹⁴⁷ *The same Augusti to Africanus, Urban Praetor.* All wills and other documents that are customarily announced in the registration office (*officium*

¹⁴⁴ Combine with C. 6.9.9 and the constitutions cited there; see the note on C. 6.9.9. Probably issued in fact by Constantius (11); but Seeck gives January 31, 320, and associates this constitution with a single original law.

¹⁴⁵ Combine with C. 5.1.3, and constitutions cited there. On the substance, see C. 6.42.1-2.

¹⁴⁶ = C.Th. 4.4.3; combine with C. 3.31.11. Seeck gives March 21, 402.

¹⁴⁷ = C.Th. 4.4.4. On the registration office, see C. 8.53.32 (registration of gifts).

permittatur fieri ulla translatio. mos namque retinendus est fidelissimae vetustatis, quem si quis in hac urbe voluerit immutare, irritam mortuorum videri faciet voluntatem.

D. VI k. Oct. Constantinopoli Caesario et Attico cons.

[19] *Impp. Honorius et Theodosius AA. Iohanni pp. pr.* Omnium testamentorum sollemnitatem superare videatur, quod insertum mera fide precibus inter tot nobiles probatasque personas etiam conscientiam principis tenet. 1. Sicut igitur securus erit, qui actis cuiuscumque iudicis aut municipum aut auribus privatorum mentis suae postremum publicavit iudicium, ita nec de eius umquam successione tractabitur, qui nobis mediis et toto iure, quod nostris est scriniis constitutum, teste succedit. 2. Nec sane illud heredibus nocere permittimus, si rescripta nostra nihil de eadem voluntate responderint. voluntates etenim hominum audire volumus, non iubere, ne post sententiam nostram inhibita videatur commutationis arbitrium, cum hoc ipsum, quod per supplicationem nostris auribus intimatur, ita demum firmum sit, si ultimum comprobatur nec contra iudicium suum defunctus postea venisse detegitur.

3. Ne quid sane praetermisisse credamur huiusmodi institutionis successoribus designatis, omnia quae scriptis heredibus competunt iubemus eos habere nec super bonorum possessionis petitione ullam controversiam nasci, cum pro herede agere cuncta sufficiat et ius omne ipsa complere aditio videatur. 4. Omnibus etenim praestandum esse censemus, ut libero arbitrio, cui testandi facultas suppetit, successorem suum oblatis possit precibus declarare et stabile sciat esse quod fecerit, nec institutus heres pertimescat, cum oblatas preces secundum voluntatem defuncti idoneis possit testibus approbare, si ei alia nocere non possunt.

D. XII k. Mart. Ravennae post consulatum Honorii VIII et Theodosii v AA.

censuale) are (also) kept there, nor is any removal of them allowed anywhere. For this ancient custom must be preserved most faithfully; if anyone in this city (Constantinople) should wish to alter it, he would make the wishes of the dead seem idle.

Given September 26, at Constantinople, in the consulship of Caesarius and Atticus (397).

[19]⁴⁸ *Emperors HONORIUS and THEODOSIUS Augusti to John, Praetorian Prefect, pr.* It should be considered as exceeding the formality (required) of all wills when there also comes to the Emperor's knowledge one that, on the basis of pure trust (i.e., lacking the formal requirements) is created by (the testator's) prayers before so many noble and worthy persons. 1. For just as he (a testator) will be protected who has announced the final judgment of his mind in the records of any judge or municipality or in the hearing of private individuals, so no question will ever arise about the succession of a person who succeeds in Our midst and with the witness of the entire law that is founded in Our bureaus. 2. Nor do We allow it to harm heirs if Our rescripts say nothing about the same will. For We wish to hear men's wills, not to command them, so that a decision to change (a will) not seem deterred after We give a judgment (in a rescript), when this very will which through a petition is communicated to Our ears shall only then be confirmed if it is shown to be his final (judgment) and the deceased is not discovered to have gone contrary to his judgment.

3. In order that We not be thought to have omitted something, We order that, when the successors of such a designation have been appointed, they have everything that falls to written heirs (under a private will), nor does any lawsuit over a claim to possession of the estate arise, since it is enough to conduct business as heir and the very entry (into succession) fulfills every legal requirement. 4. For We hold that everyone possessing the power of testation shall be provided with the ability freely to declare his successor through a petition submitted (to Us), and he shall know that his act is enduring. Nor should the designated heir fear, since he can prove, through suitable witnesses, the petition submitted according to the decedent's wishes, assuming that nothing else can prejudice his rights.

Given February 18, at Ravenna, in the post-consulate of Honorius, for the ninth time, and Theodosius, for the fifth time, Augusti (413).

⁴⁸ Combine with C.Th. 1.2.12, 2.19.6, and 8.17.4. Seeck dates to February 14, 413. Blume: "The law is important. It shows that there were two kinds of testaments, public and private. Formalities in execution applied only to the latter. Public wills are those that were (a) presented to the emperor, in council, and subsequently kept in the archives of one of the imperial bureaus, probably that of petitions; (b) those that were recorded on the public records of a judge (president, rector, etc.) or of a municipal officer, which might be done either by going to such office and letting the officer record the testament upon oral declaration, or by taking a written document there and having it spread upon the public records."

[20] *Idem AA. edictum ad populum urbis Constantinopolitanae et ad omnes provinciales. pr.* Nolumus convelli deficientium scriptas iure ac sollemniter voluntates, dum quoddam morientis supremum et non adscriptum processisse confirmatur arbitrium, tamquam patrimonium suum ad nos deficiens maluerit pertinere. 1. Omnibus enim privatis et militantibus interdiciamus, ut huiusmodi perhibeant testimonia, et falsi criminis reos teneri praecipimus, si, cum scriptae iure ac sollemniter deficientium extiterint voluntates, non scriptum aliquid sub nostrorum nominum mentione falso adstruere moliantur. 2. Nemo itaque relictus heres vel legibus ad successionem vocatus nostrum vel potentium nomen horrescat: nemo ferre testimonia in hunc modum vel suscipere gestis huiusmodi voces audeat nostro vel etiam privatorum potentium nomine.

D. VII id. Mart. Constantinopoli Theodosio A. VII et Palladio cons.

[21] *Impp. Theodosius et Valentinianus AA. Florentio pp. pr.* Hac consultissima lege sancimus licere per scripturam confidentibus testamentum, si nullum scire volunt quae in eo scripta sunt, signatam vel ligatam vel tantum clausulam involutamque proferre scripturam vel ipsius testatoris vel cuiuslibet alterius manu conscriptam, eamque rogatis testibus septem numero civibus Romanis puberibus omnibus simul offerre signandam et subscribendam, dum tamen testibus praesentibus testator suum esse testamentum dixerit quod offertur eique ipse coram testibus sua manu in reliqua parte testamenti subscripserit: quo facto et testibus uno eodemque die ac tempore subscribentibus et consignantibus valere testamentum nec ideo infirmari, quod testes nesciant quae in eo scripta sunt testamento. 1. Quod si litteras testator ignoret vel subscribere nequeat, octavo subscriptore pro eo adhibito eadem servari decernimus.

2. In omnibus autem testamentis, quae praesentibus vel absentibus testibus dictantur, superfluum est uno eodemque tempore exigere testatorem et testes adhibere et dictare suum arbitrium et finire testamentum. sed licet alio tempore dictatum scriptumve proferatur testamentum, sufficiet uno eodemque die nullo actu interveniente testes omnes, videlicet simul nec diversis temporibus, subscribere signareque testamentum. 2a. Finem autem testamenti subscriptiones et signacula testium esse decernimus. non subscriptum namque a testibus ac

[20]¹⁴⁹ *The same Augusti, an edict to the people of the city of Constantinople and to all the people of the provinces. pr.* We do not want the wishes of decedents, when written out in legal and proper form, to be overturned while some "final," unwritten judgment of the dying man is affirmed to have been made, whereby the decedent preferred that his estate come to Us. 1. For We forbid all persons, (both) private individuals and officials, from providing testimony of this kind, and We order them held guilty of falsification if, when decedent's wishes exist written out in legal and proper form, they fraudulently undertake to establish some unwritten (will) through mention of Our names. 2. So let no one who is appointed heir or summoned by statutes to the inheritance fear Our name or that of the powerful: no one shall dare to produce witnesses in such a way, or to accept testimony for such acts, on the basis of Our name or that of powerful private individuals.

Given March 9, at Constantinople, in the consulship of Theodosius Augustus, for the seventh time, and Palladius (416).

[21]¹⁵⁰ *Emperors THEODOSIUS and VALENTINIAN Augusti to Florentius, Praetorian Prefect. pr.* Through this well-considered law We ordain that persons making a will in writing are permitted, if they want no one to know what is written in it, to produce the writing sealed or tied up, or simply closed and folded, written either by the testator's hand or that of any third party; and, before seven summoned witnesses who are all adult Roman citizens, to offer it for their simultaneous signature and sealing, provided that in the witnesses' presence the testator says this is his will which is offered, and before the witnesses he signs it in his own hand on the will's final part. If this is done and the witnesses sign and seal it on one and the same day and time, (We ordain that) the will is valid and is not void because the witnesses do not know what is written in the will. 1. But if the testator is illiterate and unable to sign, We decree that, with an eighth signatory summoned in his place, the same process be followed.

2. For all wills that are dictated when witnesses are present or absent, it is excessive to demand that the testator summon witnesses and dictate his judgment and complete his will at one and the same time. On the contrary, if a will is dictated or written at a different time, it shall suffice if all the witnesses sign and seal the will on one and the same day with no intervening transaction, that is, simultaneously and not at different times. 2a. We decree that the conclusion of a will is the signatures and seals of witnesses; for a will not signed and

¹⁴⁹ = C.Th. 4.4.5 (either March 9 or 13), whence the heading is restored. Seeck prefers March 13, 416.

¹⁵⁰ = Nov. Theod. 16.1.2–5; combine with C. 5.28.8, 7.2.14.

signatum testamentum pro imperfecto haberi convenit. 3. Ex imperfecto autem testamento voluntatem tenere defuncti, nisi inter solos liberos a parentibus utriusque sexus habeatur, non volumus. 3a. Si vero in huiusmodi voluntate liberis alia sit extranea mixta persona, certum est eam voluntatem, quantum ad illam dumtaxat permixtam personam pro nullo haberi, sed liberis ad crescere.

4. Per nuncupationem quoque, hoc est sine scriptura, testamenta non alias valere sancimus, nisi septem testes, ut supra dictum est, simul uno eodemque tempore collecti testatoris voluntatem ut testamentum sine scriptura facientis audierint.

5. Si quis autem testamento iure perfecto postea ad aliud pervenerit testamentum, non alias quod ante factum est infirmari decernimus, quam id, quod secundum facere testator instituit, iure fuerit consummatum, nisi forte in priore testamento scriptis his, qui ab intestato ad testatoris hereditatem successionemve venire non poterant, in secunda voluntate testator eos scribere instituit, qui ab intestato ad eius hereditatem vocantur. eo enim casu, licet imperfecta videatur scriptura posterior, infirmato priore testamento secundam eius voluntatem non quasi testamentum, sed quasi voluntatem intestati valere sancimus. 5a. In qua voluntate quinque testium iuratorum depositiones sufficient: quo non facto valebit primum testamentum, licet in eo scripti videantur extranei.

6. Illud etiam huic legi perspeximus inserendum, ut etiam Graece omnibus liceat testari.

D. prid. id. Sept. Constantinopoli Theodosio A. xvii et Festo cons.

[22] *Imp. Zeno A. Sebastiano pp.* Dictantibus testamenta vel aliam quamlibet ultimam voluntatem legatum vel fideicommissum vel quodcumque aliud quolibet legitimo titulo testatorem posse relinquere minime dubitandum est. Testibus etiam ad efficiendam voluntatem adhibitis pro suo libitu quod voluerit testator relinquere non prohibetur.

D. k. Mai. Constantinopoli Basilio iuniore vc. cons.

[23] *Imp. Iustinus A. Archelao pp.* Consulta divalia, quibus considerate prospectum est, ne voluntates ultimae deficientium in hac regia urbe confectae apud alium aperiri possint quam virum clarissimum

sealed by witnesses is considered as incomplete. 3. We do not want the wishes of a decedent to bind on the basis of an incomplete will, except as it is made between descendants alone by ascendants of either sex. 3a.¹⁵¹ But if another non-family member (*extranea persona*) is mixed with the descendants, it is certain that it is held void insofar as the added person is concerned, and his share goes to the descendants.

4. We also ordain that wills made through oral declaration (*per nuncupationem*), that is, without a writing, are not otherwise valid unless seven witnesses, as said above, are gathered together at one and the same time and hear the wish of the testator as of one making an unwritten will.

5. If someone with a legally complete will later comes to make a second will, We decree that the earlier one is not invalidated otherwise than if the second one that the testator undertakes to make is legally completed – unless, perchance, those named (as heirs) in the earlier will are persons who could not come into the testator's inheritance or succession upon intestacy, while in the second will the testator undertakes to name persons who are summoned to his inheritance upon intestacy. For in this case, although the later writing is held incomplete, the earlier will is invalidated; in accord with his wish We ordain that it (the second will) is valid not as a will, but as the wish of one dying intestate. 5a. In this will the statements of five sworn witnesses will suffice; if this is not done, the first will shall prevail, even though third parties appear to be named in it.¹⁵²

6. We have also observed that this should be added to this law, that all are permitted to make wills also in Greek.

Given September 12, at Constantinople, in the consulship of Theodosius Augustus, for the seventeenth time, and Festus (439).

[22] *Emperor ZENO Augustus to Sebastianus, Praetorian Prefect.* There is not the slightest doubt that a testator can leave, under any legal title, a legacy or trust or anything else to persons dictating their testaments or any other (expression of) final will. A testator is also not forbidden from freely leaving what he wishes to the witnesses summoned to finalize a will.

Given May 1, at Constantinople, in the consulship of the vir clarissimus Basilius the younger (480).

[23] *Emperor JUSTIN Augustus to Archelaus, Praetorian Prefect.* We now also confirm the imperial ordinances whereby it was thoughtfully provided that decedents' final wills, executed in this Imperial City (Constantinople), cannot be opened before anyone but the *vir clarissimus* acting Master of the Census,

¹⁵¹ This section is inserted on the basis of C. 3.36.26.1.

¹⁵² In other words, the decedent is held to prefer intestacy.

pro tempore census magistrum, monumentis intervenientibus pro iuris ordine, neve in hereditate, cuius summa centum aureorum pretium non excedit, mercedis quicquam aut sumptuum censum administrantes aut censualis apparitio super intimandis isdem elogiis audeant adsequi, firma nunc quoque edicimus ac repetita promulgatione non solum iudices quorumlibet tribunalium, verum etiam defensores ecclesiarum, quos turpissimum intimationis genus inrepserat, praemonendos censemus, ne rem attingant, quae nemini prorsus omnium secundum constitutionum praecepta quam census magistro competit. absurdum est namque, si promiscuis actibus rerum turbentur officia et alii creditum alius subtrahat, ac praecipue clericis, quibus opprobrium est, si peritos se velint disceptationum esse forensium: poena etiam ferendis temeratoribus praesentis sanctionis quinquaginta librarum auri. nec enim concedendum est, ut suprema vota deficientium eversionis quicquam ex incongrua insinuatione contrahant, dum res ab incongruis usurpatur audacter.

D. XIII k. Dec. Constantinopoli Iustino A. II et Opilione cons.

[24] *Imp. Iustinianus A. Menae pp.* Ambiguitates, quae vel imperitia vel desidia testamenta conscribentium oriuntur, resecandas esse censemus et, siue institutio heredum post legatorum dationes scripta sit vel alia praetermissa sit observatio non ex mente testatoris, sed vitio tabellionis vel alterius qui testamentum scribit, nulli licentiam concedimus per eam occasionem testatoris voluntatem subvertere vel minuere.

D. k. Ian. dn. Iustiniano A. pp. II cons.

[25] *Idem A. Menae pp.* Praeposteri reprehensionem, quam novella constitutio in dotalibus instrumentis sustulisse noscitur, in aliis quoque omnibus tam contractibus quam testamentis tollimus, ut tali exceptione cessante et stipulatio et alii contractus et testatoris voluntas indubitate valeat, exactione videlicet post condicionem vel diem competente.

S. d. VII id. Dec. dn. Iustiniano A. pp. II cons.

[26] *Idem A. Menae pp.* In testamentis sine scriptis faciendis omnem formalem observationem penitus amputamus, ut, postquam septem

with a record kept in accord with ordinary legal procedure; nor for an estate whose amount does not exceed 100 gold coins shall the census administrators or census subordinates dare to accept any pay or expense for recording these same will clauses. By this fixed repeated proclamation¹⁵³ We also hold that not only the judges of all tribunals, but also the defenders of churches, who have adopted a most base form of (testamentary) publication, must be warned not to meddle in a matter that, by the precepts of all constitutions, falls, in a word, to no one but the Master of the Census. For it is ridiculous if administration of affairs is troubled by indiscriminate acts and one person take away what is entrusted to another, and (so) especially for the clergy, for whom it is disgraceful to affect skill in legal disputes. Those transgressing the present ordinance shall be inflicted with a fine of 50 pounds of gold. For it must not be allowed that decedents' final wishes suffer any invalidation from an inappropriate publication, as long as the matter has been rashly undertaken by inappropriate persons.

Given November 19, at Constantinople, in the consulship of Justin Augustus, for the second time, and Opilio (524).

[24]¹⁵⁴ *Emperor Justinian Augustus to Menas, Praetorian Prefect.* Uncertainties arising from the inexperience or sloth of those writing wills We hold should be pruned back, and, whether the designation of heirs is written after the giving of legacies or some other formality is overlooked not through the testator's intention, but by the fault of the notary or someone else writing the will, We give no one permission by this opportunity to overturn or diminish the testator's wish.

Given January 1, in the consulship of Our Lord Justinian, Ever Augustus, for the second time (528).

[25]¹⁵⁵ *The same Augustus to Menas, Praetorian Prefect.* The objection that a formulation is inverted, which a recent constitution is acknowledged to remove for dowry documents, We lift also for all other acts, both contracts and wills, so that such a defense fails, and both a stipulation and other contracts and a testator's wish are unquestionably valid, with execution due, obviously, after (fulfillment of) a condition or a deadline.

Written and given December 7, in the consulship of Our Lord Justinian, Ever Augustus, for the second time (528).

[26]¹⁵⁶ *The same Augustus to Menas, Praetorian Prefect.* In the making of non-written wills (through *nuncupatio*), We abolish all formal ritual entirely, so that,

¹⁵³ = C. 1.3.40, through "50 pounds of gold."

¹⁵⁴ Combine with C. 3.28.30 (June 1, adopted here by Lounghis *et al.*), 6.41.1.

¹⁵⁵ Combine with C. 8.37.11 (December 11, adopted here by Lounghis *et al.*). Justinian refers to a lost ordinance of Leo, but see Inst. 3.19.14.

¹⁵⁶ Combine with C. 3.28.31 (December 11, the likelier date, which is adopted by Lounghis *et al.*).

testes convenerint, satis sit voluntatem testatoris vel testatricis simul omnibus manifestari significantis, ad quos substantiam suam pervenire vellet vel quibus legata vel fideicommissa vel libertates disponeret, etiamsi non ante huiusmodi dispositionem praedixerit testator vel testatrix illa formalia verba: ideo eosdem testes convenisse, quod sine scriptis suam voluntatem vel testamentum componere censuit.

S. d. IIII id. Dec. Constantinopoli dn. Iustiniano A. pp. II cons.

[27] *Idem A. Iuliano pp. pr.* Sancimus, si quis legitimo modo condidit testamentum et post eius confectionem decennium profluxit, si quidem nulla innovatio vel contraria voluntas testatoris apparuit, hoc esse firmum. quod enim non mutatur, quare stare prohibetur? quemadmodum enim, qui testamentum fecit et nihil voluit contrarium, intestatus efficitur? 1. Sin autem in medio tempore contraria voluntas ostenditur, si quidem perfectissima est secundi testamenti confectio, ipso iure prius tollitur testamentum. 2. Sin autem testator tantummodo dixerit non voluisse prius stare testamentum, vel aliis verbis utendo contrariam aperuit voluntatem, et hoc vel per testes idoneos non minus tribus vel inter acta manifestaverit et decennium fiat emensum, tunc irritum esse testamentum tam ex contraria voluntate quam ex cursu temporali. 3. Aliter etenim testamenta mortuorum per decennii transcursionem evanescere nullo patimur modo, prioribus constitutionibus, quae super huiusmodi testamentis vacuandis latae fuerant, penitus antiquandis.

D. xv k. April. Constantinopoli Lampadio et Oreste vv. cc. cons.

[28] *Idem A. Iuliano pp. pr.* Cum antiquitas testamenta fieri voluit nullo actu interveniente et huiusmodi verborum compositio non rite interpretata paene in perniciem et testantium et testamentorum procederet, sancimus in tempore, quo testamentum conditur vel codicillus nascitur vel ultima quaedam dispositio secundum pristinam celebratur observationem (nihil enim ex ea penitus immutandum esse censemus), ea quidem, quae minime necessaria sunt, nullo procedere modo, quippe causa subtilissima proposita ea quae superflua sunt minime debent intercedere. 1. Si quid autem necessarium advenerit et in ipsum corpus laborantis respiciens contigerit, id est vel victus necessarii vel potionis oblatio vel medicaminis datio vel impositio, quibus relictis ipsa sanitas testatoris periclitatur, vel si quis necessarius naturae usus

after the seven witnesses gather, it is enough that the will of the male or female testator is revealed to all at once, indicating to whom he or she wishes the property to come or to whom he or she assigns legacies or trusts or grants of freedom, even if the male or female testator does not, prior to such a allocation, first say those formal words, that "these same witnesses have come together because he or she wanted to compose, without writing, a will or testament."

Written and given December 10, at Constantinople, in the consulship of Our Lord Justinian, Ever Augustus, for the second time (528).

[27]¹⁵⁷ *The same Augustus to Julian, Praetorian Prefect. pr.* We ordain that if anyone has executed a will in a legal manner and ten years have passed after its making, it is valid if there is, in fact, no evidence the testator has altered or reversed his wish. For why is what is unchanged forbidden to remain valid? How can someone be made intestate who made a will and wanted nothing that was opposed to it? 1. But if an opposing wish is shown in the meantime, (then) if, indeed, there is a wholly complete execution of a second will, by operation of law the earlier will is void. 2. But if the testator said merely that he did not want the earlier will to remain, or by using other words revealed a change of mind, and he makes this clear either through not less than three reliable witnesses or in (public) records, and ten years have passed, then (We hold that) the will is void both owing to change of mind and lapse of time. 3. Otherwise in no way do We allow decedents' wills to become void through passage of ten years; earlier constitutions¹⁵⁸ that were enacted on voiding such wills are entirely repealed.

Given March 18, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[28] *The same Augustus to Julian, Praetorian Prefect. pr.* Antiquity wished that wills be executed with no interrupting transaction. But since this verbal formulation was not properly interpreted and led to near disaster for both testators and wills, We ordain that, during the time when a will is made or a codicil arises or some final disposition is proclaimed in accord with traditional ritual – for We think that none of it should be entirely altered – everything (in the traditional procedure) that is not at all required shall in no respect continue, since, when an overly complicated case is presented, things that are superfluous should hardly interfere (with the will's validity). 1. If something necessary arises and happens to concern the very body of the sufferer, that is, either required food or the presentation of drink or the giving or administration of medicine, by omission of which the testator's very health is endangered, or if some natural requirement

¹⁵⁷ Combine with C. 6.33.3.

¹⁵⁸ See C.Th. 4.4.6.

ad depositionem superflui ponderis immineat vel testatori vel testibus, non esse ex hac causa testamentum subvertendum, licet morbus comitialis, quod et factum esse comperimus, uni ex testibus contigerit, sed eo quod arguet et imminet repleto vel deposito iterum solita per testamenti factionem adimpleri. 2. Et si quidem a testatore aliquid fiat testibus paulisper separatis, cum coram his facere aliquid naturale testator erubescat, iterum introductis testibus consequentiam factionis testamenti procedere. 3. Si tamen in quendam vel quosdam testium aliquid tale contingat, si quidem ex brevi temporis intervallo necessitas potest transire, iterum eorundem testium reversum expectari et sollemnia peragi.

4. Sin autem longiore spatio refectio fortuiti casus indigeat, et maxime si salus testatoris periclitantis immineat, tunc illo vel illis testibus, circa quos aliquid tale eveniet, separatis alios subrogari et ab eo vel ab eis tam testatorem quam alios testes sciscitari, si ea, quae eorum praesentiam antecedunt, omnia coram eis processissent. 5. Et si hoc fuerit undique manifestum, tunc eos vel eum una cum aliis testibus ea quae oportet facere, etsi in medio subscriptiones testium iam fuerant subsecutae. sic etenim et naturae medemur et mortuorum elogia in suo statu facimus permanere.

6. Cum autem constitutione, quae de testamentis ordinandis processit, cavetur, quatenus septem testium praesentia in testamentis requiratur et subscriptio a testatore fiat vel alio pro eo, et constitutio sic edixit: 'octavo subscriptore adhibito', et quidam testamentum suum omne manu propria conscripsit et post eius litteras testes adhibiti suas subscriptiones supposuerunt aliaque omnia sollemniter in testamento peracta sunt et testamentum ex hoc, de quo dubitatur, irritum factum est, eandem constitutionem corrigentes sancimus, si quis sua manu totum testamentum vel codicillum conscripserit et hoc specialiter in scriptura reposuerit, quod sua manu hoc confecit, sufficiat ei totius testamenti scriptura et non alia subscriptio requiratur neque ab eo neque pro eo ab alio, sed sequantur huiusmodi scripturam et litterae testium et omnis quae expectatur observatio, et sit testamentum validum, et codicillus, si quinque testium litterae testatoris scripturae coadunentur, in sua firmitate remaneat, et nemo callidus machinator huiusmodi iniquitatis in posterum inveniatur.

for disposal of an excess burden threatens either the testator or witnesses,¹⁵⁹ a will should not be overturned for this reason, even if – what we have learned has also happened – a bout of epilepsy befalls one of the witnesses. Rather, when what presses or threatens has been completed or unloaded, the usages shall again be carried out through execution of the will. 2. And if something is done by the testator a little apart from the witnesses, when the testator is embarrassed to do something natural in their presence, after the witnesses are once again led in (We allow) the completion of the will's execution to proceed. 3. But if some such thing happens to one or more witnesses, provided the necessity can pass in a short time, again (We allow) the return of the same witnesses to be awaited and the formalities to be completed.

4. But if recovery from misfortune requires a longer time, and especially if the testator's health turns threatening, then, after the departure of one or more witnesses to whom some such thing occurs, (We allow) others to be substituted and both testator and other witnesses to be asked by him or them if what happened prior to their coming were all done in presence of them. 5. And if this is in all respects clear, then he or they, along with the other witnesses, shall do what is required, even if in the meantime witness signatures had already occurred. For in this way We both satisfy nature and make the testator's will remain valid.

6. In addition, it is provided in the constitution on drawing up wills¹⁶⁰ to what extent the presence of seven witnesses is required for wills and it is signed either by the testator or another for him, and the constitution states "with an eighth signatory summoned." Someone wrote his entire will in his own hand, and, following his writing, witnesses were summoned and added their own signatures, and all other formalities were performed for the will; (but) the will was rendered void by the uncertainty in question. Correcting the same constitution, We ordain that if anyone writes out his entire will or codicil in his own hand, and specifically states in writing that he did this in his own hand, the writing of the entire testament shall suffice for him and no additional signature shall be required either from him or for him by another; but both the writing of witnesses and all the required formality shall take place after such a writing. The will shall be valid (if this is done), and a codicil shall retain its validity if the writing of five witnesses is added to the testator's writing; and let no cunning intriguer of such an injustice (questioning such a document's validity) be found hereafter.

¹⁵⁹ In sections 1–3, Justinian refers obliquely to use of bathroom facilities.

¹⁶⁰ C. 6.23.21 above. As to the case in this section, Blume: "Here the testator did not sign his name, though he wrote the whole testament in his own handwriting. The point in question was whether he should not have signed his name, or summoned an eighth witness for him. The law provides that such testament is valid, without either of these requirements."

D. VI k. April. Constantinopoli Lampadio et Oreste vv. cc. cons.

[29] *Idem A. Iuliano pp. pr.* Iubemus omnimodo testatorem, si vires ad scribendum habeat, nomen heredis vel heredum in sua subscriptione vel in quacumque parte testamenti ponere, ut sit manifestum secundum illius voluntatem hereditatem esse transmissam. 1. Sin autem forsitan ex morbi acerbitate vel litterarum imperitia hoc facere minime poterit, testibus testamenti praesentibus nomen vel nomina heredis vel heredum ab eo nuncupari, ut omnimodo sciant testes, si non ipse subscribere potest, qui sunt scripti heredes, et ita certo heredis nomine successio procedat. 2. Si enim talis est testator, qui neque scribere neque articulate loqui potest, mortuo similis est et falsitas in elogiis committitur, quam, ut exul fiat a re publica nostra, maxime in testamentorum confectione cupientes hanc edictalem legem in orbem terrarum ponimus. 3. Quod si non fuerit observatum et nomen heredis vel heredum non fuerit manu testatoris scriptum vel voce coram testibus nuncupatum, hoc testamentum stare minime patimur vel in totum, si tota heredum nomina fuerint praetermissa, vel in eius heredis institutionem, cuius nomen neque lingua neque manus testatoris significavit.

4. Sed ne aliqua forsitan oblivio testium animis incumbat pluribus interdum nominibus heredum expressis, ipsi testes in suis subscriptionibus, cum testator non haec scripserit, sed nuncupaverit, eorum nomina scribere non differant ad aeternam rei memoriam. 5. Sin vero ipse testator in qualicumque parte testamenti nomina heredum (sicut dictum est) scripserit, supervacuum est testes in sua subscriptione hoc exprimere, cum forsitan nescire eos testator suos heredes voluit et semel causa ex ipsius testatoris scriptura appareat.

6. Oportet enim omnimodo vel ex litteris testatoris vel ex voce quidem testatoris, litteris autem testium, qui ad elogium conficiendum fuerint convocati, nomina manifestari heredum. quemadmodum enim in elogio, quod sine scriptura conficitur, necesse est testatorem voce exprimere nomen vel nomina heredum, ita oportet et in testamentis per scripturam conficiendis, cum ipse testator manu sua scribere heredes vel noluerit vel minime potuerit, voce tamen eius eos manifestari.

7. Quae in posterum tantummodo observari censemus, ut, quae testamenta post hanc novellam nostri numinis legem conficiuntur, haec cum tali observatione procedant: quid enim antiquitas peccavit, quae praesentis legis inscia pristinam secuta est observationem? scituris et

Given March 27, at Constantinople, in the consulship of viri clarissimi Lampadius and Orestes (530).

[29] *The same Augustus to Julian, Praetorian Prefect. pr.* We order a testator, if he has the strength to write, in all circumstances to place (write out) the name of the heir or heirs in his signature or in some part of the will, to make it clear that the inheritance is transmitted pursuant to his wish. 1. But if, perchance, owing to severe sickness or illiteracy he can in no way do this, in the presence of the witnesses to the will he is to announce the name or names of the heir or heirs, so that, if he himself cannot write out those named heirs, at least the witnesses know, and so the succession takes place with a definite named heir. 2. For if the testator is one who can neither write nor speak articulately, he is like a dead person, and (so) forgery occurs in wills. Desiring to banish this from our state particularly in the making of wills, We publish to the world this law in the form of an edict. 3. But if this is not observed and the name of the heir or heirs is not written in the testator's hand or orally declared before witnesses, We do not at all allow this will to stand, either in its entirety if all the names of heirs are omitted, or for the designation of an heir whose name neither the testator's tongue nor his hand makes known.

4. But so that, perchance, no sort of forgetfulness overtake the minds of witnesses when many names of heirs are stated, when the testator does not write but declares them, the witnesses themselves should not hesitate to write these names in their signatures, for the enduring recollection of the event. 5. But if the testator himself writes the names of heirs in some part of the will, as said above, it is needless for the heirs to state this in their own signature, since perhaps the testator did not want them to know his heirs, and the matter is clear once and for all from the testator's own writing.

6. For in any case the names of heirs must be clear either from the testator's writing or from the testator's voice as well as the writing of the witnesses assembled to execute the will. For as in a will made without writing the testator must necessarily state orally the name or names of heirs, so also in making written wills, when the testator himself either does not wish to name the heirs with his own hand or cannot at all do this, nevertheless they must be made clear by his voice.

7. We determine that these (provisions) be observed in the future, so that testaments made subsequent to this new statute of Our Divine Majesty go forward with such a formality. For how was the past at fault, which was unaware of the present law and followed the old formality? Both notaries and those who

tabellionibus et his qui conficienda testamenta procurant, quod, si aliter facere ausi fuerint, poenam falsitatis non evitabunt, quasi dolose in tam necessaria causa versati.

D. k. Mart. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[30] *Idem A. Iohanni pp.* Nostram provisionem, maxime circa ultima elogia defunctorum, nunc etiam extendi properamus. unde cum invenimus quasdam controversias veteribus iuris interpretatoribus exortas propter testamentum, quod legitimo modo conditum est septemque testium signa habens, postea fortuito casu vel per ipsius testatoris operam lino toto vel plurima eius parte incisa in ambiguitatem inciderit, solitum ei praebemus remedium sancientes, si quidem testator linum vel signacula inciderit vel abstulerit utpote voluntate eius mutata testamentum non valere: sin autem ex alia quacumque causa hoc contigerit, durante testamento scriptos ad hereditatem vocari, maxime cum nostra constitutio, quam super tuitione testamentorum promulgavimus, testatorem disposuit vel sua manu nomen heredis scribere vel, si imperitia litterarum vel adversa validudine seu alio modo hoc facere non potest, testes ipsos audito nomine heredis sub praesentia ipsius testatoris nomen heredis suis subscriptionibus declarare.

D. xv k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[31] *Idem A. Iohanni pp. pr.* Et ab antiquis legibus et a diversis retro principibus semper rusticitati consultum est et in multis legum subtilitatibus stricta observatio eis remissa est, quod ex ipsis rerum invenimus documentis. cum enim testamentorum ordinatio sub certa definitione legum instituta est, homines rustici et quibus non est litterarum peritia quomodo possunt tantam legum subtilitatem custodire in ultimis suis voluntatibus? ideo ad dei humanitatem respicientes, necessarium duximus per hanc legem eorum simplicitati subvenire.

1. Sancimus itaque in omnibus quidem civitatibus et in castris orbis Romani, ubi et leges nostrae manifestae sunt et litterarum viget scientia, omnia, quae etiam libris nostrorum digestorum seu institutionum et imperialibus sanctionibus nostrisque dispositionibus in condendis testamentis cauta sunt, observari nullamque ex praesenti lege fieri innovationem. 2. In illis vero locis, in quibus raro inveniuntur homines litterati, per praesentem legem rusticanis concedimus antiquam eorum

see to the making of wills shall know that, if they will dare to do otherwise, they will not escape the penalty for falsification, as having acted deceitfully in such an important matter.¹⁶¹

Given March 1,¹⁶² at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[30] *The same Augustus to John, Praetorian Prefect.* We hasten now to extend our foresight especially concerning the last wills of decedents. When we learned that some disputes arose for the ancient interpreters of law over a will that was executed legally and bore the seven seals of witnesses, but afterwards, by accident or through the testator's own effort, fell into doubt because the linen band (binding the will's tablets) was cut entirely or in large part. Affording the usual remedy, We ordain that, if indeed the testator cuts or tears off the linen band or the seals to indicate his change of mind, the will is invalid. But if this happens for some other reason, the will remains in force and those named (as heirs) are summoned to the inheritance, especially because Our constitution that We proclaimed to safeguard wills¹⁶³ provided that the testator either write the heir's name in his own hand or, if he cannot do this owing to illiteracy or adverse health or any other reason, the witnesses themselves, having heard the heir's name in the testator's presence, declare the heir's name in their signatures.

Given October 18, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[31] *The same Augustus to John, Praetorian Prefect. pr.* Concern for rural conditions (*rusticitas*) has always been expressed both by ancient statutes and by various previous emperors. In many legal intricacies, strict observation has been relaxed for them, as We discover from the very documents of transactions. Since the drawing up of wills has been established under definite rules of law, how can rural people and those ignorant of letters preserve such legal technicality in their last wills? And so, in consideration of God's humanity, We held it necessary to aid their simplicity through this law.

1. So we ordain that, in all cities and army camps of the Roman world where Our laws are known and where literacy flourishes, all provisions for creating wills be observed (as set down) also in the books of Our Digest or Institutes and imperial ordinances and Our orders, and no change result from the present law. 2. But in those places where literate men are rarely found, through

¹⁶¹ This impracticable law was virtually repealed by Nov. 119.9 (544).

¹⁶² Krüger prefers February 20; so, too, Lounghis *et al.*

¹⁶³ C. 6.23.29 above.

consuetudinem legis vicem obtinere, ita tamen, ut, ubi scientes litteras inventi fuerint, septem testes, quos ad testimonium vocari necesse est, adhibeantur et unusquisque pro sua persona subscribat: ubi autem non inveniuntur litterati, septem testes et sine scriptura testimonium adhibentes admitti. 3. Si autem in illo loco minime inventi fuerint septem testes, usque ad quinque modis omnibus testes adhiberi iubemus: minus autem nullo modo concedimus. 4. Si vero unus aut duo vel plures scierint litteras, liceat his pro ignorantibus litteras, praesentibus tamen, subscriptionem suam imponere, sic tamen, ut ipsi testes cognoscant testatoris voluntatem et maxime quem vel quos heredes sibi relinquere voluerit, et hoc post mortem testatoris iurati deponant. 5. Quod igitur quisque rusticorum, sicut praedictum est, pro suis rebus disposuerit, hoc omnimodo legum subtilitate remissa firmum validumque consistat.

D. III non. Iul. Constantinopoli dn. Iustiniano A. IIII et Paulino vc. cons.

[32] ...

XXIII De Heredibus Instituendis et Quae Personae Heredes Institui Non Possunt

[1] *Imp. Titus Aelius Antoninus A. Antestiano.* Qui deportantur, si heredes scribantur, tamquam peregrini capere non possunt, sed hereditas in ea causa est, in qua esset, si scripti non fuissent.

Sine die et consule.

[2] *Imp. Antoninus A. Caecilio.* Pater tuus si ex residua parte heres institutus est, quam alter heres scriptus capere non posset, isque ad nullam partem hereditatis propter condicionem suam admitti potuit, ex asse heres extitit: nam residui commemoratio etiam totum admittit.

PP. xv k. Iul. Romae duobus Aspris cons.

[3] *Imp. Alexander A. Vitali militi. pr.* Cum proponas Alexandrum equitem testamento primo loco Iulianum ut libertum suum heredem instituisse eique substituisse his verbis: 'quod si ex aliqua causa primus hereditatem meam adire noluerit vel non potuerit, tunc in locum secundum heredem substituo Vitalem', post mortem autem testatoris

the present law We allow country folk (*rusticani*) to observe their ancient custom as statute, provided, however, that where literate men are to be found, the seven witnesses necessarily summoned to (making) a will be gathered and each sign for himself; but where literate men are not found, seven offering testimony even without writing are allowed. 3. But if in that place not even seven witnesses are found, We order that as few as five witnesses be employed by any means; but in no way do We allow fewer. 4. But if one or two or more of them are literate, they shall be permitted to write their signature for the illiterate who nonetheless are present, provided that these witnesses know the testator's wish and especially whom he wants to leave as his heir or heirs; and after the testator's death they attest this under oath. 5. What, therefore, any country person, as said above, provides for his property shall remain valid and in force, with legal technicalities altogether relaxed.

Given July 5, at Constantinople, in the consulship of Our Lord Justinian Augustus, for the fourth time, and the vir clarissimus Paulinus (534).

[32] <A Greek constitution is lost.>

Twenty-Fourth Title Designating Heirs, and What Persons Cannot Be Designated as Heirs¹⁶⁴

[1] *Emperor TITUS AELIUS ANTONINUS Augustus to Antestianus.* Those who are permanently banished, if named as heirs, cannot take (under a will), like resident non-citizens (*peregrini*); but the inheritance remains in the situation it would have been in had they not been named.

Without date and consul.

[2] *Emperor ANTONINUS Augustus to Caecilius.* Your father, if he was designated heir "to the remaining portion" that the other named heir could not take, and on account of his legal status he (the other named heir) could not be admitted to any part of the inheritance, becomes heir to the entirety (*ex asse*); for the meaning of "remaining" also includes "all."

Posted June 17, in Rome, in the consulship of the two Aspri (212).

[3] ¹⁶⁵ *Emperor ALEXANDER Augustus to Vitalis, a soldier. pr.* Since you allege that Alexander, a cavalryman, by his will had designated Julian in the first place as his freedman heir, and provided a substitute in these words: "But if for some reason the first (heir) will not or cannot accept my inheritance, then in second place I substitute Vitalis as heir," but after his death it emerged that Julian was the co-owned slave of the dead soldier (Alexander) and Zoilus his

¹⁶⁴ See D. 28.5; Inst. 2.14.

¹⁶⁵ Combine with C. 6.11.1.

Iulianum servum communem fuisse defuncti militis et Zoili fratris eius apparuerit, an tu ex substitutione admittereris, voluntatis est quaestio.

1. Nam si credens eum proprium et suum libertum heredem instituit nec per eum ad alium quemquam hereditatem pertinere voluit, extitit condicio substitutionis tibi que delata hereditas est. 2. Quod si verba substitutionis subscriptae ad ius rettulit, ut si nec per semet ipsum alium fecisset heredem (potuit enim quamvis iubente domino nolle adire), ita demum substitutus vocaretur, si tamen paruit domino et adiit, substitutioni locus non est.

PP. VI k. Mai. Maximo II et Aeliano cons.

[4] *Imp. Gordianus A. Ulpio.* Si pater tuus eum quasi filium heredem instituit, quem falsa opinione ductus suum esse credebat, non instituturus, si alienum nosset, isque postea subditicius esse ostensus est, auferendam ei successionem divi Severi et Antonini placitis continetur.

PP. prid. non. Oct. Pio et Pontiano cons.

[5] *Idem A. Cassiano.* Non ideo minus uxor iure heres videtur instituta, quod non uxor, sed adfinis testamento nominata est.

PP. v k. Oct. Gordiano A. II et Pompeiano cons.

[6] *Imp. Philippus A. et Philippus C. Antonio.* Si compensandi debiti gratia uxor maritum fecit heredem, desiderio tuo praeter portionem hereditatis debitum quoque restitui postulantis non tantum iuris severitas, verum etiam defunctae voluntas refragatur.

PP. XII k. Mart. Praesente et Albino cons.

brother, whether you are admitted by the substitution is a question of (the testator's) intention. 1. For if he designated him heir believing him to be his own freedman and did not want the inheritance to come to someone else (here, Zoilus) through him, the condition for the substitution is met and the inheritance is delivered to you. 2. But if by the substitution's words he referred to the rule that the substitute is summoned (as heir) only if the primary heir had not made another person (here, Zoilus) heir through himself – for he (Julian) could decline to accept despite his master's order – only then is the substitute summoned as heir, provided that he obeyed his master and entered into the inheritance.¹⁶⁶

Posted April 26, in the consulship of Maximus, for the second time, and Aelianus (223).

[4] *Emperor GORDIAN Augustus to Ulpian.* If your father designated someone as though his son to be his heir, whom he was misled by false report to believe his offspring, and he would not designate him if he knew him to be another's, and this person was afterwards shown to be spurious, in the opinions of the deified Severus and Antoninus it is held that the inheritance be removed from him.

Posted October 6, in the consulship of Pius and Pontianus (238).

[5] *The same Augustus to Cassianus.* A wife is deemed to be no less rightfully designated an heir because the will called her not "wife" but "relative by marriage" (*adfinis*).

Posted September 27, in the consulship of Gordian Augustus, for the second time, and Pompeianus (241).

[6] *Emperor PHILIP Augustus and PHILIP the Caesar to Antontus.* If a wife made her husband (Antonius) an heir to pay back a debt (she owed you), not only the rigor of the law but also the decedent's wish oppose your desire in asking that the debt be repaid in addition to your share of the inheritance.

Posted February 18, in the consulship of Praesens and Albinus (246).

¹⁶⁶ Blume: "In this case Alexander appointed Julianus his heir, calling him his freedman, and substituting Vitalis as heir in his stead in case Julianus would not or could not enter on the inheritance. Now the testator was mistaken in calling Julianus his freedman, for he was the slave both of the testator and of one Zoilus. If he was mistaken and believed that Julianus was his slave alone and that he would be his freedman alone (intending, as the law says, that he alone and not some master through him should receive the inheritance), then the appointment was invalid, because of the error, and the substitute took his place, C. 6.20.7; C. 6.23.4 and 5; C. 6.24.14 ... If, on the contrary, the testator was not mistaken, and he wanted the joint master of Julianus to have the inheritance (for whatever a slave acquired, he acquired for the benefit of his master), the substitution failed when Julianus accepted the inheritance, and the substitution would have applied only in case Julianus had not accepted."

[7] *Impp. Diocletianus et Maximianus AA. Zizoni.* Nec apud peregrinos fratrem sibi quisquam per adoptionem facere poterat. cum igitur, quod patrem tuum voluisse facere dicis, irritum sit, portionem hereditatis, quam is adversus quem supplicas velut adoptatus frater heres institutus tenet, restitui tibi curae habebit praeses provinciae.

PP. III non. Dec. Diocletiano II et Aristobulo cons.

[8] *Idem AA. Hadriano.* Collegium, si nullo speciali privilegio subnixum sit, hereditatem capere non posse dubium non est.

PP. x k. Iun. ipsis IIII et III AA. cons.

[9] *Idem AA. et CC. Iuliae.* Extraneum etiam cum morietur heredem scribi placuit.

PP. XVI k. Nov. Sirmi AA. cons.

[10] *Idem AA. et CC. Asclepiadae.* Neque per se heredes institutos, quibus hoc concessum non est, neque per servos proprios hereditatem posse quaerere dictat iuris ratio.

S. XVI k. Sept. Sirmii CC. cons.

[11] *Impp. Theodosius et Valentinianus AA. Hierio pp.* Extraneum etiam penitus ignotum heredem quis instituere potest.

D. x k. Mart. Constantinopoli Felice et Tauro cons.

[12] *Imp. Leo A. Erythrio pp.* Hereditatis vel legati seu fideicommissi aut donationis titulo domus aut annonae civiles aut quaelibet aedificia vel mancipia ad ius inclitae urbis vel alterius cuiuslibet civitatis pervenire possunt.

[7] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Zizo.* Not even among non-Roman citizens (*peregrini*) could anyone use adoption to obtain a brother for himself. Therefore, since what you say your father wished to do is void, the provincial governor will see to it that there is restored to you the portion of the inheritance (now) held by the target of your complaint, "an heir designated by virtue of being an adopted brother."

Posted December 3, in the consulship of Diocletian, for the second time, and Aristobulus (285).

[8]¹⁶⁷ *The same Augusti to Hadrian.* There is no doubt that a guild (*collegium*) cannot take an inheritance if it is not supported by any special legal privilege.

Posted May 23, in the consulship of the Augusti themselves, for the fourth and third time, respectively (290).

[9] *The same Augusti and the Caesars to Julia.* The prevailing view is that a third party (*extraneus*; a non-family member) can also be named heir "when he will die."¹⁶⁸

Posted October 17, at Sirmium, in the consulship of the Augusti (293).

[10] *The same Augusti and Caesars to Asclepiades.* Legal reason dictates that those designated heirs, if not granted this right (by law), can seek an inheritance neither through themselves nor through their own slaves.

Written August 17, at Sirmium, in the consulship of the Caesars (294).

[11]¹⁶⁹ *Emperors THEODOSIUS and VALENTINIAN Augusti to Hierius, Praetorian Prefect.* One can designate as heir even a wholly unknown non-family member (*extraneus*).

Given February 20, at Constantinople, in the consulship of Felix and Taurus (428).

[12]¹⁷⁰ *Emperor LEO Augustus to Erythrius, Praetorian Prefect.* By right of inheritance or legacy or trust or gift, houses or rights to municipal food distribution or any buildings or slaves can come to belong to this Illustrious City (Constantinople) or any other city.

¹⁶⁷ Combine with C. 6.26.5.

¹⁶⁸ Blume: "The general rule was that an event certain to come but indefinite as to time was not a condition, but fixed the time ... C. 4.11.1. Now an heir could not be appointed from a certain day, any more than after a certain day, and the day was struck out. D. 28.5.34. An appointment commencing when the appointee was dying, so that his heirs would get the benefit, was certain to come, though the time was uncertain. Hence the rule here stated was an exception, and the appointment was considered either as under a condition precedent, or the rule as to time was relaxed." This rule applied only to non-family members.

¹⁶⁹ = C.Th. 5.1.9; combine with C. 2.57.2, 5.3.17, 5.4.22, 5.11.6, 6.18.1, 6.61.2.

¹⁷⁰ = C. 11.32.3.

D. v k. Mart. Marciano et Zenone cons.

[13] *Imp. Iustinianus A. Menae pp.* Quotiens certi quidem ex certa re scripti sunt heredes vel certis rebus pro sua institutione contenti esse iussi sunt, quos legatariorum loco haberi certum est, alii vero ex certa parte vel sine parte, qui pro veterum legum tenore ad certam unciarum institutionem referuntur, eos tantummodo omnibus hereditariis actionibus uti vel conveniri decernimus, qui ex certa parte vel sine parte scripti fuerint, nec aliquam deminutionem earundem actionum occasione heredum ex certa re scriptorum fieri.

D. VIII id. April. Constantinopoli Decio vc. cons.

[14] *Idem A. Iohanni pp. pr.* Cum in libris Ulpiani, quos ad Massurium Sabinum scripsit, talis species relata est, hanc apertius expedire nobis visum est. 1. Quidam testamentum faciens ita instituit: 'Sempronius Plotii heres esto'. veteres quidem existimabant, errorem nominis esse et sic institutionem valere, quasi testator Plotius nominaretur, et Sempronium sibi scripsisset heredem.

2. Sed huiusmodi sententiam crassiorem esse existimamus: neque enim sic homo supinus, immo magis stultus invenitur, ut suum nomen ignoret. sed si quidem ipse testator Plotio cuidam heres extitit, manifestissimum esse sibi Sempronium heredem instituisse, ut per mediam ipsius personam Plotii heres efficiatur: et hoc argumentamur ex antiqua regula, quae voluit heredem heredis testatoris esse heredem. 3. Sin autem nihil tale factum est, supervacuam esse et inanem huiusmodi institutionem, nisi prius herede Plotio sibi instituto sic adiecit: 'Sempronius Plotii heres esto'. tunc etenim existimandum est eum dixisse, si non Plotius heres sibi fuerit, tunc Sempronium in locum partemve Plotii ex substitutione vocari, ut ita ex consequentia verborum Plotius quidem institutus, Sempronius autem substitutus inveniatur. 4. Sin autem neque ipse testator Plotio heres extitit neque Plotium heredem antea scripsit et sic Sempronium Plotio heredem voluit esse, nullius esse

Given February 25, in the consulship of Marcianus and Zeno (469).¹⁷¹

[13] *Emperor Justinian Augustus to Menas, Praetorian Prefect.* Whenever specific persons were named "heirs" to specific property, or were ordered to be content with specific property in place of their designation (as heirs), it is clear they are considered legatees (and not heirs). But others (were appointed heirs) to a specific share or with no (specified) a share, who in accord with the content of ancient laws were directed (as heirs) to the specific designation of twelfths (*unciae*). We decree that the only persons who shall sue or be sued by all inheritance actions are those who are named to a specified share or with no (specified) share, and those named heirs to specific property receive no loss by reason of these same actions.¹⁷²

Given April 6, at Constantinople, in the consulship of vir clarissimus Decius (529).

[14] *The same Augustus to John, Praetorian Prefect, pr.* In the books that Ulpian wrote commenting on Massurius Sabinus, the following case is given; We thought it best to resolve it more clearly. 1. A person (not named Plotius), in making his will, designated thus: "Let Sempronius be the heir of Plotius." The ancient jurists, to be sure, thought that this is a mistake as to a name and that the designation is valid, as though the testator were named Plotius and named Sempronius as his heir.

2. But we deem such a view too coarse, since there is no person so dull, or rather so dumb, that he does not know his own name. Still, if the testator himself were heir to some Plotius, quite obviously he designated Sempronius as heir to himself in order that he (Sempronius) be made the heir of Plotius through himself as intermediary; and We reason this from the ancient rule of law that wanted the heir of an heir to be the heir of the testator. 3. But if nothing of that sort happened, such a designation is useless and void, except if he (the testator), having first designated Plotius as his heir, added: "Let Sempronius be the heir of Plotius." For this should be construed as him having said that, if Plotius should not be his heir, then Sempronius is summoned through a substitution into Plotius' place and share, such that, owing to the logical impact of words, Plotius is indeed found to be designated, but Sempronius substituted. 4. But if the testator is not an heir to Plotius, nor did he first name Plotius his heir

¹⁷¹ Krüger suggests 472 as the likelier date. Seeck gives February 26, 472.

¹⁷² Blume: "the meaning of the term 'heir' under the Roman law was not quite the same as we generally understand that term, and ... ordinarily, an 'heir' was a person who represented the estate as successor and who received the whole or a certain undivided portion of an inheritance, these portions being, according to custom, generally given in the amount of a twelfth or multiples thereof ... A person who received a definite piece of property under a will was, generally, not an 'heir,' but a legatee without right to represent the estate." See Inst. 2.14.6-8.

momenti talem institutionem, cum non est verisimile in suum nomen quendam errasse.

D. III k. Aug. post consulatum Lampadii et Orestis vv. cc.

XXV De Institutionibus vel Substitutionibus seu Restitutionibus sub Condicione Factis

[1] *Imp. Severus et Antoninus AA. Alexandro.* Cum avum maternum ea condicione filiam tuam heredem instituisse proponas, si Anthylli filio nupsisset, non prius eam heredem existere, quam condicioni paruerit aut Anthylli filio recusante matrimonium impeditum fuerit, manifestum est.

PP. k. Oct. Anullino et Frontone cons.

[2] *Imp. Antoninus A. Cassiae. pr.* Condicioni, sub qua testamento matris tuae heres instituta es, si non paruisti, substitutio locum habet. nec enim videri potest sub specie turpium nuptiarum viduitatem tibi indixisse, cum te filio sororis suae consobrino tuo probabili consilio matrimonio iungere voluerit. 1. Nec extraordinario auxilio indiges, cum ex his quae libello complexa es declaretur non per eum stetisse, quominus supremae voluntati matris tuae testatricis satisfaceret.

PP. VIII id. Mart. Romae Antonino A. IIII et Balbino cons.

[3] *Idem A. Maxentio et aliis.* Si mater vos sub condicione emancipationis heredes instituit et, priusquam voluntati defunctae pareretur, sententiam pater meruit vel aliter defunctus est, morte eius vel alio modo patria potestate liberati ius adeundae hereditatis cum sua causa quaesistis.

S. prid. k. Mai. Sabino et Anullino cons.

and thereby wanted Sempronius to be an heir to Plotius, such a designation is of no validity, it being unlikely that anyone errs as to his own name.

Given July 30, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).¹⁷³

Twenty-Fifth Title Designations or Substitutions (of Heirs), or Restitutions Made under a Condition (in a Trust)¹⁷⁴

[1] *Emperors SEVERUS and ANTONINUS Augusti to Alexander.* Since you state that her maternal grandfather designated your daughter as heir on the condition that she had married the son of Anthyllus, it is obvious that she does not become heir before she fulfills the condition or the son of Anthylus refuses and the marriage is obstructed.

Posted October 1, in the consulship of Anullinus and Fronto (199).

[2] *Emperor ANTONINUS Augustus to Cassia, pr.* If you did not fulfill the condition under which you were designated heir by your mother's will, substitution occurs. For it does not appear that she imposed unmarried status (*viduitas*) on you through the pretense of a dishonorable marriage, since she wished, with commendable planning, to join you in marriage to her sister's son, your first cousin. 1. Nor do you merit special relief, since, from what you stated in your petition, it is not declared that he was responsible for not satisfying the last wish of your mother the testator.

Posted March 8, at Rome, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[3] *The same Augustus to Maxentius and others.* If your mother designated all of you as heirs under condition of your emancipation (from your father), and, before the decedent's wish was fulfilled, your father earned a (capital) sentence or otherwise died, by his death or in another manner you were freed from your father's power and acquired the right to take the inheritance with its burdens and benefits (*cum sua causa*).

Written April 30, in the consulship of Sabinus and Anullinus (216).

¹⁷³ Krüger argues for July 29; accepted by Lounghis *et al.*

¹⁷⁴ See D. 28.7. Blume: "While a resolutive condition was ... ordinarily void, yet it was provided by C. 6.41.1, that a testator had the right to penalize an heir and take an inheritance away from him in case the heir should fail to comply with the requirements in the testament. And then, too, under the system of trusts, dealt with at C. 6.42, a testator might require an heir to surrender the property received, at least up to three-fourths thereof, and he might further entail his property by requiring surrender thereof to successive transferees." See Inst. 2.23.11.

[4] *Imp. Alexander A. Aemilio. pr.* Si pater filium quem in potestate habebat sub condicione, quae in ipsius potestate non erat, heredem scripsit nec in defectum eius exheredavit, iure testatus non videtur. 1. Cum autem trans mare et longe te agentem sub hac condicione heredem scriptum esse dicas, si in patriam, quae in provincia Mauritaniae erat, regressus fuisses, nec exheredatum te adleges, si in eum locum non redisses, manifestum est multis casibus non voluntariis sed fortuitis evenire potuisse, ut eam implere non posses: et ideo adire non prohiberis hereditatem.

PP. VI k. April. Iuliano et Crispino cons.

[5] *Imp. Valerianus et Gallienus AA. Maximae. pr.* Reprehendenda tu magis es quam mater tua. illa enim si^{vii} heredem te sibi esse vellet, id quod est inutile, matrimonium te dirimere cum viro non iuberet. 1. Tu porro voluntatem eius divortio comprobasti: oportuerat autem, etsi condicio huiusmodi admitteretur, praeferre lucro concordiam maritalem. enimvero cum boni mores haec observari vetent, sine ullo damno coniunctionem retinere potuisti. 2. Redi igitur ad maritum sciens hereditatem matris, etiamsi redieris, retenturam, quippe quam retineres, licet prorsus ab eo non recessisses.

PP. XII k. Dec. Valeriano IIII et Gallieno III AA. cons.

[6] [Αὐτοκράτωρ Ἰουστινιανὸς Α.]. Ἐάν τις ὑπὸ αἵρεσιν τοῦ παιδοποιῆσαι τὴν θυγατέρα ἐκ τοῦ νῦν ὄντος ἀνδρός καταλείψῃ τι αὐτῇ, ἢ δὲ ἐξ ἐκείνου μὲν μὴ παιδοποιήσῃ, ἑτέρῳ δὲ γαμηθεῖσα παῖδας σχοίῃ, μηδὲν ἦττον τὸ καταλειμμένον ἔχέτω, κἂν ἰδικῶς ὁ πατὴρ τῶν τηλικαῦτα γάμων ἐμνήσθῃ.

[7] *Imp. Iustinianus A. ad senatum. pr.* Generaliter sancimus, si quis ita verba sua composuerit, ut edicat: 'si filius vel filia intestatus vel intestata' vel etiam 'sine liberis' aut 'sine nuptiis decesserit', et ipse vel ipsa vel liberos sustulerit vel nuptias contraxerit sive testamentum fecerit, firmiter res possideri et non esse locum substitutioni vel restitutioni: si enim nihil ex his fuerit subsecutum, tunc valere condicionem et res secundum verba testamenti restitui, ut incertus successionis morientis

[4] *Emperor ALEXANDER Augustus to Aemilius. pr.* If a father designated as heir a son whom he had in his power under a condition his son was unable to fulfill, and he did not disinherit him for a fault, he is not deemed to have made a valid will. 1. Since you say that, while you were across the (Mediterranean) Sea and far off, you were named heir on the condition that (when the will was published) you should have returned to your homeland in the province of Mauretania, nor do you state you were disinherited if you had not returned to that place, it could obviously occur through many involuntary, chance circumstances that you could not fulfill it; and so you will not be forbidden to enter into the inheritance.

Posted March 27, in the consulship of Julian and Crispinus (224).

[5] *Emperors VALERIAN and GALLIENUS Augusti to Maxima. pr.* You are more to blame than your (deceased) mother. For if she did not wish you to be her heir, she would not order you to break off your marriage with your husband, something that is void (as a condition). 1. Moreover, you approved her wish by divorcing him. Even if such a condition were allowed, your proper course was to prefer marital harmony over financial gain. But since, indeed, moral decency prevents this being enforced, you could have preserved your marital union without loss. 2. Therefore return to your husband knowing you will keep your mother's estate even if you return, which indeed you would keep although you had not separated from him at all.

Posted November 20, in the consulship of Valerian, for the fourth time, and Gallienus, for the third time, Augusti (257).

[6]⁷⁵ *<Emperor Justinian Augustus.>* If a man left something to his daughter under condition of her bearing children by her then husband, and she did not bear children from him but married another and had children, let her nonetheless have what was left her even if her father specifically mentioned the previous marriage.

[7]⁷⁶ *Emperor Justinian Augustus to the Senate. pr.* We ordain generally that if someone composes his words so as to say: "(let X be substituted) if my son or daughter die intestate," or "without children," or "unmarried," and he or she either bears children or contracts a marriage or makes a will, the property is securely possessed (by the child), and a substitution or turnover does not take place. For if none of these ensued, then the condition is valid and the property is turned over (to the substitute) according to the will's words in order that the

⁷⁵ From Bas. 35.12.34. Lounghis *et al.* date to between 527 and 530

⁷⁶ Combine with C. 2.44.4, 3.38.12, 5.20.2, 5.4.24.

exitus videatur certo substitutionis vel restitutionis fine concludi. cui enim ferendus est intellectus, si forsitan testamentum quidem non fecerit, posteritatem autem habuerit, propter huiusmodi verborum angustias liberos eius omni paene fructu paterno defraudari? viam itaque impiam obstruentes, ut ne quis et alius deviaverit, huiusmodi facimus sanctionem et hanc legem in perpetuum valituram inducimus tam patribus quam liberis gratam: quo exemplo etiam aliis personis, licet extraneae sunt, de quibus huiusmodi aliquod scriptum fuerit, medemur.

1. Cum autem invenimus excelsi ingenii Papinianum in huiusmodi casu, in quo pater filio suo substituit nulla liberorum ex his procreandorum adiectione habita, ex optimo intellectu disposuisse evanescere substitutionem, si is qui substitutione praegravatus est pater efficiatur et liberos sustulerit, intellegendum non esse verisimile patrem, si de nepotibus cogitaverit, talem fecisse substitutionem: humanitatis intuitu hoc et latius et pinguius interpretandum esse credidimus. 2. Et si quis naturales habuerit filios et partem eis reliquerit vel dederit usque ad modum quem nos statuimus et substitutioni eos subiugaverit nulla liberorum eorum mentione facta, et hic intellegi evanescere substitutionem, liberis eam excludentibus et intellectu optimo his qui ad substitutionem vocantur obsistente et non concedente ad eos eam partem venire, sed ad filios vel filias, nepotes vel neptes, pronepotes vel proneptes morientis transmittente, et non aliter substitutione locum accipiente, nisi ipsi liberi sine iusta subole decesserint: ut, quod inter iustos liberos sanctum est, hoc et in naturales filios extendatur.

3. Quae omnia et in legatis vel fideicommissis specialibus locum habere sancimus.

D. XI k. Aug. Constantinopoli Lampadio et Oreste vv. cc. cons.

[8] *Idem A. Iohanni pp. pr.* Si quis heredem scripserit sub tali condicione: 'si ille consul fuerit factus' vel 'praetor', vel ita filiam suam heredem instituerit: 'si nupta erit', vivo autem testatore vel ille consul processerit vel praetor fuerit factus vel filia eius nupta fuerit et adhuc vivo testatore consulatum quidem vel praeturam illi deposuerint, filia autem eius diverterit, omni dubitatione veterum explosa sancimus, quandocumque impleta fuerit condicio, sive vivo eo sive mortis tempore sive

uncertain outcome of succession to the decedent seem ended in the definite result of a substitution or turnover. For who could bear the view, supposing he does not make a will but has children, that his children be almost cheated of all benefit from their father owing to such narrow construction of words? Therefore We block this unholy path so that not one more person go astray; We enact this ordinance and introduce this ever-enduring law, pleasing alike to fathers and children, and by this example We minister also to other persons, even non-family members, for whose benefit some such thing is written.

1. Since we learn that Papinian, a man of highest talent, in a similar case where the father substituted for his son while adding nothing about children born from them, on the basis of his high intelligence determined that the substitution is voided if the one who was burdened with the substitution becomes a father and bears children, thinking it unlikely that the father, if he thought about grandchildren, had made such a substitution.¹⁷⁷ We believe, for reasons of humanity, this should be applied quite widely and extensively. 2. Also if someone has natural children (out of wedlock) and leaves or gives a share to them up to the limit that We have set,¹⁷⁸ and subjects them to a substitution with no mention of their children, here too the substitution is understood to be voided, with their children excluding it; the best interpretation obstructs those called to the substitution and does not allow that share to come to them, but transmits it to the decedent's sons or daughters, grandsons or granddaughters, great-grandsons or -granddaughters, and the substitution does not otherwise take place unless the children themselves die without legal issue, so that what is ordained for legitimate children be extended also to natural children.

3. We ordain that all these things apply also for legacies or specific trusts.

Given July 22,¹⁷⁹ at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[8]¹⁸⁰ *The same Augustus to John, Praetorian Prefect.* pr. If anyone names an heir under a condition like: "if he will become Consul," or "Praetor," or designates his daughter heir "if she will have married," and while the testator is alive either he proceeds to become Consul or Praetor, or his daughter is married, and while the testator is still alive they lay down the consulate or Praetorship, or his daughter divorces, then, driving away all the doubt of the ancient jurists, We ordain that whenever the condition will have been fulfilled, either while he lives or at his death or after his death, the condition is deemed to be fulfilled.

¹⁷⁷ See C. 6.42.30; D. 35.1.102 (Papinian).

¹⁷⁸ C. 5.27.8.

¹⁷⁹ Krüger argues for July 27.

¹⁸⁰ Combine with C. 6.25.9 and 10, 6.26.10 and 11.

post mortem, condicionem videri esse completam. 1. Quod et in legatis et in fideicommissis et in libertatibus obtinendum esse censemus, ne, dum nimia utimur circa huiusmodi sensus subtilitate, iudicia testantium defraudentur.

D. VIII k. Aug. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[9] *Idem A. Iohanni pp. pr.* Si testamentum ita scriptum inveniatur: 'ille heres esto secundum condiciones infra scriptas', si quidem nihil est adiectum neque aliqua condicio in testamento posita est, super-
vacuam esse condicionum pollicitationem sancimus et testamentum puram habere institutionem. 1. Et argumento utimur, quod Papinianus respondit vicos rei publicae relictos, qui proprios fines habebant, non ideo ex fideicommisso minus deberi, quod testator fines eorum et certaminis formam, quam celebrari singulis annis voluit, alia scriptura se declaraturum promisit ac postea morte praeventus non fecit. 2. Sin autem condiciones quasdam in quavis parte testamenti posuit, tum videri ab initio condicionalem esse institutionem et sic omnia compleri, tamquam si testator ipsas institutiones eisdem condicionibus copulasset, quae infra scriptae sunt.

D. VI k. Aug. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[10] *Idem A. Iohanni pp. pr.* Cum quidam praegnantem habens coniugem scripsit heredem ipsam quidem uxorem suam ex parte, ventrem vero ex alia parte, et adiecit, si non postumus natus fuerit, alium sibi esse heredem, postumus autem natus impubes decessit, dubitabatur, quid iuris sit, tam Ulpiano quam Papiniano viris disertissimis voluntatis esse quaestionem scribentibus, cum opinabatur Papinianus ideo testatorem voluisse postumo nato et impubere defuncto matrem magis ad eius venire successionem quam substitutum. si enim et suae substantiae partem uxori dereliquit, multo magis et luctuosam hereditatem ad matrem venire curavit. 1. Nos itaque in hac specie Papiniani dubitationem reserantes substitutionem quidem in huiusmodi casu, ubi postumus natus adhuc impubes viva matre decesserit, respuendam esse censemus. tunc autem tantummodo substitutionem admittimus, cum postumus minime editus fuerit vel post eius partum mater prior decesserit.

D. III k. Aug. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

1. We hold this also to apply both for legacies and for trusts and for grants of freedom, lest, while we are employing excessive technicality in such interpretations, the judgments of testators are cheated.

Given July 24,¹⁸¹ at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[9]¹⁸² *The same Augustus to John, Praetorian Prefect. pr.* If a will is found to state: "Let him be heir according to the conditions written below," but nothing was added nor was any condition placed in the will, We ordain that the promise of conditions is void and the will has an unrestricted designation. 1. And We use as argument what Papinian responded:¹⁸³ that certain villages with definite borders, left by a trust to a municipality, were not any the less owed because the testator promised (in his will) that he would declare in a different writing their boundaries and the form of the game that he wanted celebrated each year, but was afterward prevented by death from doing so. 2. But if he placed some conditions in any part of his will, then the designation is deemed to be conditional from the start, and so all is fulfilled as if the testator had joined these designations to the same conditions that were written below.

Given July 27, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[10]¹⁸⁴ *The same Augustus to John, Praetorian Prefect. pr.* A man with a pregnant wife made his wife heir to a share (of his estate), but the unborn child to the other share, and added that, if there was no posthumous child, another was his heir (to that share); the posthumous child died before puberty (i.e., adulthood). Doubt arose as to what the law was, with both Ulpian and Papinian, most learned men, writing that it was a question of (the testator's) intent; Papinian thought the testator wished that, when the posthumous child was born and died before puberty, the mother come to succeed him, rather than the substitute. For if he also left part of his estate to his wife, much more he saw to it that this grievous inheritance also come to the mother. 1. Cutting through Papinian's hesitation in this matter, We hold that a substitution in such a case, where a posthumous child is born and dies before puberty and while the mother lives, should be rejected. We permit the substitution only then, when the posthumous child is not born or the mother dies first after its birth.

Given July 30, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

¹⁸¹ Krüger argues that this and the following two constitutions date to July 29, 531; followed by Lounghis *et al.*

¹⁸² Combine with C. 6.25.8 and 10, 6.26.10 and 11.

¹⁸³ D. 31.77.33 (Papinian).

¹⁸⁴ Combine with C. 6.25.8 and 9, 6.26.10 and 11.

XXVI De Impuberum et De Aliis Substitutionibus

[1] *Imp. Titus Aelius Antoninus A. Secundo.* Cum heredes ex disparibus partibus instituti et invicem substituti sunt nec in substitutione facta est ullarum partium mentio, verum est non alias partes testatorem substitutioni tacite inseruisse, quam quae manifeste in institutione expressae sunt.

D. Claro II et Severo cons.

[2] *Imp. Severus et Antoninus AA. Phronimae.* Hereditatem quidem intestati filii delatam tibi dubitari non oportet. substitutio enim testamento patris facta ad pubertatis tempora porrigi non potest, quia ipso et aliis non eiusdem condicionis heredibus institutis et invicem substitutis propter eorum personam, quibus in unum casum dumtaxat substitui potest, etiam in filio idem debere servari et ratio suadet et divus Marcus pater constituit.

PP. VI k. Aug. Cilone et Libone cons.

[3] *Imp. Alexander A. Achillae. pr.* Heres instituta matris testamento si successionem ex testamento omisisti et ab intestato bonorum possessionis ius habere voluisti, substituto locum quin feceris, in dubium non venit. 1. Proinde si substitutus hereditatem amplexus est, actionibus quae adversus matrem competeabant ipsum convenire, non successionem ab intestato potes vindicare.

PP. XI k. Sept. Maximo II et Aeliano cons.

[4] *Idem A. Firmiano.* Quamvis placuerat substitutionem impuberis, qui in potestate testatoris fuerit, a parente factam ita: 'si heres non erit' porrigi ad eum casum, quo, posteaquam heres extitit, impubes decessit, si modo non contrariam defuncti voluntatem extitisse probetur: cum tamen proponas ita substitutionem factam esse: 'si mihi Firmianus filius et Aelia uxor mea (quod abominor) heredes non erunt, in locum eorum

Twenty-Sixth Title Substitutions for Minors¹⁸⁵ and Other Substitutions

[1]¹⁸⁶ *Emperor TITUS AELIUS ANTONINUS Augustus to Secundus.* When heirs were designated to unequal shares and substituted for each other, and no mention was made of other parties in the substitution, it is correct that the testator did not impliedly insert into the substitution any other shares than those he clearly stated in the designation.

Given in the consulship of Clarus, for the second time, and Severus (146).

[2] *Emperors SEVERUS and ANTONINUS Augusti to Phronima.* It must not be doubted that the inheritance from your intestate son falls to you. For a substitution made in a father's will cannot be extended up to the age of puberty, since reason dictates and the deified Marcus determined that, even when he (the son) and others not of the same status (i.e., not *filiifamilias* for whom pupillary substitution was possible) were designated heirs and substituted for one another, on account of the others' legal position, to whom there can be only one substitution, the same rule should also apply also for the son.¹⁸⁷

Posted July 27, in the consulship of Cilo and Libo (204).

[3] *Emperor ALEXANDER Augustus to Achilla. pr.* If you were designated heir in your mother's will and you refused the testamentary succession and wished to have the right to possess the estate on intestacy, there is no doubt that you opened the way for the substitute (to take the estate). 1. Hence, if the substitute took the inheritance, you can sue him by the actions that were available against your mother, but cannot claim succession on intestacy.

Posted August 22, in the consulship of Maximus, for the second time, and Aelianus (223).

[4] *The same Augustus to Firmianus.* The accepted view was that a substitution for a minor (*impubes*) in the testator's power, made by a parent as follows: "If he will not be the heir," is extended to the case in which, after he became heir, the minor died, assuming the decedent's contrary wish is not shown.

¹⁸⁵ *Impuberes*, below the age of adulthood (conventionally, 14 for boys, 12 for girls). A *paterfamilias* who appointed his child as heir could appoint a substitute heir for the child if he or she died before reaching adulthood (pupillary substitution). This differs from ordinary ("direct") substitution, where a named heir fails to take the inheritance and the substitute is named in his place. See D. 28.6; Inst. 2.15-16.

¹⁸⁶ = Inst. 2.15.2. Blume: "Supposing that A was appointed as heir to 6/12ths, B to 4/12ths, and C to 2/12ths of the estate, and supposing A died. Inasmuch as B received twice as much of the estate in the first place as C, he received, under the reciprocal substitution, without mention to the contrary, twice as much of the property of A as a substitute."

¹⁸⁷ This decision is cited at D. 28.6.4.2.

Publius Firmianus heres esto', manifestum est in eum casum factam substitutionem, quo utrique heredum substitui potuit.

PP. IIII k. Iul. Fusco II et Dextro cons.

[5] *Imp. Diocletianus et Maximianus AA. Hadriano.* Post aditam hereditatem directae substitutiones non impuberibus filiis factae expirare solent.

PP. x k. Iun. ipsis IIII et III AA. cons.

[6] *Idem AA. et CC. Quintiano.* Testamento iure facto multis institutis heredibus et invicem substitutis, adeuntibus suam portionem coheredum etiam invitis repudiantium adcrecit portio.

Sine die et consule.

[7] *Idem AA. et CC. Feliciano.* Si testamento facto intra pupillarem aetatem et in sua potestate constitutae filiae, si intra pubertatem decesserit, directis verbis pater substituit, heredem te factum ex testamento post eventum condicionis intestati successionem exclusisse constitit.

S. k. Ian. Sirmi AA. cons.

[8] *Idem AA. et CC. Petroniae. pr.* Precibus tuis manifestius exprimere debueras, maritus quondam tuus miles defunctus, quem testamento facto heredem communem vestrum filium instituisse proponis et secundum heredem scripsisse, utrumne in primum casum an filio suo, quem habuit in potestate mortis tempore, si intra quartum decimum aetatis suae annum an postea decesserit. 1. Nam non est incerti iuris, quod, si quidem in patris militis positus potestate primo casu tantum habuit substitutum et patri heres extitit, eo defuncto ad te omnimodo eius pertineat successio. 2. Si vero substitutio in secundum casum vel expressa vel compendio non usque ad certam aetatem facta reperiat, si quidem infra pubertatem decessit, eos habeat heredes, quos pater ei constituit et adierunt hereditatem: si vero post pubertatem, te eius

Nevertheless, since you posit that the substitution was made as follows: "If Firmianus my son and Aelia my wife ~ heaven forbid! ~ will not be my heirs, let Publius Firmianus be heir in their place," it is clear that the substitution was made for the case in which there could be substitution for both heirs (i.e., no pupillary substitution).

Posted June 28, in the consulship of Fuscus, for the second time, and Dexter (225).

[5]¹⁸⁸ *Emperors DIOCLETIAN and MAXIMIAN Augusti to Hadrian.* After entry to the inheritance, direct substitutions normally expire unless made for minor children.

Posted May 23, in the consulship of the Augusti themselves, for the fourth and third times, respectively (290).

[6]¹⁸⁹ *The same Augusti and the Caesars to Quintianus.* When a will is legally made and many heirs are designated and substituted for each other, the portion of those refusing (the inheritance) accrues to those co-heirs accepting their share, even unwillingly.

Without date and consul.

[7] *The same Augusti and Caesars to Felicianus.* If in his will a father made a direct substitution (*directis verbis*) for his daughter who was still a minor and in his power, should she die before puberty, it is settled that you, who were made a heir by will after the condition occurred (because the daughter died before reaching 12), have excluded succession by the intestate heir.

Written January 1, at Sirmium, in the consulship of the Augusti (293).

[8] *The same Augusti and Caesars to Petronia. pr.* In your petition you ought to have stated more clearly – as to your former husband, a deceased soldier, who you say designated your son as "a common heir" and named a second heir – whether he did this (only) for the first instance (*in primum casum*), or (rather) for his son, whom he had in his power at his death, should he die before age 14 or afterwards. 1. For it is not contested law that, if he was placed in the power of his soldier father and had a substitute only in the first instance, and he became his father's heir, on his death his succession would go entirely to you. 2. But if substitution is discovered to be for the second instance (*in secundum casum*) either expressly or in short form not up to a fixed age, if indeed he died before puberty, he would have the heirs whom his father appointed for him, and they would take the inheritance; but if after puberty, and you are holding

¹⁸⁸ Combine with C. 6.54.8.

¹⁸⁹ Combine with C. 6.49.4, where the subscription says: "Written July 10, at Philippopolis, in the consulship of the Augusti (293)." This constitution refers to an estate burdened with debts.

successionem obtinente velut ex causa fideicommissi bona, quae cum moreretur patris eius fuerunt, a te possunt petere.

S. v id. April. AA. cons.

[9] *Imp. Iustinianus A. Menae pp. pr.* Humanitatis intuitu parentibus indulgemus, ut, si filium vel nepotem vel pronepotem cuiuscumque sexus habeant nec alia proles descendantium eis sit, iste tamen filius vel filia vel nepos vel neptis vel pronepos vel proneptis mente captus vel mente capta perpetuo sit, vel si duo vel plures isti fuerint, nullus vero eorum saperet, liceat isdem parentibus legitima portione ei vel eis relicta quos voluerint his substituere, ut occasione huiusmodi substitutionis ad exemplum pupillaris nulla querella contra testamentum eorum oriatur, ita tamen, ut, si postea resipuerit vel resipuerint, talis substitutio cesset, vel si filii aut alii descendentes ex huiusmodi mente capta persona sapientes sint, non liceat parenti qui vel quae testatur alios quam ex eo descendentes unum vel certos vel omnes substituere. 1. Sin vero etiam alii liberi testatori vel testatrici sint sapientes, ex his vero personis quae mente captae sunt nullus descendat, ad fratres eorum unum vel certos vel omnes eandem fieri substitutionem oportet.

D. III id. Dec. Constantinopoli dn. Iustiniano A. pp. II cons.

[10] *Idem A. Iohanni pp. pr.* Cum quidam duobus impuberibus filiis suis heredibus institutis adiecit, si uterque impubes decesserit, illum sibi esse heredem, et dubitabatur apud antiquos legum auctores, utrumne tunc voluit substitutum admitti, cum uterque filius eius in prima aetate decesserit, an alterutro decedente ilico substitutus in eius partem succedat, placuit Sabino substitutionem tunc locum habere, cum uterque decesserit: cogitasse enim patrem primo decedente fratrem suum in eius portionem succedere. 1. Nos eiusdem Sabini veriore sententiam existimantes non aliter substitutionem admittendam esse censem, nisi uterque eorum in prima aetate decesserit.

D. VI k. Aug. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

the succession, they can seek from you, as on the basis of a trust, the property that was his father's when he died.¹⁹⁰

Written April 9, in the consulship of the Augusti (293).

[9] *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect. pr.* For motives of humanity We grant to parents that, if they have a child or grandchild or great-grandchild of either sex and they have no other descendants, but this son or daughter or grandson or granddaughter or great-grandson or great-granddaughter is permanently insane, or if there are two or more but none of them is sane, these same parents are allowed to provide such substitutes as they wish to him, her, or them as to the statutory share left them, so that no complaint (of undutifulness) arise against their will because of such a substitution on analogy with a pupillary one; but in such a way that, if he, she, or they afterwards become sane, such a substitution shall fail, or if there are sane children or other descendants from such an insane person, a male or female testator parent may not substitute any except one or a few or all of those descended from him. 1. But if there are other sane offspring to the male or female testator, but no one descends from those insane persons, the same substitution ought to be made in favor of one or a few or all of their siblings.

Given December 11, at Constantinople, in the consulship of Our Lord Justinian, Ever Augustus, for the second time (528).

[10]¹⁹¹ *The same Augustus to John, Praetorian Prefect. pr.* When someone, having designated his two minor sons as heirs, added that, if either dies as a minor, that man is his heir, it was disputed among the ancient writers of laws (the jurists) whether he wanted the substitute to be admitted when both of his sons died at an early age (before adulthood), or (instead), if either died, he succeeded at once into his share. Sabinus held that the substitution took place (only) when both died; for the father thought that when the first died his brother succeeded into his share. 1. We think the view of this same Sabinus more correct, and hold that substitution is not otherwise allowed except if both of them die at an early age.

Given July 27,¹⁹² at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

¹⁹⁰ This rescript concerns a soldier's will, not bound by normal rules. The "first instance" is just a normal direct substitution in the event the son did not become heir; the "second instance" is a pupillary substitution.

¹⁹¹ Combine with C. 6.25.8-10, 6.26.11.

¹⁹² Krüger argues for July 29, as in the following constitution.

[11] *Idem A. Iohanni pp. pr.* Si quis duobus heredibus institutis filio suo impuberi eos una cum alio tertio substituit et verba testamenti ita composuerit: 'quisquis mihi heres erit, et Titius filio meo heres esto' secundum quod apud Ulpianum invenimus, mortuo impubere filio quaerebatur, quomodo ad substitutionem vocentur tres substituti: utrumne duo priores, qui et patri heredes fuerant scripti, in dimidiam vocantur et Titius in reliquam dimidiam, an tres substituti unusquisque ex triente ad substitutionem vocantur? alia applicata dubitatione, si quis ita heredem scripserit: 'Titius una cum filiis suis et Sempronius heredes mihi sunt'. et in praesente etenim specie quaerebatur secundum Ulpianum voluntas testantis: utrumne Titium una cum suis filiis in dimidiam vocat et Sempronium in aliam dimidiam, an omnes in virilem portionem? 1. Nobis autem in prima quidem specie videtur tres substitutos unumquemque in trientem vocari, in secunda autem specie, cum et natura pater et filius eadem persona paene intelleguntur, dimidiam quidem partem Titio cum filiis, alteram autem partem Sempronio adsignari.

D. IIII k. Aug. Constantiinopoli post consulatum Lampadii et Orestis vv. cc.

XXVII De Necessariis et Servis Heredibus Instituendis vel Substituendis

[1] *Imp. Pertinax A. Lucretio.* Is, qui solvendo non est, heredem necessarium etiam in fraudem creditorum relinquere potest. sed si pignori datus fuisti et in eadem causa permansisti, nec ab eo quidem debitore qui solvendo non fuit liber et heres necessarius existere potuisti.

PP. XI k. April. Falcone et Claro cons.

[2] *Imp. Antoninus A. Aufidio.* Cum vos servi constituti sub appellatione libertorum heredes scripti essetis, ea scriptura benigna interpretatione perinde habenda est, ac si liberi et heredes instituti fuissetis. quod in legato locum non habet.

Accepta VII k. Mart. Prisco et Apollinari cons.

[3] *Idem AA. et CC. Felici.* Si tutor ancillam tuam contubernio suo coniunxit ac post heredem instituit, neque dominium ex huiusmodi facto

[11] ¹⁹³ *The same Augustus to John, Praetorian Prefect. pr.* Someone, having designated two heirs, substituted them along with a third party to his minor son, and worded his will as follows: "Let whoever will be my heir and Titius (the third party) be heir to my son." According to what we found in Ulpian, it was asked, when the minor son died, in what proportion the three substitutes were called to the substitution: whether the first two, who were also named heirs to the father, are called to half and Titius to the remaining half, or the three substitutes are each called to a third of the substitution. Another doubt occurred if someone named an heir thus: "Let Titius along with his sons and let Sempronius be my heirs." In this present case a question of the testator's wish arose, according to Ulpian: whether he calls Titius along with his sons into half and Sempronius into the other half, or all to equal portions. 1. To us it appears, in the first case, that the three substitutes are called each to a third, but in the second case, since also by nature father and son are understood as almost the same person, a half is assigned to Titius with the sons, the other half to Sempronius.

Given July 29, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Twenty-Seventh Title Designating or Substituting Compulsory Heirs or Slaves¹⁹⁴

[1] *Emperor PERTINAX Augustus to Lucretius.* An insolvent person can leave a compulsory heir (*heres necessarius*) even to defraud creditors. But if you (a slave) had been given as a pledge and so remained, you were unable to be made free and a compulsory heir by an insolvent debtor.

Posted March 22, in the consulship of Falco and Clarus (193).

[2] *Emperor ANTONINUS Augustus to Aufidius.* When you (plural), although you had the position of slaves, were (nonetheless) called freedmen when named as heirs, this writing should be given a liberal interpretation, as if you were (both) made free and designated heirs. This rule does not apply to a legacy.

Accepted February 23, in the consulship of Priscus and Apollinaris (169).¹⁹⁵

[3] *The same Augusti and the Caesars to Felix.¹⁹⁶* If your tutor took your slave woman as his domestic partner (*contubernalis*) and later designated her his

¹⁹³ Combine with C. 6.25.8, 9, and 10, 6.26.10.

¹⁹⁴ Blume: "A slave appointed as heir could not refuse to accept the inheritance. He was a compulsory heir – *heres necessarius*. This is a principle unknown to our law. The Romans adopted such principle perhaps because of their repugnance to intestacy, but mainly in case of the insolvency of the testator." Mommsen considered *et servus* a superfluous Justinianic addition.

¹⁹⁵ The compilers apparently assumed the emperor was Caracalla.

¹⁹⁶ The heading should have read: *Emperors DIOCLETIAN and MAXIMIAN to Felix.*

tibi auferri potuit et, ut eius aditione iussu tuo tibi per hanc successio quaeratur, iure concessam habes facultatem.

S. xvi k. Ian. Sirmi AA. cons.

[4] *Imp. Iustinianus A. Iuliano pp. pr.* Cum quidam suum pupillum heredem instituit et servo directis verbis libertatem reliquit et in secundo gradu, in quo pupillarem substitutionem faciebat, ipsum servum sine libertate pupillo suo substituit, quaerebatur inter prudentes, si ex huiusmodi substitutione heres necessarius pupillo existat.

1. Causa etenim altercationis ex vetere regula orta est, quia omnibus placuerat hunc servum necessarium heredem domino fieri, cui in eodem gradu et hereditas et libertas relinquebatur, in praesenti autem non in unum tam libertas quam substitutio congregata est, sed in alium et alium gradum.

2. Nobis itaque eandem altercationem decidentibus mirabile visum est, si quis putet ex huiusmodi scrupulositate impediri testatoris voluntatem, et maxime domini, et existimet non fieri servum heredem necessarium, sed ei licentiam praestet et libertatem consequi et hereditatem respuere et domini voluntati reclamare: qui si hoc differre^{viii} temptaverit, etiam puniendus est. sit itaque et vivo pupillo liber, quia testator hoc voluit, et mortuo pupillo necessarius heres, quia et hoc testator voluit.

D. xv k. Dec. Constantinopoli Lampadio et Oreste vv. cc. cons.

[5] *Idem A. Iohanni pp. pr.* Quidam, cum testamentum conderet, duobus heredibus scriptis unum quidem ex parte instituit, servum autem suum, cuius et nomen addidit, ex reliqua parte sine libertate scripsit heredem et postea eundem servum alii legavit, vel post institutionem heredis servum per legatum alii adsignavit et tunc heredem eum sine libertate instituit: et dubitabatur, si huiusmodi legatum vel institutio aliquas vires potest habere et cui acquiritur legatum vel institutio.

1. Dubitationis autem materia erat, quod adhuc servum suum constitutum heredem sine libertate scripserat, et tanta inter veteres exorta est contentio, ut vix possibile sit videri eandem decidere.

1a. Sed antiquitatem quidem haec altercantem relinquendum est. nobis autem alius modus huiusmodi decisionis inventus est, quia semper

^{viii} inferre

heir, by such an act he could not deprive you of ownership, and you have a legally granted power to acquire the inheritance for yourself through her, by her acceptance on your order.

Written December 17, at Sirmium, in the consulship of the Augusti (293).

[4] *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect. pr.* A man designated his minor son (*pupillus*) as heir and gave freedom to his slave in imperative language, and in the second grade (of the will),¹⁹⁷ where he made a pupillary substitution, he substituted this very slave for his minor son, (but) without giving him freedom. A question arose among the jurists if such a substitution resulted in a compulsory heir to the minor. 1. The reason for the dispute arose from an ancient rule of law, because all were agreed that a slave becomes a compulsory heir to his master if he was left both freedom and the inheritance in the same grade, but in the present case freedom was not joined with substitution in a single grade, but in different grades.

2. In deciding this dispute, We regarded it as it remarkable if anyone thinks that a testator's wish, and especially an owner's, can be impeded by such a technicality, and believes that a slave does not become a compulsory heir, but (instead) gives him the opportunity both to obtain freedom and to decline the inheritance, and (so) to thwart his master's wish. If anyone tries to advance this (argument), he must also be punished. And so he (the slave) shall both be free while the minor lives, because the testator wished it so, and a compulsory heir when the minor dies, because the testator wanted this as well.

Given November 17, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[5]¹⁹⁸ *The same Augustus to John, Praetorian Prefect. pr.* A certain man composed a will in which he named two heirs: one he designated for a share, but (the other,) his slave whose name he mentioned, he named as heir to the remaining part without (giving him) freedom; and later (in the will) he bequeathed the same slave to a third party. Alternatively, after naming an heir he assigned the slave by legacy to a third party and then designated him heir without (giving) freedom. Doubt arose if such a legacy or designation can have some strength, and (in any case) for whom the legacy or designation is acquired. 1. The substance of the doubt was that he named as heir, without (giving) freedom, a person till then in the position of his slave, and such great strife arose among the ancients that it seemed scarcely possible to resolve it.

1a. But we must abandon antiquity's debate over this. We found another way of deciding this, because We always follow the traces of testators' wishes. 1b.

¹⁹⁷ The designated heirs are in the first grade; the second grade is "fallback"

¹⁹⁸ Combine with C. 6.46.6.

vestigia voluntatis sequimur testatorum. **1b.** Cum igitur invenimus a nostro iure hoc esse inductum, ut, si quis servum suum tutorem filiis suis reliquerit sine libertate, ex ipsa tutelae datione praesumatur etiam libertatem ei favore pupillorum imposuisse, quare non hoc et in hereditate et humanius et favore libertatis inducimus, ut, si quis servum suum scripserit heredem sine libertate, omnimodo civis Romanus efficiatur? **1c.** Quo inducto neque adquisitio neque tam effusus veterum atque inextricabilis tractatus locum habeat. neque enim ferendum est supponere quosdam ita esse supinos, ut eundem servum et heredem instituant sine libertate et item alii per legatum eundem servum adsignent.

1d. Sed cum veteres et aliam proposuerunt ambiguitatem dicentes, si quis servum suum in testamento quidem heredem ex parte sine libertate scripsisset, in codicillis autem libertatem ei reliquisset, si possit institutio valere et ille tam heres quam liber fieri, ne videatur per codicillos hereditas confirmari, in quibus hereditas dari secundum veterem regulam non potest: nos in tali dispositione, licet in codicillis fuerit scripta, et libertatem et hereditatem simul servis per nostram liberalitatem et benignam interpretationem indulgemus, ut gratulentur, cum non servi remaneant, sed et liberti et heredes efficiantur, cum tanta in eos nostri numinis benivolentia effusa est, ut, etsi libertas eis neque testamento neque codicillis data est, tamen hereditate servis relicta quasi iniunctam et libertatem esse videri.

2. Illo videlicet observando, ut, si legatum vel fideicommissum eis sine libertate relinquatur, maneat in servitute. **2a.** Non tamen ita impii heredes existant, ut liberalitatem testatoris servilis laboris debita remuneratione defraudare conentur et non derelictum, licet adhuc servis constitutis, donent.

3. Quae iuris nostri definitio etiam ad aliam speciem dubitatam benigne extendatur. si quis etenim in principali testamento servum suum cuidam legaverit, in pupillari autem substitutione eundem servum filio suo sine libertate substituerit, quaerebatur, sive utilis esset talis substitutio et per servum legatum substitutio post mortem pupilli legatario acquiritur, sive inutilis est huiusmodi substitutio, quia sine libertate in servum proprium facta est. **3a.** Melius itaque nobis videtur legatario eum non statim adquiri sancire, sed expectandum esse substitutionis eventum. et si quidem pupillo mortuo locus fuerit substitutioni, et liber et

Inasmuch as We found this rule introduced through Our law,¹⁹⁹ that, if anyone leaves his slave as *tutor* to his children without (giving) freedom, from the giving of tutelage it is presumed, out of consideration for the wards (*pupilli*), that he also imposed freedom on him (the slave), why do We not, in a more humane spirit and out of consideration for freedom (of slaves), introduce this rule also for inheritances, so that, if someone names his slave as heir without (giving) freedom, he is nonetheless made a Roman citizen? 1c. After this is introduced, neither acquisition (of property by anyone through such a slave) nor the extravagant and intricate handling by the ancients is relevant. For it is unbearable to suppose that persons are so thoughtless as both to designate the same slave as heir without freedom and also to assign the same slave to a third party by legacy.

1d. But when the ancients proposed another uncertainty, asking if, should anyone in his will name his slave as heir to a portion without (giving) freedom, but in codicils leave him freedom, the designation can be valid and that person become both heir and free; (and if so whether) it would not seem that the inheritance is confirmed through codicils in which an inheritance cannot be given according to an old rule of law. For such a disposition, although it was written in codicils, through Our generosity and kind interpretation We grant both freedom and the inheritance at once to slaves, that they rejoice when they do not remain slaves but become both freedmen and heirs. Indeed so great is the benevolence of Our Divine Majesty lavished upon them that, even if freedom is not given to them either in the will or in codicils, nevertheless freedom also seems, as it were, inseparable when an inheritance is left to slaves.

2. Clearly this rule must (also) be observed: if a legacy or trust is left to them without freedom, they remain in servitude. 2a. Still, heirs should not be so wicked as to try to defraud the testator's generosity of the repayment owed for servile labor, and not give what is left (to them) although they are still in the position of slaves.

3. This provision of Our law shall also be extended for reasons of benevolence to another doubtful case. For if someone in the beginning of his will legates his slave to someone, but in a pupillary substitution substitutes the same slave for his son without (giving the slave) freedom, it was questioned whether such a substitution would be effective and (so) through the bequeathed slave the substitution would be acquired for the legatee after the ward's death, or such a substitution is ineffective because made for his own slave without (giving) freedom. 3a. It seems best to Us to ordain that he is not immediately acquired for the legatee, but (rather) the outcome of the substitution must be awaited.

¹⁹⁹ See Valerian and Gallienus In C. 7.4.9, a decision evidently adopted in the First Codex of 529; also D. 26.2.10.4 and 32.2.

heres efficiatur: sin autem substitutio minime locum habuerit, forsitan pupillo iam in pubertatem perveniente, tunc ad legatarii dominium transeat. 3b. Quemadmodum enim veteres, si cum libertate substitutio fuisset, hoc inducebant quatenus in suspensio fiat libertas et statuliber intellegatur, ita et ex nostra interpretatione et sine adiectione libertatis in substitutione et liber et heres pupillo existat.

D. 11 k. Mai. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[6] *Idem A. Iohanni pp.* Decisione nostra, quam fecimus sancientes eum, qui a domino suo sine libertate heres instituitur, videri libertatem accepisse, in propria firmitate durante, si quis servum suum pure quidem heredem instituit, libertatem autem sub condicione ei donavit, si quidem condicio talis sit, quae in potestate servi posita est: ille autem eam neglexerit minimeque compleverit, et libertate eum et hereditate sua culpa defraudari. sin autem casualis est condicio et ex fortunae insidiis defecerit, tunc humanitatis intuitu libertatem quidem ei omnimodo competere, hereditatem autem, si quidem solvendo sit, ad alios venire, quos leges vocabant, si non aliquis fuisset substitutus. sin autem solvendo non sit, ut necessarius heres constitutus simul et libertatem et hereditatem obtineat. tunc enim secundum definitionem tam veteris quam nostrae decisionis et liber et heres existat necessarius.

D. 11 k. Aug. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

XXVIII De Liberis Praeteritis vel Exheredatis

[1] *Impp. Severus et Antoninus AA. Fabio. pr.* Cum post omnes heredum gradus exheredatio scribatur, si adiciat testator ab omnibus se gradibus exheredare, non dubitatur iuri satisfactum. et ideo, etiamsi id non adiciatur, appareat tamen eum cum eo consilio scripsisse, ut ab omnibus exheredaret, recte factum testamentum videtur. 1. Proinde cum pater familias filiis institutis et invicem substitutis filiam exheredaverit, intellegendus est exheredationem ab utroque gradu fecisse. nam

And if indeed by the ward's death the substitution takes place, he becomes both free and an heir; but if the substitution does not take place, perhaps because the ward has now reached adulthood, then he passes into the legatee's ownership. 3b. For just as the ancients, when substitution was made with (a grant of) freedom, introduced this rule that as long as freedom remains in suspense and he is considered a conditional freedman (*statuliber*), so by Our interpretation he becomes both free and an heir to the ward even without the addition of freedom in the substitution.

Given April 30, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[6]²⁰⁰ *The same Augustus to John, Praetorian Prefect.* Leaving in force the decision We made ordaining that a person who is designated heir by his master without (being given) freedom is deemed to have received freedom,²⁰¹ (We further provide:) if someone designated his slave as an unconditional heir, but gave him liberty under a condition, then if the condition is such that it is in the slave's power (to fulfill), but he disregards it and does not fulfill it, by his fault he is deprived of both freedom and the inheritance. But if the condition is a matter of chance and fails due to fortune's snares, then for humane considerations he receives freedom in any case, but the inheritance, if solvent, goes to others whom the law calls (the intestate heirs), unless someone was substituted. But if the estate is not solvent, in the position of a compulsory heir he simultaneously obtains both freedom and the inheritance. For then, by the determination of both the ancient and Our decision, he becomes both free and a compulsory heir.

Given July 31,²⁰² at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Twenty-Eighth Title Offspring Who Are Passed Over or Disinherited²⁰³

[1] *Emperors SEVERUS and ANTONINUS Augusti to Fabius. pr.* When a disinheritance (*exheredatio*) is written after all the grades of heirs, if the testator adds that he disinherits (someone) from all grades, there is no doubt the law is satisfied (and the disinheritance is absolute). And even if this is not added, but it appears that he wrote with the aim that he disinherit from all (grades), the will is considered correctly made. 1. Hence, since your *paterfamilias*, after having designated his sons and substituted them for one another, disinherited his daughter,

²⁰⁰ Combine with C. 6.25.8–10 and 6.26.10.

²⁰¹ C. 6.27.5 just above.

²⁰² Krüger argues for July 29.

²⁰³ See D. 28.2; Inst. 2.13.

cum idem heredes instituti sunt, nulla ratio reddi potest, quare videatur in posteriore tantum casu exheredare voluisse.

PP. VI k. Iul. Cilone et Libone cons.

[2] *Imp. Alexander A. Heraclidae.* Si avus tuus, qui patrem tuum et novercam aequis portionibus heredes instituit, cum te quoque haberet in potestate, testamento nominatim non exheredavit, mortuo patre tuo vivo avo sine impedimento legis Vellaeae succedendo in patris tui locum rupisti avi testamentum et ad te hereditas eius tota pertinuit.

PP. VI id. April. Fusco II et Dextro cons.

[3] *Imp. Iustinianus A. Iuliano pp.* Si quis filium proprium ita exheredaverit: 'ille filius meus alienus meae substantiae fiat', talis filius ab huiusmodi verborum conceptione non praeteritus, sed exheredatus intellegatur. cum enim manifestissimus est sensus testatoris, verborum interpretatio nusquam tantum valeat, ut melior sensu existat.

D. x k. Mart. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[4] *Idem A. Iohanni pp. pr.* Maximum vitium antiquae subtilitatis praesenti lege corrigimus, quae putavit alia esse iura observanda in successione parentum, si ex testamento veniant, in masculis et in feminis, cum ab intestato simile ius utrique sexui servaverunt, et aliis verbis exheredari debere filium sanxerunt, aliis filiam, et inter nepotes exheredandos alia iura civilia, alia praetoris introduxerunt. 1. Et si praeteritus fuerat filius, vel ipso iure testamentum evertibat vel contra tabulas bonorum possessionem in totum accipiebat, filia autem praeterita ius adcrendi ex iure vetere accipiebat, ut eodem momento et testamentum patris quodammodo ex parte iure adcrendi evertat et ipsa quasi scripta legatis supponeretur, ex praetore autem habebat contra tabulas bonorum possessionem in totum, constitutio autem Magni Antonini

he should be interpreted as having disinherited her from both grades. For when the same heirs have been designated (in both grades), no reason can be given why he seems to have wished to disinherit her only in the second case.

Posted June 26, in the consulship of Cilo and Libo (204).

[2] *Emperor ALEXANDER Augustus to Heraclidas.* If your grandfather, who designated your father and stepmother as heirs to equal shares while he also had you in his power, by his will did not disinherit you (his grandson) by name, and your father died while the grandfather was alive, by succeeding into your father's place without hindrance from the *lex Vellaea*²⁰⁴ you have broken your grandfather's will, and (so) his entire inheritance belonged to you.

Posted April 8, in the consulship of Fuscus, for the second time, and Dexter (235).

[3] *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect.* If anyone disinherits his own son as follows: "Let that son of mine have no part of my estate," by this sort of verbal formulation such a son is understood as not passed over but disinherited. For when the testator's intent is very clear, interpretation of words should never be so strong as to prevail over intent.

Given February 20, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[4]²⁰⁵ *The same Augustus to John, Praetorian Prefect. pr.* By this law We correct the greatest fault of ancient technicality, which held that – despite their observing a similar rule for both sexes upon intestacy – different rules should be followed for males and females in succession to (the estates of) parents if they come through a will: they decreed that a son ought to be disinherited by one set of words, a daughter by another, and in disinheriting grandchildren they introduced some civil law provisions, and others of Praetorian origin. 1. And if a son was passed over, either he overturned the will by operation of law (if he was in his father's power) or he received complete possession of the estate contrary to the will (if emancipated). But through ancient law (the *ius civile*) a passed-over daughter received (only) the right of sharing (alongside the named heirs), so that at the same time she both in part overturns her father's will, in a sense, through the right of sharing, and is herself burdened with the legacies like a named heir. From the Praetor she had

²⁰⁴ The *lex Junia Vellaea* (probably 26 CE) contained rules on designating and disinheriting posthumous children; some wording at D. 28.2.29.11–14. The point is that Heraclidas, like a child born between the writing of the will and the testator's demise, broke the will by becoming a *suius heres* not accounted for by the testator.

²⁰⁵ Combine with 3.28.35 and 36.

eam in tantum coartabat, in quantum ius adcrendi competebat. qui enim tales differentias inducunt, quasi naturae accusatores existunt, cur non totos masculos generavit, ut, unde generentur, non fiant.

2. Nam haec corrigentes et maiorum nostrorum sequimur vestigia, qui eandem observationem colere manifestissimi sunt. scimus etenim antea simili modo et filium et alios omnes inter ceteros exheredatos scribere esse concessum, cum etiam centumviri aliam differentiam introduxerunt. 3. Et ex hac iniquitate vitium emerit, quale ex libris Ulpiani, quos ad edictum fecit praetoris, inventum a Triboniano viro gloriosissimo nostro quaestore ceterisque viris facundissimis compositoribus iuris enucleati ad nostras aures relatum est.

4. Nam cum ultimum adiutorium de inofficiosi querella positum est et nemo ex alio ortus praesidio ad hanc decurrere possit, inventa fuerat filia praeterita minus habens quam filia exheredata. cum enim per contra tabulas bonorum possessionem vel ius adcrendi semissem substantiae filia praeterita accipiebat et omnibus legata praestare compellebatur, scilicet usque ad dodrantem suae portionis, remanebat ei sescuncia tantummodo in sua successione. 5. Quod si fuisset exheredata, quarta pars omnimodo totius substantiae ei relinqui debebat, et quam iniuria dignam pater existimabat, amplius habebat ea, quam taciturnitate in institutione praeteriit: et si secundum nostrae constitutionis definitionem, quam de supplemento quadrantis posuimus, repletio fuerat introducta, simili modo exheredatae in quarta repletio accedebat et ita vitium permansit, ut nec ex nostra constitutione emendationem aliquam sentiret.

complete possession of the estate contrary to the will, but a constitution of Antoninus (Pius) the Great²⁰⁶ restricted her to as much as the right to share extended. Those who introduce such distinctions accuse nature, as it were, for not producing males alone, so that those (females) from whom they are born might not exist.

2. In correcting these things, We also follow the traces of Our predecessors, who quite clearly desired equal treatment. For We know that previously it was allowed to name both a son and all others along with the rest who were disinherited, when the centumviral court also introduced another distinction. 3. And from this unfairness a defect arose of the sort that was discovered, in the books Ulpian wrote on the Praetor's Edict, by *vir gloriosissimus* Tribonian Our Quaestor, and brought to Our attention by other most learned compilers of the condensed law.

4. For when the complaint over an undutiful will has been established as a last resort and no one possessing another remedy can resort to it, a passed-over daughter was found to have less than a disinherited daughter, since a passed-over daughter, through possession of the estate contrary to the will or the right of sharing, received half of the estate and was compelled to pay legacies to everyone up to three-fourths of her portion; there remained to her just three-twenty-fourths in her inheritance.²⁰⁷ 5. But if she were disinherited, in any case a fourth part of the entire estate had to be left to her, and she whom her father considered worthy of insult had more than the one he passed over in silence in designating (an heir). And if a supplement occurred in accord with the provision of Our constitution which We laid down on making up the deficiency in the fourth, the complement accrued similarly to the disinherited (daughter) in her fourth, and thus the defect persisted, so that it found no correction even from Our constitution.²⁰⁸

²⁰⁶ Actually probably Caracalla, see Gaius, *Inst.* 2.126.

²⁰⁷ Blume: "This upon the theory that there would be only one daughter, and the heirs were outsiders. In such event, she received one-half of the whole or 12/24ths, leaving her only 3/24ths, if she was compelled to pay out three-fourths of what she received, in legacies etc. The proportion would be different if there were more than one daughter, for in such event all of the daughters passed over together received only the half of the whole."

²⁰⁸ The constitution is C. 3.28.30. On the calculation, Blume: "This again upon the theory that the heirs were outsiders and there was only one daughter. A child, unless good cause to the contrary existed, was entitled to receive a fourth of what she would have received if the testator had died intestate. That was the birthright portion. If there was only one daughter – one child – she would have received 12/12th of the inheritance, if the testator had died intestate. Her birthright portion therefore would have been 3/12ths, or a fourth. But if there were more children, they were all of them together entitled to the fourth of the whole property, and if, e.g. there were four children, each of them was entitled to 1/16th. The illustration, however, given in this law would have held good throughout, on the assumption that all the daughters would have been required to pay out three-fourths of what they received, in case they were passed over. We would always start out with 3/24ths in one case and 1/4th or 6/24ths in the other." The birthright portion was later increased by Nov. 18.1.

6. Sancimus itaque, quemadmodum in successione parentum, quae ab intestato deferuntur, aequa lance et mares et feminae vocantur, ita et in scriptura testamentorum eas honorari et similibus verbis exheredationes nominatim procedere et contra tabulas possessionem talem habere, qualem filius suus vel emancipatus, ut et ipsa, si fuerit praeterita, ad instar filii emancipati vel sui vel testamentum ipso iure evertat vel per contra tabulas bonorum possessionem stare hoc non patiatur.

7. Et haec non solum in filiabus obtinere, sed etiam in nepotibus et in neptibus et deinceps observari censemus, si tamen ex masculis progeniti sunt.

8. Sed quia et aliud vitium fuerat sub obtentu differentiae introductum et alia iura exheredationis in postumis, alia in iam natis observantur, cum necesse fuerat postumam inter ceteros exheredatam etiam legato honorari, filiam autem iam progenitam et sine datione, et hoc brevissimo incremento verborum ad plenissimam definitionem deduximus sancientes eadem iura obtinere et in postumis exheredandis, sive masculini sive feminini sexus sint, quae in filiis et filiabus iam statuimus, ut etiam ipsi vel ipsae nominatim exheredentur, id est postumi vel postumae facta mentione.

D. k. Sept Constantinopoli post consulatum Lampadii et Orestis vv. cc.

XXVIII De Postumis Heredibus Instituendis vel Exheredandis vel Praeteritis

[1] *Imp. Antoninus A. Brittiano.* Si post testamentum factum, quo postumorum suorum nullam mentionem testator fecit, filiam suscepit, intestato vita functus est, cum agnatione postumae cuius non meminit testamentum ruptum sit: ex rupto autem testamento nihil deberi neque peti posse explorati iuris est.

D. et pp. IIII k. Iul. Antonino A. IIII et Balbino cons.

6. Therefore We ordain that, just as both males and females are summoned in equal measure to inheritances from ascendants that are conferred through intestacy, so shall women be treated in written wills as well, and with similar words disinheritanes by name shall proceed, and they have possession contrary to the will just as his son whether in his father's power or emancipated, so that a daughter, if she is passed over, on the example of a son whether in power or emancipated may either overturn the will by operation of law or through possession of the estate contrary to the will not allow it to stand.

7. And We determine that these rules be observed not only for daughters, but also for grandsons and granddaughters and so on, provided they are born through males (agnates).

8. But because in consideration of the difference (between the sexes) yet another defect was introduced, and different rules of disinheritance were observed for posthumous daughters than for those already born, it being required also to bestow a legacy on a posthumous child disinherited in a general clause (*inter ceteros*) while a daughter already born (could be disinherited) without a gift, We have in the very briefest of phrases brought this practice to a quite definite end by ordaining that the same rules apply both in disinheriting posthumous children, whether male or female, as We have now established for sons and daughters, (namely) that children of either sex be disinherited by name, that is, with express mention of a posthumous son or daughter.

Given September 1, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Twenty-Ninth Title Designating Posthumous Children as Heirs, or Disinheriting or Passing Over Them²⁰⁹

[1] *Emperor ANTONINUS Augustus to Brittianus.* If a daughter was born to him after a testator made a will in which he made no mention of his posthumous children, he died intestate, since a will is broken by the entry into the agnatic kin-group of a posthumous daughter whom he does not mention. It is recognized law that from a broken will nothing is owed or can be sought.

Given and posted June 28,²¹⁰ in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

²⁰⁹ See D. 28.2.

²¹⁰ Some manuscripts have June 26.

[2] *Imp. Diocletianus et Maximianus AA. et CC. Sotericho*. Uxor abortu testamentum mariti non solvi, postumo vero praeterito, quamvis natus ilico decesserit, non restitui ruptum iuris evidentissimi est.
S. XII k. Mart. Sirmi CC. cons.

[3] *Imp. Iustinianus A. Iuliano pp. pr.* Quod certatum est apud veteres, nos decidimus. cum igitur is qui in ventre portabatur praeteritus fuerat, qui, si ad lucem fuisset redactus, suus heres patri existeret, si non alius eum antecederet, et nascendo ruptum testamentum faciebat, si postumus in hunc quidem orbem devolutus est, voce autem non emissa ab hac luce subtractus est, dubitabatur, si is postumus ruptum facere testamentum potest. 1. Veteres animi turbati sunt, quid de paterno elogio statuendum sit. cumque Sabiniani existimabant, si vivus natus est, etsi vocem non emisit, ruptum testamentum, apparet,^{lx} quod, etsi mutus fuerat, hoc ipsum faciebat, eorum etiam nos laudamus sententiam et sancimus, si vivus perfecte natus est, licet ilico postquam in terram cecidit vel in manibus obstetricis decessit, nihilo minus testamentum corrumpi, hoc tantummodo requirendo, si vivus ad orbem totus processit ad nullum declinans monstrum vel prodigium.

D. XV k. Dec. Constantinopoli Lampadio et Oreste vv. cc. cons.

[4] *Idem A. Iuliano pp. pr.* Quidam, cum testamentum faciebat, his verbis usus est: 'si filius vel filia intra decem mensuum spatium post mortem meam fuerint editi, heredes sunt', vel ita dixit: 'filius vel filia, qui intra decem menses proximos mortis meae nascentur, heredes sunt'. iurgium antiquis interpretatoribus legum exortum est, an videantur^x non contineri testamento et hoc ruptum facere. 1. Nobis itaque eorum sententias decidentibus, cum frequentissimas leges posuimus testatorum voluntates adiuvantes, ex neutra huiusmodi verborum positione ruptum fieri testamentum videtur, sed sive vivo testatore sive post mortem eius intra decem menses a morte testatoris numerandos filius vel filia fuerint progeniti, maneat testatoris voluntas immutata, ne poenam patiatur praeteritionis, qui suos filios non praeteriit.

D. XII k. Dec. Constantinopoli Lampadio et Oreste vv. cc. cons.

^{lx} [apparet.]

^x videantur <qui vivo testatore nascentur>

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Soterichus.* It is quite clear law that the will of a husband is not broken by his wife's miscarriage, but when a posthumous child is passed over, although it dies immediately after birth, (the will once) broken is not reinstated.

Written February 18, at Sirmium, in the consulship of the Caesars (294).

[3] *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect. pr.* We determine an issue contested among the ancients. When a child carried in the womb was passed over, who, if he had seen the light (of life), would have been a *suus heres* to his father if no one other (such as his father) preceded him, and by its birth it (potentially) caused the will to be broken, (then) if the posthumous child had entered the world but departed from this light without uttering a sound, question arose if this posthumous child can break the will. 1. Ancient opinions were confused about what should be decided about the father's will. When the Sabinians thought that the will was broken if it was born alive even if it did not utter a sound, because it (also) did this even if it was mute, We too praise their view and ordain that if it is born entirely alive, although it died immediately after falling to earth or in the midwife's hands, nevertheless the will is broken, provided it comes entirely alive to this world and does not deviate toward the monstrous or prodigious.

Given November 17, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[4] *The same Augustus to Julian, Praetorian Prefect. pr.* Someone, in making a will, used these words: "If a son or daughter are born within ten months after my death, let them be my heirs," or said this: "Let a son or daughter who are born within the next ten months from my death be my heirs." A quarrel arose among the ancient interpreters of the law as to whether children born while the testator lived seem not to be included in the will and (thus) break it. 1. To Us in settling their views, granted that We have enacted numerous laws supporting the wishes of testators, it is deemed best that the will be broken by neither of these verbal formulations, but no matter whether a son or daughter are born while the testator lives or after his death within ten months counting from the testator's death, the testator's wishes shall remain unscathed, so that a person who does not pass over his own children does not suffer the penalty for passing over them.

Given November 20,²²¹ at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

²²¹ Krüger prefers November 17; so, too, Lounghis *et al.*

**XXX De Iure Deliberandi et de Adeunda vel Adquirenda
Hereditate**

[1] *Imp. Antoninus A. Titiae.* Si a patre emancipata eo defuncto bonorum possessionem non agnovisti, frustra vereris, ne hereditati paternae sis obligata, quod servum eius nullo iure manumisisti resque et mancipia quaedam propter funeris impensas distraxisti.

PP. k. Iul. Messala et Sabino cons.

[2] *Imp. Alexander A. Florentino militi.* Cum debitum paternum te exsolvisse adlegas, pro portione hereditaria agnovisse te hereditatem defuncti non ambigitur.

PP. vi id. Febr. Maximo II et Aeliano cons.

[3] *Imp. Gordianus A. Florentino militi. pr.* Si fratris tui filius mortis tempore in patris sui fuit potestate, sive ex asse heres institutus est, etiam clausis tabulis heres potuit existere, sive ex parte, nihilo minus statim suus heres ei extitit nec eapropter, quod intra paucos dies mortis patris sui concessit in fatum, tu ad eiusdem fratris tui potes accedere successionem. 1. Quod si, cum sui iuris esset, ante aditam hereditatem decessit tuque fratri tuo legitimus heres extitisti seu intra tempora edicto praefinita bonorum possessionem agnovisti: quae facultatum sunt vel quae ab alio iniuria detinentur, praesidis diligentia tibi restituentur.

PP. xv k. Sept. Gordiano A. II et Pompeiano cons.

[4] *Imp. Decius A. Athenaidi.* Filio familias delata hereditate si pater pro herede voluntate filii gessit, sollemnitati iuris satisfactum videri saepe rescriptum est.

PP. x k. Mart. Decio A. et Grato cons.

Thirtieth Title The Right to Consider (Whether to Enter into an Inheritance), and Accepting or Acquiring an Inheritance²¹²

[1] *Emperor ANTONINUS Augustus to Titia.* If you, after being emancipated by your father, did not claim possession of the estate (*agnoscere bonorum possessionem*) following his death, you needlessly fear that you are liable on your father's inheritance because you manumitted a slave without the right to do so and sold some slaves to pay funeral expenses.²¹³

Posted July 1, in the consulship of Messala and Sabinus (214).

[2]²¹⁴ *Emperor ALEXANDER Augustus to Florentinus, a soldier.* Since you state that you paid a debt of your (dead) father in proportion to your inherited share, there is no doubt that you have claimed the decedent's inheritance.

Posted February 8, in the consulship of Maximus, for the second time, and Aelianus (223).

[3] *Emperor GORDIAN Augustus to Florentinus, a soldier. pr.* If your brother's son was, at the time of (your brother's) death, in the power of his father, (then) if he was designated sole heir, even before opening the will he could become heir; or if (only) to a part, nonetheless he immediately became a *suus heres* to him. And (so) you cannot enter upon your brother's succession (as intestate heir) on the ground that he (the nephew) yielded to fate (died) a few days after your brother's death. **1.** But if he was *sui iuris* (because emancipated) and died before accepting the inheritance, and you were the statutory heir to your brother or, within the time fixed by the Edict, you claimed possession of the estate, what resources there were (in the estate), or wrongfully held by a third party, shall be restored to you through the governor's thoroughness.

Posted August 18, in the consulship of Gordian Augustus, for the second time, and Pompeianus (241).

[4] *Emperor DECIUS Augustus to Athenais.* Rescripts have often held that, if an inheritance falls to a son in his father's power and the father acts as heir by the son's wish, the formal legal requirement (for acceptance) is satisfied.

Posted February 20, in the consulship of Decius Augustus and Gratus (250).

²¹² See D. 28.8, 29.2.

²¹³ Titia meddled with the estate after her father's death, but, because she was emancipated, could accept the inheritance on intestacy only by applying to the Praetor for possession of it. The issue in this and many subsequent constitutions is whether meddling amounts to acceptance of an estate.

²¹⁴ Combine with C. 3.28.8 (February 7).

[5] *Impp. Valerianus et Gallienus AA. Paulo.* Potuit pupillus pro herede tutore auctore gerendo consequi successionem, sed ipsius actus et voluntas fuit necessaria. nam si quid nesciente eo tutor egit, illi hereditatem non potuit adquirere.

PP. XVI k. Iul. ipsis IIII et III AA. cons.

[6] *Impp. Diocletianus et Maximianus AA. Philippae.* Si avia tua patrem tuum ex duabus uncis scripsit heredem, et sola animi destinatione pater tuus heres fieri poterat. igitur si testamento suo easdem uncias ad te pertinere decrevit, apud rectorem provinciae duarum unciarum ius persequi poteris.

PP. XVI k. Aug. Sirmi ipsis IIII et III AA. cons.

[7] *Idem AA. et CC. Eusebio.* Quoniam sororem tuam prius defunctam esse proponis, quam cognosceret, an a fratre sibi aliquid hereditatis fuisset relictum, manifestum atque evidens est, antequam pro herede gereret vel bonorum possessionem admiserit, defunctam successionem eam non potuisse ad heredes suos transmittere.

PP. k. Mai. Thiralli AA. cons.

[8] *Idem AA. et CC. Claudio.* Licet in continenti sui heredes se paternis non miscuerint bonis, tamen ignorantes delatam sibi esse hereditatem longi temporis praescriptione, quominus hanc recte vindicent, excludi non possunt.

S. XVII k. Ian. Sirmi AA. cons.

[9] *Idem AA. et CC. Platoni.* Si curatoris tui quondam testamento iure facto vel ab intestato legitima delata successio est, hoc casu ei qui non repudiavit hereditatem eam licet adire. rector igitur aditus provinciae, si hereditati necdum sunt obligati, eos an heredes sint interrogare debet ac, si tempus ad deliberandum petierint, moderatum statuet.

S. XVI k. Ian. Sirmi AA. cons.

[5] *Emperors VALERIAN and GALLIENUS Augusti to Paul.* A minor (*pupillus*) could accept succession by acting as heir with his *tutor's* consent, but (both) an act and his wish were required. For if the *tutor* did something without his (the ward's) knowledge, he could not acquire the inheritance for him.

Posted June 16, in the consulship of the Augusti, for the fourth and third time, respectively (257).

[6] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Philippa.* If your grandmother named your father as heir to two-twelfths (of her estate), your father could become heir even by mere intent (to accept). If, therefore, in his will he ordered the same share to go to you, before the provincial governor you can sue for your right to the two-twelfths.

Posted July 17, at Sirmium, in the consulship of the Augusti themselves, for the fourth and third time, respectively (290).

[7]²⁹⁵ *The same Augusti and the Caesars to Eusebius.* Since you posit that your sister died before she knew whether her brother had left her any inheritance, it is clear and apparent that on her death she could not transmit this succession to her heirs before she acted as an heir or took possession of the estate (of her brother).

Posted May 1, at Thirallum (Tzouroulon), in the consulship of the Augusti (293).

[8] *The same Augusti and Caesars to Claudius.* Although the *sui heredes* did not immediately become involved with their father's property, still they, (despite) being unaware that the inheritance came to them, cannot be excluded through the (current holder's) long-time prescription from rightly claiming its ownership.

Written December 16,²⁹⁶ at Sirmium, in the consulship of the Augusti (293).

[9] *The same Augusti and Caesars to Plato.* If a succession came (to you and others) through the legally made will of your former *curator* or by statutory right upon intestacy, in this situation a person who has not rejected the inheritance may (still) accept it. So, upon being approached, the provincial governor should ask them, if they were not yet bound to the inheritance, whether or not they are heirs, and, if they ask for time to consider, grant a reasonable time.

Written December 17, at Sirmium, in the consulship of the Augusti (293).

²⁹⁵ = Consultatio 6.19 (April 22); combine with C. 2.3.21, 6.53.6.

²⁹⁶ December 24 in one manuscript.

[10] *Idem AA. et CC. Sabinae.* Si te bonis paternis maior quinque et viginti annis miscuisti, neque inopia patris te excusat neque vis fratris portionem tuam vel testamentum eripientis arcere te exactione creditorum, qui iure civili pro hereditaria te portione conveniunt, potest.

S. xvi k. Ian. Sirmi CC. cons.

[11] *Idem AA. et CC. Philuminae.* Renitente te pater tuus, in cuius fuisti potestate, neque spem delatae tibi legitimae quaerendae successionis absumere neque hereditarios manumittendo servos his praestare libertatem potuit.

S. vi id. Febr. Sirmi CC. cons.

[12] *Idem AA. et CC. Antonio.* Puberem agnoscentem bonorum possessionem, posteaquam ei fuit hereditas delata, pro herede gerere non ambigitur.

S. iii k. Dec. CC. cons.

[13] *Idem AA. et CC. Archepolidi.* Suum heredem omnia bonorum possessione paternam successionem obtinere potuisse certi iuris est.

S. iii id. Dec. Nicomediae CC. cons.

[14] *Idem AA. et CC. Flaviae.* Si sorori suae frater tuus civili vel honorario successit iure, licet res ex eius descendentes bonis non probetur tenuisse, heres tamen effectus contra possidentes experiri potest.

S. d. xviii k. Ian. Nicomediae CC. cons.

[15] *Imp. Constantius A. ad Leontium comitem Orientis.* Non est dubium, si, priusquam filius iussu patris adierit hereditatem, propriae potestatis effectus est, arbitrio suo eundem hanc sibi potuisse quaerere.

D. viii id. April. Limenio et Catulino cons.

[16] *Imp. Arcadius et Honorius AA. Ennodio.* Nec emere nec donatum adsequi nec damnosam quisque hereditatem adire compellitur.

[10] *The same Augusti and Caesars to Sabina.* If you are older than 25 and involved yourself in your father's estate, neither your father's poverty, nor the force that your brother used in wresting away your portion or the (whole) will, can protect you from the demands of creditors who sue you under civil law in proportion to your inheritance (*pro portione hereditaria*).

Written December 17, at Sirmium, in the consulship of the Caesars (294).²¹⁷

[11] *The same Augusti and Caesars to Philumena.* Your father, in whose power you were, could not against your will take away your expectation of acquiring a statutory inheritance that had come to you, nor give freedom to the slaves in the inheritance by manumitting them.

Written February 8, at Sirmium, in the consulship of the Caesars (294).

[12] *The same Augusti and Caesars to Antonius.* There is no doubt that an adult male (*pubes*) acts as heir by claiming possession of the estate after an inheritance came to him.

Written November 29, in the consulship of the Caesars (294).

[13] *The same Augusti and Caesars to Archepolis.* It is settled law that a *suus heres* could obtain succession to a father without resorting to (a claim of) possession of the estate.

Written December 11, at Nicomedia, in the consulship of the Caesars (294).

[14] *The same Augusti and Caesars to Flavia.* If your brother succeeded to your sister by Civil or Praetorian law, he became heir and can sue the possessors even if it is not shown that he held the property deriving from her estate.

Written and given December 14,²¹⁸ at Nicomedia, in the consulship of the Caesars (294).

[15]²¹⁹ *Emperor CONSTANTIUS Augustus to Leontius, Count of the East.* There is no doubt that if, before he (a son in his father's power) accepted an inheritance on his father's order, he became his own master (*sui iuris*), he could claim it for himself at his own discretion.

Given April 6, in the consulship of Limenius and Catulinus (349).

[16]²²⁰ *Emperors ARCADIUS and HONORIUS Augusti to Ennodius.* No one is compelled to make a purchase, or to take a gift, or to accept an insolvent inheritance.

²¹⁷ More probably written 293, in the consulship of the Augusti.

²¹⁸ Haloander gives December 21.

²¹⁹ = C.Th. 8.1.8.5; combine with C. 6.14.3.

²²⁰ = C.Th. 12.1.149; combine with C.Th. 11.1.24, 3.5.25.

D. VII k. Ian. Olybrio et Probino cons.

[17] *Idem AA. et Theodosius A. Anthemio pp.* Cretionum scrupulosam sollemnitatem hac lege penitus amputari decernimus.

D. XVI k. April. Constantinopoli Honorio VII et Theodosio II AA. cons.

[18] *Impp. Theodosius et Valentinianus AA. ad senatum. pr.* Si infanti, id est minori septem annis, in potestate patris vel avi vel proavi constituto vel constitutae hereditas sit derelicta vel ab intestato delata a matre vel linea ex qua mater descendit vel aliis quibuscumque personis, licebit parentibus eius sub quorum potestate est adire eius nomine hereditatem vel bonorum possessionem petere. 1. Sed si hoc parens neglexerit et in memorata aetate infans decesserit, tunc parentem quidem superstitem omnia ex quacumque successione ad eundem infantem devoluta iure patrio quasi iam infanti quaesita capere.

2. Parente vero non subsistente, si quidem post eius obitum tutor infanti sit vel datus fuerit, posse eum etiam adhuc infante pupillo constituto nomine eius adire hereditatem sive vivo parente sive post mortem eius ad eum devolutam vel bonorum possessionem petere et eo modo eidem infanti hereditatem quaerere. 3. Sin vero vel non sit tutor vel, cum sit, ea facere neglexerit, tunc eodem infante in ea aetate defuncto omnes hereditates ad eum devolutas et non agnitas ita intellegi, quasi ab initio non essent ad eum delatae, et eo modo ad illas personas perveniant, quae vocabantur, si minime hereditas infanti fuisset delata. ea vero, quae de infante in potestate parentum constituto statuimus, locum habebunt et si quacumque causa sui iuris idem infans inveniatur.

4. Sin autem septem annos aetatis pupillus excesserit et priore parente mortuo in pupillari aetate fati munus impleverit, ea obtinere praecipimus, quae veteribus legibus continentur, nulla dubietate relictis, quin pupillus post impletos septem annos suae aetatis ipse adire hereditatem vel possessionem bonorum petere consentiente parente, si sub eius potestate sit, vel cum tutoris auctoritate, si sui iuris sit, poterit vel, si non habeat tutorem, adire praetorem et eius decreto hoc ius consequi.

D. VIII id. Nov. Ravennae Theodosio XII et Valentiniano II AA. cons.

Given December 26, in the consulship of Olybrius and Probinus (395).

[17]²²¹ *The same Augusti and THEODOSIUS Augustus to Anthemius, Praetorian Prefect.* We order that the scrupulous technicalities of formal acceptances (*cre-tiones*) be altogether abolished by this law.

Given March 17,²²² at Constantinople, in the consulship of Honorius, for the seventh time, and Theodosius, for the second time, Augusti (407).

[18]²²³ *Emperors THEODOSIUS and VALENTINIAN Augusti to the Senate. pr.* If an inheritance is left to an infant, that is, a child of either sex less than 7 years old, in the power of a father or grandfather or great-grandfather, or comes by intestacy, from a mother or the line from which the mother descends or from any other persons, its male ascendants (*parentes*), under whose power it is, may accept the inheritance in its name or seek possession of the estate. 1. But if the male ascendant neglects this and the infant dies within the mentioned age, then by the right of a father the surviving ascendant takes all that fell to the same infant from whatever succession, as if it were already acquired by the infant.

2. But when the ascendant does not survive, if indeed after his death a *tutor* has been or will be given to the infant, he can, while the ward remains an infant, in his name accept the inheritance that came to him either while his ascendant was alive or after his death, or seek possession of the estate and in this manner claim the inheritance for this infant. 3. But if there is no *tutor*, or if there is but he neglects to do this, then, when this infant dies within that age (age 7), all the inheritances that fell to him (the infant) and were not accepted are construed as if they had not originally fallen to him, and in this way they come to those persons who were summoned if the inheritance had not fallen to the infant. But these things that We ordain about an infant in the power of its ascendants will apply also if for any reason the same infant is found to be *sui iuris*.

4. If the ward has passed the age of 7 and after its father's death, while still a ward, fulfills the burden of destiny (dies), We order application of the rules contained in ancient laws; but no doubt remains that the ward, after age 7, can accept the inheritance or claim possession of the estate with his ascendant's consent, if he is in power, or with a tutor's authorization, if he is *sui iuris*, or, if he does not have a tutor, (can) approach the Praetor and by his decree receive this right.

Given November 6, at Ravenna, in the consulship of Theodosius, for the twelfth time, and Valentinian, for the second time, Augusti (426).

²²¹ = C.Th. 8.18.8.1.

²²² Haloander has March 28. Seeck gives Krüger's date.

²²³ Combine with C. 6.55.1.1 and the texts cited there.

[19] *Imp. Iustinianus A. Demostheni pp. pr.* Cum antiquioribus legibus et praecipue in quaestionibus Iulii Pauli invenimus filios familias paternam hereditatem deliberantes posse et in suam posteritatem hanc transmittere, et aliis quibusdam adiectis, quae in huiusmodi persona praecipua sunt: eam deliberationem et in omnes successores sive cognatos sive extraneos duximus esse protelandam. 1. Ideoque sancimus: si quis vel ex testamento vel ab intestato vocatus deliberationem meruerit vel hoc quidem non fecerit, non tamen successionem renuntiaverit, ut ex hac causa deliberare videatur, sed nec aliquid gesserit, quod additionem vel pro herede gestionem inducit, praedictum arbitrium in successionem suam transmittat, ita tamen, ut unius anni spatii eadem transmissio fuerit conclusa. 2. Et si quidem is, qui sciens hereditatem sibi esse vel ab intestato vel ex testamento delatam deliberatione minime petita intra annale tempus decesserit, hoc ius ad suam successionem intra annale tempus extendat. 3. Si enim ipse, postquam testamentum fuerit insinuat, vel ab intestato vel ex testamento vel aliter ei cognitum sit heredem eum vocatum fuisse, annali tempore translapso nihil fecerit, ex quo vel adeundam vel renuntiandam hereditatem manifestaverit, is cum successionem suam ab huiusmodi beneficio excludatur. 4. Sin autem instante annali tempore decesserit, reliquum tempus pro adeunda hereditate suis successoribus sine aliqua dubietate relinquat, quo completo nec heredibus eius alius regressus in hereditatem habendam servabitur.

Recitata septimo in novo consistorio palatii Iustiniani. d. III k. Nov. Decio vc. cons.

[20] *Idem A. Iohanni pp. pr.* Quidam elogio condito heredem scripsit in certas uncias et post certa verba testamenti eundem in alias uncias vel tantas vel quantascumque et tertio vel in aliam partem hereditatis vel quendam unciarum modum, ille autem unam institutionem vel duas admittens unam vel duas vel quantascumque respuendas esse censuit: quaerebatur apud veteres, si hoc ei facere permittitur. 1. Similique modo dubitabatur, si impuberem quis filium suum heredem ex parte instituit et quendam extraneum in aliam partem, quem pupillariter substituit, et postquam testator decessit, pupillus quidem patri heres extitit, extraneus autem hereditatem adiit, et postea adhuc in prima aetate pupillus constitutus ab hac luce subtractus est et pupillaris substitutio locum sibi vindicavit: cumque substitutus eandem partem admittere noluit,

[19] *Emperor JUSTINIAN Augustus to Demosthenes, Praetorian Prefect. pr.* After We found, in the more ancient statutes and especially in the *Questions* of (the jurist) Julius Paulus, that sons in their father's power, while (still) considering (whether to accept) a paternal inheritance, can also convey it, along with some other things specific to such a person, to their descendants, We have determined that this time for consideration should be extended also to all successors, whether related (*cognati*) or non-kin (*extranei*). 1. And so We ordain: If anyone, by being summoned (to inherit) either by a will or on intestacy, gains a time for consideration, or does not do so but nevertheless does not repudiate the succession such that he may seem to be considering for this reason, but he does nothing that amounts to acceptance or acting as an heir (and thus accepting tacitly), (then) he shall convey this (right of) choice to his successors, though in such a way that this transmission (of the estate) is completed within one year. 2. And if a person, knowing the inheritance has fallen to him either on intestacy or by a will, does not seek a time for consideration and dies within the year, this right shall extend to his successors within the year. 3. For, after the will is opened or he is made aware that he is summoned as heir either upon intestacy or by will or otherwise, if a year has passed and he does nothing whereby he signals either accepting or repudiating the inheritance, (then) he with his successors shall be excluded from (receiving) such benefit. 4. But if he dies within the year, beyond any doubt he leaves to his successors the remaining time for accepting the inheritance; when this (time) ends, no other recourse remains to his heirs for holding the inheritance.

Recited at the seventh (milepost) in the New Consistory of the Palace of Justinian. Given October 30, in the consulship of the vir clarissimus Decius (529).

[20] *The same Augustus to John, Praetorian Prefect. pr.* In writing his will someone named an heir to specified twelfths (of the estate); and, further along in the will, (again named) the same man to different (additional) twelfths, either as much or as many; and in a third place, either to a different share of the inheritance or some measure of twelfths. That person (the heir), while accepting one or two of these designations, thought that one or two or more should be rejected. The ancients questioned if he is allowed to do this. 1. And a similar question arose if someone named his minor son as heir to a share and some non-kinsman to a different share while making him the pupillary substitute (for his son); and, after the testator died, the ward (*pupillus*) became his father's heir and the non-kinsman accepted the inheritance; and afterwards, while still a young ward, he (the son) passed from this light (died), and

quaesitum est, si potest iam heres ex principali testamento factus pupillarem substitutionem repudiare.

2. Utramque igitur dubitationem simul decidendam esse censemus: placuit etenim nobis sive in institutionibus sive in pupillari substitutione, ut vel omnia admittantur vel omnia repudientur et necessitas imponatur heredi particulari facto vel aliam aut alias partes hereditatis admittere vel etiam substitutionem pupillarem.

D. prid. k. Mai. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[21] *Idem A. Iohanni pp. pr.* Cum aliquis scripsit heredem eum, qui de sua condicione ei qui dominium eius vindicabat in iudicio adversabatur, is autem qui dominum sese dicebat adire eum hereditatem imperabat, ut acquisitio hereditatis per eum celebretur, indignatus est quasi domino ei parere. dubitatio veteribus exorta est, si qua poena ei imponitur huiusmodi insolentiae. 1. Veteres in multas retrahuntur sententias, sed nos eorum discordiam sic esse decidendam censemus, ut distinctio subtilis causae imponatur.

2. Et si quidem ita scripta est institutio: 'illum servum illius heredem instituo', quia apertissimum est intuitu domini esse institutionem conscriptam, necesse est omnimodo per competentem iudicem eum compelli adire quidem hereditatem et eam acquirere, nulli autem ex postfacto subici gravamini, si liber pronuntietur, sed omne sive lucrum sive damnum ad eum redundare qui in servitute eum trahebat et denegari ei et adversus eum omnes hereditarias actiones, nullo ex hoc ei praeiudicio generando.

3. Sin autem quasi liber institutus est nulla domini vel servi mentione in institutione habita, tunc nullo compelli modo eum adire hereditatem nec denegari ei liberale iudicium, sed et hereditatem per suum ius decurrere et liberale iudicium suam expectare sententiam sive agente eo sive pulsato, ut, si quidem servus pronuntietur, tunc domino suo hereditatem adquirat, sin autem liber, eam adipiscatur, si adire maluerit.

D. 11 k. Mai. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[22] *Idem A. ad senatum.* Scimus iam duas esse promulgatas a nostra clementia constitutiones, unam quidem de his, qui deliberandum pro hereditate sibi delata existimaverunt, aliam autem de improvisis debitis

a pupillary substitution was claimed for him. The question was if he, having already become an heir under the first part of the will, can reject the pupillary substitution.

2. We think that both uncertainties should be decided. Our determination is that, whether for designations (of heirs) or for pupillary substitution, either all are accepted or all are repudiated; and on a person who becomes a partial heir the requirement shall be imposed to accept either another or other parts of the inheritance, or even a pupillary substitution.

Given April 30, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[21] *The same Augustus to John, Praetorian Prefect. pr.* When someone named as heir a person who was defending a lawsuit over his legal status against a person who claimed ownership of him, the claimant of ownership ordered him to accept the inheritance so that the estate's acquisition would be memorialized through him; but he protested against obeying that man as if he were his master. Hesitation arose among the ancients about imposing some penalty on him for such insolence. 1. The ancients were divided in their views, but We hold that their dispute must be decided by imposing a fine distinction on the case.

2. If the designation is written as follows: "I designate that slave of that person as my heir," because it is quite clear that the designation is written to benefit the master, he (the named heir and alleged slave) must necessarily be compelled by the appropriate judge to accept the inheritance and acquire it, but be subjected to no loss after the fact if he is found to be free; all gain or loss accrue to the person who was dragging him into slavery, and all actions on the inheritance are denied both to him and against him (the named heir); and no prejudice to his case shall arise from this decision.

3. But if he was designated as if free, with no mention of "master" or "slave" made in the designation, then in no way is he compelled to accept the inheritance, nor is the trial on his freedom denied to him, but (rather) the inheritance devolves through his right to it and, whether he is the plaintiff or defendant, the decision (as to accepting it) awaits (follows on) the trial over freedom, so that, if he is found to be a slave, then he acquires the inheritance for his owner, but if free, he obtains it if he wishes to accept it.

Given April 30, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[22] *The same Augustus to the Senate. pr.* We are aware that two constitutions have been promulgated by Our Clemency: one about persons who thought

et incerto exitu per diversas species eis imposito. sed etiam veterem constitutionem non ignoramus, quam divus Gordianus ad Platonem scripsit de militibus, qui per ignorantiam hereditatem adierint, quatenus pro his tantummodo rebus conveniantur, quas in hereditate defuncti invenerint, ipsorum autem bona a creditoribus hereditariis non inquietentur: cuius sensus ad unam praefatarum constitutionum a nobis redactus est. arma etenim magis quam iura scire milites sacratissimus legislator existimavit.

1. Ex omnibus itaque istis unam legem colligere nobis apparuit esse humanum et non solum milites adjuvare huiusmodi beneficio, sed etiam ad omnes hoc extendere, non tantum si improvisum emergerit debitum, sed etiam si onerosam quis inveniat esse quam adierit hereditatem. ita enim nec satis necessarium deliberationis erit auxilium, nisi hominibus formidolosis, qui et ea timent, quae nulla digna sunt suspitione.

1a. Cum igitur hereditas ad quendam sive ex testamento sive ab intestato fuerit delata, sive ex asse sive ex parte, si quidem recta via adire maluerit hereditatem et spe certissima hoc fecerit vel sese immiscuerit, ut non postea eam repudiet, nullo indiget inventario, cum omnibus creditoribus suppositus est, utpote hereditate ei ex sua voluntate infixā. 1b. Similique modo, si non titubante animo respuendam vel abstinendam esse crediderit hereditatem, ei apertissime intra trium mensuum spatium, ex quo ei cognitum fuerit scriptum se esse vel vocatum heredem, renuntiet nullo nec inventario faciendo nec alio circuitu expectando, et sit alienus huiusmodi hereditate, sive onerosa sive lucrosa sit.

2. Sin autem dubius est, utrumne admittenda sit nec ne defuncti hereditas, non putet sibi esse necessariam deliberationem, sed adeat hereditatem vel sese immisceat, omni tamen modo inventarium ab ipso conficiatur, ut intra triginta dies post apertas tabulas vel postquam nota ei fuerit apertura tabularum vel delatam sibi ab intestato hereditatem cognoverit numerandos exordium capiat inventarium super his rebus, quas defunctus mortis tempore habebat. 2a. Et hoc inventarium intra alios sexaginta dies modis omnibus impleatur sub praesentia tabulariorum ceterorumque, qui ad huiusmodi confectionem necessarii sunt. 2b. Subscriptionem tamen supponere heredem necesse est, significantem et quantitatem rerum et quod nulla malignitate circa eas ab eo facta vel facienda res apud eum remanent, vel si ignarus sit litterarum vel scribere praepeditur, speciali tabulario ad hoc solum adhibendo, ut pro eo litteras supponat, venerabili signo antea manu heredis praeposito, testibus videlicet adsumendis, qui heredem cognoscunt et iubenti ei tabularium pro se subscribere interfuerint. 3. Sin autem locis, in quibus

they needed to consider an inheritance that came to them,²²⁴ the other about unforeseen debts (of estates) and the uncertain outcome imposed on them (the heirs) in various cases. But We also are not unaware of the ancient constitution which the deified Gordian wrote to Plato about soldiers who accept an estate in ignorance: they are sued only for those things that they find in the decedent's estate, but their own goods are not reached by the estate's creditors. The content of this (law) was embodied by us in one of the constitutions mentioned above, for this most imperial lawgiver thought that soldiers knew arms better than laws.

1. It seemed to Us benevolent to gather all these into one law, and not just to aid soldiers by such a benefit, but to extend it to all, not only if an unforeseen debt arose, but also if someone found an accepted estate to be burdened (with debt). Thus the aid of a time for consideration will not be much needed, except for timorous men who fear even those things unworthy of suspicion.

1a. So when an inheritance comes to someone either by will or on intestacy, either the entirety or a part, if he prefers to accept it directly and does so with very high hopes, or he meddles in it so he cannot afterwards refuse it, he needs no (advance) inventory when he is liable to all (the estate's) creditors since the estate is attached to him by his wish. 1b. Similarly, if he unhesitatingly believes the inheritance should be rejected or refrained from, within a period of three months from when it becomes known to him that he was named or called as an heir he shall openly renounce it without (need of) making an inventory or awaiting other inspection; and he shall be a stranger to such an inheritance whether debt-ridden or profitable.

2. But if he is unsure whether the decedent's inheritance should be taken or not, he shall not think deliberation is required, but should accept the inheritance or meddle with it, but in any case he shall make an inventory so that, within thirty days counting from the opening of the document (the will) or from when the opening of the document is made known to him or he learns that the inheritance falls to him on intestacy, an inventory is begun of those things that the decedent had at his death. 2a. And this inventory shall by all means be completed within another sixty days in the presence of notaries and others required for completing such a task. 2b. But the heir must affix his signature stating both the quantity of property and that the property remains with him, with no bad conduct having occurred or to occur on his part toward it; or if he is illiterate or hindered in writing, a special notary should be summoned for the sole purpose of signing on his behalf after the venerable sign (of the cross) is affixed by the heir's hand. Obviously, witnesses must be gathered who know the heir and are present as he orders the notary to sign for him. 3. But if it happens that the heirs are not in the place where the inheritance property

²²⁴ C. 6.30.19 above. The other two constitutions mentioned below are not preserved.

res hereditariae vel maxima pars earum posita est, heredes abesse contigerit, tunc eis unius anni spatium a morte testatoris numerandum damus ad huiusmodi inventarii consummationem: sufficit enim praefatum tempus, etsi longissimo spatio distant, tamen dare eis facultatem inventarii conscribendi vel per se vel per instructos procuratores in locis ubi res posita sunt mittendos. 4. Et si praefatam observationem inventarii faciendi solidaverint, et hereditatem sine periculo habeant et legis Falcidiae adversus legatarios utantur beneficio, ut in tantum hereditariis creditoribus teneantur, in quantum res substantiae ad eos devolutae valeant. 4a. Et eis satisfaciant, qui primi veniant creditores, et, si nihil reliquum est, posteriores venientes repellantur et nihil ex sua substantia penitus heredes amittant, ne, dum lucrum facere sperant, in damnum incidant. sed si legatarii interea venerint, et eis satisfaciant ex hereditate defuncti vel ex ipsis rebus vel ex earum forsitan venditione.

5. Sin vero creditores, qui ex post emensum patrimonium necdum completi sunt, superveniant, neque ipsum heredem inquietare concedantur neque eos qui ab eo comparaverunt res, quarum pretia in legata vel fideicommissa vel alios creditores processerunt: licentia creditoribus non deneganda adversus legatarios venire et vel hypothecis vel indebiti conditione uti et haec quae acceperint recuperare, cum satis absurdum est creditoribus quidem suum ius persequentibus legitimum auxilium denegari, legatariis vero, qui pro lucro certant, suas partes legem accommodare. 6. Sin vero heredes res hereditarias creditoribus hereditariis pro debito dederint in solutum vel per dationem pecuniarum satis eis fecerint, liceat aliis creditoribus, qui ex anterioribus veniunt hypothecis, adversus eos venire et a posterioribus creditoribus secundum leges eas abstrahere vel per hypothecariam actionem vel per condictionem ex lege, nisi voluerint debitum eis offerre. 7. Contra ipsum tamen heredem, secundum quod saepius dictum est, qui quantitatem rerum hereditariarum expenderit, nulla actio extendatur.

8. Sed nec adversus emptores rerum hereditiarum, quas ipse vendidit pro solvendis debitis vel legatis, venire alii concedatur, cum satis anterioribus creditoribus a nobis provisum est vel ad posteriores creditores vel ad legatarios pervenientibus et suum ius persequentibus.

9. In computatione autem patrimonii damus ei excipere et retinere, quidquid in funus expendit vel in testamenti insinuationem vel inventarii confectionem vel in alias necessarias causas hereditatis

or the bulk of it is located, then We give them one year, counting from the testator's death, to complete such an inventory; for such a time is enough, even if they are very far distant, nonetheless to give them the opportunity to write out the inventory either on their own or through procurators to be sent with instructions in the places where the property is located. 4. If they fully execute the foregoing procedure for making an inventory, they will both have the inheritance at no risk and use the benefit of the *lex Falcidia* against legatees, so that they are liable to the estate's creditors for only the value of the assets of the estate they receive. 4a. And they shall satisfy the first creditors to arrive, and, if there is nothing left, those who come later shall be repelled; the heirs shall lose nothing at all from their own property, lest, while they (the heirs) hope to acquire a gain, they incur a loss. But if in the meantime legatees turn up, they (the heirs) shall satisfy them from the decedent's inheritance, either from the property itself or perhaps from its sale.²²⁵

5. But if there remain creditors not yet fully paid after the estate is dispersed, they are not allowed to trouble the heir himself nor those who purchased property from him, the proceeds of which he applied to legacies or trusts or other creditors. Permission shall not be denied to creditors to move against legatees, and to use either (the action on) hypothecs (real securities) or the claim for restitution of an unowed payment (*condictio indebiti*) and (so) to recover what they received, for it would be incongruous enough to deny lawful aid to creditors who pursue their rights, but have law assist legatees who contest (only) for gain. 6. But if the heirs gave property in the estate to creditors of the estate for payment of a debt, or they satisfied them through paying money, other creditors who act on the basis of prior hypothecs may move against them and in accord with contract terms (*leges*) remove it (the property) either through the action on hypothec or by the statutory claim for restitution, unless they voluntarily pay the debt. 7. Nonetheless, as has often been stated, no action shall lie against the heir himself who disperses the amount of the estate's property.

8. Nor shall a third party be allowed to move against the buyers of the estate's property that he himself (the heir) sold to pay debts or legacies, since We have sufficiently provided for prior creditors to obtain their rights by approaching subsequent creditors or legatees and pursuing their right.

9. In computing the patrimony, we allow him (the heir) to set aside and retain whatever he spends on the funeral or what he shows he paid for publication of

²²⁵ Blume: "Prior to the right to make an inventory given in the present law, the question of priority among creditors could not well arise, since the heir who accepted was liable for all the debts in proportion as he inherited . . . Thus if a man was given an undivided one-third of the inheritance – and that was the general method of appointment – he was liable for one-third of the debts, and the other heirs who received the two-thirds of the inheritance were liable for that proportion of the debts. After the introduction of the inventory, it became important in which priority debts were to be paid." This is detailed in subsequent sections; see also C. 4.16. Justinian's reform undoes one of the core doctrines of the classical law of succession.

approbaverit sese persolvisse. sin vero et ipse aliquas contra defunctum habebat actiones, non eae confundantur, sed similem aliis creditoribus per omnia habeat fortunam, temporum tamen praerogativa inter creditores servanda.

10. Licentia danda creditoribus seu legatariis vel fideicommissariis, si maiorem putaverint esse substantiam a defuncto derelictam, quam heres in inventario scripsit, quibus voluerint legitimis modis quod superfluum est approbare, vel per tormenta forsitan servorum hereditariorum secundum anteriorem nostram legem, quae de quaestione servorum loquitur, vel per sacramentum illius, si aliae probationes defecerint, ut undique veritate exquisita neque lucrum neque damnum aliquod heres ex huiusmodi sentiat hereditate: illo videlicet observando, ut, si ex hereditate aliquid heredes subripuerint vel celaverint vel amovendum curaverint, postquam fuerint convicti, in duplum hoc restituere vel hereditatis quantitati computare compellantur.

11. Donec tamen inventarium conscribitur, vel si res praesto sint, intra tres menses, vel si afuerint, intra annale spatium secundum anteriorem distinctionem, nulla erit licentia neque creditoribus neque legatariis vel fideicommissariis eos inquietare vel ad iudicium vocare vel res hereditarias quasi ex hypothecarum auctoritate vindicare, sed sit hoc spatium ipso iure pro deliberatione heredibus concessum, nullo scilicet ex hoc intervallo creditoribus hereditariis circa temporalem praescriptionem praeiudicio generando. 12. Sin vero, postquam adierint vel sese immiscuerint, praesentes vel absentes inventarium facere distulerint, et datum iam a nobis tempus ad inventarii confectionem effluxerit, tunc ex eo ipso, quod inventarium secundum formam praesentis constitutionis non fecerunt, et heredes esse omnimodo intellegantur et debitis hereditariis in solidum teneantur nec legis nostrae beneficio perfruantur, quam contemnendam esse censuerunt.

13. Et haec quidem de his sancimus, qui deliberationem nullam petendam curaverint, quam putamus quidem penitus post hanc legem esse supervacuum et debere ei derogari: cum enim liceat et adire hereditatem et sine damno ab ea discedere ex praesentis legis auctoritate, quis locus deliberationi relinquitur? 13a. Sed quia quidam vel vana formidine vel callida machinatione pro deliberando nobis supplicandum esse necessarium existimant, quatenus eis liceat annale tempus tergiversari et hereditatem inspicere et alias contra eam machinationes excogitare et

the will or making the inventory or other urgent needs for the estate. But if he too had some rights of action against the decedent, they shall not be intermingled (with these expenses); in every regard his condition shall resemble that of other creditors, though priority of time (*temporum praerogativa*) is preserved among creditors for him.

10. If creditors or legatees or trust beneficiaries think that the estate left by the decedent is greater than the heir wrote in the inventory, they shall have permission to prove the surplus by whatever legal means they wish, either perchance by torture of the slaves in the inheritance in accord with Our earlier law on the questioning of slaves,²²⁶ or by that person's (the heir's) oath if other proofs are lacking, so that, after the truth has been thoroughly investigated, the heir receive neither any gain nor loss through such inheritance. Obviously let this be enforced, that, if heirs pilfer or conceal or see to the removal of anything from the estate, after being convicted they be forced to restore, or add to the estate's amount, double that amount.

11. But until the inventory is made – either within three months if the property is near or within a year if it is distant, according to the foregoing distinction – neither creditors nor legatees nor trust beneficiaries will be permitted to disturb them (the heirs) or summon them to court or claim ownership of the estate's property as if on the basis of hypothec; that time shall be conceded to heirs by operation of law for consideration. Certainly, the estate's creditors suffer no prejudice, because of this interlude, as to long-time prescription (*praescriptio temporalis*). 12. But if, after they accept or they meddle in it, whether they are present or are in a different location, they fail to make an inventory, and the time that We now give for making an inventory has passed, then, for the very reason that they did not make an inventory in accord with the model of the present law, they shall be construed unequivocally as heirs and as liable for the whole (*in solidum*) of the estate's debts, nor shall they enjoy the benefit of Our law, which they thought it proper to scorn.

13. We ordain these provisions for those who do not see to claiming any time for consideration, something We consider is entirely needless after this statute and ought to be abolished; for since, under the present law, one may both accept an inheritance and walk away from it without loss, what place is left for considering (the estate)? 13a. But because some persons, either through empty fear or by sly trickery, thought it necessary to ask from Us a time for consideration so that they can shift back and forth during the year-long period and inspect the inheritance and think up other plots against it,

²²⁶ C. 2.58.1.

eandem deliberationem flebilibus adsertionibus repetita prece saepius accipere: ne quis nos putaverit antiquitatis penitus esse contemptores, indulgemus quidem eis petere deliberationem vel a nobis vel a nostris iudicibus, non tamen amplius ab imperiali quidem culmine uno anno, a nostris vero iudicibus novem mensibus, ut neque ex imperiali largitate aliud tempus eis indulgeatur, sed et, si fuerit datum, pro nihilo habeatur: semel enim et non saepius eam peti concedimus.

14. Sin autem hoc aliquis fecerit et inventarium conscripserit (necesse enim est omnimodo deliberantes inventarium cum omni subtilitate facere), non liceat ei post tempus praestitutum, si non recusaverit hereditatem, sed adire maluerit, nostrae legis uti beneficio, sed in solidum secundum antiqua iura omnibus creditoribus teneatur. 14a. Cum enim gemini trames inventi sunt, unus quidem ex anterioribus, qui deliberationem dederunt, alter autem rudis et novus a nostro numine repertus, per quem et adeuntes sine damno conservantur, electionem ei damus vel nostram constitutionem eligere et beneficium eius sentire vel, si eam aspernandam existimaverit et ad deliberationis auxilium convolaverit, eius effectum habere: et si non intra datum tempus recusaverit hereditatem, omnibus in solidum debitis hereditariis teneatur et non secundum modum patrimonii, sed etsi exiguus sit census hereditatis, tamen quasi heredem eum in totum obligari, et sibi imputet, qui pro novo beneficio vetus elegit gravamen.

14b. Et ideo et in ipsam deliberationis dationem et divinum rescriptum super hoc promulgandum hoc adici volumus, ut sciant omnes, quod omnimodo post petitam deliberationem, si adierint vel pro herede gesserint vel non recusaverint hereditatem, omnibus in solidum hereditariis oneribus teneantur. 14c. Si quis autem temerario proposito deliberationem quidem petierit, inventarium autem minime conscripserit et vel adierit hereditatem vel minime eam repudiaverit, non solum creditoribus in solidum teneatur, sed etiam legis Falcidiae beneficio minime utatur. 14d. Quod si post deliberandum recusaverit inventario minime conscripto, tunc res hereditatis creditoribus vel his qui ad hereditatem vocantur legibus reddere compelletur, quantitate earum sacramento res accipientium manifestanda, cum taxatione tamen ab iudice statuenda.

15. Notissimum autem est ex hac constitutione, quae omnes casus continet, nostris constitutionibus iam pro eisdem capitulis promulgatis esse derogatum, quarum alteri et Gordianae constitutionis sensus

and by tearful declarations and a repeated petition to receive more than once the same time for consideration: so that no one think We are completely contemptuous of antiquity, We will allow them to seek a time for consideration either from Us or from Our judges, but not for longer than a year from the Imperial Highness, but (only) nine months from Our judges, such that no further time be conceded to them through imperial generosity, but also, if it shall be given, it be void. For We allow it to be sought (only) once and no more.

14. But if someone does this (seeks time for consideration) and makes an inventory – for those considering must in any case make a fully detailed inventory – if he does not refuse the inheritance but prefers to accept it, after the prescribed time he may not use the benefit of Our law, but is liable for the whole (*in solidum*) to all creditors, in accord with ancient law. 14a. For when two ways have been found, one from earlier law that gave time for deliberation, the other raw and new, discovered by Our Divine Majesty, whereby those accepting are held harmless, We give him (the heir) a choice either to choose Our constitution and to feel its benefit, or, if he thinks it best to disregard this and he resorts to the aid of a time for consideration, to abide by its consequence. And if he does not refuse the inheritance within the given time, he is liable for the whole on all the estate's debts, and not according to the measure of the inheritance; but even if the value of the inheritance is small, nevertheless as heir he is obligated for all, and he shall have himself to blame who chooses an ancient burden over a new benefit.

14b. And so, both regarding the very conferral of a time of consideration and the imperial rescript to be promulgated on this subject, We want this provision added, that all persons know that if, after a time for deliberation is sought, they accept an inheritance or act as heir or do not refuse it, they are liable in any case for the whole on all the estate's debts. 14c. Further, if anyone rashly seeks a time for consideration, but does not make an inventory and either accepts the inheritance or does not reject it, not only shall he be liable to the creditors for the whole, but also he shall not use the benefit of the *lex Falcidia*. 14d. But if he refuses (the estate) after considering, and no inventory is made, then he shall be forced to return the estate's property to the creditors or to those called by statutes to the inheritance, the amount thereof to be determined by the oath of those accepting the property, within a limit to be set by the judge.

15. It is quite evident that this constitution, which covers all circumstances, abolishes Our constitutions previously promulgated on the same legal subjects,

continebatur. 16. Cum enim ampliore tractatu habito melior exitus inventus est et tribus constitutionibus in unum congregatis unus apparet et in milites et in alios omnes iuris probabilis articulus, quapropter ex anterioribus inquietari nostro subiectos imperio patimur? scilicet ut milites, etsi propter simplicitatem praesentis legis subtilitatem non observaverint, in tantum tamen teneantur, quantum in hereditate invenerint.

Quam, patres conscripti, in huiusmodi casibus in posterum obtinere sancimus.

D. v k. Dec. post consulatum Lampadii et Orestis vv. cc.

XXXI De Repudianda vel Abstinenda Hereditate

[1] *Imp. Antoninus A. Muciano.* Si paterna hereditate te abstinuisse constiterit et non ut heredem in domo, sed ut inquilinum vel custodem vel ex alia iusta ratione habitasse liquido fuerit probatum, ex persona patris conveniri te procurator meus prohibebit.

PP. id. Iul. Messala et Sabino cons.

[2] *Idem A. Severo.* Si paterna hereditate abstinuisti, non ideo, quod a creditoribus fundos comparasti, si modo id bona fide fecisti, a posterioribus, qui sub isdem obligationibus pecuniam patri crediderint, iure conveniris.

PP. v k. Iul. Laeto II et Cereale cons.

[3] *Impp. Diocletianus et Maximianus AA. et CC. Theodotiano.* Suus heres exceptione pacti, qui testamentum iniustum adseverans postea nihil se de paterna successione petiturum non ex causa donationis, sed transigendi animo in iure professus est, cum respuere quaesitam nequiret hereditatem et transactio nullo dato vel retento seu promisso minime procedat, submoveri non potest.

Sine die CC. cons.

one of which also contains the content of a constitution of Gordian.²²⁷ 16. For since a better solution has been found through a fuller treatment, and, with three constitutions amalgamated into one, the one appears a credible article of law both for soldiers and for all others, why do We allow those subject to Our rule to be harassed through prior (constitutions)? Provided, indeed, that soldiers, even if, because of their naiveté, they do not observe the precise requirements of the present law, still are liable only for as much as they find in the inheritance.

We ordain, Senators, that this (constitution) apply in such cases hereafter.

Given November 27, in the post-consulate of viri clarissimi Lampadius and Orestes (531).

Thirty-First Title Rejecting or Refusing an Inheritance²²⁸

[1] *Emperor ANTONINUS Augustus to Mucianus.* If it is established that you refused your father's inheritance and it is demonstrated by manifest proof that you lived not as an heir in (his) house, but as a tenant or a watchman or for some other appropriate reason, my procurator will prevent you from being sued in connection with your father's estate.

Posted July 15,²²⁹ in the consulship of Messala and Sabinus (214).

[2] *The same Augustus to Severus.* If you refused your father's inheritance you cannot, because you bought (back) farms from his creditors, provided you did this in good faith (*bona fides*), lawfully be sued by subsequent creditors who lent money to your father on the basis of the same encumbrances.

Posted June 27,²³⁰ in the consulship of Laetus, for the second time, and Cerealis (215).

[3] ²³¹ *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Theodotianus. pr.* A privileged heir (*suus heres*), who claimed that the terms of a will were unjust and then later stated in court that he would claim nothing from his father's estate, not for the purpose of making a gift but with the intention of reaching a settlement, cannot be defeated by raising the affirmative defense of an existing agreement (*exceptio pacti*), since he cannot reject the inheritance once he has accepted it and the settlement has no validity at all when nothing has been given, kept back, or promised.

²²⁷ C. 6.30.22 pr.

²²⁸ See D. 29.2.

²²⁹ The precise day is uncertain: possibly June 29.

²³⁰ The precise day is uncertain: possibly June 29.

²³¹ Combine with C. 2.6.4; 6.19.1. The end is repeated in C. 2.4.38.

[4] *Idem AA. et CC. Modestino militi.* Sicut maior quinque et viginti annis, antequam adeat, delatam repudians successionem post quaerere non potest, ita quaesitam renuntiando nihil agit, sed ius quod habuit retinet nec, quod confessos pro iudicatis haberi placuit, ad vocem repudiantis hereditatem, sed ad certam quantitatem deberi confitentem pertinet.

S. v k. Ian. Sirmi AA. cons.

[5] *Idem AA. et CC. Claudianae.* Pupillorum repudiatio delatae hereditatis sine tutore auctore facta nihil eis nocet.

S. prid. k. Ian. Sirmi AA. cons.

[6] *Imp. Iustinianus A. Iohanni pp. pr.* Si quis suus recusaverit paternam hereditatem, deinde maluerit eam adire, cum fuerat indistincte ei permissum, donec res paternae in eodem statu manent, hoc facere et post multum tempus licebat ei ad eandem hereditatem redire, hoc corrigentes sancimus, si quidem res iam venundatae sint, ut nullus aditus ei ad hereditatem reservetur: quod et antiquitas observabat. 1. Sin autem res alienatae non sint, si quidem maior annis constitutus est et tempora restitutionis nulla ei supersint, intra trium annorum spatium tantummodo huiusmodi ei detur licentia. 2. Sin autem vel minor est vel in utili tempore constitutus, tunc post completum quadriennium, quod spatium pro utili anno qui restitutionibus dabatur praestitum est, aliud triennium ei indulgeri, intra quod potest rebus in suo statu manentibus adire hereditatem et suam abdicationem revocare. 3. Quo tempore transacto nullus aditus penitus ad paternam hereditatem ei reservetur, nisi forte adhuc in minore aetate eo constituto res venditae sunt. tunc etenim per in integrum restitutionem non denegatur ei adire hereditatem et res recuperare et creditoribus paternis satisfacere.

D. xv k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc. anno secundo.

Written December 25, at Nicomedia, in the consulship of the Caesars (294).²³²

[4] *The same Augusti and Caesars to Modestinus, a soldier.* Just as once a person more than 25 years of age rejects an inheritance made available to him before entering upon it he cannot later claim it, so rejecting it once accepted has no legal effect. Instead he (the heir) retains the rights he or she already had, and the rule that an acknowledgment is deemed equivalent to a judgment does not apply to a statement rejecting an inheritance, but to someone admitting that a certain sum is owed.

Written December 28, at Sirmium, in the consulship of the Augusti (293).

[5]²³³ *The same Augusti and Caesars to Claudiana.* When the rejection of an inheritance made available is accomplished by minor wards without the authorization of their tutor, this does not prejudice their interests.

Written December 31, at Sirmium, in the consulship of the Augusti (293).

[6] *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* If any *suus heres* has refused his father's inheritance and then wished instead to enter upon it, he was indiscriminately permitted to do this, as long as the father's property remained in the same situation (of ownership), and he used to be allowed to enter upon said inheritance even after a long period of time had passed. In correcting this, then, We lay down that if, certainly, the property has already been sold, no right of entry shall be preserved for him – which also used to be the rule in antiquity. 1. But if, however, the property has not been alienated, provided he, to be sure, is older than 25 and the period for restoration of rights has elapsed, permission (to enter) shall be granted to him only for a period no longer than three years. 2. But if, however, he is less than 25 or still enjoys the grace period for restoration of rights, then, after four years, which is the period established in place of the continuous year that used to be granted for restoration of rights,²³⁴ another three years shall be given, in which, as long as the property remains in the same situation (of ownership), he can revoke the refusal and enter upon the inheritance. 3. When this period of time has passed no entry at all upon a father's inheritance shall be preserved for such a person, unless it happens that the property was sold while he or she was still less than 25. For then by means of a restoration of rights he is not rebuffed from entering upon the inheritance, recovering the property, and satisfying the father's creditors.

Given October 18, at Constantinople, in the second post-consulate of viri clarissimi Lampadius and Orestes (532).

²³² Most of the information in the *subscriptio* derives from the *lex gemina*. The date places this constitution after C. 6.31.5.

²³³ Combine with C. 6.58.6.

²³⁴ See C. 2.52.7.

**XXXII Quomodo Aperiantur Testamenta et Inspiciantur
et Describantur**

[1] *Imp. Alexander A. Proculae.* Ut testamentum, quod dicis factum, proferatur et publice recitetur, competens iudex iubebit.

PP. II k. April. Maximo II et Aeliano cons.

[2] *Imp. Valerianus et Gallienus AA. Alexandro.* Testamenti tabulas ad hoc tibi a patre datas, ut in patria proferantur, adfirmans potes illic proferre, ut secundum leges moresque locorum insinuentur, ita scilicet, ut testibus non praesentibus adire prius vel pro tribunali vel per libellum rectorem provinciae procures ac permittente eo honestos viros adesse facias, quibus praesentibus aperiantur et ab his rursum obsignentur.

PP. XII k. Ian. Maximo II et Glabrione cons.

[3] *Imp. Diocletianus et Maximianus AA. et CC. Aristoteli.* Eius, quod ad causam novissimi patris vestri iudicii pertinet, de calumnia tibi iuranti praeter partem, quam aperiri defunctus vetuit vel ad ignominiam alicuius pertinere dicitur, inspiciendi ac describendi praeter diem et consulem tibi rector provinciae facultatem fieri iubebit.

D. VI k. Mai. CC. cons.

[4] *Imp. Gratianus Valentinianus et Theodosius AAA. ad Hesperium pp.* Codicillos seu scripturam quolibet tenore formatam ea oportebit observatione in publicum proferri, qua testamenta panduntur.

D. III k. Aug. Mediolano Ausonio et Olybrio cons.

**XXXIII De Edicto Divi Hadriani Tollendo Et Quomodo
Scriptus Heres In Possessionem Mittatur**

[1] *Imp. Severus et Antoninus AA. Lucillo.* Cum inter institutum et substitutum controversia moveatur, eum, qui primo loco institutus est, induci in possessionem oportet.

PP. XII k. Dec. Dextro et Prisco cons.

**Thirty-Second Title How Wills Are Opened, Inspected,
and Copied²³⁵**

[1] *Emperor ALEXANDER Augustus to Procula.* The appropriate judge will order that the will, which you claim was made, be brought forth and read (aloud) in public.

Posted March 31, in the consulship of Maximus, for the second time, and Aelianus (223).

[2] *Emperors VALERIAN and GALLIENUS Augusti to Alexander.* You claim that your father gave you the text of his will to make public in his hometown. You may do so, so that it be communicated in accordance with the local laws (*leges*) and customs (*mores*), with this proviso, clearly, that, if the witnesses (to the will) are not present you manage first to approach the provincial governor either in his court or by means of a petition, and with his permission you (then) arrange for men of good reputation and high standing (*honesti viri*) to appear, in whose presence the will shall be opened and sealed up again by them.

Posted December 21, in the consulship of Maximus, for the second time, and Glabrio (256).

[3] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Aristotle.* After you swear an oath that your intentions are not malicious, the provincial governor will order that you be given the opportunity of inspecting and copying, aside from the day and year (of its making), the document that reflects the last wishes of your father, with the exception of the portion that the decedent forbade to be opened or that is said to impugn someone's reputation.

Given April 26, in the consulship of the Caesars (294).

[4]²³⁶ *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS Augusti to Hesperius, Praetorian Prefect.* Codicils or texts composed with any content at all (of a testamentary nature) ought to be brought forth in public using the same procedure by which wills are made public.

Given July 30,²³⁷ at Milan, in the consulship of Ausonius and Olybrius (379).

**Thirty-Third Title Repealing the Edict of the Deified Hadrian,
and How a Named Heir is Placed in Possession**

[1] *Emperors SEVERUS and ANTONINUS Augusti to Lucillus.* When a dispute arises between an appointed heir and a substitute, the one who was appointed in the first place ought to be placed in possession (of the estate).

Posted November 20, in the consulship of Dexter and Priscus (196).

²³⁵ See D. 29.3.

²³⁶ Perhaps combine with C. Th. 8.18.6.

²³⁷ The precise day is uncertain: the alternative is July 31, and the constitution is "Received" August 29 in C. Th. 8.18.6. Seeck gives July 31, 379.

[2] *Imp. Alexander A. Butacto.* Quamvis quis se filium defuncti praeteritum esse adleget aut falsum vel inofficiosum testamentum seu alio vitio subiectum vel servus defunctus esse dicatur, tamen scriptus heres in possessionem mitti solet.

PP. VI k. Nov. Maximo II et Aeliano cons.

[3] *Imp. Iustinianus A. Iuliano pp. pr.* Edicto divi Hadriani, quod sub occasione vicesimae hereditatum introductum est, cum multis ambagibus et difficultatibus et indiscretis narrationibus penitus quiescente, quia et vicesima hereditatis a nostra recessit re publica, antiquatis nihilo minus et aliis omnibus, quae circa repletionem vel interpretationem eiusdem edicti promulgata sunt, sancimus, ut, si quis ex asse vel ex parte competenti iudici testamentum ostenderit non cancellatum neque abolitum neque ex quacumque suae formae parte vitiatum, sed quod prima figura sine omni vituperatione appareat et depositionibus testium legitimi numeri vallatum sit, mittatur quidem in possessionem earum rerum, quae testatoris mortis tempore fuerunt, non autem legitimo modo ab alio detinentur, et eam cum testificatione publicarum personarum accipiat. 1. Sin autem aliquis contradictor extiterit, tunc in iudicio competenti causae in possessionem missionis et subsecutae contradictionis ventilentur et ei possessio adquiratur, qui potiora ex legitimis modis iura ostenderit, sive qui missus est sive qui antea detinens contradicendum putavit.

2. Nullis angustiis temporum huiusmodi missione coartanda, sed sive tardius sive praemature aliquis missus est, legis tantummodo arbitrium requiratur et causa, unde vel missio vel contradictio exoritur. 3. Sive enim post annale tempus sive post maioris aevi curricula aliquis fuerit missus, si tantum ex legitime formato testamento missio procedat, nullum ei temporis obiciatur obstaculum, nisi tantum temporis effluxerit, quod possit vel possessori plenissime securitatem et super dominio praestare, vel ipsi qui missus est omnem intensionem excludere. 4. Si enim vel ex una parte vel ex utroque latere temporis prolixitas occurrit, manifestissimum est non solum missionem, sed etiam ipsam principalem causam esse sopitam.

D. XII k. April. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[2] *Emperor ALEXANDER Augustus to Eutactus.* Even if someone claims that he or she as the child of the decedent has been passed over in his will, or that the will is forged, undutiful, or laboring under some other defect, or the decedent is said to have been a slave, nevertheless the named heir is usually placed in possession (of the estate).

Posted October 27, in the consulship of Maximus, for the second time, and Aelianus (223).

[3]²³⁸ *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect. pr.* The edict of the deified Hadrian that was introduced regarding the 5 percent tax on inheritances (*vicesima hereditatum*), with its many ambiguities, difficulties, and jumbled provisions, is completely obsolete, as are all other ancient measures concerning the supplementation or interpretation of said edict, because the 5 percent tax itself is no longer collected by Our commonwealth. So We ordain that if someone has been (named heir) in whole or in part and shows the will to the appropriate judge and this is not scratched out, effaced, or defective in any part of its text, but on its face is without any flaw and is supported by the attestations of the legally required number of witnesses, he or she shall assuredly be placed in possession of the property that belonged to the testator at the time of death, but not that which is being physically held by someone else in a legally recognized manner, and he or she shall receive possession of this property with public officials bearing witness to it. 1. But if, however, someone comes forth to challenge (this arrangement), then the arguments for and against the grant of possession (*missio in possessionem*) shall be aired in the appropriate court and possession shall be acquired by the person who shows the stronger right in legal terms, either the one who has been granted possession or the one who, having previously had physical control of the property, thought that this grant should be contested.

2. No time-limitations shall apply to this type of *missio in possessionem*, but, whether someone has been placed in possession very early or rather late, only the authority of the law (*legis arbitrium*) and a ground for the *missio* or the objection to it are necessary. 3. For whether someone is placed in possession after a year or a greater length of time, provided that the *missio* follows pursuant to a lawfully executed will, no lapse of time shall be an impediment, unless the full period of time passes which can give a complete guarantee even of ownership to the possessor or shut out every recourse for the person granted *missio*. 4. For if sufficient time has run in one or both cases, it is very clear that not only the right to *missio* but also the very argument for this has been silenced.

Given March 21, at Constantinople, after the consulship of the viri clarissimi Lampadius and Orestes (531).²³⁹

²³⁸ Combine with C. 6.23.27.

²³⁹ See C. 6.23.27 for a variant on the date. Lounghis *et al.* give March 18, 530.

[4] ...

XXXIII Si Quis Aliquem Testari Prohibuerit vel Coegerit

[1] *Imp. Alexander A. Severae.* Civili disceptationi crimen adiungitur, si testator non sua sponte testamentum fecit, sed compulsus ab eo qui heres est institutus, vel quoslibet alios quos noluerit scripserit.

S. xv k. Ian. Alexandro A. III et Dione cons.

[2] *Impp. Diocletianus et Maximianus AA. Nicagorae.* Eos, qui, ne testamentum ordinetur, impedimento fuisse monstrantur, velut indignas personas a successionis compendio removeri celeberrimi iuris est.

PP. k. Ian. Diocletiano II et Aristobulo cons.

[3] *Idem AA. et CC. Eutychidi.* Iudicium uxoris postremum in se provocare maritali sermone non est criminis.

D. v k. Ian. CC. cons.

[4] [Αὐτοκράτωρ Ζήνων Α.]. ... Ἐάν τις κωλύσῃ τινὰ διαθέσθαι ἢ ἀρξάμενον αὐτὸν διατίθεσθαι κωλύσῃ πληρῶσαι τὴν διαθήκην, κατέχεται μὲν καὶ τῷ ζημιωθέντι προφάσει τῆς κωλύσεως, καὶ εἴ τι δὲ ἄλλο περισσεύσει, δημόσιον ἔσται καὶ αὐτὸς ἐν ἐξορίᾳ τὸν λοιπὸν βίον διατελέσει.

D. III k. Iun. Constantinopoli Zenone A. cons.

XXXV De His Quibus Ut Indignis Auferuntur et ad Senatus Consultum Silanianum

[1] *Impp. Severus et Antoninus AA. Celeri. pr.* Heredes, quos necem testatoris inultam omisisse constitit, fructus integros cogantur reddere, neque enim bonae fidei possessores ante controversiam illatam

[4]²⁴⁰

Thirty-Fourth Title If Someone Prevents or Compels Another's Writing a Will²⁴¹

[1]²⁴² *Emperor ALEXANDER Augustus to Severa.* A criminal charge is added to a dispute at private law, if a testator did not make a will of his own accord, but did so compelled by the person who has been appointed heir, or has named (as heirs) any others whom he did not wish.

Written December 18, in the consulship of Alexander Augustus, for the third time, and Dio (229).

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Nicagoras.* It is a very well-known point of law (*celeberrimum ius*) that those who are shown to have prevented a will from being written shall be removed from the benefits of (intestate) succession, on the ground that they are unworthy persons.

Posted January 1, in the consulship of Diocletian, for the second time, and Aristobulus (285).

[3] *The same Augusti and the Caesars to Eutycheis.* It is not a criminal act to induce a wife to make a will in one's favor through husbandly small-talk.

Given December 28, in the consulship of the Caesars (294).

[4]²⁴³ *Emperor ZENO Augustus.*²⁴⁴ If someone prevents another from writing a will or, when it has been started, prevents the testator from finishing it, he or she shall be certainly liable to the party harmed by the act of prevention, and if anything else remains it shall be forfeit to the Treasury and the offender shall spend the rest of his or her life in exile.

Given May 30, at Constantinople, in the consulship of Zeno Augustus (479).

Thirty-Fifth Title Those Ineligible to Succeed on the Ground of Unworthiness, and the *Senatus Consultum Silanianum*²⁴⁵

[1] *Emperors SEVERUS and ANTONINUS Augusti to Celer. pr.* Heirs shown to have left the murder of a testator unavenged shall be compelled to return the benefits (*fructus*, i.e., of the inheritance) in their entirety. For those who have

²⁴⁰ A constitution written in Greek is missing.

²⁴¹ See D. 29.6.

²⁴² Combine with C. 7.45.4.

²⁴³ Derived from Basilika 35.4.7.

²⁴⁴ This information derives from the *subscriptio*, Lounghis *et al.* date to May 28 or 30, 479.

²⁴⁵ The SC *Silanianum*, passed in 10 BC, in essence punished with death all of the slaves found under the same roof as a master murdered with violence.

videntur fuisse, qui debitum officium pietatis scientes omiserint. 1. Ex hereditate autem rerum distractarum vel a debitoribus acceptae pecuniae post motam litem bonorum usuras inferant. 2. Quod in fructibus quoque locum habere, quos in praediis hereditariis inventos aut exinde perceptos vendiderint, procul dubio est. 3. Usuras autem semisses dependere satis est.

D. xv k. April. Cilone et Libone cons.

[2] *Idem AA. Vero. pr.* Polla quidem liberam habuit administrandi patrimonii sui potestatem nec idcirco, quod pupillus illi heres extitit, ea quae ab ipsa finita sunt revocari in disceptationem oportet. 1. Sed si pupilli nomine falsum dicere vis testamentum, de quo per Pollam transactum est, potes experiri, dum memineris, si in causa non obtinueris, et portionem, quam ex eo testamento pupillus habet, te ei salvam facturum, quam adimi pupillo necesse erit secundum iuris formam, et de calumnia tua praesidem deliberaturum, quamvis pupilli nomine agere videaris, cum retractas ea quae finita sunt per coheredem.

PP. vii k. Mai. Antonino A. III et Geta III cons.

[3] *Imp. Alexander A. Antiochiano.* Si ea quaestio infertur filiis eius, quam consobrinam tuam dicis, quod tabulae testamenti patris eorum, qui a familia interfectus dicebatur, priusquam quaestio de servis haberetur, apertae et recitatae sunt, propter amplissimi ordinis consultum hereditas a fisco vindicatur et ideo agi causa apud procuratorem meum debet, quia non eo tempore pupilli fuerunt.

PP. ii non. April. Alexandro A. cons.

[4] *Idem A. Philomuso.* Hereditas in testamento data per epistulam vel codicillos adimi non potuit. quia tamen testatrix voluntatem suam non

knowingly neglected to fulfill the duty of loyalty (*officium pietatis*) that they owed are not deemed to have been possessors in good faith (*bona fides*) before the commencement of a lawsuit (to dislodge them from the inheritance). 1. Once the suit over the estate has begun, moreover, they shall pay interest on the property from the inheritance they have sold or on money they have collected from debtors. 2. It is far from doubtful that this also applies to fruits which they found on the land they inherited or harvested there and (in either case) sold. 3. It is enough, however, for them to pay interest at the rate of 6 percent a year.

Given March 18, in the consulship of Cilo and Libo (204).

[2] *The same Augusti to Verus.* pr. Polla, admittedly, had free capacity to manage her property, and it is not the case that, because a minor ward became her (co-)heir,²⁴⁶ the matters she disposed of ought to be called into question (in the context of a lawsuit). 1. But if you wish to claim in the name of the minor ward that the will, about which Polla made a settlement, was forged, you can sue, provided you keep in mind, if you do not win your case, both that you are going to indemnify the ward for that portion which he enjoys under the will, which of necessity will be taken from him according to the legal rules (*iuris forma*),²⁴⁷ and that the governor is going to consider the issue of whether your suit was malicious, since, although you appear to be suing in the name of the ward, you are rehashing matters that were put to rest by a co-heir.

Posted April 25, in the consulship of Antoninus Augustus, for the third time, and Geta, for the second time (208).²⁴⁸

[3] *Emperor ALEXANDER Augustus to Antiochianus.* If the objection is raised against the children of the woman you claim to be your cousin, that the will of their father, who was said to have been murdered by his slave-household, was opened and read out loud before a judicial examination of the slaves under torture was conducted, then, pursuant to the decree of the most respectable order (the Senate; i.e., the *SC Silanianum*), the estate is forfeit to the Treasury and on that account the case ought to be tried before my procurator because the children were not at that time minor wards.

Posted April 4, in the consulship of Alexander Augustus (222).

[4] *The same Augustus to Philomusus.* An inheritance bestowed in a will was not able to be withdrawn by a letter or by codicils. Because nonetheless the testator had stated her view (*voluntas*) that one of her heirs was undeserving, it is

²⁴⁶ Literally "illi heres" = "heir to that one", i.e., not to Polla.

²⁴⁷ Blume: "In general, anyone, who attacked a will, prosecuted the suit to the finish and lost, also lost any benefit under the will, and all his rights thereunder inured to the benefit of the fisc."

²⁴⁸ Geta's second consulship was in 208 (he did not enjoy a third, despite the manuscript reading "iii").

mereri unum ex heredibus declaraverat, merito eius portio non iure ad alium translata fisco vindicata est. libertates autem in eadem epistula datae peti poterunt.

PP. II k. Dec. Maximo II et Aeliano cons.

[5] *Idem A. Tyranno.* Non oportet ut indignis heredibus successiones auferri praetextu, quod in sepultura supremis defunctorum obtemperatum non fuisset.

PP. VII id. Mart. Iuliano et Crispino cons.

[6] *Idem A. Venusto et Clementino. pr.* Minoribus quinque et viginti annis heredibus non obesse crimen inultae mortis placuit. 1. Cum autem vos etiam accusationem pertulisse et quosdam ex reis punitos proponatis, licet is qui mandasse caedem dicitur provocaverit, vereri non debetis, ne quam hereditatis paternae a fisco meo quaestionem patiamini. convenit enim pietati vestrae respondere causam appellationis reddenti. 2. Quod si maioris aetatis fuissetis, etiam ex necessitate provocationis certamen implere deberetis, ut possitis adire hereditatem.

PP. XV k. Iul. Alexandro A. III et Dione cons.

[7] *Idem A. Vitaliae.* Si ideo ultio necis testatoris non est desiderata, quia caedis auctores reperiri non potuerunt, obesse heredibus, in quo nulla eorum culpa detegitur, non oportet.

PP. id. Mart. Lupo et Maximo cons.

[8] *Imp. Gordianus A. Tatiae.* Alia causa est eius, qui falsi instituta accusatione ad finem usque quod insimulabat perduxit et contrariam sententiam meruit, alia eius, qui inchoatam accusationem non pertulit, cum in illius quidem partem succedat fiscus, hic autem, qui contrariam iudicis sententiam non sustinuit, suae partis non perdat persecutionem.

PP. XV k. Febr. Gordiano A. et Aviola cons.

right that that person's portion has by operation of law not been made over to another (heir) but claimed by the Treasury. Manumissions granted in the same letter, however, can be petitioned for.

Posted November 30, in the consulship of Maximus, for the second time, and Aelianus (223).

[5] *The same Augustus to Tyrannus.* The rights to succession ought not to be taken from heirs as though (they are) unworthy on the claim that the last wishes of decedents regarding burial had not been respected.

Posted March 9, in the consulship of Julian and Crispinus (224).

[6] *The same Augustus to Venustus and Clementinus. pr.* It is a settled rule that those less than 25 years of age cannot be charged with failure to avenge a death. 1. Since you state, moreover, that you have even concluded a prosecution and that some of the defendants have been punished, you ought not to fear that you will be subjected to any objection from my Treasury about your inheriting from your father, even though he who is said to have commissioned the murder has launched an appeal. For it is consistent with your sense of family loyalty (*pietas*) to respond to the person making the case for an appeal. 2. But if you had been of full legal majority (i.e., 25 or older), you would have even been compelled to contest the appeal in order to be able to enter upon the inheritance.

Posted June 17,²⁴⁹ in the consulship of Alexander Augustus, for the third time, and Dio (229).

[7] *The same Augustus to Vitalia.* If avenging the testator's murder was not felt to be necessary because the murderers could not be found, this ought not to present a problem for the heirs, inasmuch as they have not been found to be at fault (*culpa*).

Posted March 15, in the consulship of Lupus and Maximus (232).

[8] *Emperor GORDIAN Augustus to Tatia.* The situation of one who launched an accusation that a will was forged, carried his allegations through to the end, and lost his case is different from that of a person who began one and did not finish it. This is because the Treasury claims the portion (granted under the will) in the former case, certainly, while in the latter the person who has not received an adverse judicial decision (on the charge of forgery) does not lose his claim to the portion (granted in the will).

Posted January 18, in the consulship of Gordianus Augustus and Aviola (239).

²⁴⁹ The precise day is uncertain: the alternative is June 20.

[9] *Imp. Diocletianus et Maximianus AA. Aeliana.* Cum fratrem tuum veneno peremptum esse adseveras, ut effectus successionis eius tibi non auferatur, mortem eius ulcisci te necesse est. licet enim hereditatem eorum, qui clandestinis insidiis perimuntur, hi qui iure vocantur adire non vetantur, tamen, si interitum non fuerint ulti, successionem obtinere non possunt.

PP. Tiberiano et Dione cons.

[10] *Idem AA. et CC. Silvanae. pr.* Sororem fratris necem iure licito vindicantem evincere ab uxore scripta recte successionem non convenit. 1. Secundum quae, si fiduciam innocentiae geris et neque dolo malo tuo maritum necatum neque alias indignam te successione posse probari confidis, adversus omnem calumniam maximam habes securitatem.

D. XII k. Mai. Sirmi CC. cons.

[11] *Imp. Iustinianus A. Iohanni pp. pr.* Cum Silanianum senatus consultum et a nobis tam laudandum quam corroborandum est nec non divi Marci oratio, quae circa id facta est, invenimus autem in ea nullam mentionem libertatis factam et veteres movit quaedam de libertatibus relictis in testamento necati testatoris quaestio, necessarium nobis visum est etiam haec dirimere. 1. Si enim, qui libertate fuerant in hoc testamento donati, et si eam acceperant, lucrum, quod eis in medio accidit, poterant sibi adquirere, interea autem procrastinatione propter necis vindictam habita hoc minime ad eos pervenit et postea in libertatem deducti periclitabantur.

2. Ne medium tempus fuerit eis damnosum, et maxime si ancillae in medio pepererint et postea hereditas adita sit, bellissimum nobis videtur divi Marci prudentissimi principis orationem et in libertatibus producere, ne princeps philosophiae plenus aliquid videatur imperfectum sanxisse: sed ita in hereditatibus et in legatis et in fideicommissis et maxime in libertatibus, quas semper philosophia amplectitur, extendatur

[9] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Aeliana.* Since you assert that your brother was killed by poison, it is necessary that you avenge his death in order that the benefits of your succeeding to him not be taken away from you. For although those who are eligible under the law are not forbidden to enter upon the inheritance of those who perish through hidden snares, nevertheless, if they do not avenge the death, they cannot retain it.

Posted (without day), in the consulship of Tiberianus and Dio (291).

[10] *The same Augusti and the Caesars to Silvana. pr.* It is not appropriate that a sister avenging the death of her brother, as she has the right to do, evict from an inheritance a wife properly named as heir. 1. If, accordingly, you are confident of your innocence and you are convinced that it can be proved that your husband was not murdered through your malicious intent (*dolus malus*) and that you are not otherwise unworthy of succeeding to him, you are perfectly secure against every malicious claim.

Given April 20, at Sirmium, in the consulship of the Caesars (294).

[11] *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* We must praise as much as strengthen the SC *Silanianum*, as well as the legislative proposal (*oratio*) of the deified Marcus (Aurelius) passed pursuant to it, but we have found no mention in it of manumissions, and (yet) a certain controversy stirred the ancient jurists (*veteres*) concerning the issue of manumissions left in the will of the murdered testator. So it seemed necessary to Us to remove even this (uncertainty).²⁵⁰ 1. For those (slaves) had been granted freedom in that will and, if they had actually received it, were able to keep for themselves the income (*lucrum*) which in the meantime accumulated for them; but when a delay occurred owing to a murder investigation, it (the profit) did not become theirs in the meantime, and even once they gained freedom, they bore this risk.

2. So that this interval not cause them loss, and especially if female slaves give birth in the meantime and the inheritance is entered upon afterwards, it seems most agreeable to Us to extend the legislative proposal (*oratio*) of the deified Marcus, that wisest of emperors, even to encompass manumissions, so that an emperor filled with the love of wisdom (*philosophia*) not seem to have legislated something that was incomplete. So just as with inheritances, legacies, and trusts, his *oratio* shall be applied especially to manumissions,

²⁵⁰ Blume: "Marcus had provided that inheritances, legacies and trusts granted to slaves should be preserved for them – if they would ultimately have received them, that is to say, would not be found guilty of complicity in the crime or guilty of not having prevented it – but he had not said anything as to the earnings of the slaves in the meantime, and he had not said anything about manumissions; that is to say, as to the time from which they should be considered effective."

eius oratio, ut et lucrum quod in medio accidit eis post libertatem acceptam restituatur et partus liber et ingenuus esse intellegatur nullaque machinatione huiusmodi praepeditio damnum aliquod inrogare concedatur et libera eorum posteritas, si in medio fuerint ab hac luce subtracti, suorum genitorum commodum consequatur. 3. Merito enim nobis sanctissimi Marci per omnia constitutionem replere placuit: nihil etenim actum esse credimus, dum aliquid addendum superest.

D. II k. Mai. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[12] *Idem A. Iohanni pp. pr.* Talis de antiquo iure dubietas nostrae serenitati suggesta est propter senatus consultum silanianum et servos, qui supplicio adficiuntur sub eodem tecto commorantes et non suum auxilium domino per insidias occiso praebentes. veteres enim certum non faciunt, qui intellectus de verbis 'sub eodem tecto' significatur, sive in eodem cubiculo sive in triclinio vel porticu vel in aula haec appellatio accipi debeat, adicientes, si dominus in via vel in agro fuerit interfectus, eos servos puniri, qui praesto erant et non auxilium ad prohibendum periculum praebuerunt, nulla distinctione super qualitate praesentiae utentes.

1. Nos igitur omnem eis occasionem ad declinanda supplicia super negligentia salutis domini sui amputantes sancimus omnes servos, ex quocumque loco sive in domo sive in via sive in agro possint clamorem exaudire vel insidias sentire et non auxilium tulerint, supplicio senatus consulti subiacere. oportet enim eos, ubicumque senserint dominum periclitantem, ad prohibendas insidias concurrere.

D. xv k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc. anno secundo.

XXXVI De Codicillis

[1] *Imp. Alexander A. Mocimo et aliis. pr.* Rupto quidem testamento postumi agnatione codicillos quoque ad testamentum pertinentes

which *philosophia* always embraces, so that even the income that accumulates for them in the meantime be restored to them after they receive their freedom; their offspring shall be deemed free and free-born; by no contrivance shall such impediment be allowed to cause any loss for them; and if they die in the meantime their free offspring shall obtain the material resources of their parents. 3. Certainly We have rightly decided to complete in every respect the constitution of the most blessed Marcus. For We believe that nothing has been accomplished as long as there remains something to be added.

Given April 30, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[12] *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* The following uncertainty concerning the ancient law (*antiquum ius*) has been brought to the notice of Our Serenity concerning the SC *Silanianum* and the slaves who are punished with death if they are situated under the same roof and do not offer their assistance to the master when he is treacherously slain. For the ancient jurists (*veteres*) do not make clear what is meant by the term “under the same roof” (*sub eodem tecto*) – whether this phrase ought to be understood either as in the same sleeping quarters, or in a dining facility, portico, or reception hall, and they add that if the master is killed in the street or on an open piece of land those slaves shall be punished who were present and did not offer assistance in order to prevent the danger, making no discrimination over the nature of their presence.

1. Therefore, by way of eliminating every opportunity to evade the death penalty in connection with negligence over the safety of their master We ordain that all slaves, in whatever place they may be, whether in the house, in the street, or on an open piece of land, who can hear the cry for help or who are aware of the act of treachery and do not offer assistance, shall be liable to the capital punishment established by the decree of the Senate. For wherever they perceive the master to be in difficulty they ought to run in order to prevent treachery.

Given October 18, at Constantinople, in the second post-consulate of the viri clarissimi Lampadius and Orestes (532).

Thirty-Sixth Title Codicils²⁵¹

[1] *Emperor ALEXANDER Augustus to Mocimus and others. pr.* When, for example, a will is broken because of the birth of a posthumous child, it does

²⁵¹ See D. 29.7; Inst. 2.25.

non valere in dubium non venit. 1. Sed cum post ruptum testamentum patrem pupillorum vestrorum litteras emisisse proponatis, quibus praecedens iudicium confirmavit, praetor nihil contra ius fecit, si novissimam eius voluntatem secutus relictum testamento rei publicae fideicommissum ut ex codicillis relictum praestandum esse pronuntiavit.

PP. III k. Iul. Maximo et Paterno cons.

[2] *Impp. Philippus A. et Philippus C. Asclepiodotae. pr.* Hereditatem quidem neque dari neque adimi codicillis posse manifestum est: verbis tamen precariis per huiusmodi etiam novissimi iudicii ordinationem iura non faciunt irritas voluntates. 1. Unde ineffaciter te codicillis rogatam esse, ut quibusdam rebus contenta portionem quam testamento fueras consecuta aliis restitueres, falso tibi persuasum est.

PP. id. Oct. Peregrino et Aemiliano cons.

[3] *Impp. Diocletianus et Maximianus AA. Hyacintho et aliis.* Cum proponatis pupillorum vestrorum matrem diversis temporibus ac dissonis voluntatibus duos codicillos ordinasse, in dubium non venit id, quod priori codicillo inscripserat, per eum in quem postea secreta voluntatis suae contulerat, si a prioris tenore discrepat et contrariam voluntatem continet, revocatum esse.

PP. VI id. Sept. ipsis IIII et III AA. cons.

[4] *Idem AA. et CC. Stratonico.* Non idcirco minus, quod intestato te absente codicillos mater tua fecit, ii, quibus precariis verbis adscripta sunt, relicta capiunt.

Sine die et consule.

[5] *Idem AA. et CC. Flaviae.* Nec codicillos quidem furem posse facere certissimi iuris est. si igitur scriptura velut codicillorum patris tui

not enter into doubt that the codicils related to the will are also invalid. 1. But since you state that after the will was broken the father of your minor wards sent a letter in which he confirmed his prior dispositions, the Praetor has done nothing contrary to the law, if, having followed the most recent expression of the decedent's wishes, he declared that a trust left in the will to a town is to be paid as though it were left in codicils.²⁵²

Posted June 29, in the consulship of Maximus and Paternus (233).

[2] *Emperor PHILIP Augustus and PHILIP Caesar to Asclepiodota. pr.* It is clear that an inheritance, to be sure, can neither be given nor taken away by codicils. All the same, the laws do not render invalid last wishes when expressed in suppletory language even in this sort of last-minute manner of composition. 1. For this reason you have been wrongly persuaded that the request made to you in codicils is invalid, that you be content with certain things and turn over to others a portion that you received under the will.²⁵³

Posted October 15, in the consulship of Peregrinus and Aemilianus (244).

[3] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Hyacinthus and others.* Since you allege that the mother of your minor wards composed two codicils at different times and with contradictory provisions, it does not enter into doubt that what she wrote in the first codicil has been revoked by that in which she later conveyed the private contents of her last wishes, if the latter differs from the substance of the first and expresses a contrary sentiment.

Posted September 8, in the consulship of the Augusti, for the fourth, and third time, respectively (290).

[4] *The same Augusti and the Caesars to Stratonicus.* The parties do not any the less receive a bequest left to them by a trust directive (*precariis verbis*; a *fideicommissum*) simply because your mother, without a will and in your absence, drew up codicils.

Without day and year.

[5] *The same Augusti and Caesars to Flavia.* It is a very certain point of law (*certissimum ius*) that a lunatic cannot even draw up codicils. If, therefore, a

²⁵² Blume: "Now the codicil that was made, was made after the will had become void - when there was no will; hence the codicil did not depend on the will, and hence the trust left in it for the benefit of the municipality was perfectly valid, even though the reference for identification had to be made to the will."

²⁵³ Blume: "The appointment of an heir was required to be made by a will. Nor could a condition be imposed on an appointed heir, or direct substitution be effected except by a will. ... But property given to an heir or to anyone else in a will, could be taken away indirectly by a trust, that is to say, as stated in the present law, by precatory words."

fuit prolata, ut aliquid ex hac peti possit, adseverationi tuae mentis eum compotem fuisse negantis fidem adesse probari convenit.

D. vi k. Dec. Divelli CC. cons.

[6] *Idem AA. et CC. Demostheni.* Sive initio quae fuerat codicillis relicturus generaliter, sive novissime relicta servari mandaverit, confirmatione munitus nullam iustam gerere sollicitudinem potes.

D. III id. Dec. Nicomediae CC. cons.

[7] *Imp. Constantinus A. ad Maximum pp.* Si idem codicilli quod testamenta possent, cur diversum his instrumentis vocabulum mandaretur, quae vis ac potestas una sociasset? igitur specialiter codicillis instituendi ac substituendi potestas iuris auctoritate data non est.

D. III. ... Iun. Pacatiano et Hilariano cons.

[8] *Imp. Theodosius A. Asclepiodoto pp. pr.* Si quis agere ex testamento quolibet modo sive scripto sive sine scriptura confecto de hereditate voluerit, ad fideicommissi persecutionem adspirare cupiens, minime permittatur. 1. Tantum enim abest, ut aditum cuiquam pro suo migrandi desiderio concedamus, ut etiam illud sanciamus, ut, si testator faciens testamentum in eodem pro codicillis etiam id valere complexus sit, qui hereditatem petit, ab ipsis intentionis exordiis utrum velit eligendi habeat potestatem, sciens se unius electione alterius sibi aditum praeciusse: ita ut, sive bonorum possessionem secundum tabulas aut secundum nuncupationem ceterasque similes postulaverit, aut certe mitti se ad possessionem ex more petierit, statim inter ipsa huius iuris auspicia propositum suae intentionis explanet.

1a. Illud quoque pari ratione servandum est, ut testator, qui decreverit facere testamentum, si id implere nequiverit, intestatus videatur esse defunctus nec traducere liceat ad fideicommissi interpretationem velut ex codicillis ultimam voluntatem, nisi id ille complexus sit, ut vim etiam codicillorum scriptura debeat obtinere: illo iure electionis

document of your father's has been produced as though in the form of codicils so that something can be claimed from it, it befits your allegations that the credibility be demonstrated of your denial that your father was of sound mind.

Given November 26, at Divellium, in the consulship of the Caesars (294).²⁵⁴

[6] *The same Augusti and Caesars to Demosthenes.* You cannot have any justified concern, since you are supported by a confirmation (in either case), whether (the testator) ordained generally at the outset what he was going to bequeath in codicils should be maintained or at the very end what he had bequeathed (should be maintained).

Given December 11, at Nicomedia, in the consulship of the Caesars (294).

[7] *Emperor CONSTANTINE Augustus to Maximus, Praetorian Prefect.* If codicils could accomplish the same thing as wills, why would a different name have been given to these documents, if they had been united by one force and effect? Hence the capacity to appoint and substitute (heirs) has not been specially granted to codicils by the authority of the law (*auctoritas iuris*).

Given May or June ??, in the consulship of Pacatianus and Hilarianus (332).²⁵⁵

[8] *Emperor THEODOSIUS Augustus to Asclepiodotus, Praetorian Prefect. pr.²⁵⁶* If anyone wishes to sue for an inheritance from a will composed in any manner at all, whether written or oral, though he desire (also) to make a claim for a trust, this shall not at all be allowed. 1. For so far are We from allowing anyone an opening to shift the ground for a claim that We also lay down that, if a testator when making a will has stated therein that it also shall be valid as to codicils, a claimant of the inheritance from the very beginning of his suit shall have the opportunity of choosing which he wishes, knowing that by choosing one he has forgone access to the other. As a result, whether he claims *bonorum possessio* according to the terms of a written will or an oral declaration (*nuncupatio*) and the other similar forms or at any rate he asks to be put in possession in the customary manner the claimant shall immediately, at the very beginning of the lawsuit, set forth the motive behind his claim.

1a. This point too shall be preserved with equal reason, that the testator who decides to make a will but fails to complete it shall be deemed to have died intestate, nor shall it be permitted to translate the expression of last wishes into a trust as though it derived from codicils, unless the testator has stated that the incipient will ought to preserve the force even of codicils. (Even so,) that right

²⁵⁴ Both the day and place are uncertain: Mommsen prefers October 30, 294, at Develtum.

²⁵⁵ Seeck and the *Projet Volterra* have May 30, 332.

²⁵⁶ Pr.-2 = (in part, with changes) C Th. 4.4.7. Combine with C. 6.13.1.

videlicet perdurante, ut, qui ex testamento agere voluerit, ad fideicommissum migrare non possit.

2. Si quis vero ex parentibus utriusque sexus ac liberis usque ad gradum quartum agnationis vinculis adligatus vel cognationis nexu constrictus ad tertium scriptus heres fuerit vel nuncupatus, in eo videlicet testamento, quod testator vicem quoque codicillorum voluit obtinere, licebit ei, si de hereditate ex testamento secundum mortui voluntatem agens fuerit forte superatus vel certe ipse sponte voluerit, ad fideicommissi subsidium convolare. non enim par eademque ratio videtur amittere debita et lucra non capere.

3. In omni autem ultima voluntate excepto testamento quinque testes vel rogati vel qui fortuito venerint in uno eodemque tempore debent adhiberi, sive in scriptis sive sine scriptis voluntas conficiatur: testibus videlicet, quando scriptura voluntas componitur, subnotationem suam accommodantibus.

D. x k. Mart. Constantinopoli Victore vc. cons.

XXXVII De Legatis

[1] *Imp. Antoninus A. Pius libertis Sextiae Basiliae.* Quamvis verbis his: 'ut quoad cum Claudio Iusto morati essetis', alimenta vobis et vestiarium legatum sit, tamen hanc fuisse defuncti^{xi} cogitationem interpretor, ut et post mortem Iusti eadem vobis praestari voluerit.

Sine die et consule.

[2] *Imp. Severus et Antoninus AA. Sabiniano.* Quamvis heres institutus hereditatem vendiderit, tamen legata et fideicommissa ab eo peti possunt et, quod eo nomine datum fuerit, venditor ab emptore vel fideiusoribus eius petere poterit.

PP. x k. Sept. Laterano et Rufino cons.

[3] *Idem AA. Victorino.* Qui post testamentum factum praedia quae legavit pignori vel hypothecae dedit, mutasse voluntatem circa

^{xi} defunctae (D.)

of election clearly remains valid, so that he or she who wishes to sue under the will cannot shift to (a claim for) a trust.

2. If, however, anyone of the ascendants of either sex and the descendants to the fourth degree, if bound by an agnatic tie, or the third, if connected by a link of cognate (blood) relationship, is named heir in a written or oral will, in that will, clearly, which the testator wished to have the force of codicils, it will be permitted for him or her to have recourse to a trust as a fallback, if while suing under the will over the inheritance in accordance with the decedent's wishes he happens to lose or at any rate wishes this of his own accord. For there does not seem to be the same justification in failing to reap a benefit as in losing what is properly owed.

3. Moreover, in every expression of one's last wishes, with the exception of a will, five witnesses, either summoned for the purpose or having shown up by chance, ought at one and the same time to be employed, whether the expression of last wishes is accomplished in writing or without it. When the last wishes are put in writing, obviously, the witnesses shall sign underneath.

Given February 14, at Constantinople, in the consulship of the vir clarissimus Victor (424).

Thirty-Seventh Title Legacies²⁵⁷

[1]²⁵⁸ *Emperor ANTONINUS PIUS Augustus to the freedpersons of Sextia Basilia.* Although in this wording (of the will): "As long as you reside with Claudius Justus," the means of subsistence (*alimenta*) and clothing have been left as a legacy to you, nevertheless I interpret the thinking of the decedent to be as follows: even after the death of Justus she wanted the same things to be provided to you.

Without date and year.

[2] *Emperors SEVERUS and ANTONINUS Augusti to Sabinianus.* Although the person appointed heir sells the inheritance, the legacies and trusts can nevertheless be claimed from him and whatever was given under that title the seller will be able to claim from the buyer or his sureties.

Posted August 23, in the consulship of Lateranus and Rufinus (197).

[3]²⁵⁹ *The same Augusti to Victorinus.* Whoever, after making a will, has given as a pledge or hypothec (*hypotheca*) properties that he or she granted as a legacy is not deemed to have changed his or her wishes concerning the legatees.

²⁵⁷ See D. 30-32; Inst. 2.29.

²⁵⁸ = (in part, with changes) Scaev. D. 34.1.13.1.

²⁵⁹ See Inst. 2.20.12.

legatariorum personam non videtur: et ideo, etiam si in personam actio electa est, recte placuit ab herede praedia liberari.

PP. VI k. Mai. Gentiano et Basso cons.

[4] *Imp. Antoninus A. Sulpicio.* Servis testamento dominorum non data libertate legatum seu fideicommissum relictum non valet nec convalescere potest, licet post mortem testatoris libertatem aliqua ratione consecuti sunt.

PP. V k. Iul. Antonino A. IIII et Balbino cons.

[5] *Idem A. Donato.* Non est dubium denegari actionem legatorum ei pro portione competenti in his rebus, quas subtraxisse eum de hereditate apparuerit.

PP. V id. Sept. Antonino A. IIII et Balbino cons.

[6] *Idem A. Iulio.* Si legata relictas primus legatarius agnovit, substitutio eorum in personam Pontianae facta evanuit.

PP. VIII k. Mai. Romae Laeto II et Cereale cons.

[7] *Idem A. Fausto. pr.* Si Fortidianum fundum primo pater tuus fratribus per praeceptionem ac mox tibi legavit, concursu dominium eius tibi quoque quaeritur. 1. Error autem nominum in scriptura factus, si modo de mancipiis vel de possessionibus legatis non ambigitur, ius legati dati non minuit.

PP. V id. Iul. Laeto II et Cereale cons.

[8] *Idem A. Demetrio.* Ab administratione tutelae religio sacramenti Marcellum, quem vobis a patre tutorem datum testamento proponitis, eripit. quae res, quominus legatum consequatur, non impedit: nec enim iuste ab ea petitione repellitur, cum, etiam si vellet, tutelam administrare prohibeatur.

PP. VIII id. Mart. Romae Sabino II et Anullino cons.

[9] *Imp. Alexander A. Antiocho.* Si in fraudem eorum quae testamento relictas sunt admissus est accusator, qui testamentum falsum diceret, praeses provinciae secundum iurisdictionis formam solvi legata

And for this reason too if an action *in personam* has been raised (against the heir), it has been correctly decided that the properties shall be freed from encumbrances by the heir.

Posted April 26, in the consulship of Gentianus and Bassus (211).

[4] *Emperor ANTONINUS Augustus to Sulpicius.* A legacy or a trust left to slaves in the will of their master without a grant of freedom is invalid. Nor can they become valid even if after the death of the testator they have acquired freedom in some way.

Posted June 27, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[5] *The same Augustus to Donatus.* There is no doubt that an action on recovering a legacy shall be denied to someone for the appropriate share of the property that, it has emerged, he has made off with from the estate.

Posted September 9, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[6] *The same Augustus to Julius.* If the primary legatee has accepted the legacies bequeathed (to him or her), the fact that Pontiana had been named a substitute regarding them has lost its significance.

Posted April 24, in the consulship of Laetus, for the second time, and Cerealis (215).

[7] *The same Augustus to Faustus. pr.* If your father made a legacy of the Fortidian farm first to your brothers as a preferential legacy (*per praeceptionem*) and then to you, its ownership also accrues jointly to you. 1. Moreover, a mistake made over names in the documentation, provided that there is no ambiguity over the slaves and rural property bequeathed, does not diminish your right over the legacy that has been made.

Posted July 11, in the consulship of Laetus, for the second time, and Cerealis (215).

[8] *The same Augustus to Demetrius.* Respect for his oath (as a soldier) keeps Marcellus, whom, you allege, your father appointed as your *tutor* in his will, from managing the tutelage. This fact does not prevent him from receiving a legacy (given in the will). For it is not right that his suit be denied since he would be prevented from managing the tutelage even if he wished to do so.

Posted March 8, at Rome, in the consulship of Sabinus, for the second time, and Anullinus (216).

[9] *Emperor ALEXANDER Augustus to Antiochus.* If a plaintiff who declares that a will has been forged is allowed to proceed with fraudulent designs on legacies left in it, the governor of the province will order, in accordance with

iubebit, interposita cautione, si evicta fuerit hereditas, ea restitutum, quamvis alias cautioni tunc locus sit, cum sine controversia legata solvantur.

PP. VII id. Febr. Maximo II et Aeliano cons.

[10] *Idem A. Ingenuae.* Cum alienam rem quis reliquerit, si quidem sciens, tam ex legato quam ex fideicommisso ab eo qui legatum seu fideicommissum meruit peti potest. quod si suam esse putavit, non aliter valet relictum, nisi proximae personae vel uxori vel alii tali personae datum sit, cui legaturus esset, et si scisset rem alienam esse.

PP. v k. Febr. Albino et Maximo cons.

[11] *Idem A. Albiniano.* Filia legatorum non habet actionem, si ea, quae ei testamento reliquit, pater vivus postea in dotem dedit.

PP. v non. Mart. Pompeiano et Peligno cons.

[12] *Idem A. Muciano. pr.* Cum responso viri prudentissimi Papiniani, quod precibus insertum est, praeceptionis legatum et omitta parte hereditatis vindicari posse declaratur, intellegis desiderio tuo iuxta iuris formam esse consultum. 1. Verba vero responsi haec sunt: Filiae mater praedium ita legavit: 'praecipito sumito extra partem hereditatis': cum hereditati matris filia renuntiasset, nihilo minus eam recte legatum vindicare visum est.

PP. constitutio v id. Iul. Sabino II et Venusto cons.

[13] *Impp. Diocletianus et Maximianus AA. Severae.* Proprias tuas res legari vel fideicommitteri tibi non potuisse manifestum est.

PP. xv k. Mai. Maximo II et Aquilino cons.

the rules of his jurisdiction (*iurisdictionis forma*), the legacies to be paid out, with a guarantee (*cautio*) given that he or she (the legatee) is going to refund them if the heir is evicted from the estate, even though in other situations there is a place for a *cautio* when legacies are paid out in the absence of a dispute.

Posted February 7, in the consulship of Maximus, for the second time, and Aelianus (223).

[10] *The same Augustus to Ingenua.* When someone has bequeathed someone else's property, whether as a legacy or trust, if, certainly, he did so knowingly, it can be claimed by the person granted the legacy or trust. But if the giver thought it was his or her own property, the bequest is valid only if it was given to a person closely related, such as a wife or other such person, to whom the giver would leave a legacy, even in the knowledge that the property was not his or her own.²⁶⁰

Posted January 28, in the consulship of Albinus and Maximus (227).

[11] *The same Augustus to Albinianus.* A daughter does not have an action on legacy if her father later, while still living, gave her as dowry those items he had left to her in his will.

Posted March 3, in the consulship of Pompeianus and Pelignus (231).

[12] *Emperor GORDIAN Augustus to Mucianus.*²⁶¹ *pr.* Since the response (*responsum*) of the most learned man Papinian, which is cited in your petition, states that a preferential legacy (*per praeceptionem*) can be claimed even when the legatee does not enter upon his or her share of the inheritance, you understand that your request is provided for consistently with the legal rules (*iuris forma*). 1. The wording of the *responsum* is in fact as follows: "A mother left a property as a legacy to her daughter in the following way: 'Go ahead and take [the property] as a preferential legacy apart from your share of the inheritance.' Although the daughter rejected the mother's inheritance it was nonetheless decided that she rightly claimed the legacy."

The constitution was posted July 11, in the consulship of Sabinus, for the second time, and Venustus (240).

[13] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Severa.* It is clear that your own property could not be bequeathed to you as a legacy or as a trust.

Posted April 17, in the consulship of Maximus, for the second time, and Aquilinus (286).

²⁶⁰ Blume: "Another's property might be given as a legacy. In such event, the heir was compelled to purchase the property and deliver it, or pay the legatee the value thereof."

²⁶¹ On the basis of the date, Haloander assigns the text to Gordian instead of Alexander, as the manuscripts prefer.

[14] *Idem AA. Tatiano.* Monumenta quidem legari non posse manifestum est, ius autem mortuum inferendi legare nemo prohibetur.

PP. II k. Sept. Maximo II et Aquilino cons.

[15] *Idem AA. Terentio. pr.* Si universae facultates, quas pater vester reliquit, debito fiscali aut privato absumuntur, nihil ex his, quae testamento eius adscripta sunt, valere potest. 1. Quod si deducto debito in relictis bonis superfluum est, libertates impediri iuris ratio non permittit, quando etiam legata nec non fideicommissa salva lege Falcidia praestanda sunt.

PP. III k. Oct. ipsis III et III AA. cons.

[16] *Idem AA. et CC. Scyllae.* Creditor, si a debitore suo rem, quam pignoris nomine suscepit, legatum sibi contendit, etiam debito ab heredibus eius oblato, quominus restituat, defendi potest.

S. XVIII k. Febr. Sirmi CC. cons.

[17] *Idem AA. et CC. Eutychiano.* Datum legatum adimi tam pure quam sub condicione, non libertis tantum, sed etiam ingenuis placuit.

D. III non. Mart. CC. cons.

[18] *Idem AA. et CC. Iustino.* Ex legato nominis, actionibus ab his qui successerunt non mandatis, directas quidem actiones legatarius habere non potest, utilibus autem suo nomine experietur.

D. VI id. Dec. CC. cons.

[19] *Idem AA. et CC. Niconi.* Non tantum duum mensuum, sed etiam minoris temporis maritus uxori testamento scriptus succedit, nec legata vel fideicommissa seu donationes temporis huius angustia capi prohibet.

D. V id. Dec. Nicomediae CC. cons.

[20] *Idem AA. et CC. Eutychiano.* Uxor patruus tui si testata decesserit, res tuas tantum usum fructum earum habens legare non potuit.

D. VII k. Ian. CC. cons.

[14] *The same Augusti to Tatianus.* It is clear that tombs, in fact, cannot be bequeathed as legacies, but no one is prevented from bequeathing as a legacy the right of burying a dead person therein.

Posted August 31, in the consulship of Maximus, for the second time, and Aquilinus (286).

[15] *The same Augusti to Terentius. pr.* If all of the material resources that your father left to you are consumed by debts to the Treasury or to private persons, none of those things he wrote in his will can be valid. 1. But if after the deduction of debts something is left over in the property that remains, legal principles (*iuris ratio*) do not allow manumissions to be hindered, since even legacies and trusts are to be paid out, provided the *lex Falcidia* is respected (with one-quarter reserved for the heir).

Posted September 29, in the consulship of the Augusti, for the fourth and third times, respectively (290).

[16] *The same Augusti and the Caesars to Scylla.* If a creditor claims that an item which he had received as a pledge from his debtor was given to him as a legacy by the same, even if the latter's heirs pay off the debt, he can defend a suit against restitution.

Written January 15, at Sirmium, in the consulship of the Caesars (294).

[17] *The same Augusti and Caesars to Eutybianus.* It is an accepted principle that a legacy, whether made unconditionally or conditionally, can be withdrawn, not only from freedpersons but also from the free-born.

Given March 5, in the consulship of the Caesars (294).

[18] *The same Augusti and Caesars to Justin.* In connection with the legacy of a debt, when the heirs have not mandated (i.e., assigned) the actions, the legatee cannot sue on direct actions, certainly, but will proceed under his own name on the basis of analogous (*utiles*) ones.

Given December 8, in the consulship of the Caesars (294).

[19] *The same Augusti and Caesars to Nico.* A husband who has been married not quite two months, or even less time, succeeds to his wife when he has been named heir in her will. Nor does the brevity of this period of time (i.e., of the marriage) prevent him from taking legacies, trusts, or gifts.

Given December 9, at Nicomedia, in the consulship of the Caesars (294).

[20] *The same Augusti and Caesars to Eutybianus.* The wife of your paternal uncle, if she dies having made a will, could not give your property as a legacy since she had only a usufruct over it.

Given December 26, in the consulship of the Caesars (294).

[21] *Imp. Constantinus A. ad populum.* In legatis vel fideicommissis verborum necessaria non sit observantia, ita ut nihil prorsus intersit, quis talem voluntatem verborum casus exceperit aut quis loquendi usus effuderit.

D. k. Febr. Constantio II et Constante cons.

[22] *Imp. Iustinianus A. Menae pp.* In annalibus legatis vel fideicommissis, quae testator non solum certae personae, sed etiam eius heredibus praestari voluit, eorum exactionem omnibus heredibus et heredum heredibus conservari pro voluntate testatoris praecipimus.

D. III id. Dec. Constantinopoli dn. Iustiniano A. pp. II cons.

[23] *Idem A. Iuliano pp. pr.* Cum quaestio talis de significatione verborum animos veterum movit, si quis cuidam agrum puta Cornelianum vel alium quendam in solidum legaverit, deinde alii partem eius dimidiam, quantam portionem primus, quantam secundus legatarius consequitur (simili dubitatione et in hereditate et in fideicommissis habita), cumque computationes multae introducebantur et multis ratiocinatoribus dignae: nos huiusmodi computationes quasi superfluas et contrarias voluntati testatorum omnes esse sopiendas censemus.

1. Cum enim manifestissimum est eum, qui ab initio duodecim uncias rei cuidam reliquit, alii autem postea sex, recessisse quidem a priore voluntate, voluisse autem minui eam sex unciis, cum alii eas obtulit, et praesens casus exitum apertissimum inveniet. 1a. Si quis itaque vel agrum vel hereditatem reliquerit, primo quidem in totum, secundo autem in partem dimidiam, utrumque in sex uncias esse vel dominum rei legatae vel heredem. 1b. Et si primo re tota relicta tertiam partem secundo reliquerit, secundum praedictum modum octo quidem uncias vel agri vel hereditatis apud primum remanere, tertiam autem partem vel quattuor uncias ad secundum migrare.

1c. Et sic in omnibus statuendum est, id est in hereditatibus vel legatis vel fideicommissis: vestigia enim voluntatis testatoris non aliter nisi per huiusmodi viam aestimanda sunt.

[21]²⁶² *Emperor CONSTANTINE Augustus to the people.* In making legacies or trusts respect for the usage of words shall not be necessary, so that it makes absolutely no difference what verbal contingency expresses the wish or what style of language sets this forth.

*Given February 1, in the consulship of Constantius, for the second time, and Constans (339).*²⁶³

[22] *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect.* We instruct regarding annuities linked to legacies or trusts that what the testator wished be paid not only to a certain person, but also to his or her heirs shall so be paid, according to the wishes of the testator, to all heirs and the heirs of the heirs.

Given December 11, in the consulship of Our Lord Justinian, Ever Augustus, for the second time (528).

[23] *The same Augustus to Julian, Praetorian Prefect.* **pr.** Such a controversy stirred the spirits of the ancient jurists (*veteres*) over the meaning of words: if someone left as a legacy to one person an entire farm, for example, the Cornelian or some other, and leaves to another person half of it, how much does the first legatee receive and how much the second? A similar hesitation arose with both inheritances and trusts. Many calculations were brought to bear worthy of numerous accountants. We lay down that all such calculations shall be extinguished on the ground that they are all unnecessary and contrary to the wishes of the testator.

1. For since it is very clear that he who has from the beginning left all (twelve-twelfths) of the property to one person, but has left half (six-twelfths) later to another, has, in fact, changed his mind and instead wants the whole to be diminished by one-half (six-twelfths) because he has offered as much to another person, even the present situation will find a very clear solution. **1a.** So if someone leaves a farm or an inheritance as a whole to the first person, for example, but to the second (only) half, he shall leave each party one-half as an owner of the property bequeathed in the form of a legacy or as an heir. **1b.** And if having left the whole to the first person, the testator then leaves one-third to the second, according to the method just explained two-thirds, to be sure, of the farm or inheritance shall remain with the first party but a third – or four-twelfths – shall pass over to the second.

1c. And this is how it shall be decided in all (such) matters, that is, in regard to inheritances, legacies, and trusts. For the traces of the testator's wishes are not to be appraised except in such a way as this.

²⁶² Combine with C. 6.9.9 (Laodicea) and the constitutions mentioned there.

²⁶³ The constitutions cited in the previous note give the more persuasive date of 320 (Seeck has January 31, 320); in 339 Constantius would be the issuing emperor. The Projet Volterra has January 31, 320, for the date and the location as Serdica. See the note on C. 6.9.9.

2. Sed et aliam disceptationem iuris antiqui non absimilem constitutam decidere nobis humanum esse apparuit. agitabatur enim, si quis agrum Cornelianum vel forte alium vel quandam rem cuidam legaverit et postea iterum vel saepius ei eandem rem per legatum vel fideicommissum dederit, post talia autem verba testamenti Sempronio eundem agrum vel aliam rem legaverit, ut saepius quidem Titii fuisset mentio, semel autem Sempronii, quid statuendum est, et quid iuris sit, si coniunctim an separatim eis relinquatur, sive in legato hoc consistat sive in hereditate?

2a. Huiusmodi igitur decedentes antiquam controversiam sancimus, cuicumque fuerit vel hereditas vel ager in memoratis casibus sive coniunctim sive soli sive saepius eidem relictus, aequa lance et hereditatem et agrum et aliam quamcumque rem dividi et ad dimidiam partem unumquemque vocari, nisi specialiter expresserit et dixerit testator tantas quidem partes velle unum, tantas autem alterum habere. in omnibus etenim testatoris voluntatem, quae legitima est, dominari censemus.

D. xv k. Dec. Lampadio et Oreste vv. cc. cons.

[24] *Idem A. Iohanni pp. pr.* Cum quidam suum filium familias impuberem exheredatum fecit aliis heredibus scriptis, eidem autem pupillo alium substitutum reliquit, maximam scilicet ostendens ad filium suum adfectionem, cui nihil quidem emolumenti reliquit, sed post exheredationis iniuriam etiam substitutionem ei addidit et a substituto legatum reliquit, quaerebatur, si huiusmodi legatum vel fideicommissum potest valere.

1. Sed et si legatum eidem exheredato filio pater reliquerit et substituerit ei exheredato facto aliquem extraneum, iterum certabatur, si saltem per eundem modum fideicommissum potest relinquere.

2. Cum igitur antiquitas quidem haec diverse tractare maluit, nobis autem huiusmodi iurgia supervacua esse videntur, sancimus nullo legato nullo fideicommisso huiusmodi substitutum qui exheredato

2. But it also seemed to us consistent with humane sympathy (*humanum*) to put an end to another, not dissimilar, controversy of the ancient law (*ius antiquum*). For it used to be debated, if someone left the Cornelian farm, or perhaps some other farm or any given object to a certain person as a legacy and later (i.e., in the same will) gave the same thing once or several times as a legacy or a trust to the same person, but following such wording in the will the testator bequeathed as legacy to Sempronius the farm or other item, so that several times, in fact, there was mention of Titius, but (only) once of Sempronius – what shall be decided? And what is the operative legal principle: was it left to them jointly or separately, and was it left as a legacy or as an inheritance?

2a. Therefore, settling this ancient debate, We order that to whomever the inheritance or farm in the aforementioned cases has been left, whether jointly or to (each) person alone (i.e., separately) or to the same person several times, the inheritance, farm, or whatever item it is shall be divided equally and each party shall be eligible for one-half, unless the testator has particularly set forth and declared that he wished one party to have, to be sure, such a proportion and the other party to have such a proportion. For in all things We lay down that the wishes of the testator, insofar as they are lawful, shall rule.

Given November 17, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[24]²⁶⁴ The same Augustus to John, Praetorian Prefect. pr. A certain man disinherited his minor son-in-power, naming others as heirs. But he appointed a substitute for the same minor ward, showing, of course, the greatest affection for his own son, to whom he left no material benefits at all, but hard upon the insult of the disinheritance he added a substitution into the bargain and ordered the substitute to pay a legacy. It used to be debated whether such a legacy or trust could be valid.

1. But even if the father disinherited his son, left him a legacy, and appointed some non-relative as a substitute, again it used to be disputed if even in this way he could leave (i.e. order the substitute to pay) a trust.

2. So, although the ancients, to be sure, preferred to differ in treating this matter, such quarrels seem to Us, however, beside the point. We ordain that a such a substitute appointed in place of a disinherited minor ward shall not be

²⁶⁴ Combine with C. 6.42.31.

pupillo datus est praegravari, nec si ipsam rem quam pupillo legavit a substituto eius vel legare vel fideicommittere voluit.

D. 11 k. Mai. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[25] *Idem A. Iohanni pp. pr.* Si legatarius celaverit testamentum et postea hoc in lucem emergerit, an possit legatum sibi derelictum is qui celaverit ex eo testamento vindicare, dubitabatur. 1. Quod omnimodo inhibendum esse censemus, ut non accipiat fructum suae calliditatis, qui heredem voluit hereditate defraudare: sed huiusmodi legatum illi quidem auferatur, maneat autem quasi pro non scripto apud heredem, ut, qui alii nocendum esse existimavit, ipse suam sentiat iacturam, quemadmodum, si legatarius, cui propter tutelam gerendam aliquid derelictum sit, non subierit tutelam, ei quidem legatum aufertur, pupillo autem adsignatur, cui ille utilis esse noluit.

D. k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[26] *Idem A. Iohanni pp. pr.* Illud, quod de legatis vel fideicommissis temporalibus utpote irritis a legum conditoribus definitum est, emendare prospeximus sancientes et talem legatorum vel fideicommissorum speciem valere et firmitatem habere. 1. Cum enim iam constitutum est fieri posse temporales donationes et contractus, consequens est etiam legata vel fideicommissa, quae ad tempus relicta sunt, ad eandem similitudinem confirmari: post completum videlicet tempus ad heredem isdem legatis vel fideicommissis remeantibus, necessitatem habente legatario vel fideicommissario cautionem in personam heredis exponere, ut post transactum tempus res non culpa eius deterior facta restituatur.

burdened by any legacy or by any trust, not even if the testator wished that the substitute pay as a legacy or trust the very thing which he gave as a legacy to the minor ward.²⁶⁵

Given April 30, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[25] *The same Augustus to John, Praetorian Prefect. pr.* If a legatee conceals a will and this afterwards comes to light, there used to be hesitation over whether a person can claim a legacy left to him in a will that he had hidden. 1. We ordain that this shall be completely prevented, so that the person who wished to cheat the heir of his inheritance shall not reap the fruits of his craftiness. Instead such a legacy shall, assuredly, be taken from him, while it shall remain with the heir as though not written into the will, so that the person who thought some harm should befall another shall himself feel his own loss, just as if a legatee to whom something has been left to manage a tutelage does not take up the tutelage, the legacy is taken from him of course, but assigned to the minor ward, to whom he did not wish to be of service.

Given November 1, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[26] *The same Augustus to John, Praetorian Prefect. pr.* That holding laid down by the founders of the laws (*conditores legum*; the jurists) concerning temporary legacies and trusts, namely, that they were invalid, We have contemplated improving by ordaining that even such a category of legacies and trusts shall be valid and have force. 1. For since it has already been held (in a constitution) that temporary gifts and contracts can be made,²⁶⁶ it is logical that also legacies or trusts that have been left for a period of time be confirmed on the basis of analogy. Obviously after the time-period has finished the same legacies and trusts shall pass back to the heir, and the legatee or trust-beneficiary shall have the obligation of offering a guarantee (*cautio*) to the heir to the effect that after the time-period has passed the property shall be returned without suffering material damage through his fault (*culpa*).

²⁶⁵ Blume: "The father made a pupillary substitution. This was in effect making a will for the minor, providing that should the minor die before the age of puberty, some other person should be his heir, so as to inherit all the property which such minor should have. This as we have seen was permissible. But the further question arose whether the testator could also provide that such substitute (if the minor died) should pay a legacy or trust to someone else. This right was denied under the rule that he could not provide for a legacy or trust out of property which he did not give himself ... And the same rule is here applied even in case the testator gave a legacy to the son, because disinheritions [sic] were not favored or aided in any way, although such requirement might have been made in case of legacy left to a stranger."

²⁶⁶ See perhaps C. 8.54.2.

D. xv k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc. anno secundo.

XXXVIII De Verborum Et Rerum Significatione

[1] *Imp. Antoninus A. Antipatrae. pr.* Praediis instructis legatis, quavis ex fructibus oleum et vinum in eodem fundo habuerit, tamen si id venale fuit, item ea, quae ad tempus propter incursionem latronum tutelae causa in praedium translata sunt, legato non cedere iuris auctoribus placuit. 1. Vinum vero, quod in apothecis fuit, si ideo illic habuit, ut, cum in praedium venisset mater familias, eo uteretur, legato cedere ignorare non debes.

PP. vi id. Aug. Antonino A. IIII et Balbino cons.

[2] *Imp. Diocletianus et Maximianus AA. et CC. Rufino. pr.* Fundo 'sicut instructus est' legato sive per fideicommissum relicto vilicum hominesque et omnia, quae vel, ut ipse pater familias, cum ibi ageret, vel fundus esset instructus, non temporis causa habuit in eo, relicta esse iuris auctoritate definitum est: ea etiam, quae tam fructuum colligendorum quam servandorum. 1. Item pecora stercorandi vel pascendi causa ibi constituta, ut fructus de his capiantur vel ut fundus sit instructor, fideicommisso cedere certi iuris est.

D. non. Oct. Sirmi AA. cons.

[3] *Imp. Iustinianus A. Iuliano pp.* Sancimus cautionis nomine vel ἀσφαλείας non esse fideiussoris dationem interpretandam, nisi hoc specialiter vel in Graecis vel in Latinis verbis scriptum fuerit: nisi enim vel generaliter de satisdatione vel de fideiussione specialiter sit nominatum, cautione vel cautela vel ἀσφαλεία minime fideiussionem, sed nudam promissionem significari.

D. k. Mart. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

Given October 18, at Constantinople, in the second post-consulate of viri clarissimi Lampadius and Orestes (532).

Thirty-Eighth Title The Meaning of Words and Things²⁶⁷

[1] *Emperor ANTONINUS Augustus to Antipatra. pr.* It has been a principle accepted by the jurists (*iuris auctores*) that when properties equipped for cultivation (*praedia instructa*) are bequeathed as legacies, although (the testator) had oil and wine among the fruits on that same farm, nevertheless, if these items were for sale, they, as well as those things that were temporarily brought onto the property for safekeeping against the depredations of bandits, did not form part of the legacy. 1. But if he had wine in storage there so that when the lady of the household (*mater familias*) came to the farm she might make use of it, you ought not to be unaware that this forms part of the legacy.

Posted August 8, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Rufinus. pr.* When a farm has been left "just as it is equipped" as a legacy or trust it is established by the authority of law (*iuris auctoritas*) that included in the bequest are the farm manager (*vilicus*), the slave staff, and everything which either the owner (*paterfamilias*) when he was on-site had (for his personal use) or (what) he had so that the farm was (suitably) equipped, not what he had there on a temporary basis – also those things which serve the purpose of gathering as well as preserving its fruits. 1. Likewise, it is a fixed principle of law (*certum ius*) that herd animals introduced there for the purpose of providing manure or grazing the pastures, in order that income (*fructus*) be realized from them or that the farm be better equipped (for cultivation), form part of the trust.

Given October 7, at Sirmium, in the consulship of the Augusti (293).

[3] *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect.* We lay down that the words "*cautio*" and "*asphaleia*" shall not be understood to mean the giving of a surety, unless that (meaning) is specifically stated in Greek or in Latin. For unless there is either a general or a specific mention of a guarantee (*satisdatio*) or a surety (*fideiussio*), "*cautio*," "*cautela*," and "*asphaleia*" shall not at all mean "surety" but "simple promise."

Given March 1,²⁶⁸ at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

²⁶⁷ See D. 50.16.

²⁶⁸ The precise day is disputed: possibly February 20, 531; so Lounghis *et al.*

[4] *Idem A. Iohanni pp. pr.* Cum quidam sic vel institutionem vel legatum vel fideicommissum vel libertatem vel tutelam scripsisset: 'ille vel ille heres mihi esto' vel 'illi aut illi do lego' vel 'dari volo', vel 'illum aut illum liberum' vel 'tutorem esse volo' vel 'iubeo', dubitabatur, utrumne inutilis sit huiusmodi institutio et legatum et fideicommissum et libertas et tutoris datio, an occupantis melior condicio sit, an ambo in huiusmodi lucra vel munia vocentur et an secundum aliquem ordinem admittantur, an uterque omnimodo, cum alii primum in institutionibus quasi institutum admitti, secundum quasi substitutum, alii in fideicommissis posteriorem solum accepturum fideicommissum existimaverunt, quasi recentiore voluntate testatoris utentem. 1. Et si quis eorum altercationes singillatim exponere maluerit, nihil prohibet non leve libri volumen extendere, ut sic explicari possit tanta auctorum varietas, cum non solum iuris auctores, sed etiam ipsae principales constitutiones, quas ipsi auctores rettulerunt, inter se variasse videntur.

1a. Melius itaque nobis visum est omni huiusmodi verbositate explosa coniunctionem 'aut' pro 'et' accipi, ut videatur copulativo modo esse prolata et magis sit παραδιόξευξις, ut et primam personam inducat et secundam non repellat. 1b. Quemadmodum enim verbi gratia in interdicto quod vi aut clam 'aut' coniunctio pro 'et' apertissime posita est, ita et in omnibus huiusmodi casibus sive institutionum sive legatorum sive fideicommissorum vel libertatum seu tutelarum hoc esse intellegendum, et ambo veniant aequa lance ad hereditatem, ambo legata similiter accipiant, fideicommissum in utrumque dividatur, libertas utrumque capiat, tutoris ambo fungantur officio.

1c. Sic nemo defraudetur a commodo testatoris, sic maior providentia pupillis inferatur, ne, dum dubitatur, apud quem debet esse tutela, in medio res pupillorum depereant. sed haec quidem sancimus, cum in personas huiusmodi proferatur scriptura.

2. Sin autem una quidem est persona, res autem ita derelictae: 'illam aut illam rem illi do lego', vel 'per fideicommissum relinquo', tunc secundum veteres regulas et antiquas definitiones vetustatis iura

[4] *The same Augustus to John, Praetorian Prefect. pr.* When a certain testator had appointed an heir, given a legacy or a trust, or provided for a manumission or a guardianship in the following (disjunctive) manner: "This or that person shall be my heir," "I give and bequeath as a legacy to this or that person" – or "I wish to be given" – "to this or that person," or "I wish this or that person to be free" or "to be *tutor*," there used to be hesitation over whether such an appointment of an heir, bequest of a legacy or trust, grant of manumission, or appointment of a *tutor* was invalid, whether the claim of the (prior) occupant was superior, whether both were eligible for such benefits and duties and whether they were admitted according to some order, or both enjoyed an absolutely equal claim. Some (jurists) thought that regarding appointments of heirs the first person named should be eligible as the appointed heir, and the second as his or her substitute, while others thought that regarding trusts only the last named would receive the trust on the ground that this reflected a more recent expression of wishes on the part of the testator. 1. And if someone preferred to set forth their disputes (on this subject) separately, nothing would prevent him from composing a book of no small size, so that in this way such a great diversity of expert opinions could be set forth, since not only the jurists (*iuris auctores*) but also the very imperial constitutions which the jurists themselves report seem to differ from one another.

1a. It seemed better to Us, therefore, to eliminate all such excess verbiage and to understand the conjunction "or" (*aut*) as "and" (*et*) so that it be deemed to have been extended in a copulative manner and act more as a conjunctive disjunctive (*paradiazeuxis*), with the result that it both validates the first person and does not exclude the second. 1b. For just as, for example, in the interdict "by force or stealth" (*quod vi aut clam*) the conjunction "or" (*aut*) has been very clearly substituted for "and" (*et*), so also in all such cases of appointments of heirs, legacies, trusts, manumissions, and tutelages, this shall be understood, and both parties shall come on an equal basis to the inheritance, both shall accept legacies on a similar basis, a trust shall be divided between the two, both shall be manumitted, and both shall discharge the duty of *tutor*.

1c. In this way, no one shall be wrongly deprived of the benefaction of the testator; in this way, greater oversight shall be provided for minor wards, so that the property of minor wards not suffer in the meantime, while there is hesitation over who ought to be assigned the tutelage. But We ordain these things, certainly, (only) when such a document is brought forth regarding multiple persons.

2. But if, however, there is, to be sure, (only) one person, but property has been left in the following way: "I give and bequeath as a legacy this or that thing to that person" or "I bequeath through a trust (this or that thing)," then,

maneant incorrupta, nulla innovatione eis ex hac constitutione introducenda. 3. Quod etiam in contractibus locum habere censemus.

D. prid. k. Mai. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[5] *Idem A. Iohanni pp. pr.* Suggestioni Illyricianae advocationis respondentes decernimus familiae nomen talem habere vigorem: parentes et liberos omnesque propinquos et substantiam, libertos etiam et patronos nec non servos per hanc appellationem significari.

1. Et si quis per suum elogium fideicommissum familiae suae reliquerit, nulla speciali adiectione super quibusdam certis personis facta, non solum propinquos, sed etiam his deficientibus generum et nurum. et hos enim nobis humanum esse videtur ad fideicommissum vocari, ita videlicet, si matrimonium morte filii vel filiae fuerit dissolutum. nullo etenim modo possint gener vel nurus filiis viventibus ad tale fideicommissum vocari, cum hi procul dubio eos antecendant: et hoc videlicet gradatim fieri, ut post eos liberti veniant.

2. Hoc eodem valente, et si quis rem immobilem cuidam legaverit vel fideicommissum eamque alienari prohibuerit adiciens, ut, si hoc fideicommissarius praeterierit, familiae suae res adquiratur.

3. In aliis autem casibus nomen familiae pro substantia oportet intelligi, quia et servi et aliae res in patrimonio uniuscuiusque esse putantur.

D. xv k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc. anno secundo.

XXXVIII Si Omissa Sit Causa Testamenti

[1] *Impp. Severus et Antoninus AA. Ianuariae.* Si in fraudem legatorum transmissam hereditatem ad substitutum probatura es, utilis actio adversus eum, cum quo fraudis consilium participatum est, competit. plane si pecunia accepta omisit aditionem, legata et fideicommissa praestare cogitur.

in accordance with ancient principles and long-standing rules, the legal principles of antiquity (*vetustatis iura*) shall remain intact, and no change shall be introduced for them from this constitution. 3. We ordain that this also shall apply for contracts.

Given April 30, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[5] *The same Augustus to John, Praetorian Prefect. pr.* By way of response to the policy proposal (*suggestio*) of the Society of Advocates of Illyricum, We decree that the word "*familia*" shall have the following force: by this term shall be meant ascendants, descendants, all close relatives, (household) property, freedpersons, patrons, as well as slaves.

1. And if someone leaves a trust in his will to his "*familia*," making no particular mention of certain stated persons, (it embraces) not only close relatives but also, in the absence of these, a son- and daughter-in-law. For We deem it consistent with humane sympathy (*humanum*) that even these shall be eligible for the trust, under the condition, obviously, that the marriage is ended by the death of the son or daughter (to whom they were married). For in no way can a son- or daughter-in-law be eligible for such a trust while (biological) children are still living, since it is far from doubtful that the latter take priority over them. And clearly this shall occur in degrees, so that after them freedpersons shall have a claim.

2. This same rule holds, even if someone bequeaths immovable property to a certain person as a legacy or trust, forbidding its alienation and adding that if the trust-beneficiary violates this prohibition the property accrues to his *familia*.

3. In other situations, however, the word *familia* ought to be understood as "(household) property," because both slaves and other property are considered to be in each person's estate.

Given October 18, at Constantinople, in the second post-consulate of the viri clarissimi Lampadius and Orestes (532).

Thirty-Ninth Title If a Will's Purpose Was Not Heeded²⁶⁹

[1] *Emperors SEVERUS and ANTONINUS Augusti to Januaria.* If you are going to show that an inheritance has been made over to a substitute heir in order to defraud (those eligible for) legacies, you have an analogous (*utilis*) action against the person (the substitute) who colluded in the scam (*fraus*). Plainly, if the heir took money and neglected to enter upon the inheritance, he is compelled to pay out the legacies and trusts.

²⁶⁹ See D. 29.4.

Accepta k. Oct. Dextro II et Prisco cons.

[2] *Imp. Philippus A. et Philippus C. Victoriae. pr.* Eum, qui, cum testamento posset obtinere hereditatem, ab intestato ius successionis voluit amplecti, libertatibus eodem testamento datis obesse non posse iam pridem placuit. 1. Quod si, cum neque adiri ex testamento hereditas neque bonorum possessio peti possit, iudicium defuncti non usurpabitur, sed ad irritum iuris ratione vocatum est, petitio relictorum nullo iure procedit. 2. Sin vero iure facto testamento cessante herede scripto alter ab intestato adiit hereditatem, neque libertates neque legata ex testamento posse praestari manifestum est.

PP. k. Ian. Philippo A. et Titiano cons.

[3] *Imp. Diocletianus et Maximianus AA. et CC. Apro et Piaae.* Si Proculina patri vestro, cuius estis heredes, testamento quid reliquit et scripti iure secundum eius iudicium vel omissa causa testamenti successerunt ab intestato, aditus competens iudex, quatenus legis Falcidiaae modus patitur, vobis relicta restitui iubebit.

D. xv k. Ian. Sirmi AA. cons.

XXXX De Indicta Viduitate et de Lege Iulia Miscella Tollenda

[1] *Imp. Gordianus A. Bono.* Legatum alii sub condicione sic relictum, si uxor nuptui se post mortem mariti non collocaverit, contractis nuptiis condicione deficit ideoque peti legatum nequaquam potest.

PP. XIII k. Aug. Gordiano A. II et Pompeiano cons.

[2] *Imp. Iustinianus A. Iuliano pp. pr.* Ambiguitates legis Iuliae miscellae generali lege tollentes nullum concedimus fieri iuramentum

Received October 1, in the consulship of Dexter, for the second time, and Priscus (196).²⁷⁰

[2] *Emperor PHILIP Augustus and PHILIP Caesar to Victoria. pr.* It has for a long time been settled law that the person who could have inherited under a will but preferred to embrace his right of intestate succession cannot block the manumissions granted in the same will. 1. But if, when (the heir) can neither enter upon the inheritance nor apply for *bonorum possessio* (from the Praetor), the decedent's will is not being disrespected but has been declared invalid on a legal principle (*iuris ratio*), a claim for bequests has no basis in law to go forward. 2. But if, however, the will was properly made from a legal perspective, (and) the named heir fails to take the inheritance and another person has entered upon the inheritance on intestacy, it is clear that neither can the manumissions be performed nor the legacies paid in accordance with the terms of the will.

Posted January 1, in the consulship of Philip Augustus and Titianus (245).

[3] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Aper and Pia.* If Proculina left something in a will to your father, whose heirs you are, and her lawfully named heirs either inherited in accordance with the terms of the will or on intestacy, having disregarded the will's purpose, the appropriate judge, once approached, will order, insofar as the calculation of the *lex Falcidia* permits, what has been bequeathed to you to be turned over to you.

Given December 18, at Sirmium, in the consulship of the Augusti (293).

Fortieth Title Coerced Widowhood and the Repeal of the *Lex Julia Miscella*²⁷¹

[1] *Emperor GORDIAN Augustus to Bonus.* When a legacy was left to another person on condition that the testator's wife not remarry after the death of her husband, if she should remarry the condition fails and on that account the legacy can in no way be claimed.

Posted July 20, in the consulship of Gordian Augustus, for the second time, and Pompeianus (241).

[2] *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect. pr.* By way of removing the obscurities of the *lex Julia Miscella* with a general law (*generalis*

²⁷⁰ The year is uncertain: possibly 225.

²⁷¹ The "Lex Julia of Varied Content" is Justinian's way of referring here to the Augustan marriage legislation, in particular, the *lex Julia de maritandis ordinibus*, which (among other things) allowed a spouse, typically a wife, to take a legacy left to her by a husband on condition that she did not remarry, provided that she did in fact remarry within a year and swore an oath that her motive for doing so was to bear children. If she did not marry within a year she could receive the legacy by offering the *cautio Muciana* (next note).

secundum praedictam legem, sed penitus ea cum Muciana cautione super hac causa quiescente licere mulieribus, etiam maritorum suorum interminatione sprete, quae viduitatem eis indicit, et non dato sacramento procreandae subolis gratia, tamen ad secundas migrare nuptias, poena huiusmodi cessante, sive habeat liberos, sive non, et percipere ea, quae maritus dereliquit (quorum omnium manifestissimum est dominium minime eas liberis existentibus habere usu fructu tantummodo apud eas manente et ad liberos prioris tori proprietate eorum deferenda secundum ea, quae de secundis nuptiis lucrisque ex his mulieribus statuta sunt), ne ex necessitate legis et sacramento colorato periurium committatur.

1. Cum enim mulieres ad hoc natura progenit, ut partus ederent, et maxima eis cupiditas in hoc constituta est, quare scientes prudentesque periurium committi patimur? 2. Tale igitur iuramentum conquiescat et lex Iulia miscella cedat cum Muciana cautione super hoc introducta, a re publica separata. augeri etenim magis nostram rem publicam et multis hominibus progenitis frequentari quam impiis periuriis adfici volumus, cum satis esse inhumanum videtur per leges, quae periuria puniunt, viam periuriis aperiri.

D. x k. Mart. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[3] *Idem A. Iohanni pp. pr.* Legem Iuliam miscellam quemadmodum in feminis sustulimus, ita et in masculis esse sublatam pertinere quidem ad sensum nostrae legis, quam super hoc promulgavimus, non est incertum. 1. Ne tamen quaedam ambiguitas simplices animos moveat, etiam expressim sancimus legem Iuliam miscellam et senatus consulta, quae circa eam facta sunt, nec non Mucianam cautionem, quae super talibus nuptiis introducta est, non solum in feminis, sed etiam in masculis cessare.

2. Sed quia apud Ulpianum in libris Sabinianis invenimus quaedam verba, quae effugiunt legis miscellae observationem, ne quis et

lex), We allow no oath to take place in accordance with the aforesaid statute, but (declare) utterly invalid this law together with the *cautio Muciana* related to it.²⁷² We permit women to move on all the same to a subsequent marriage, even as they scorn the threat, which enjoins widowhood upon them, leveled by their husbands, and refuse the oath about their purpose being to bear children. Such a penalty shall be without force whether they have children or not. They shall also be permitted to take the property their husbands bequeathed to them, so that they do not commit perjury under the compulsion of the statute and through a specious oath. If there are surviving children it is very clear that (the women) shall not at all have the ownership of all this property, but only the usufruct of it, while ownership shall devolve to the children of the prior marriage, according to what has been enacted concerning subsequent marriages and the benefits connected with these accruing to women.

1. For since nature has produced women for the purpose of giving birth to children and they have been instilled with a very great desire to this end, why should We knowingly and advisedly permit perjury to be committed? 2. So let such an oath fall silent, and let the *lex Julia Miscella* together with the *cautio Muciana* devised in connection with it give way, banished from Our community. For We have a greater wish that Our community be increased by and filled with many persons born here than that it be afflicted with wicked perjuries, since it seems fairly inconsistent with humane sympathy that the road to perjury be paved with laws that (ostensibly) punish acts of perjury.

Given February 20, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[3] *The same Augustus to John, Praetorian Prefect. pr.* It is not uncertain that, just as We have abolished the *lex Julia Miscella* regarding women, so its repeal also assuredly concerns men with respect to the intent of the law that We passed on this subject.²⁷³ 1. All the same, so that a certain confusion not overtake the minds of the simple, We even expressly ordain that the *lex Julia Miscella*, the senatorial decrees passed pursuant to it, as well as the *cautio Muciana*, which was introduced in connection with such marriages, shall be void not only for females, but also for males.

2. But in Ulpian's commentary on Sabinus We find certain phrases that evade compliance (*observatio*) with the *lex Miscella*. For this reason, so that no one

²⁷² The *cautio Muciana* ("Mucian guarantee") was introduced by the late Republican jurist Q. Mucius Scaevola as a means of allowing a legatee to receive a bequest on a negative condition, that is, that she not do something. Predating the Augustan marriage legislation (a point evidently misunderstood by Justinian), it was adapted to its purpose so that by offering the *cautio* a widow who did not remarry within a year (see previous note) could still receive a bequest from her husband conditioned on her remaining a widow.

²⁷³ C. 6.40.2.

ea sublata esse putaverit, sancimus, cum huiusmodi verbis mulieribus aliquid relinquatur: 'si vidua erit' vel 'cum vidua erit' vel 'quotiens vidua erit', vel e contrario maribus: 'si amiserint uxores' vel 'quando ad caelibatum pervenerint', non vetari ea vindicare vel legitimo modo sumere, quae eis derelicta sunt. neque enim ut permaneant vel feminae in viduitate vel masculi in caelibatu relictum esse videtur, ut locum vel ante nostram legem habeat lex Iulia miscella, quae iam perempta est: sed cum primum hoc evenerit, ilico competat talibus personis eius quod relictum est persecutio, quia sub condicione relictum esse videtur, sive semel sive in annos singulos haec liberalitas fuerit conscripta, quasi pro solacio suae tristitiae.

D. k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

XXXXI De His Quae Poenae Nomine in Testamento vel Codicillis Relinquantur

[1] *Imp. Iustinianus A. Menae pp. pr.* Supervacuam observationem veterum legum, per quam voluntates testatorum ad effectum duci impediabantur, amputamus praecipientes nullum valere, dicendo poenae nomine quaedam esse relictum vel ademptum in supremis testantium voluntatibus, ea infirmare, sed licere testanti pro implenda sua voluntate vel pecunias dari praecipere vel aliam pecuniariam poenam inferre quibus voluerit, tam in adimendis hereditatibus vel legatis vel fideicommissis vel libertatibus quam in praecipiendo ad alias personas ea transferri ab eo, cui relictum ab initio sunt, vel aliquid aliis ab eo dari, si minus dispositionibus suis heres vel legatarius vel libertate donatus paruerit. 1. Quod si aliquid facere vel legibus interdictum vel alias probrosum vel etiam impossibile iussus aliquis eorum fuerit, tunc sine ullo damno etiam neglecto testatoris praecepto servabitur.

D. k. Ian. Constantinopoli dn. Iustiniano A. pp. II cons.

thinks that these holdings too have been abolished, We lay down that when something is left to women with such words as "if she will be a widow," "when she will be a widow," or "whenever she will be a widow," or, on the other hand, to men, "if they lose their wives" or "when they become single," it shall not be forbidden to them to claim as their own or to take in a lawful manner that which has been left to them. For the bequest is deemed to have been made not so that women remain widows or men remain unmarried, nor did the *lex Julia Miscella*, which is now utterly abolished, apply here even before the passage of Our law. Instead, as soon as (the condition) is fulfilled, a claim shall immediately lie for such persons for what was left as a bequest to them. This is (precisely) because it is construed to have been left under a condition, whether the act of generosity in question was written in the form of a single payout or as an annuity, as though it were left as a consolation for the (recipient's) loss.

Given November 1, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Forty-First Title Bequests Made in a Will or Codicils as Punishment²⁷⁴

[1]²⁷⁵ *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect. pr.* We abolish the useless rule of the old laws (*veteres leges*) through which the wishes of testators were being hindered from being rendered effective, by laying down that the rule disallowing things that have been left or taken away in wills as a form of penalty shall be invalid.²⁷⁶ Instead, it shall be permitted for a testator in pursuance of his or her wishes either to instruct that money be given or to impose another monetary penalty on whomever he or she wishes, taking away inheritances, legacies, trusts, or manumissions as much as directing that such things be transferred to others from the initial recipient, or that, if the heir, the legatee, or the manumitted slave fails to live up to the testator's instructions, something be given by that person to others. 1. But if any one of these persons is ordered to do something forbidden by the laws (*leges*), otherwise disgraceful, or even impossible, then without any loss (the bequest) will be preserved for the recipient even if he or she ignores the instruction of the testator.

Given January 1,²⁷⁷ in the consulship of Our Lord Justinian, Ever Augustus, for the second time (528).

²⁷⁴ See D. 34.6.

²⁷⁵ Combine with C. 3.28.30, 6.23.24.

²⁷⁶ Blume: "A legacy, trust or gift of an inheritance was considered as having been given for the benefit and the honor of the donee. If not so given it was considered contrary to the nature thereof, and therefore void. Hence formerly the gift, revocation and transference of legacies by way of penalty was void."

²⁷⁷ The month is uncertain: either January or June. Lounghis *et al.* prefer June 1, 528.

XXXXII De Fideicommissis

[1] *Imp. Antoninus A. Demetrio.* Si probaveris Demetrium petisse de matre heredeque sua, ut tibi alimenta menstrua et vestiarium annuum praestaret, eamque secutam voluntatem filii sui per multum temporis, id est non minus in tali causa triennio, ea praestitisse: ut in futurum quoque ea praestentur et, si qua in praeteritum praestita non sunt, exsolvantur, impetrabis.

PP. xvii k. Sept. duobus Aspris cons.

[2] *Idem A. Eupatrio.* Etsi inutiliter fideicommissum relictum est, tamen si heredes comperta voluntate defuncti praedia ex causa fideicommissi avo tuo praestiterunt, frustra ab heredibus de ea re quaestio tibi movetur, cum non ex ea sola scriptura, sed ex conscientia relictī fideicommissi satis defuncti voluntati factum esse videatur.

PP. vi k. Aug. Laeto ii et Cereale cons.

[3] *Idem A. Rufino.* Cum secundum voluntatem defunctae Chrysidem puellam ab heredibus manumissam eamque, priusquam ei restituere-
tur hereditas, intestatam vita functam proponas, ad manumissores eius successio pertinet. qui si adierint eius hereditatem, confusis actionibus fideicommisso sunt liberati.

PP. v id. Dec. Laeto ii et Cereale cons.

[4] *Imp. Alexander A. Victorino.* Voluntas patris prohibentis liberos fundos extra familiam vendere vel pignori dare fratrem sorori donare prohibuisse non videtur.

PP. v k. Iul. Maximo ii et Aeliano cons.

[5] *Idem A. Reginae.* Si frater tuus, posteaquam patri heres extitit, pubes iam sine liberis decessit, ex pupillari substitutione tibi hereditas eius delata non est. sed si verbis fideicommissi aliqua parte testamenti confirmata est, fideicommissum ab heredibus petere non prohiberis.

PP. xv k. Febr. Iuliano et Crispino cons.

Forty-Second Title Testamentary Trusts (*Fideicommissa*)²⁷⁸

[1] *Emperor ANTONINUS Augustus to Demetrius.* If you show that Demetrius asked his mother and heir that she provide you with support (*alimenta*) on a monthly basis and a yearly allowance for clothing, and that she, in respecting her son's last wishes for a lengthy period of time, that is, in this case not less than three years, did provide these things, you will succeed both in being provided with such also in the future and in being paid for anything not provided in the past.

Posted August 16, in the consulship of the two Aspri (212).

[2] *The same Augustus to Eupatrius.* Even if a trust was bequeathed invalidly, all the same, if the heirs, upon learning of the decedent's wishes, have turned over properties to your grandfather in line with the terms of the trust, it is useless for them to sue you over this, since the wishes of the decedent seem to have been fairly well complied with in a manner not pursuant to the document alone but to a recognition that a trust had been bequeathed.

Posted July 27, in the consulship of Laetus, for the second time, and Cerealis (215).

[3] *The same Augustus to Rufinus.* Since you allege that the girl Chrysis has been manumitted by the heirs of the decedent according to the latter's wishes and that she, before the inheritance was turned over to her, died intestate, the rights of succession belong to her manumitters. If they enter upon it, they are freed from the obligation imposed by the trust through a merger of rights of action (i.e., those they held as patrons of the decedent and executors of the trust).

Posted December 9, in the consulship of Laetus, for the second time, and Cerealis (215).

[4] *Emperor ALEXANDER Augustus to Victorinus.* The last wishes of the father forbidding his children from selling farms outside the agnatic kin (*familia*) or giving them as a pledge is not deemed as having forbidden a brother from giving them to his sister as a gift.

Posted June 27, in the consulship of Maximus, for the second time, and Aelianus (223).

[5] *The same Augustus to Regina.* If your brother, after he became heir to your father, died as an adult at law without children, the inheritance has not passed to you as his pupillary substitute (substitute to a minor ward). But if in some part of the will this arrangement was confirmed by the words of a trust, you are not prevented from claiming the trust from the heirs.

Posted January 18, in the consulship of Julian and Crispinus (224).

²⁷⁸ See D. 30–32; Inst. 2.23 and 24.

[6] *Idem A. Nilo. pr.* Praedia obligata per legatum vel fideicommissum relictā heres luere debet, maxime cum testator condicionem eorum non ignoravit aut, si scisset, legaturus tibi aliud, quod non minus esset, fuisset. 1. Sin vero a creditore distracta sunt, pretium heres exsolvere cogetur, nisi contraria defuncti voluntas ab herede ostendatur.

PP. xvi k. Mart. Iuliano et Crispino cons.

[7] *Idem A. Septimo.* Voluntatis defuncti quaestio in aestimatione iudicis est.

PP. xv k. Mart. Fusco II et Dextro cons.

[8] *Idem A. Mascello.* Qui fideicommissariam libertatem meruit, legata seu fideicommissa a defuncto sibi data suo iure persequitur.

PP. xv k. Iun. Fusco II et Dextro cons.

[9] *Imp. Gordianus A. Paulinae.* Ab eo, qui neque legatum neque fideicommissum neque hereditatem vel mortis causa donationem accepit, nihil per fideicommissum relinqui potest.

PP. xvii k. Oct. Pio et Pontiano cons.

[10] *Idem A. Firmo.* Verbum 'volo' licet desit, tamen quia additum perfectum sensum facit, pro adiecto habendum est.

PP. iiii id. Dec. Gordiano A. et Aviola cons.

[11] *Idem A. Papiniano.* Quotiens ab omnibus, qui alienatione facta ad fideicommissi petitionem adspirare possint, venditio celebratur aut quibusdam vendentibus alii consenserint, auctoritas contractus convelli nequaquam potest.

PP. ii k. Iun. Gordiano A. II et Pompeiano cons.

[12] *Imp. Philippus A. et Philippus C. Rufino.* Post mortem suam rogatam restituere hereditatem defuncti iudicio et antequam fati munus

[6] *The same Augustus to Nilus. pr.* The heir ought to pay the lien against encumbered properties when these are bequeathed by legacy or trust, especially when the testator was not unaware of their status or, if he had known about it, he would have given you something else of no lesser value as a legacy. 1. But if, however, they have been alienated by the creditor, the heir will be compelled to pay their value, unless a contrary wish of the decedent is shown by the heir.

Posted February 14, in the consulship of Julian and Crispinus (224).

[7] *The same Augustus to Septimus.* A dispute over the wishes of a decedent lies in the discretion of the judge.

Posted February 15, in the consulship of Fuscus, for the second time, and Dexter (225).

[8] *The same Augustus to Mascellus.* Someone who has gained manumission through a trust claims by his own right legacies or trusts left to him by the decedent.

Posted May 18,²⁷⁹ in the consulship of Fuscus, for the second time, and Dexter (225).

[9] *Emperor GORDIAN Augustus to Paulina.* No one can be charged with a trust who has received neither a legacy, trust, inheritance, or gift in contemplation of death (*mortis causa*).

Posted September 15, in the consulship of Pius and Pontianus (238).

[10] *The same Augustus to Firmus.* Although the verb "I wish" (*volo*) is missing, nevertheless, since once added it makes perfect sense (of the words in the will), it must be considered as though it had been included.

Posted December 11, in the consulship of Gordian Augustus and Aviola (239).

[11] *The same Augustus to Papinianus.* Whenever a sale is made by all those who, once the property is alienated, are able to entertain the prospect of a claim to a trust, or others have given their consent to certain persons selling (the property), the validity of the (sale) contract cannot at all be broken.

Posted December 31, in the consulship of Gordian Augustus, for the second time, and Pompeianus (241).

[12] *Emperor PHILIP Augustus and PHILIP Caesar to Rufinus.* It is an accepted point of law (*exploratum ius*) that when one is required, by the will of a

²⁷⁹ The precise date is uncertain: the alternative is June 15.

impleat posse satisfacere (id est restituere hereditatem) quarta parte vel retenta vel omissa, si voluerit, explorati iuris est.

PP. id. Oct. Peregrino et Aemiliano cons.

[13] *Idem A. et C. Sempronio.* Quotiens principali loco heres institutus testatori succedit, legata seu fideicommissa a substituto data posci iure non possunt.

PP. VIII k. Mart. Praesente et Albino cons.

[14] *Impp. Valerianus et Gallienus AA. Falconi. pr.* Ea, quam frater tuus instituerat, siue quaesita siue non quaesita hereditate decesserit, cum tamen simpliciter, antequam duodecimum annum aetatis impleret, verbis precativis testamento facto nonnullos ei voluerit substitutos, nihil prohibet fideicommissum peti vel ab ipsius heredibus, qui bona intestati tenent. 1. Tunc enim locum habet, quod regulariter traditur ea quae in testamento relinquuntur, si ex testamento non adeatur hereditas, non valere, cum verbis relicta directis adiri potuit hereditas, non cum illa ipsa sic data est, ut esset etiam ab intestato successoribus postulanda. 2. Quod rescripsimus sequentes adseverationem tuam, quasi scripta heres non fuerit iure adoptata. alioquin si in familia relicta heres facta decessit, et consequenter ipsius heredes petitioni fideicommissi respondere coguntur.

PP. XIII k. Sept. Valeriano III et Gallieno II AA. cons.

[15] *Idem AA. Philocrati.* Quamvis simpliciter te ac fratrem tuum aliquis instituerit heredes eiusque hereditatis commodum pater ex tua fratrisque persona pro portionibus vestris potestatis ratione quaesierit, tamen quia inferioribus verbis testamenti vos sui iuris facere testator curavit, intellegi potest restituendi hereditatis commodi fideicommisso patrem obstrictum esse.

PP. VI id. Oct. Romae Maximo II et Glabrione cons.

decedent, to turn over an inheritance after one's death, this (i.e., turning over one's inheritance) can, even before one's death, be accomplished either with or without subtraction of the (Falcidian) fourth, as one wishes.

Posted October 15, in the consulship of Peregrinus and Aemilianus (244).

[13] *The same Augustus and Caesar to Sempronius.* Whenever an heir appointed in the first degree succeeds to a testator, legacies and trusts assigned to be given by a substitute heir cannot be legally claimed.

Posted February 22, in the consulship of Praesens and Albinus (246).

[14] *Emperors VALERIAN and GALLIENUS Augusti to Falco. pr.* She whom your brother had appointed as heir died after either having claimed or not claimed the inheritance. But he (your brother), having made his will, expressed the wish unconditionally, by a trust directive (*precaris verbis*) that some persons be substituted for her (as heirs) before she turned 12. Nothing prevents the trust from being claimed even from those heirs of his who hold the property on intestacy.²⁸⁰ 1. For the general rule that what is bequeathed in a will is not valid if the inheritance is not entered upon in accordance with the terms of the will holds then, when the inheritance, bequeathed with straightforward language, could have been entered upon, not when it was given in such a way that it is to be claimed even from the heirs on intestacy. 2. But We composed this reply assuming the truth of your assertion that the named heir had not been legally adopted. Otherwise, if having been made an heir she died as a member of your brother's agnatic kinship group (*familia*), as a logical consequence her own heirs also (in this case) are compelled to respond to a claim for the trust.

Posted August 19, in the consulship of Valerian, for the third time, and Gallienus, for the second time, Augusti (255).

[15] *The same Augusti to Philocrates.* Although someone appointed you and your brother unconditionally as heirs, and your father acquired the benefit of that inheritance through the two of you, in full measure, by reason of his paternal power (*potestas*), nevertheless, because the testator in a later part of the will provided that you both should be rendered *sui iuris* (i.e., emancipated), it can be understood that your father was bound by a trust to turn over the benefit of the inheritance (to you).

Posted October 10, at Rome, in the consulship of Maximus, for the second time, and Glabrio (256).

²⁸⁰ It seems preferable to understand the word *ipsius* to refer to Falco's brother, so that his heirs on intestacy are meant. This assumes that the girl had not accepted the inheritance. If she had, presumably this would be a reference to her heirs on intestacy. To avoid the ambiguity, Krüger proposes the reading *vel ab his*.

[16] *Imppp. Carus Carinus et Numerianus AAA. Isidorae. pr.* Cum virum prudentissimum Papinianum respondisse non ignoramus etiam legata huiusmodi fideicommisso contineri, id est ubi heres rogatus fuerat, quidquid ex hereditate pervenerit, post mortem restituere, animadvertis etiam praeceptionis compendium testatoris verbis comprehensum esse. 1. Sane quoniam in fideicommissis voluntas magis quam verba plerumque intuenda sunt, si quas pro rei veritate praeterea probationes habes ad commendandam hanc patris voluntatem, quam fuisse adseveras, apud praesidem experiri non vetaris.

PP. prid. id. Nov. Caro et Carino AA. cons.

[17] *Impp. Diocletianus et Maximianus AA. Fortunato.* Si creditoris voluntas iure subnixa liberari te debito volentis doceri potest, et antequam sollemniter tibi liberatio a successore praestetur, exceptionem tibi ex voluntate descendantem competere manifestum est.

PP. XII k. Mai. Maximo II et Aquilino cons.

[18] *Idem AA. Apolausto.* Cum necessitatem reddendae rationis defunctus remittendam tibi esse petierit, manifesti iuris est voluntatem defuncti immotam esse debere.

PP. id. Mart. ipsis IIII et III AA. cons.

[19] *Idem AA. Ampliato.* Clari et aperti iuris est in fideicommissis posteriores voluntates esse firmiores.

PP. VIII id. Sept. ipsis IIII et III AA. cons.

[20] *Idem AA. Iuliano.* Etiam a pupillorum tutoribus velut ab ipsis relicta fideicommissa debentur.

[16] *Emperors CARUS, CARINUS, and NUMERIANUS Augusti to Isidora. pr.* Since We are not unaware that the very learned man Papinian in a response to a legal enquiry stated that even legacies were included in a trust of this kind, that is, when the heir is required to turn over whatever he or she receives from an inheritance after his or her death, you see that the benefit also of a preferential legacy is embraced by the words of the testator. 1. Indeed, because as a general principle in the case of trusts the wishes of the testator are to be given greater weight than his words, if you have any further evidence as to the truth of the matter, for the purpose of establishing your father's intentions, as you allege them to have been, you are not forbidden from putting the matter before the provincial governor.

Posted November 12, in the consulship of Carus and Carinus, Augusti (283).

[17] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Fortunatus.* It is clear that if a legally valid expression of the last wishes of your (decedent) creditor can be shown to have intended that you be freed from your debt, even before his heir provides you with a formal release an affirmative defense (*exceptio*) lies for you in accordance with testator's wishes.

Posted April 20, in the consulship of Maximus, for the second time, and Aquilinus (286).

[18] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Apolaustus.* Since the decedent requested that you be freed from the necessity of providing an accounting, it is a clear point of law (*manifestum ius*) that the wishes of the decedent must be maintained.

Posted March 15, in the consulship of the Augusti, for the fourth and the third time, respectively (290).

[19] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Ampliatus.* It is a clear and transparent point of law (*clarum et apertum ius*) that in trusts subsequent expressions of (decedent's) wishes are more valid (than earlier ones).

Posted September 6,²⁸¹ in the consulship of the Augusti, for the fourth and the third time, respectively (290).

[20]²⁸² *The same Augusti to Julian.* Trusts ought to be paid that have been bequeathed also by the *tutores* of minor wards, just as by the wards themselves.

²⁸¹ The precise day is uncertain: the alternative is September 11.

²⁸² = (in part, with minor changes) C. 4.1.5.

PP. III non. Dec. ipsis IIII et III AA. cons.

[21] *Idem AA. et CC. Tiberio.* Si in persona patris tui, cui te successisse proponis, fideicommissi dies utiliter cessit, licet tempore quo fuerat datum necdum te natum probetur, uxorem patruī, quem contendis patri tuo rogatum, si sine liberis decesserit, ab avo relicta restituere, si ei successit, de fideicommisso convenire debes. nam si patruī etiam hereditas tibi quaesita est, non de fideicommisso quaerendum, sed hereditas ab ea vindicanda est.

D. VI id. Febr. AA. cons.

[22] *Idem AA. et CC. Planciano.* Et in epistula vel brevi libello vel sine scriptura, immo etiam nutu fideicommissum relinqui posse adhibitis testibus nulla dubitatio est.

D. id. April. Byzantii AA. cons.

[23] *Idem AA. et CC. Stratonico.* Si veritas vel sollemnitatis iuris deest nec amplexus parentis voluntatem relicta dedisti vel transactionis causa stipulantibus promisisti negotiumque integrum est, ad solutionem urgeri non potes.

D. v k. Febr. AA. cons.

[24] *Idem AA. et CC. Menestrato.* Instrumenta praediorum per fideicommissum relictorum, quae ad probationem originis eorum pertinent, heredes praestare necesse non habent: tamen cautionem praestare debent, quod, si opus fuerit legatario seu fideicommissario, ipsa, si habent, proferant.

D. k. Dec. Sirmi AA. cons.

[25] *Idem AA. et CC. Iulianae.* Heredum etiam res proprias per fideicommissum relinqui posse non ambigitur.

D. II k. Mart. CC. cons.

Posted December 3, in the consulship of the Augusti, for the fourth and the third time, respectively (290).

[21] *The same Augusti and the Caesars to Tiberius.* If the time for a trust-payment has effectively arrived in the person of your father, whose heir you claim to be, although it is shown that at the time the trust was given you were not yet born, you ought to sue the wife of your paternal uncle over the trust, if she became his heir, since you claim (the uncle) was required by your grandfather to turn over the bequest in question to your father if he died without children. For if you are also heir to your uncle, no claim is to be made on the trust, but the inheritance shall be claimed from her.

Given February 8, in the consulship of the Augusti (293).

[22] *The same Augusti and Caesars to Plancianus.* There is no doubt that by enlisting witnesses a trust can be bequeathed in a letter, in a brief memorandum, or without a document, or rather even with (just) a nod.

Given April 13, at Byzantium, in the consulship of the Augusti (293).

[23] *The same Augusti and Caesars to Stratonicus.* If the truth and the formalities required by law are lacking, and having embraced the declared wishes of your ascendant male relative (*parens*) you have not paid the bequests or for the sake of a settlement made stipulations, and the matter stands as it was, you cannot be pressed to make payment.²⁸³

Given January 28,²⁸⁴ in the consulship of the Augusti (293).

[24] *The same Augusti and Caesars to Menestratus.* Heirs are not obligated to furnish documents showing the title of properties left as a trust, but they ought to provide a guaranty (*cautio*) to the effect that, if they have such documents, they shall produce them should the legatee or trust-beneficiary have need of them.

Given December 1 (?), at Sirmium, in the consulship of the Augusti (293).

[25] *The same Augusti and Caesars to Juliana.* There is no doubt that even the property of the heirs can be given as a trust.

Given February 28, in the consulship of the Caesars (294).

²⁸³ Blume: "If the reason therefor was absent – that is to say, if the document under which a bequest was claimed was forged, or did not in fact contain the bequests, none were owing thereunder. It was somewhat different if the proper solemnity in the execution of the document was absent; for if, in such case, recognition to the bequests was given by the party charged therewith, he was thereafter bound to carry out the bequests."

²⁸⁴ The precise month is uncertain: January or August.

[26] *Idem AA. et CC. Gaiano.* Ex repudiatione fideicommissi doli mali exceptio iusta causa intercedente tunc opponitur, quando ipse, cui fideicommissum relictum est, repudiatione usus fuerit. unde cum hoc non te, sed patrem fecisse adseveras, qui tibi nocere non potuit, nihil tibi obesse potest.

D. II id. April. Sirmi CC. cons.

[27] *Idem AA. et CC. Olympiadi.* Fideicommissum eius qui reliquerat paenitentia probata successores numquam praestare compelluntur.

D. V k. Oct. Viminacii CC. cons.

[28] *Idem AA. et CC. Gaio.* Ex fideicommisso sub condicione sine libertate servis propriis inutiliter dato libertas peti non potest.

D. XV k. Nov. trans mare^{xii} CC. cons.

[29] *Idem AA. et CC. Achilleo.* Ex testamento, quod iure non valet, nec fideicommissum quidem, si non intestato quoque succedentes rogati probentur, peti potest.

D. VIII id. Dec. CC. cons.

[30] *Imp. Iustinianus A. Demostheni pp.* Cum acutissimi ingenii vir et merito ante alios excellens Papinianus in suis statuit responsis, si quis filium suum heredem instituit et restitutionis post mortem oneri subegit, non aliter hoc videri disposuisse, nisi cum filius eius sine subole vitam reliquerit: nos huiusmodi sensum merito mirati plenissimum ei donamus eventum, ut, si quis haec disposuerit, non tantum filium heredem instituens, sed etiam filiam, vel ab initio nepotem vel neptem, pronepotem vel proneptem vel aliam deinceps posteritatem, et eam restitutionis post obitum gravamini subiugaverit, non aliter hoc sensisse videatur, nisi hi qui restitutione onerati sunt sine filiis vel filiabus vel nepotibus vel pronepotibus fuerint defuncti, ne videatur testator alienas successiones propriis antepone.

Recitata septimo in novo consistorio palatii Iustiniani. d. III k. Nov. Decio vc. cons.

^{xii} Transmariscae

[26] *The same Augusti and Caesars to Gaius.* Rejection of a trust is countered with an affirmative defense of fraud (*exceptio doli mali*) for a good reason when the party to whom the trust was left is the one who rejects it. So since you claim that not you but your father did this, and since his action could not harm you, it cannot at all be held against you.

Given April 12, at Sirmium, in the consulship of the Caesars (294).

[27]²⁸⁵ *The same Augusti and Caesars to Olympias.* When the person who left a trust is shown to have changed his or her mind, the heirs are never compelled to pay it.

Given September 27, at Viminacium, in the consulship of the Caesars (294).

[28] *The same Augusti and Caesars to Gaius.* Manumission cannot be claimed pursuant to a trust ineffectually given to one's own slaves upon the condition "without manumission."

Given October 18, at Transmarisca, in the consulship of the Caesars (294).

[29]²⁸⁶ *The same Augusti and Caesars to Achilleus.* Not even a trust can be claimed pursuant to a will that is legally invalid, unless also the heirs on intestacy are shown to have been required to pay it.

Given December 6, in the consulship of the Caesars (294).

[30] *Emperor JUSTINIAN Augustus to Demosthenes, Praetorian Prefect.* Since Papinian, a man of the sharpest intellect who rightly surpasses all others, held in his work on *Replies*²⁸⁷ that if someone appointed his own son as heir and imposed on him the burden of turning over the inheritance after his death, he is deemed as having made this disposition only for the case that his son died without offspring. We, in just admiration of such an opinion, give it a very full application, so that if anyone makes these dispositions appointing not only a son as heir, but also a daughter or a grandson or granddaughter in the first degree, a great-grandson or great-granddaughter and so on with other descendants, and he imposes on them the burden of turning over the inheritance after death, he shall be deemed as having made this disposition only for the case that those burdened with the obligation to turn over the property die without sons, daughters, grandchildren, or great-grandchildren, so that the testator not be considered as preferring the rights of strangers to succeed to him over those of his own descendants.

Recited seven times October 30, in the New Consistory of the Palace of Justinian, in the consulship of the vir clarissimus Decius (529).

²⁸⁵ Combine with C. 8.53.23.

²⁸⁶ Combine with C. 2.4.36(?), 6.23.14.

²⁸⁷ See C. 6.25.7.1; Pap. D. 35.1.102.

[31] *Idem A. Iohanni pp. pr.* Quidam filium suum a sacris paternis remisit et postea testamento condito eum praeteriit nullo ei penitus relicto, aliis heredibus derelictis, ipsum autem, quem neque heredem neque exheredatum fecit, fideicommisso praegravavit. quaerebatur, si utile est huiusmodi fideicommissum. 1. Tota igitur antiqua dubietate super hoc explosa nobis in hoc casu placuit, ut emancipatus utpote iniuria a patre afflictus non compellatur fideicommissum a sua persona relictum praestare. 2. Quod etiam in aliis personis, quas exheredari necesse est, locum habere censemus.

D. prid. k. Mart. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[32] *Idem A. Iohanni pp. pr.* Quaestionem ex facto emergentem resecantes et voluntati defunctorum prospicientes sancimus, si sine scriptura et praesentia testium fideicommisso derelicto fideicommissarius elegerit iuramentum heredis vel forsitan legatarii vel fideicommissarii, quotiens ab eo relictum est fideicommissum, sive universitatis sive speciale, necesse habere heredem vel legatarium vel fideicommissarium prius iureiurando de calumnia praestito vel sacramentum subire et omni inquietudine sese relaxare vel, si recusandum existimaverit sacramentum aut certam quantitatem manifestare fideicommissario derelictam noluerit, si forsitan maiorem fideicommissarius expetat, omnimodo exactioni fideicommissi subiacere et eum ad satisfactionem compelli, cum ipse sibi iudex et testis invenitur, cuius religio et fides a fideicommissario electa est, nullis testibus nullisque aliis adventiciis probationibus requisitis, sed sive quinque sint testes vel minores vel nemo, causam per illius sacramentum vel dandum vel recusandum suam habere tam firmitatem quam exactionem, sive pater sit, qui fideicommissum dederit, sive extraneus, ut aequitatis ratio communiter in omnes procedat.

1. Cum enim res per testium sollemnitatem ostenditur, tunc et numerus testium et nimia subtilitas requirenda est. lex etenim, ne quid falsitatis incurrat per duos forte testes compositum, maiorem

[31]²⁸⁸ *The same Augustus to John, Praetorian Prefect. pr.* A certain person emancipated his son and afterwards when making his will passed him over, leaving nothing at all to him. Though he left others as his heirs, the son himself, however, whom he had neither named as heir nor disinherited, he burdened with a trust. It used to be debated whether such a trust was valid. 1. So by eliminating all ancient hesitation over this matter We have decided in this case that the emancipated son, inasmuch as he has been afflicted with an affront by his father, shall not be compelled to pay the trust that has been left to him to pay. 2. We lay down that this rule also applies in the case of other persons whom it is necessary to disinherit (in order to exclude them under a will).

Given February 28, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[32] *The same Augustus to John, Praetorian Prefect. pr.* In resolving a dispute arising out of a situation of fact and looking out for the last wishes of decedents, We lay down that if a trust has been left in the absence of documents and witnesses and the beneficiary chooses to request an oath of the heir or perhaps of a legatee or of (another) trust beneficiary, whenever the trust has been left to (one of) the latter to pay out, whether it is for the entire inheritance or a particular thing, it shall be necessary for the heir, legatee, or trust-beneficiary, after an oath on malicious prosecution shall first be sworn (by the complainant), to take the oath (that there is no trust) and free himself from all anxiety or, if he thinks the oath should be refused or declines to inform the beneficiary as to the precise amount that was left in the trust, should the latter happen to claim a higher amount, he shall be entirely liable to pay the trust and shall be compelled to satisfy the claim. This is because he is discovered to be his own judge and witness whose scruples and honesty were appealed to by the beneficiary. No witnesses and no other, extraordinary evidence are required, but whether there are five witnesses, fewer, or none at all, whether his father was the one who gave the trust or an outsider, (We decree) that the case shall have – through the swearing or declining to swear an oath on the part of that one (under accusation) – its own foundation as much as a basis for payment, so that the principle of fairness shall operate in common for everyone.

1. For when the matter (i.e., the existence of the trust) is shown through the formality of witnesses, then both the number of witnesses and an extraordinary level of complexity (of procedure) is to be required. For the law, in order that

²⁸⁸ Combine with C. 6.37.24. Lounghis *et al.* date to April 30, 531.

numerum testium expostulat, ut per ampliores homines perfectissima veritas reveletur.

2. Cum autem is, qui quid ex voluntate defuncti lucratur, et maxime ipse heres, cui summa auctoritas totius causae commissa est, dicere compellitur veritatem per sacramenti religionem, qualis locus testibus relinquatur vel quemadmodum ad extraneam fidem decurratur, propria et indubitata relictā? cum et in leges respeximus, quae iustis dispositionibus testatorum omnimodo heredes oboedire compellunt et sic strictius causam exigunt, ut etiam amittere lucrum hereditatis sanciant eos, qui testatoribus suis minime paruerunt.

D. v k. Dec. Constantinopoli post consulatum Lampadii et Orestis. vv. cc.

XXXXIII Communia de Legatis et Fideicommissis et de in Rem Missione Tollenda

[1] *Imp. Iustinianus A. Demostheni pp. pr.* Cum ii, qui legatis vel fideicommissis honorati sunt, personalem plerumque actionem habere noscuntur, quis vel vindicationis vel sinendi modo aliorumque generum legatorum subtilitatem prono animo admittet, quam posteritas optimis rationibus usa nec facile suscepit nec inextricabiles circuitus laudavit? quis in rem missionis scrupulosis utatur ambagibus?

1. Rectius igitur esse censemus in rem quidem missionem penitus aboleri, omnibus vero tam legatariis quam fideicommissariis unam naturam imponere et non solum personalem actionem praestare, sed etiam in rem, quatenus eis liceat easdem res, vel per quodcumque genus legati vel per fideicommissum fuerint derelictae, vindicare in rem actione instituenda, et insuper utilem Servianam (id est hypothecariam) super his quae fuerint derelicta in res mortui praestare. 2. Cum enim hoc iam iure nostro increbuit licere testatori hypothecam rerum suarum in testamento quibus voluerit dare, et iterum novellae constitutiones in multis casibus et tacitas hypothecas induxerunt, non ab re est etiam nos in

something false is not contrived by two casual witnesses, demands a greater number of them, so that through a greater number of persons the most consummate truth shall be brought to light.

2. But when a party who benefits in some way from the last wishes of the decedent and especially the heir himself, to whom supreme authority in the entire matter has been entrusted, is compelled to speak the truth through reverence for an oath, what place shall be left for witnesses, or how shall recourse be had to external proof, when his (the testator's) own undoubted proof was left behind? This is because We have also had regard for the laws which compel heirs to respect in every way the proper dispositions of testators, and so demand this outcome in a rather narrow fashion, so that they even ordain that those who have not at all complied with their testators' wishes shall lose the benefit of their inheritance.

Given November 27,²⁸⁹ at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Forty-Third Title Common Rules on Legacies and Trusts, and the Abolition of the Authorization to Seize Property

[1] *Emperor JUSTINIAN Augustus to Demosthenes, Praetorian Prefect. pr.* Since those who have been honored with legacies and trusts are generally recognized to have the right of a personal action (i.e., an action *in personam*), who will embrace with an eager spirit the complexities of the legacies *per vindicationem* or *sinendi modo* and the other kinds,²⁹⁰ which more recent times have, for excellent reasons, neither easily adopted nor praised for their impenetrable entanglements? Who shall make use of the oversubtle circumlocutions of the authorization to seize property (*missio in rem*)?

1. Therefore We ordain that it is more correct entirely to abolish the authorization to seize property, to be sure, to impose one form on all, in fact, legatees and trust-beneficiaries alike, and not only to provide a personal action, but also one *in rem*, to the extent that it shall be permitted for them to claim ownership of the same items, no matter in what form of legacy or trust they were bequeathed, by bringing an action *in rem*, and to provide moreover an analogous *actio Serviana* (that is, an action on a hypothec) regarding those things that were bequeathed to them by the decedent. 2. For since it has already become common in Our law (*ius nostrum*) to allow a testator to give a hypothec (*hypotheca*) of his property in his will to those whom he wishes, and again, recent constitutions (*novellae constitutiones*) have introduced even implied

²⁸⁹ The precise day is uncertain: possibly November 17.

²⁹⁰ Classical law knew several different types of legacies, of which two are named here; for a fuller list, see Gaius, 2.192-223. Blume: "Justinian, by the present law, not only abolished the distinctions between the different kinds of legacy known to the former law, but he also provided that there should be no difference between legacies and trusts of single things."

praesenti casu hypothecariam donare, quae et nullo verbo praecedente possit ab ipsa lege induci. 3. Si enim testator ideo legata vel fideicommissa dereliquit, ut omnimodo personae ab eo honoratae ea percipiant, apparet ex eius voluntate etiam praefatas actiones contra res testatoris esse instituendas, ut omnibus modis voluntati eius satisfiat, et praecipue cum talia sint legata vel fideicommissa, quae piis actibus sunt deputata.

4. Et haec disponimus, non tantum si ab herede fuerit legatum derelictum vel fideicommissum, sed et si a legatario vel fideicommissario vel alia persona, quam gravare fideicommisso possumus, fideicommissum cuidam relinquatur. cum enim non aliter valeat, nisi aliquid lucri offerat ei a quo derelictum est, nihil est grave etiam adversus eum non tantum personalem, sed etiam in rem et hypothecariam extendere actionem in rebus, quas a testatore consecutus est.

5. In omnibus autem huiusmodi casibus in tantum et hypothecaria unumquemque conveniri volumus, in quantum personalis actio adversus eum competit, et hypothecam esse non ipsius heredis vel alterius personae quae gravata est fideicommisso rerum, sed tantummodo earum, quae a testatore ad eum pervenerint.

D. xv k. Oct. Chalcedone Decio vc. cons.

[2] *Idem A. Iuliano pp. pr.* Omne verbum significans testatoris legitimum sensum legare vel fideicommittere volentis utile atque validum est, sive directis verbis, quale est 'iubeo' forte, sive precariis utetur testator, quale est 'rogo' 'volo' 'mando' 'fideicommitto', sive iuramentum posuerit, cum et hoc nobis audientibus ventilatum est, testatore quidem dicente 'ἐννοκῶ', partibus autem huiusmodi verbum huc atque illuc lacerantibus. 1. Sit igitur secundum quod diximus ex omni parte verborum non inefficax voluntas secundum verba legantis vel fideicommittentis et omnia, quae naturaliter insunt legatis, ea et fideicommissis inhaerere intellegantur et e contrario, quidquid fideicommittitur, hoc intellegatur esse legatum, et si quid tale est, quod non habet natura legatorum, hoc ei ex fideicommissis accommodetur, et sit omnibus perfectus eventus, ex omnibus nascentur in rem actiones, ex omnibus hypothecariae, ex omnibus personales.

hypothec in many situations, it is not beside the point that We too in the instant case grant an action on the hypothec, since this too can be introduced by the statute itself, with no word (that is, agreement) preceding (between individuals). 3. For if the testator bequeathed legacies or trusts for this reason, that the persons honored by them actually receive them, it seems consonant with his wishes that even the aforesaid actions against the property of the testator ought to be granted, so that in every way his wishes be met, and this particularly when there are legacies or trusts of such a nature as to be devoted to projects of a religious nature.

4. And We make these dispositions not only in case an heir has been left a legacy or a trust to pay out, but also in case a trust has been bequeathed to a certain person to be paid by a legatee or a trust-beneficiary, or by another person on whom We can impose the duty to pay out a trust. For since that can only be valid when some benefit is offered to him by the person making the bequest, it is not a heavy burden to extend even against him not only the personal action, but also the actions *in rem* and on the hypothec regarding that property he obtained from the testator.

5. But in all such situations We wish each person to be sued for as much under the action on the hypothec as he is liable on the personal action, and that the hypothec falls not on the property of the heir himself or another person burdened with a trust, but only on the property which comes to him from the testator.

Given September 17, at Chalcedon, in the consulship of the vir clarissimus Decius (529).

[2] *The same Augustus to Julian, Praetorian Prefect. pr.* Every word giving a lawful meaning used by a testator wishing to leave a legacy or a trust is effective and valid, whether he employs straightforward terms, such as perhaps "I order," or a trust directive such as "I ask," "I wish," "I commend," or "I entrust," or he inserts an oath, since even this has been aired in Our hearing, when a testator says, for example, "I swear" (*enorkō*) but the parties involved distort such a term in every direction. 1. Let the wishes of the testator, then, pursuant to what We have said, not be rendered without effect in every part of the language he uses, consistent with the wording employed by a person making a legacy or a trust, and all those things that are naturally found in legacies shall be understood also to form part of trusts, and vice-versa, whatever is given as a trust shall be understood to be have been given as a legacy. And if there is any such thing that a legacy by its nature does not contain, this shall be appropriated for it from trusts, and there shall be for all an exquisite outcome, as from all of them actions *in rem* shall arise, from all of them actions on the hypothec, from all of them personal actions.

2. Ubi autem aliquid contrarium in legatis et fideicommissis eveniat, hoc fideicommisso quasi humaniori adgregetur et secundum eius dirimatur naturam.

3. Et nemo moriens putet suam legitimam voluntatem reprobari, sed nostro semper utetur adiutorio, et quemadmodum viventibus providimus, ita et morientibus prospiciatur: et si specialiter legati tantummodo faciat testator mentionem, hoc et legatum et fideicommissum intellegatur, et si fidei heredis vel legatarii aliquid committatur, hoc et legatum esse videatur. nos enim non verbis, sed ipsis rebus leges imponimus.

D. x k. Mart. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[3] *Idem A. Iohanni pp. pr.* Si duobus vel tribus hominibus vel pluribus forte optio servi vel alterius rei relicta fuerit, vel si uni quidem legatario optio servi vel alterius rei relicta est, ipse autem moriens plures sibi reliquerit heredes, dubitabatur inter veteres, si inter legatarios vel heredes legatarii fuerit certatum et alter alterum servum vel aliam rem eligere velit, quid sit statuendum. 1. Sancimus itaque in omnibus huiusmodi casibus rei iudicem fortunam esse, sortem etenim inter altercantes adhibendam, ut, quem sors praetulerit, is quidem habeat potestatem eligendi, ceteris autem aestimationem praestet contingentium eis partium: id est in servis quidem et ancillis maioribus decem annis, si sine arte sint, viginti solidis aestimandis, minoribus videlicet decem annis non amplius quam decem solidis computandis: sin autem artifices sunt, usque ad triginta solidos aestimatione eorum procedente, sive masculi sive feminae sunt, exceptis notariis et medicis utriusque sexus, cum notarios quinquaginta solidis aestimari volumus, medicos autem et obstetrices sexaginta: eunuchis minoribus quidem decem annis usque ad triginta solidos valentibus, maioribus vero usque ad quinquaginta, sin autem artifices sint, usque ad septuaginta.

1a. Sed et si quis optionem servi vel alterius rei reliquerit non ipsi legatario, sed quem Titius forte elegerit, Titius autem vel noluerit eligere vel morte fuerit praeventus, et in hac specie dubitabatur apud veteres, quid statuendum sit, utrumne legatum expirat, an aliquid inducitur ei adiutorium, ut viri boni arbitrato procedat electio. 1b. Censemus itaque, si intra annale tempus ille qui eligere iussus est hoc facere supersederit vel

2. When however some contradiction occurs in legacies or trusts, it shall be assimilated to (the rules for) trust, on the ground that this is more consistent with humane sympathy and it shall be resolved according to its nature.

3. And let no dying person imagine that his lawful last wishes shall be rejected, but will always make use of Our assistance. And just as We have provided for the living, so there shall also be a concern for the interests of the dying. And if a testator makes particular mention only of a legacy, this shall be understood as both a legacy and a trust, while if he entrusts something to an heir or a legatee this shall be regarded as a legacy as well. For We impose laws not on words, but on reality itself.

Given February 20, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[3] *The same Augustus to John, Praetorian Prefect. pr.* If the choice of a slave or of other property happened to be left to two, three, or more persons, or if the election of a slave or of other property was left just to a single legatee, but he died and left behind several heirs, it was debated among the ancients (*veteres*), if a dispute arose among the legatees or the heirs of the legatee and each wished to choose a different slave or different property, what should be decided. 1. We therefore lay down that in all such situations chance shall be the judge of the matter. For lots shall be drawn among the disputants and whoever the lot selects shall have, to be sure, the power of choosing, but he shall pay the others the value of the proportions of the property accruing to them. That is, in the case of male slaves, certainly, and female slaves older than 10 years, if unskilled, they shall be appraised at 20 solidi, while for those less than 10 years old clearly not more than 10 solidi shall be calculated. But if, however, they possess a skill, the appraisal of their worth shall extend up to 30 solidi, whether they are male or female, with the exception of notaries and physicians of either sex. This is because We wish notaries to be appraised at 50 solidi, but physicians and midwives at 60. As for eunuchs, if they are less than 10 years old, indeed, they shall be worth up to 30 solidi, older ones in fact up to 50; but if, however, they possess a skill, up to 70.

1a. But even if someone bequeaths the election of a slave or some other property not to the legatee himself, but (leaves) the choice to Titius, and Titius either declines to choose or is prevented from doing so by death, in this kind of situation there also was hesitation among the ancients (*veteres*) as to what should be decided: whether the legacy was extinguished or some form of assistance was provided to it, (i.e.) that the election might go ahead by the standards of an upright man (*bonus vir*). 1b. We therefore ordain that if within the space of a year the one who was ordered to make the election has failed to do so,

minime potuerit vel quandocumque decesserit, ipsi legatario videri esse datam electionem, ita tamen, ut non optimum ex servis vel aliis rebus quicquam eligat, sed mediae aestimationis, ne, dum legatarium satis esse fovendum existimamus, heredis commoda defraudentur.

2. Sed quia nostra maiestas per multos casus legatariis et fideicommissariis prospexit et actiones tam personales quam in rem et hypothecarias dedimus et in rem missionis tenebrosissimus error abolitus est, et ad hanc legem pervenimus. 2a. Nemo itaque ea, quae per legatum vel pure vel sub certo die relictæ sunt vel quae restitui aliis dispositæ sunt vel substitutione posita, secundum veterem dispositionem putet esse in posterum alienanda vel pignoris vel hypothecae titulo adsignanda vel mancipia manumittenda, sed sciat, quod hoc quod alienum est non ei liceat utpote sui patrimonii existens alieno iuri applicare, quia satis absurdum est et inrationabile rem, quam in suis bonis pure non possidet, eam ad alios posse transferre vel hypothecae pignorisve nomine obligare vel manumittere et alienam spem decipere.

3. Sin autem sub condicione vel sub incerta die fuerit relictum legatum vel fideicommissum universitatis vel speciale vel substitutione vel restitutione, melius quidem faciat, et si in his casibus caveat ab omni venditione vel hypotheca, ne se gravioribus oneribus evictionis nomine supponat. 3a. Sin autem avaritiae cupidine propter spem condicionis minime implendae ad venditionem vel hypothecam prosiluerit, sciat, quod condicione impleta ab initio causa in irritum devocetur et sic intellegenda est, quasi nec scripta nec penitus fuerat celebrata, ut nec usucapio nec longi temporis praescriptio contra legatarium vel fideicommissarium procedat. 3b. Quod similiter censemus in huiusmodi legatis, quae sive pure sive sub die certo sive sub condicione sive sub incerta die relictæ sint: sed in his omnibus casibus legatario quidem vel fideicommissario omnis licentia pateat rem vindicare et sibi adsignare, nullo obstaculo ei a detentatoribus opponendo.

4. Emptor autem sciens rei gravamen adversus venditorem actionem habeat tantummodo ad restitutionem pretii, neque dupli stipulatione

could not at all do so, or has at some point passed away, that the choice shall be deemed to have been given to the legatee himself, with this proviso all the same, that he not choose the best slave or the best property, but that of medium value, so that, although We believe that the legatee is to be sufficiently provided for, the heirs not be cheated of their benefits.

2. And because Our Majesty has in many situations looked out for the interests of legatees and trust beneficiaries and We have provided them with personal actions as well as actions *in rem* and on the hypothec – and the very shady folly of the authorization to seize property (*missio in possessionem*) has been abolished – We arrive even at this law. 2a. So let no heir think that in the future property which has been bequeathed unconditionally, at a specified date, under orders to be turned over to others, or subject to a substitution (of himself), is to be alienated, encumbered by a pledge or hypothec, or – if slaves – manumitted, pursuant to the old rules (*vetus dispositio*). Let him know instead that he shall not be permitted to convert to the legally protected uses of another that which does not belong to him, as though it were his own property. This is because it would be fairly absurd and unreasonable that he be able to transfer, encumber by hypothec or pledge, or manumit property that he does not own unconditionally, and so cheat others of their hopes.

3. But if, however, a legacy or a trust either of the entire inheritance or of a particular item has been left under a condition or at an uncertain point in time, or under an arrangement for a substitute or under an instruction to turn it over to another, he would do better, to be sure, even in these situations to avoid every possibility of sale or hypothec, so as not to subject himself to even heavier burdens under the heading of eviction. 3a. But if, however, out of the passion of greed he leaps forward to a sale or a hypothec, in the hope that the condition would not at all be fulfilled, let him know that once the condition is fulfilled his action shall be counted as invalid from the start and that it must be understood as not having been put into writing and not at all having been done, so that neither usucapion nor long-time prescription shall be effective against the legatee or the trust-beneficiary. 3b. We lay down that this shall apply in a similar fashion to such legacies which are left either unconditionally, (or) subject to a specified date, a condition, or an uncertain period of time. But in all of these situations every possibility shall lie for the legatee, to be sure, or the trust-beneficiary to claim ownership of the property and to have it made over to him, and no obstacle shall be opposed to him by those with physical control over it.

4. A purchaser, moreover, who knows of the burden on the property shall have an action for restitution of the price only against the seller, and neither the stipulation for double the price (in case of eviction) nor a claim for the

neque melioratione locum habente, cum sufficiat ei saltem pro pretio, quod sciens dedit pro aliena re, sibi satisfieri: creditori nihilo minus pigneraticia contraria actione adversus debitorem competente, ut ex omni parte omnique studio id, quod semper properamus, ad effectum perducatur, ut ultima elogia defunctorum legitimum finem sortiantur: bonae fidei procul dubio emptoribus integra iura et nullo modo ex hac constitutione deminuta contra venditores habentibus.

D. k. Sept. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

XXXXXIII De Falsa Causa Adiecta Legato vel Fideicommisso

[1] *Imp. Antoninus A. Septimio.* Verba testamenti, quae inseruisti, aut solutam pecuniam debitam testatori declarant aut voluntatem eius liberare volentis debitorem manifeste ostendunt. et ideo aut peti quod solutum est non potest aut ex causa fideicommissi, ut debitor liberaretur, agendum est, nisi liquido probari possit eum non liberari debitorem voluisse, sed errore lapsum solutam sibi pecuniam existimasse.

PP. VII k. Mart. Antonino A. IIII et Balbino cons.

[2] *Imp. Alexander A. Faustinae.* Etiam si veritas debiti non subest, falsa demonstratio non perimit legatum et ex testamento eius quoque nomine competit actio.

PP. VII id. Nov. Alexandro A. cons.

[3] *Idem A. Verinae. pr.* Si non designata certa quantitate dotem tibi legavit maritus, sed quodcumque ad eum dotis nomine pervenisset perventurumve esset, et id ex testamento petis, necessaria probatio est numeratae pecuniae. 1. Quod si quantitatem expressit, debetur et si in dotem datum non est, quasi aliud legatum, non eo iure, quo dos fungitur.

PP. non. Mai. Maximo II et Aeliano cons.

value of improvements shall be operative, since it shall be enough for him to be satisfied just with the price that he knowingly tendered for property belonging to a third party. The reverse action on the pledge shall nonetheless lie for the creditor against his debtor, so that, with all zeal and in every particular, that which We are ever quick in implementing be brought to its (desired) effect, so that the last wishes of decedents shall achieve their ends as a matter of law. It is far from doubtful that the rights of purchasers in good faith against their sellers shall remain unimpaired and in no way be diminished by this constitution.

Given September 1, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Forty-Fourth Title An Untrue Reason Cited for a Legacy or Trust²⁹¹

[1] *Emperor ANTONINUS Augustus to Septimius.* The wording of the will, which you have included (in your petition), either states that money owed to the testator had been paid or shows clearly his wish to be that of a person wanting to release the debtor. And on that account either what has been paid cannot be claimed or the suit must be on the trust, in order that the debtor be released, unless it can be clearly proved that the testator did not want the debtor to be released, but having fallen into a mistake thought that the money had been paid to him.

Posted February 23, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2] *Emperor ALEXANDER Augustus to Faustina.* Even if a debt does not in fact exist, a false statement that it does exist does not invalidate a legacy and an action lies also under this heading in accordance with the terms of the will.

Posted November 7, in the consulship of Alexander Augustus (222).

[3] *The same Augustus to Verina. pr.* If your husband left your dowry as a legacy to you without having indicated a precise value for it, and instead (bequeathed) whatever had come or was going to come to him under the title of dowry, and you claim this in accordance with the terms of the will, it is necessary to show the amount of the money paid out to him. 1. But if he articulated a precise amount, this is owed (to you) even if it was not given as dowry, just as any other legacy and not with the rights that attach to the dowry.

Posted May 7, in the consulship of Maximus, for the second time, and Aelianus (223).

²⁹¹ See D. 35.1.

[4] *Imp. Gordianus A. Alexandro.* Si dotem, ut proponis, defuncta in matrimonio uxore tua patri eius reddidisti, vel etiam ea non reddita testamenti verbis, ut adseveras, munitus es, quibus recepissee dotem universam quondam socer tuus significavit, ne hoc nomine conveniaris, sollicite agere non debes, cum aut soluta dote nulla supersit actio aut non reddita adversus petentem iuxta defuncti voluntatem parata sit exceptio.

PP. xv k. Iun. Sabino II et Venusto cons.

[5] *Imp. Diocletianus et Maximianus AA. et CC. Severae.* Refert largiter, dotem reddi maritus tibi, an quae instrumento dotali conscripta sunt, legati seu precariis verbis statuit, quippe superiore quidem casu datum probanti repeti tantum, posteriore vero nihil nocente falsa demonstratione significatum instrumento postulari possit.

S. XIII k. Dec. CC. cons.

XXXXV De His Quae Sub Modo Legata vel Fideicommissa Relinquuntur

[1] *Imp. Antoninus A. Saturninae.* In legatis quidem et fideicommissis etiam modus adscriptus pro condicione observatur. sed si per te non stat, quominus voluntati testatoris pareas, sed per eum, cui nubere iussa es, quominus id quod tibi relictum est retineas, non oberit.

PP. v k. Ian. Gentiano et Basso cons.

[2] *Imp. Gordianus A. Ammonio. pr.* Ex his verbis: "Titio decem millia vel insulam relinquo, ita ut quinque millia ex his vel eandem insulam Mevio restituat", licet antea neque legati neque fideicommissi petitio nascebatur, tamen in libertate a divo Severo hoc admissum est. 1. Sed in pecuniariis causis voluntatis tuendae gratia non immerito recipiendum est, ut etiam ex huiusmodi verbis, sive ad condicionem sive ad modum respiciunt, sive ad dandum vel faciendum aliquid, fideicommissi actio

[4] *Emperor GORDIAN Augustus to Alexander*. If, as you allege, your wife died during the marriage and you returned the dowry to her father, or even if you did not return it and you are, as you assert, protected by the words of the will in which your father-in-law indicated that he had at one point received back the entire dowry, you ought not to be concerned that you will be sued in this connection. This is because, if the dowry has been returned, no action remains, and, if it has not been returned, you have an affirmative defense (*exceptio*) against the claimant pursuant to the wishes of the decedent

Posted May 18, in the consulship of Sabinus, for the second time, and Venustus (240).

[5]²⁹² *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Severa*. It makes a great deal of difference whether your husband decided that you be left, as a legacy or by trust directive (*precariis verbis*), the actual amount received as dowry or the amount written in the dowry document, since in the former situation, to be sure, you can only recover what you show to have been given, while in the latter, on the other hand, since an erroneous description (*falsa demonstratio*) is no obstacle, you can make a judicial request for the amount indicated in the document.

Written November 18, in the consulship of the Caesars (294).

Forty-Fifth Title Property Bequeathed as a Legacy or a Trust Subject to a Duty (*Sub Modo*)²⁹³

[1] *Emperor ANTONINUS Augustus to Saturnina*. Even the duty (*modus*) written into legacies, to be sure, and trusts is treated like a condition. But if it is not your fault that you do not comply with the testator's wishes, but that of the man you were instructed to marry, this will not prevent you from keeping that which was bequeathed to you.

Posted December 28, in the consulship of Gentianus and Bassus (211).

[2] *Emperor GORDIAN Augustus to Ammonius. pr.* Through these words "I leave to Titius ten thousand or an apartment block (*insula*) provided that he turn over five thousand or the same apartment block to Maevius," although previously a claim used to arise neither on a legacy nor a trust, nevertheless one was allowed by the deified Severus in the case of a manumission.²⁹⁴ 1. But in civil cases, for the sake of safeguarding the last wishes (of the decedent), the rule not unjustly must be accepted that even from such wording, whether it is

²⁹² Cf. C. 4.30.12

²⁹³ See D. 35.1.

²⁹⁴ This law, evidently in the form of a *decretum*, is not preserved.

omnifariam nascatur, videlicet in condicionibus post exitum earum.
 2. Sin vero legato aut fideicommisso relicto testator legatarium seu fideicommissarium prohibuerit heredem suum vel alium quendam debitum exigere, habet debitor adversus legatarium seu fideicommissarium agentem usque ad quantitatem relicti fideicommissi sive legati exceptionem.

PP. vi id. Aug. Sabino II et Venusto cons.

XXXXVI De Condicionibus Insertis Tam Legatis Quam Fideicommissis et Libertatibus

[1] *Impp. Severus et Antoninus AA. Claudiae.* Cum testatorem fideicommissum Trallianis ab eo, quem pro parte heredem instituerat, ita reliquisse proponas, si sine liberis institutus diem obisset, isque nepotem, quem ex filia susceperat, heredem instituerat, condicionem adscriptam fideicommisso defecisse manifestum est, nisi alia defuncti voluntas evidenter probabitur.

PP. non. Dec. Laterano et Rufino cons.

[2] *Idem AA. Gallicano. pr.* Cum patrem familias fideicommissi nomine, quod in diem certam reliquit, ita cavere praecepisse proponas, si a marito non divertisset, iurisdictionis originem perinde servari aequum est, ac si nihil super ea re scriptum fuisset. 1. Nec exemplum legati vel hereditatis, in quibus condicio divortii nonnumquam remitti solet, huic rei comparandum est, cum absurdum sit ideo perpetui edicti neglegi formam, quia patris sui voluntati non obtemperatur.

PP. Antiochiae XI k. Aug. Antonino A. II et Geta II cons.

related to a condition or a duty (*modus*), whether this is for giving or for doing something, the action on the trust shall arise in all circumstances, obviously in the case of conditions upon their fulfillment. 2. But if, however, a testator, after leaving a legacy or a trust, forbids the legatee or the beneficiary of the trust to claim a debt from the heir or from anyone else, the debtor has an affirmative defense (*exceptio*) against a legatee or trust-beneficiary suing for this up to the value of the legacy or trust.

Posted August 8, in the consulship of Sabinus, for the second time, and Venustus (240).

Forty-Sixth Title Conditions Placed on Legacies, Trusts, and Manumissions²⁹⁵

[1] *Emperors SEVERUS and ANTONINUS Augusti to Claudia.* Since you state the testator left a trust which the person whom he had appointed heir to part of the estate was to pay to the town of Tralles "if the appointed person died without children," and the latter appointed as heir his grandson through his daughter, it is clear that the condition written into the trust has failed, unless the wishes of the decedent are shown clearly to have been otherwise.

Posted December 5, in the consulship of Lateranus and Rufinus (197).

[2] *The same Augusti to Gallicanus. pr.* Since you state that a *pater familias* had instructed that under a trust designed to be effective on a certain date his daughter shall provide a guarantee (*cautio*) if she had not (already) divorced her husband, it is fair that the Praetorian Edict (*iurisdictionis origo*) be respected as though nothing had been written about this matter (i.e., the divorce). 1. Nor is to be compared to this situation the parallel of a legacy or a trust in which the fulfillment of a condition regarding a divorce is sometimes accustomed to be remitted, since it would be absurd that the rules of the Perpetual Edict (*perpetui edicti forma*) be neglected on this account, because she does not comply with her father's wishes.²⁹⁶

Posted July 22, at Antioch, in the consulship of Antoninus Augustus, for the second time, and Geta, for the second time (205).²⁹⁷

²⁹⁵ See D. 35.1.

²⁹⁶ Blume: "A condition affixed to inheritances etc. which required the beneficiary to get a divorce was deemed to be against good morals and void ... In the case above, [the daughter] did not comply with her father's desire as to the divorce and still wanted to be relieved from giving the bond. The law, however, required such bond, and hence the situation was as though the father had not mentioned the subject at all."

²⁹⁷ So Krüger, but Geta's first consulship was in 205, his second in 208, while Caracalla's second was in 205, his third in 208.

[3] *Imp. Antoninus A. Aurelio militi.* Si ea condicione Auluzanus legata testamento praestari voluit, si cum focaria sua matreque eius moraretur, et per eum stetit, quominus voluntati testatoris pareret, cum sponte scripturae testamenti non obtemperaverit, ad petitionem non admittitur.

PP. VI id. Iul. Laeto II et Cereale cons.

[4] *Imp. Alexander A. Liciniae.* Legatum sive fideicommissum a patruo tuo relictum tibi sub condicione, si filio eius nupsisses, cum mortuo filio, priusquam matrimonium cum eo contraheres, condicio defecerit, nulla ratione tibi debere existimas.

PP. k. Dec. Alexandro A. II et Marcello cons.

[5] *Imp. Diocletianus et Maximianus AA. et CC. Faustino. pr.* Si uxorem tuam tempore nuptiarum in patria potestate fuisse monstretur, fideicommissi commodum ei relictum, cum nupserit, nullo alio diem eius cedere prohibente patri quaesitum non ambigitur. 1. Quod si a patre ante nuptias emancipata fuerit ac postea decesserit, superstite patre et marito ac liberis actionem fideicommissi sibi competentem ad heredes suos transmisit.

S. VI k. Febr. Sirmi CC. cons.

[6] *Imp. Iustinianus A. Iohanni pp. pr.* Cum quidam testamento condito libertatem suo servo dereliquit sub condicione, si suo heredi certum numerum solidorum praestet vel aliam quandam speciem vel vicarium servum, ille autem servus non in eodem loco constitutus, ubi etiam heres fuerat, herili testamento cognito properabat ad heredem cum ipso, quod iussus erat dare heredi, sed in medio latronum vel hostium incursione peremptum est quod portabat: quaerebatur inter antiquos, si praepeditur libertas, quia hoc dare servus non potest propter memoratum fortuitum casum. 1. Itaque veterum dubietate quiescente nobis placuit, ut et libertas omnimodo competat et commodum, quod heredi

[3] *Emperor ANTONINUS Augustus to Aurelius, a soldier.* If Auluzanus wished that the legacies bequeathed in his will be paid on condition that he (the recipient) reside with his concubine and her mother, and it was his doing that he did not respect the wishes of the testator, since he did not comply with the wording of the will of his own accord, he is not permitted to make a claim.

Posted July 10, in the consulship of Laetus, for the second time, and Cerealis (215).

[4] *Emperor ALEXANDER Augustus to Licinia.* When a legacy or a trust was left to you by your paternal uncle on the condition that you marry his son, since the son died before you married him, the condition has failed, and you have no reason to think that legacy or trust is owed to you.

Posted December 1, in the consulship of Alexander Augustus and Marcellus (226).²⁹⁸

[5] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Faustinus. pr.* There is no doubt that, if it should be shown that your wife was in a father's power (*patria potestas*) at the time of your marriage, the benefit of a trust left to her "when she married" accrued to her father if no other reason prevented its becoming due at that time. 1. But if she had been emancipated by her father before marriage and subsequently died, leaving as survivors a father, husband, and children, she has passed on to her heirs the action on the trust for which she was eligible.

Written January 27, at Sirmium, in the consulship of the Caesars (294).

[6]²⁹⁹ *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* A certain person in writing his will bequeathed manumission for his slave on the condition that he pay a fixed number of gold coins (*solidi*) to his heir, or (that he pay) some other specific item or a slave of a slave (*vicarius*). But since the slave was not in the same place as the heir, upon learning of the contents of his master's will he was hastening to the heir with the very thing he had been ordered to give to him, but en route what he was carrying was lost during an attack by bandits or enemies. It was debated among the ancients (*antiqui*) whether the manumission was blocked, because the slave was unable to give this thing (to the heir) owing to the aforementioned chance circumstances. 1. And so, as the hesitation of the ancients (*veteres*) subsides, We have decided both that the

²⁹⁸ Blume: "A supervening impossibility, as in this rescript, made the gift void, except in case of manumission and except when the fulfillment of the condition was defeated by the want of cooperation of another, whose cooperation was necessary – as where such other refused to marry the legatee."

²⁹⁹ Combine with C. 6.27.5.

vel extraneo relinquitur, non abstrahatur. 2. Ex quacumque igitur causa impediatur, sive per heredem sive per eum, cui dare aliquid iussus est, sive per fortuitos casus, in libertatem quidem ipse omnimodo perveniat, nisi ipse servus noluit adimplere condicionem: obnoxius tamen constituatur post libertatem heredi vel ei cui dare iussus est, nisi et ipse oblatas pecunias non suscepit (quod enim semel repudiatum est ab eo, redintegrari minime concedimus), quatenus hoc quod dare iussus est omnimodo adimplere compellatur vel in ipso mancipio, si extat, vel in aestimatione eius non amplius quam in quindecim solidos imputanda, vel in alia re, si et ipsa appareat, vel si non existat, vera eius aestimatione praestanda.

D. prid. k. Mai. Constantinopoli post consulatum Lampadii et Orestis vv. cc. anno secundo.

[7] *Idem A. Iohanni pp. pr.* Si plures personae unam condicionem implere fuerint iussae, apud Ulpianum dubitabatur, utrumne omnes simul eandem facere debent, an singuli quasi soli implere eam compelluntur. 1. Videtur autem nobis unumquemque necessitatem habere condicionem implere et pro portione sibi contingente accipere, quiddid ex hoc commodum est, ut hi quidem, qui compleverint iussa, ad lucrum vocentur, qui autem neglexerint, sibi imputent, si ab huiusmodi commodo repellentur.

D. III k. Aug. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[8] ...

XXXXVII De Usuris et Fructibus Legatorum vel Fideicommissorum

[1] *Impp. Severus et Antoninus AA. Maximo.* Legatorum seu fideicommissorum usuras ex eo tempore, quo lis contestata est, exigere posse manifestum est. sed et fructus rerum et mercedes servorum, qui ex testamento debentur, similiter praestari solent.

Proposita prid. k. Aug. Anullino et Frontone cons.

manumission shall be entirely valid and that the benefit which was bequeathed to the heir or to an outsider shall not be taken away. 2. For whatever reason, then, the (slave) was blocked, whether by the heir, by someone (else) to whom he was ordered to give something, or by chance circumstances, he himself, to be sure, shall absolutely arrive at manumission, except if the slave himself refused to fulfill the condition. Nevertheless, after manumission he shall be made liable to the heir or to the person to whom he was ordered to give something, unless even the latter himself did not accept the money when it was offered to him – for once he has rejected this We do not allow it to be claimed anew – to the extent that he shall be compelled to fulfill entirely that which he was ordered to give, either in terms of the slave (of a slave), if he is alive, or in terms of monetary value, which is not to be reckoned as more than 15 solidi, or in terms of the other object, if that is available, or, if not, by having to pay its true value.

Given April 30, at Constantinople, in the second post-consulate of the viri clarissimi Lampadius and Orestes (532).³⁰⁰

[7] *The same Augustus to John, Praetorian Prefect. pr.* If more than one person has been ordered to fulfill a single condition, Ulpian hesitated as to whether all of them ought to do the same thing at the same time, or individuals are compelled to do this as though acting on their own (i.e., as though each was the only one obligated by the condition). 1. But it seems to Us that each is obliged to fulfill the condition and receive the share of the benefit due respectively to him. So those, at any rate, who carry out the instructions shall be eligible for this gain, but those who neglect them shall have only themselves to blame for being denied such a benefit.

Given July 30,³⁰¹ at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Oreste (531).

[8] <A Greek constitution appears to have fallen out.>

Forty-Seventh Title Interest and Income from Legacies and Trusts

[1] *Emperors SEVERUS and ANTONINUS Augusti to Maximus.* It is clear that interest on legacies or trusts can be claimed from the time of joinder of issue (*litis contestatio*). But income (*fructus*) from property and the earnings of slaves that are owed in accordance with the terms of a will are also usually paid in a similar fashion.

Posted July 31, in the consulship of Anullinus and Fronto (199).

³⁰⁰ The date is in fact 531, as Haloander and Krüger have shown.

³⁰¹ The precise day is uncertain: the alternative is July 29 (preferred by Lounghis *et al.*).

[2] *Imp. Antoninus A. libertis Cassiani. pr.* Adversus eos, qui sub obtentu legis Falcidiae legata morantur, notissimum est iuris auxilium.

1. Si igitur proposita stipulatione cavere cum satisfactione potestis vos restitutos, quanto amplius quam per eam legem licet acceperitis, iudex qui fideicommissis ius dicit solida vobis legata praestari iubebit.

2. Quod si satisfactionem implere non poteritis, arbitro dato diem vobis praefiniet, intra quem altera parte cessante partibus suis fungetur. et si constiterit legi Falcidiae locum non esse, et usuras et fructus post litem contestatam percipietis.

PP. XVI k. Iun. duobus Aspris cons.

[3] *Imp. Alexander A. Paterno.* Si homines certi per fideicommissum tibi relictos fuerunt, post moram periculo debitoris fideicommissi fuerunt.

Proposita XII k. April. Iuliano et Crispino cons.

[4] *Imp. Gordianus A. Dionysio.* In legatis et fideicommissis fructus post litem contestationem, non ex die mortis sequuntur, sive in rem sive in personam agatur.

PP. non. Sept. Gordiano A. et Aviola cons.

XXXXVIII De Incertis Personis

[1] [Αὐτοκράτωρ Ἰουστινιανὸς Α.]. *pr.* ... Incertus ... 1. Καὶ ὅτι καλῶς γράφει ὁ θέλων οἷονδήποτε πῶστουμον κληρονόμον οὐ μὴν ἀλλὰ καὶ ληγάτον καὶ φιδικομμίσσον αὐτῷ καταλιμπάνει, ἐὰν δηλονότι οὐκ ἐκωλύετο αὐτοῦ κληρονομεῖν ἢ εἰ ἦν ἐν φύσει.

2. Καὶ ὅτι οὐ συγχωρεῖ κληρονόμους γράφεσθαι ἀφανεῖς, εἰ μὴ ἄρα κυοφορούμενος εἴη· ἐπὶ γὰρ τούτου τὴν τοῦ ὀνόματος αὐτοῦ χρεῖαν ἀναπληροῖ ἡ γαστήρ ἢ τοῦτον φέρουσα καὶ ὁ πατήρ.

3. Καὶ περὶ τῶν πρὸς ἅπαξ τοῖς συγγενέσι καταλιμπανομένων καθ' ὁμάδα φιδικομμίσσων ἢ ληγάτων, εἰ μὴ ἐν ἑκατέρῳ καιρῷ (τυχὸν τῆς τελευτῆς) εὑρεθῇ τις συγγενής, ἀλλὰ ἐν μόνῳ τῷ καιρῷ τῆς τελευτῆς ἐπιτεχθῇ

[2] *Emperor ANTONINUS Augustus to the freedpersons of Cassianus*. pr. The legal remedy (*iuris auxilium*) against those who delay paying legacies on the pretext of respecting the *lex Falcidia* is very well known.³⁰² 1. If, then, you are able to furnish a guarantee in the form of a stipulation together with a surety to the effect that you will return any amount that you receive in excess of what this statute permits, the judge with jurisdiction over trusts will order that the legacies be paid to you in their entirety. 2. But if you are not able to provide a surety, an arbitrator will be appointed who will set a date for you at whose expiry, if your opponents fail to comply, he will discharge his responsibility. And if it is determined that the *lex Falcidia* does not apply, you will receive both income and interest accruing in the wake of joinder of issue.

Posted May 17, in the consulship of the two Aspri (212).

[3] *Emperor ALEXANDER Augustus to Paternus*. If certain slaves were left to you as a trust, and their delivery is delayed, they are held at the risk of the one who owes the trust.

Posted March 21, in the consulship of Julian and Crispinus (224).

[4] *Emperor GORDIAN Augustus to Dionysius*. The income from legacies and trusts is paid from the time of joinder of issue, not from that of death, whether the suit is *in rem* or *in personam*.

Posted September 5, in the consulship of Gordianus Augustus and Aviola (239).

Forty-Eighth Title Uncertain Persons

[1]³⁰³ [*Emperor JUSTINIAN Augustus*] ... pr. An uncertain person ...³⁰⁴ 1. (The constitution) also (states) that he is entitled to name whomever he wishes as a posthumous heir.³⁰⁵ There is absolutely no doubt that he can also leave him either a legacy or a trust, unless it is plain that he was forbidden to inherit from him whether he was conceived or is already born.

2. And (it says) that it is not permitted to name uncertain heirs unless, after all, such heir is in the womb. For in this case the womb that bears him – as does his father – fills the need for a name.

3. And (it) concerns trusts and legacies that have been left, in a lump sum, to cognates (blood relatives) as a group, when at neither time – for example, at the time of the testator's death³⁰⁶ – a blood relative is among the living, but just at

³⁰² The *lex Falcidia* (40 BCE) ordained that one-quarter of an inheritance had to be reserved for the heir(s).

³⁰³ 1-9, 11-14, 17-29 derive from *Basilika* 44.18.29. Krüger shows that this law of Justinian was in fact the only constitution in this title: see *Nomoc.* 2.1; *Inst.* 2.20.27.

³⁰⁴ See *Parat. ad Const.* 2 and 3. A summary of this constitution is restored from a number of sources, including the sixth-century *Nomocanon XIV Titulorum* and *Bas.* 44.18.29.

³⁰⁵ See *Inst.* 2.20.28; 3.9 pr.

³⁰⁶ Blume: "Or ... at the time of executing the testament."

ἢ ἐγκυμονῆται. 4. Ἡ ἂν τοῖς ἐν καιρῷ διαθήκης συγγενέσι καταλείψῃ, ἐπιτεχθῶσι δὲ ἕτεροι, περὶ ὧν ἐν τῷ διατίθεσθαι οὐκ ἐνεθυμήθη. 5. Καὶ εἰ ὁ διαθέμενος πᾶσι τοῖς συγγενέσιν αὐτοῦ καταλείψει, πῶς οὐ κατὰ βαθμὸν οὐδὲ κατὰ τάξιν δεῖ καλεῖσθαι τοὺς συγγενεῖς, ἀλλὰ πάντας. 6. Καὶ εἰ εἴποι τοῖς ἐξ ἀδιαθέτου καλουμένοις συγγενέσι δοθῆναι, τίνες καλοῦνται.

7. Καὶ περὶ τοῦ, ἂν τις τοῖς ἰδίοις ἀπελευθέροις ληγατεύσῃ, τίνες τὰ ληγάτα λαμβάνουσι. 8. Καὶ εἰ γενικῶς ληγατεύσας πᾶσι τοῖς ἀπελευθέροις ἐν τῇ διαθήκῃ ἰδικὸν ἕτερόν τι καταλείψῃ πρεσβεῖον τοῖς ἐν τῇ διαθήκῃ αὐτοῦ ἐλευθερωθεῖσιν ἢ ἐν κωδικέλλοις ἢ καὶ ἀγράφως, τι γίνεται.

9. Καὶ περὶ τοῦ, εἰ τῇ φασιλίᾳ καταλειφθῇ πρεσβεῖον, μὴ ὑπόντων συγγενῶν ἢ γαμβροῦ ἢ νύμφης, πῶς καλοῦνται οἱ ἀπελευθέροι.

10. Ἐάν τις ἢ τῇ ἱερᾷ συγκλήτῳ ἢ βουλευτηρίῳ πόλεως ἢ τάξει ὑπηρετουμένη ταῖς μεγάλας ἀρχαῖς ἢ ταῖς ἐν ἐπαρχίαις ἢ τῷ τῶν ἱατρῶν ἢ διδασκάλων ἢ συνηγόρων σωματείῳ ἢ τοῖς στρατιώταις ἢ ὁμοτέχνοις ἢ τοῖς κληρικοῖς ἢ ἀπλῶς οἰωδήποτε μὴ ἀπηγορευμένῳ σωματείῳ καταλείψῃ τι, ἔρρωται τὸ καταλειφθέν· καὶ εἰ μὲν ἀπλῶς τοῦ συστήματος ἢ τάγματος μνημονεύσει, πάντες ἀπαιτοῦσιν οἱ ἐν τῷ καιρῷ τῆς τελευτῆς αὐτοῦ εὐρισκόμενοι ἐν τῷ συλλόγῳ καὶ πρὸς τὸν ἀριθμὸν τῶν προσώπων αὐτὸ διαιροῦνται, εἰ μὴ ἄρα ὁ διαθέμενος ἕκαστον αὐτῶν ῥητόν τι λαβεῖν διετάξατο. μηδενὸς περιεργαζομένου κατὰ τὴν παλαιὰν διάταξιν, εἰ ἀπὸ κέρτας ἀδμινιστρατίονος ἦν τὸ πρόσωπον ἢ μὴ.

11. Καὶ περὶ διαθεμένου κελεύσαντος ἐκ προτελευτῆς τοῦ τιμηθέντος τοῖς παισὶν αὐτοῦ ἢ ἐγγόνοις ἢ προεγγόνοις ἢ καὶ συγγενέσι δοθῆναι τὸ καταλειφθέν.

12. Καὶ εἰ μόνων υἱῶν μνημονεύσει, πῶς αἱ θυγατέρες οὐδὲν ὠφελοῦνται. καὶ περὶ τοῦ, εἰ γενικῶς ὁ διατίθεμενος εἴποι προτελευτῶντος αὐτοῦ τοὺς ἐξ αὐτοῦ λαμβάνειν τὸ καταλειφθέν, πῶς τότε καὶ υἱοὺς καὶ θυγατέρας καὶ ἐγγόνους, καὶ ἐγγόνας καὶ προεγγόνους καὶ προεγγόνας καλεῖσθαι.

13. Καὶ εἰ ῥητῶς ἐπαγάγῃ τοὺς ἐξ αὐτοῦ προελθόντας καὶ τοὺς ἐφεξῆς λαμβάνειν, τίνες ἀπαιτεῖν δύνανται τὸ καταλειφθέν. 14. Τὸ αὐτὸ καὶ περὶ συγγενῶν. καὶ ταῦτα μὲν περὶ τῶν πρὸς ἅπαξ καταλιμπανομένων.

the point of his death was either on the cusp of being born or still in the womb. 4. Or if, at the time of the writing of the will, something is left to the blood relatives, but then others are born, of whom the testator has not taken account in his writing of the will. 5. And if the testator leaves something to all of his blood relatives they ought to be eligible not according to degree of relationship or in any particular order, but all of them equally. 6. And if he states that the inheritance should be given to those blood relatives eligible on intestacy (the constitution lays down) which ones are in fact eligible.

7. And concerning the situation in which someone leaves legacies to his freed-persons (it determines) which ones receive the legacies. 8. And if someone has made a general legacy to all of his freed-persons in his will but then leaves some other particular item as a bequest to those manumitted in the will, in codicils or even orally (it determines) what happens.

9. And concerning the situation in which a bequest is left to the household (*familia*) and there are no blood relatives, son-in-law, or daughter-in-law, the freedpersons shall be eligible.

10.³⁰⁷ If someone bequeaths something to the Blessed Senate, to the council of his hometown, to an administrative staff which serves high-ranking officials (in the capital) or in the provinces, to an association of physicians, instructors, or trial attorneys, to soldiers, to workmen in the same trade, to clergy, or simply to any association that is not prohibited, the bequest shall be valid. And if anyone simply mentions a professional association or a legion, all those who are found to be in its number at the time of the testator's death shall make a claim and divide it up in proportion to the number of persons, unless perhaps the testator has assigned each one of them to take something fixed. Nor shall anyone be concerned, pursuant to the ancient constitution (*palaia diataxis*), if a person hails from a certain administrative staff or not.

11. And (the constitution provides for the situation) concerning the testator who, if his beneficiary predeceases him, orders what was bequeathed to him to be turned over to his surviving children, grandchildren, great-grandchildren, or blood relatives.

12. If mention is made only of sons, this does not benefit daughters. And concerning the situation in which the testator orders generally that if the beneficiary predeceases him his surviving offspring shall receive the bequest, (it ordains that) then sons, daughters, grandsons, granddaughters, great-grandsons and great-granddaughters shall be eligible.

13. And if he adds in particular that his offspring and their descendants shall receive something, (it provides as to) who can claim the bequest. 14. The same

³⁰⁷ §10 is found in Nomoc. 2.1.

15. Ἐάν δὲ ἐνιαυσιᾶ ἢ κατὰ μῆνα ἢ καθ' ἡμέραν καταλείψῃ τοῖς ἰδίοις συγγενέσιν ὁ διαθέμενος, εἰ μὲν μηδὲν πλέον εἴπῃ, μόνοις τοῖς ἐν τῷ καιρῷ τῆς τελευτῆς αὐτοῦ συγγενέσιν ἕως ὅτε περίεσι διδασθαι τὸ καταλείμμενον, ὥσπερ εἰ καὶ μὴ συγγενέσιν, ἀλλὰ τοῖς ἐκ τινος συστήματος ἢ τάγματος ἢ σωματείου κατέλειπε ταῦτα τὰ ἐνιαυσιᾶ ἢ μηνιαῖα ἢ ἡμερήσια ληγάτα· καὶ τότε γὰρ οἱ περιόντες μόνοι κατὰ τὸν καιρὸν τῆς τελευτῆς αὐτοῦ καλοῦνται καὶ ἐξ ἰσότητος διαιροῦνται τὸ καταλείμμενον. 16. Εἰ δὲ συγγενέσι τις καταλιμπάνων ἐνιαυσιᾶ ἢ μηνιαῖα ἢ ἡμερήσια ληγάτα ἐπάγει καὶ τοῖς ἐξ αὐτῶν ταῦτα διδασθαι, εἰ προσθήῃ εἰς τὸ διηνεκές, διηνεκῇ τὴν δόσιν εἶναι καὶ μηδέποτε παύεσθαι. 17. Τὸ αὐτὸ καὶ ἐπὶ συνηγόροις κρατεῖ καὶ διδασκάλοις καὶ στρατιώταις.

18. Καὶ εἰ μηδαμοῦ τὸ διηνεκῶς εἴπῃ, ἀλλὰ τοῖς αὐτῶν βουλευθείη διδασθαι. 19. Καὶ πότε μέχρι τρίτης διαδοχῆς τὸ γένος ἢ τάγμα καλεῖται πρὸς τὴν τοῦ καταλειφθέντος ἀπαίτησιν. 20. Καὶ εἰ ἀπελευθέρους ληγατεύσει, μὴ προσθήσει δὲ καὶ τοῖς ἐξ αὐτῶν ἢ προσθήσει. 21. Καὶ περὶ τοῦ, εἰ τελευτήσει ἐπὶ πάντων τῶν θεμάτων εἰς ἐξ αὐτῶν, τί γίνεται. 22. Κἂν διορίσῃται, τί χρή λαμβάνειν ἕκαστον, ἢ μὴ, ἀλλὰ πᾶσιν ἅμα μίαν ποσότητα καταλείψῃ κελεύσας διηνεκῶς διδασθαι τὸ καταλειφθέν. 23. Καὶ εἰ μὴ προσθήσει τὸ διηνεκῶς διδασθαι.

24. Καὶ ὅτι ἀπελευθέρους ἀπελευθέρου οὐδέποτε πρὸς τὸ τοιοῦτον καλεῖται ληγάτον, εἰ μὴ ῥητῶς ὁ διαθέμενος τοῦτο παρεκελεύσατο.

25. Καὶ εἰ ἕκαστῳ τῶν πολιτῶν ῥητὴν ποσότητα κελεύσει διανέμεσθαι, τί γίνεται καὶ πῶς ρυθμίζεται.

26. Καὶ περὶ τῶν διηνεκῶς ἀπαιτουμένων, καταλιμπανομένων δὲ ἐκκλησίαις, ξενώσι ἢ πτωχείοις ἢ εὐαγέσιν οἴκοις ἢ τῷ κοινῷ τοῦ κλήρου παντός ἢ εἰς αἰχμαλώτων λύσιν ἢ αὐτοῖς τοῖς πτωχοῖς ἢ αἰχμαλώτοις.

27. Καὶ περὶ τοῦ, ἔάν τις εἴπῃ κληρονόμον αὐτοῦ γενέσθαι τὸν πρῶτον γινόμενον ὕπατον μετὰ τελευτὴν αὐτοῦ ἢ τὸν ἐρχόμενον εἰς τὸν τάφον αὐτοῦ ἢ τὸν ἐκδιδόντα τὴν θυγατέρα αὐτοῦ τῷ ἰδίῳ υἱῷ ἢ τὸν ἐπιγαμβρεύοντα αὐτῷ ἢ ἕτερόν τι τούτοις παραπλήσιον, πῶς ἀνυπόστατός ἐστι πανταχόθεν ἢ τοιαύτη ἔνστασις διὰ τὸ μὴ φέρεσθαι

also holds for blood relatives. And the same for property that has been left in a lump sum.

15.³⁰⁸ But if the testator leaves to his own blood relatives legacies to be paid on a yearly, monthly, or daily basis, if he says nothing more, the bequest shall be given only to those blood relatives who are living at the time of his death, in the same manner if he leaves legacies to be paid out on a yearly, monthly, or daily basis not to his blood relatives, but to the members of a professional association, legion, or (any other) association. For then too only those living at the time of his death shall be eligible and shall share in the bequest on an equal basis. 16. But if someone, in leaving to his blood relatives legacies to be paid on a yearly, monthly, or daily basis, orders that they shall be given also to their offspring, and adds that this shall be in perpetuity, the bequest shall be valid in perpetuity and shall never end. 17. The same point holds also for trial attorneys, instructors, and soldiers.

18. (The same is true) even if the testator at no point specifies "in perpetuity," but wishes (the bequest) to be given to their offspring. 19. And (the constitution lays down) when the blood-line or legion is eligible up to the third generation to claim the bequest. 20. (The same holds) also if he leaves a legacy to his freed-persons, whether or not he adds "also to their offspring." 21. The constitution lays down) concerning the situation in which, in all of these cases, what happens regarding "the offspring" if one of them dies. 22. And (it lays down what happens) if he determines what each one ought to take, or not, but he leaves one amount to all together, ordering the bequest to be given in perpetuity. 23. And (it lays down what happens) if he does not add that the bequest is to be given in perpetuity.

24. And (it lays down) that a freed-person of a freed-person shall never be eligible for such a legacy, unless the testator specially ordered this.

25. And if he orders a specific amount to be distributed to each of the citizens, (it lays down) what happens and how it is counted out.

26.³⁰⁹ And (it lays down what happens) concerning claims made about property left in perpetuity to churches, guest-houses for pilgrims, poor-houses, religious institutions, the whole of a clerical order, for the ransoming of captives, or to the poor or captives themselves.

27. And (the constitution lays down) concerning the situation in which someone declares that his heir shall be the first person to become Consul after his death, the first to come to his tomb, the first who gives his daughter in marriage to the testator's son, the first who becomes the testator's son-in-law, or something else similar to these, that such an appointment of an heir shall be

³⁰⁸ §§15 and 16 are found in *Nomoc.* 2.1.

³⁰⁹ See *Nomoc.* 2.1.

κύριον ὄνομα τοῦ κληρονόμου. ἀλλ' οὐδὲ ληγᾶτον τοιοῦτοις προσώποις καταλιμπανόμενον ἰσχύει.

28. Καὶ ὅτι ἐπίτροπος ἀφανέσιν οὐ δύναται δοθῆναι.

29. Καὶ ὅτι τὸ τοῖς πτωχοῖς καταλιμπανόμενον μὴ νομιζέσθω ἄδηλον.

XXXXVIII Ad Senatus Consultum Trebellianum

[1] *Impp. Severus et Antoninus AA. Probo.* Si ex senatus consulto partem quartam hereditatis retinuisti et dodrantem fideicommissi restituisti, quod creditoribus hereditariis pro novem unciiis praestiteris, a fideicommissario petere potes.

PP. xv k. April. Laterano et Rufino cons.

[2] *Imp. Philippus A. et Philippus C. Iuliano.* Ad eum, cui ex Trebelliano senatus consulto pars hereditatis restituitur, successionis onera seu legatorum praestationem pro competenti portione spectare indubitati iuris est.

PP. xviii k. Nov. Peregrino et Aemiliano cons.

[3] *Imppp. Carus Carinus et Numerianus AAA. Zotico.* Si per fideicommissum hereditas rei publicae relictæ est, ex Trebelliano senatus consulto, quod ab intestato quoque locum habet, quartæ partis et fructus eius vobis restitutio competit.

Sine die et consule.

[4] *Impp. Diocletianus et Maximianus AA. et CC. Quintiano.* Non iustam te gerere sollicitudinem per fideicommissum relictæ portionis hereditatis perspicimus verentem, ne fructum amittas relictæ fideicommissi, quoniam avia testatoris ex parte scripta heres et tibi rogata restituere calliditate ac fraude repudiavit, ut ad alium nepotem eundemque coheredem devolvatur portio, a quo tibi nominatim non fuerat fideicommissum relictum, et coacta suspectam hereditatem adire, priusquam pro herede gereret, rebus sit humanis exempta: cum

invalid in every way because the actual name of the heir is not given. But not even a legacy left to such persons shall be valid.

28.³²⁰ And (the constitution lays down) that a *tutor* cannot be given to uncertain persons.

29. And (the constitution lays down) that what is left to the poor shall not be deemed uncertain (i.e., as left to uncertain persons).

(528-529).

Forty-Ninth Title The *Senatus Consultum Trebellianum*³²¹

[1] *Emperors SEVERUS and ANTONINUS Augusti to Probus.* If you kept a fourth part of the inheritance in accordance with the decree of the Senate and turned over three-quarters as a trust, you can claim from the trust-beneficiary what you paid to the creditors of the estate that was due on that three-fourths.

Posted March 18, in the consulship of Lateranus and Rufinus (197).

[2] *Emperor PHILIP Augustus and PHILIP Caesar to Julian.* It is undoubted law (*indubitatum ius*) that payment of the debts and legacies associated with an inheritance is the responsibility, in line with the appropriate share, of the person to whom a part of this is turned over, pursuant to the *SC Trebellianum*.

Posted October 15,³²² in the consulship of Peregrinus and Aemilianus (244).

[3] *Emperors CARUS, CARINUS, and NUMERIAN Augusti to Zoticus.* If an inheritance has been left to a town in the form of a trust, you have a claim that a one-quarter share, as well as the income (*fructus*) deriving from it, be turned over to you pursuant to the *SC Trebellianum*, which applies even on intestacy.

Without day and year.

[4]³²³ *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Quintianus.* We discern that you are needlessly concerned over the portion of an inheritance left to you as a trust, since you are worried that you will lose the benefit (*fructus*) from the trust bequeathed to you, because the grandmother of the testator, having been named part-heir and having been requested to turn over (the trust) to you, craftily and fraudulently rejected (her portion) so that it would pass to another grandson, her co-heir, who had not been specifically ordered to pay the trust to you: and when compelled to enter upon

³²⁰ See Inst. 2.2.6.27.

³²¹ See D. 36.1. The *SC Trebellianum*, passed in 56 CE, regulated trusts requiring an heir to turn over an estate to a third party.

³²² The precise day is uncertain: the alternative is October 20.

³²³ Combine with C. 6.26.6.

divo Antonino parenti nostro deberi etiam a substitutis fideicommissum contemplatione iudicii testatoris quasi tacite ab his repetitum iam dudum placuerit. neque enim quartae retentionem, quam illa quae repudiaverit hereditatem, adire coacta suspectam retinere non potuit, timere debes.

S. VI id. Iul. Philippopoli AA. cons.

[5] *Idem AA. et CC. Verissimo. pr.* Et sine scriptura per fideicommissum hereditas recte relinquitur. 1. Igitur si te uxor tua et privignum suum in discrimine mortis constituta designavit velle successionem obtinere, usque ad dodrantem eius voluntatem ratam servari convenit, cum intestato ei succedentes de restituendo fideicommisso conventos ultra quartam (aere alieno deducto), quam penes eos sententia senatus consulti relinqui praecepit, tantum obtinere posse praestiterit.

S. v k. Mai. Sirmi CC. cons.

[6] *Imp. Zeno A. Dioscuro pp. pr.* Iubemus, quotiens pater vel mater, filio seu filiis, filia seu filiabus ex aequis partibus vel inaequis heredibus institutis, invicem seu simpliciter quosdam ex his aut quendam rogaverit, qui prior sine liberis decesserit, portionem hereditatis suae superstiti seu superstitibus restituere, ut modis omnibus retenta quarta pro auctoritate Trebelliani senatus consulti, non per imputationem reddituum, licet hoc testator rogaverit vel iusserit, sed in ipsis rebus hereditariis, dodrans restituatur. 1. Idemque in retinenda legis Falcidiae portione obtinere iubemus, et si pater vel mater filio seu filia institutis (sicut supra dictum est) heredibus rogaverit eos easve nepotibus vel neptibus, pronepotibus vel proneptibus suis ac deinceps restituere hereditatem.

1a. In supra dictis autem casibus fideicommissorum servandorum satisfactionem cessare iubemus, si non specialiter eandem satisfactionem testator exigi disposuerit et cum pater vel mater secundis existimant nuptiis non abstinendum: in his etenim duobus casibus, id est

the inheritance (she claimed was) suspect (of insolvency), but before she took action as heir, she died. (Your concerns are groundless) because Our predecessor (*parens*) the deified Antoninus (Septimius Severus) long ago decided that a trust was owed even by substitute heirs because out of regard for the wishes of the testator it was claimed from them as if implicitly ordered.³¹⁴ Nor ought you to be concerned over the retention of the one-fourth share, which she who had rejected the inheritance, once compelled to enter upon it could not retain, since (she claimed it was) suspect.

Written July 10, at Philippopolis, in the consulship of the Augusti (293).

[5] *The same Augusti and Caesars to Verissimus. pr.* Even without a written document an inheritance is validly bequeathed in the form of a trust. *1.* Therefore if your wife indicated at the time of her death that she wanted you and her stepson to receive the inheritance, it is a settled principle that her wishes shall be confirmed and respected up to the limit of three-quarters, since she brought it about that her intestate successors, responsible for turning over the trust beyond the one-quarter, after deduction of debts, that the rule of the senatorial decree instructs shall be left to them, could only retain so much.

Written April 27, at Sirmium, in the consulship of the Caesars (294).

[6] *Emperor ZENO Augustus to Dioscurus, Praetorian Prefect. pr.* We ordain that, whenever a father or mother has appointed a son or sons, a daughter or daughters heirs for equal or unequal shares and asks certain ones or one among them in turn or unconditionally, should they predecease the others without children of their own, to turn over his or her share of the inheritance to the surviving sibling(s), the one-quarter shall be in every way held back in accordance with authoritative the rule of the *SC Trebellianum* without the accrual of income, even if the testator asked or ordered this, but regarding the very property of the inheritance three-quarters shall be turned over. *1.* We order the same to hold in keeping back the portion (i.e., one-fourth) of the *lex Falcidia*, also if the father or mother has appointed a son or daughter as heir (just as is said above) and asks them to turn over the inheritance to their grandsons or granddaughters, great-grandsons or great-granddaughters, and so on.

1a. In the above-mentioned situations however We order that no security (*satisfactio*) need be given for the purpose of preserving the trusts,³¹⁵ unless the testator has specifically instructed that said security be demanded and when the father or mother believes that they should not refrain from a new marriage.

³¹⁴ This law, actually a rescript of Severus and Caracalla, does not survive, but is cited at Ulp. D. 30.74.

³¹⁵ Blume: "Security was ordinarily required in such cases to insure the fulfillment of the trust, unless the testator directed the contrary."

cum testator specialiter satisfacere voluerit vel cum secundis se pater vel mater matrimoniis iunxerint, necesse est, ut eadem satisfactio pro legum ordine praebetur.

2. Sin autem is, qui fideicommissaria restitutione gravatus est, uno filio superstite vel nepote ex filio seu ex filia nato vel pronepote vel postumo relicto decesserit, non videtur extitisse condicio et ideo deficit fideicommissi petitio.

3. Illud etiam admonemus ea, quae de Falcidiaae portione non per relictum, sed per ipsas res hereditarias retinenda et de satisfactione fideicommissorum (sicut supra dictum est) concedenda diximus, non ulterius quam in his personis et casibus, quorum superius mentio facta est, oportere produci.

PP. k. Sept. Constantinopoli Eusebio cons.

[7] *Imp. Iustinianus A. Iohanni pp. pr.* Sancimus licentiam esse etiam soli tutori recte fieri fideicommissi nomine universitatis restitutionem, quod pupillo relictum est, et sine onere fideiussionis, ubi tamen pupillus dari non possit vel abesse noscitur, ne, dum nimia subtilitate circa res utimur pupillares, ipsa subtilitas ad perniciem eorum revertatur.

1. Idemque iuris esse oportet, et si furioso fideicommissaria debeatur hereditas, ut restitutio curatori eius soli, nomine scilicet furiosi, celebretur. quis enim sensus, quae vox certa furioso esse intellegitur, cum in utroque casu restituentes plenissimam consequantur ex nostra lege securitatem? 1a. Hoc eodem observando, et si ipsi pupilli vel furiosi restitutione gravati sunt.

1b. Cum autem aliquis hereditatem restituere iussus est et dolo malo vel post litem contestatam vel antea sese contumaciter celaverit, vel si suppositus fideicommissariae restitutioni, antequam restitueret hereditatem, ab hac luce subtractus est nullo herede vel successore existente, vel si fideicommissarius, cui restituta est ex Trebelliano hereditas, alii per fideicommissum restituere iussus fuerit res hereditarias: quemadmodum actionum translatio celebretur in tribus istis casibus, apud veteres dubitabatur: et Domitius Ulpianus constituendum esse super his putavit. 1c. Sancimus itaque, ut, sive per contumaciam afuerit is, cui restitutio imposita est, sive morte praeventus nullo relicto successore

For in these two situations, that is, when the testator specifically wishes security be given or when the father or mother enters a subsequent marriage, it is necessary that this security be given in accordance with statutory rules.

2. But if, however, he who has become burdened with the responsibility of turning over the trust dies leaving behind a surviving child, grandchild through a son or a daughter, a great-grandchild, or a posthumous child, the condition is deemed to remain unfulfilled and so the claim on the trust fails.

3. We also make the point that what We have said as to the need to retain for the Falcidian portion not the income but only the property of the inheritance itself, and the need to disallow the giving of security for trusts (as is said above), ought not to be applied any further than in regard to those persons and situations of which mention is made above.

Posted September 1, at Constantinople, in the consulship of Eusebius (489).

[7] *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* We ordain that it shall be permitted lawfully to turn over even to a *tutor* alone an entire inheritance left in the form of a trust, which has been bequeathed to a minor ward, even without the burden of a surety (*fideiussio*), provided nevertheless the ward is not (yet) capable of speech or is known to be abroad. The point is that, while we make too much use of complex rules regarding the property of minor wards, this very complexity not redound to their detriment.

1. And the same rule ought to hold even if the inheritance in the form of a trust is left to a lunatic (*furiosus*), that it be turned over to his *curator* alone, obviously in the name of the lunatic. For what form of comprehension, what sure sense is to be ascribed to a lunatic, when in both situations those making the transfer enjoy a very full protection under Our law? 1a. This same rule shall be observed, even if the minor wards or lunatics have themselves been burdened with the (obligation to make the) transfer.

1b. When, moreover, anyone who has been ordered to turn over an inheritance either after or before joinder of issue obstinately, or through deceit (*dolus malus*), conceals himself, if he who was obligated to turn over the trust, before he transferred the inheritance, has died, leaving no heir or successor on intestacy, or if the trust-beneficiary to whom the inheritance has been turned over pursuant to the *SC Trebellianum* has himself been ordered to turn over to another person as a trust the property in the inheritance, in what way the transfer of actions would take place in these three situations was the object of discussion among the ancients (*veteres*). And Domitius Ulpianus thought that imperial legislation was required on these subjects. 1c. So We lay down that whether the person under an obligation to make the transfer is absent through

fuerit, sive a primo fideicommissario in secundum translatio celebrari iussa est, ipso iure utiles actiones transferantur.

D. x k. Nov. Constantinopoli Lampadio et Oreste vv. cc. cons.

[8] *Idem A. Iohanni pp. pr.* Quidam testamento condito iussit heredem omnem hereditatem quam ei dereliquit alii restituere, speciale autem fideicommissum alteri adscripsit. et quaerebatur, specialis fideicommissarius id quod ei derelictum est a quo consequi debeat, utrumne ab herede, ut post retentionem eius alias res universitatis fideicommissarius accipiat, an una cum aliis rebus oporteat et hoc generali fideicommissario adgregari, ut ipse speciali fideicommissario hoc tradat, sive in rebus sive in pecuniis sit fideicommissum. 1. Sancimus itaque totam quidem substantiam secundum senatus consulti Trebelliani auctoritatem restitui generali fideicommissario, illum autem speciali fideicommissario id quod ei derelictum est dependere.

D. xv k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc. anno secundo.

L Ad Legem Falcidiam

[1] *Impp. Severus et Antoninus AA. Prisco.* Scire debes ommissa Falcidia, quo plenior fidem portionis restituendae exhiberes, non videri plus debito solutum esse.

obstinacy, has died with no successor surviving, or a transfer has been ordered to take place from one trust-beneficiary to another, by the very operation of law analogous actions (*utiles actiones*) shall be transferred.³¹⁶

Given October 23, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).³¹⁷

[8] *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* A certain person made a will and ordered that his heir turn over to another the entire inheritance that he had left to him, but added a particular provision for a trust for yet another person. And it used to be asked from whom the beneficiary of the particular trust ought to receive that which had been bequeathed to him, whether from the heir, so that after its deduction the beneficiary of the general trust receive the other property, or, no matter if the particular trust should consist of property or of cash, this too ought to be bundled together with that other property for the beneficiary of the general trust, so that he himself hand it over to the beneficiary of the particular trust. 1. So We ordain that the entire estate, in fact, in accordance with the authoritative rule of the *SC Trebellianum*, shall be turned over to the beneficiary of the general trust, but that he shall pay out to the beneficiary of the particular trust that which has been bequeathed to the latter.

Given October 18, at Constantinople, in the second post-consulate of the viri clarissimi Lampadius and Orestes (532).

Fiftieth Title On the Lex Falcidia³¹⁸

[1] *Emperors SEVERUS and ANTONINUS Augusti to Priscus.* You ought to know that, having omitted (your claim to) the (one-fourth share provided by the lex) Falcidia, to the extent that you display a fuller faith in restoring the portion

³¹⁶ Blume: "A trust might at times be detrimental rather than beneficial for the *cestui que trust* [i.e., the beneficiary], because of the debts that might be against it. It was therefore doubted whether the guardian of a child unable to speak or absent, or a curator for an insane person, was able to accept the trust for such child or insane person. The doubt was resolved in favor of the proposition, for the reason, as Justinian says, not to give such power would often be detrimental to the ward. The parties required to deliver such trust were accordingly authorized in such cases to turn it over to the guardian or curator, and were, upon such delivery, lawfully released from their obligation."

³¹⁷ The date is uncertain: possibly October 18, 531 (or 532). Lounggis *et al.* give October 18, 531.

³¹⁸ See D. 35.2; Inst. 2.22. The lex Falcidia, enacted in 40 BCE, required that the heirs receive at least one-fourth of the estate of the testator, or that each individual heir receive one-fourth of his or her share. If more was bequeathed in legacies and trusts, such bequests were reduced proportionally so that the heirs would still receive the quarter share of the estate.

PP. III id. Mai. Laterano et Rufino cons.

[2] *Idem AA. Sanctiano.* Falcidiae rationem adversus omnes pro modo legatorum et fideicommissorum locum habere certi et explorati iuris est.
PP. k. Iul. Laterano et Rufino cons.

[3] *Imp. Alexander A. Hermagorae.* Etiam si tacitum fideicommissum heredem administrasse apparuerit, legata tamen seu fideicommissa, quae testamento relicta sunt, praestanda esse ambigi non oportet, ad eum videlicet modum, quem lex Falcidia patitur, cum quartam, quae aufertur heredi, qui contra legem fidem suam obtulit, legatariis proficere non placuit.

PP. id. Oct. Alexandro A. cons.

[4] *Idem A. Philetiano.* Et in legatis principi datis legem Falcidiam locum habere merito divo Hadriano placuit.
PP. v k. Ian. Alexandro A. cons.

[5] *Idem A. Samosatae.* Si mortis causa immodicas donationes in sororem tuam matrem contulisse probare potes, legis Falcidiae ratione secundum constitutionem divi Severi avi mei uti potes.

PP. xv k. Nov. Maximo II et Aeliano cons.

[6] *Idem A. Secundinae.* In ponenda ratione legis Falcidiae omne aes alienum deducitur, etiam quod ipsi heredi mortis tempore debitum fuerit, quamvis additione hereditatis confusae sint actiones. 1. Omnia autem legata, quamvis in operibus publicis conficiendis statuisque ponendis data sint, ad contributionem dodrantis pro rata suae cuiusque quantitatis revocantur. 2. Nec si quid ultro solidum heres praestiterit aut perfecerit, legitimae computationi praeiudicatur.

(bequeathed as legacies), no more than what was owed is deemed to have been paid.³²⁹

Posted March 13, in the consulship of Lateranus and Rufinus (197).

[2] *The same Augusti to Sanctianus.* It is certain and established law that the Falcidian portion applies against everyone in proportion to their legacies and trusts (*fideicommissa*).

Posted July 1, in the consulship of Lateranus and Rufinus (197).

[3] *Emperor ALEXANDER Augustus to Hermagoras.* Even if it appears that the heir has paid out a tacit trust,³²⁰ still it must not be doubted that the legacies or trusts that have been left in the will must be provided, but up to the amount that the *lex Falcidia* allows, since it has been decided that the fourth share, which is taken away from the heir who offered his faith in violation of the law, does not benefit the legatees.³²¹

Posted October 15, in the consulship of Alexander Augustus (222).

[4] *The same Augustus to Philetianus.* It has been rightly decided by the deified Hadrian that the *lex Falcidia* applies even for legacies given to the Emperor.

Posted December 28, in the consulship of Alexander Augustus (222).

[5] *The same Augustus to Samosata.* If you can prove that your mother provided your sister excessive gifts in contemplation of her death, you can use the rule of the *lex Falcidia* in accordance with a constitution of the deified Severus, my grandfather.

Posted October 18, in the consulship of Maximus, for the second time, and Aelianus (223).

[6] *The same Augustus to Secundina. pr.* In applying the rule of the *lex Falcidia*, all debt is deducted, even what is owed to the heir himself at the time of death, although the rights of action when the inheritance is entered are merged. 1. All legacies, however, although they may have been given for building public works or erecting statues, are recalled for the three-fourths limit in proportion to each one's amount. 2. Nor is the lawful computation prejudiced if the heir has offered or performed anything completely of his own accord.

³²⁹ As Blume points out, the heir has followed the instructions of the will and paid legacies in excess of three-fourths of the estate, or of his or her share of the estate. This payment cannot be called back. The mechanism for reducing the legacies came when the heir was sued for the legacies: the heir could oppose a defense, the *exceptio legis Falcidiae*.

³²⁰ A tacit trust was an agreement between the testator and the heir to provide a legacy to a person not capable of receiving it; such a trust was legally void.

³²¹ In some circumstances, as Blume points out, the portion taken from the heir was confiscated by the Treasury.

S. v k. Ian. Maximo II et Aeliano cons.

[7] *Idem A. Pomponio.* In testamento quidem militis ius legis Falcidiae cessat. sed ea, quae ad vos pertinentia defunctus tenuit, bonorum eius videri minime possunt et ideo recte rationem eorum ut aeris alieni haberi desiderabitis.

PP. k. Mai. Alexandro II et Marcello cons.

[8] *Idem A. Aurelio. pr.* Irritum quidem propterea testamentum fratris tui esse non potest, quod ex causa fideicommissi obligatus fuit, ut, si sine liberis prior decederet, paternam tibi hereditatem redderet. 1. Sed licet te heredem scripserit, in ponenda tamen legatorum ratione, quibus te oneratum esse suggeris, fideicommissum debitum aeris alieni loco deduci oportet insuperque in residuo legis Falcidiae beneficium vindicabis.

PP. id. Sept. Maximo II et Paterno cons.

[9] *Imp. Gordianus A. Mestriano.* Error facti quartae ex causa fideicommissi non retentae repetitionem non impedit. is autem, qui sciens se posse retinere universum restituit, conditionem non habet: quin etiam, si ius ignoraverit, cessat repetitio.

PP. xv k. Nov. Pio et Pontiano cons.

[10] *Idem A. Diogenio.* Quamquam pater tuus fratrem tuum rogaverit, ut, si sine liberis diem suum fungeretur, portionem hereditatis tibi restitueret, tamen intestato eodem diem suum functo id, quod beneficio legis Falcidiae habere potuit, ad successorem intestati pertinere ideoque non immerito sororem tuam, quae simul tecum ab intestato ei successit, emolumenti quod retineri potuit portionem sibi vindicare manifestum est.

PP. v id. Nov. Gordiano A. II et Pompeiano cons.

[11] *Idem A. Maximae.* Si, ut adlegas, pater tuus eam portionem, ex qua te fecit heredem, fratribus tuis restituere iussit certisque speciebus pro Falcidia praecepit esse contentam, auxilium legis Falcidiae, quod imploras, apud suum iudicem non prohiberis flagitare.

PP. VII k. Nov. Arriano et Papo cons.

Written December 28, in the consulship of Maximus, for the second time, and Aelianus (223).

[7] *The same Augustus to Pomponius.* In a soldier's will the principle of the *lex Falcidia* is inapplicable. But those things belonging to you (plural) that the decedent held cannot be seen as his part of his estate, and for that reason you will correctly desire that they be reckoned as a debt.

Posted May 1, in the consulship of Alexander, for the second time, and Marcellus (226).

[8] *The same Augustus to Aurelius. pr.* Your brother's will cannot be invalid for the reason that he was obligated on the basis of a trust to restore his inheritance from his father to you if he died first without children. 1. But although he named you as heir, in the calculation of the legacies with which you state that you have been burdened, a trust that he owed must be deducted as a debt, and in addition you will claim the benefit of the *lex Falcidia* for the rest.

Posted September 13, in the consulship of Maximus, for the second time, and Paternus (233).

[9] *Emperor GORDIAN Augustus to Mestrianus.* An error of fact does not impede seeking back the fourth not retained on the basis of a trust. However, a person who turned over the whole property although knowing he could retain it does not have a claim for restitution. Indeed, if he did not know the law, his (right to) reclaim is not applicable.

Posted October 18, in the consulship of Pius and Pontianus (238).

[10] *The same Augustus to Diogenius.* Although your father asked your brother to restore his share of the inheritance to you if he should finish his days without children, nevertheless, when the same person died intestate, it is manifest that what he could have had by the benefit of the *lex Falcidia* goes to his successor on intestacy, and that for that reason your sister, who along with you has succeeded him on intestacy, does not wrongly claim for herself the portion of the gain that could have been retained.

Posted November 9, in the consulship of Gordian Augustus, for the second time, and Pompeianus (241).

[11] *The same Augustus to Maxima.* If, as you allege, your father ordered you to turn over to your brothers the share of which he made you heir and instructed that you be content with certain items (*species*) as the *Falcidian* share, you are not prohibited from demanding before their (*suum*) judge the aid that you implore from the *lex Falcidia*.

Posted October 26, in the consulship of Arrianus and Papus (243).

[12] *Impp. Diocletianus et Maximianus AA. Iustino.* In donationibus inter virum et uxorem factis legem Falcidiam habere locum, quando fideicommissi partibus funguntur, nonnullis iuris placitis comprehensum est.

PP. XVI k. Iul. ipsis AA. IIII et III cons.

[13] *Idem AA. et CC. Zetho. pr.* Si ea, cuius filium tuum servum significas, ex iudicio defuncti, quem dicis fideicommissariam libertatem ei reliquisse, aliquid consecuta est, ad restituendam fideicommissariam libertatem non immerito obnoxia constituta debet urgueri. 1. Nam fideicommissum ei relictum usque ad eum modum potest petere, quod deducto pretio servorum, quos fuerat rogata manumittere, relictorum substantia patitur.

S. v k. Mai. Heracliae AA. cons.

[14] *Idem AA. et CC. Faustinae.* Licet adieris patris hereditatem et confusione pro parte qua eidem successeris extinguatur actio, quam tibi competere eo, quod ex administratione tutelae multa eum debuisse contendis, pro residuis tamen partibus coheredes convenire non prohiberis et fundum a te relictum eatenus, quod deducta quarta residui substantia patitur, praestare necesse habes.

D. VI k. Oct. Viminacii AA. cons.

[15] *Idem AA. et CC. Pomponio.* Si praediorum dotis apud te iure remanentis instrumenta verbis precariis vel testamento vel codicillis uxor tibi dari mandavit, eius iudicium successores implere compellentur, cum instrumentis praediorum domino relictis Falcidiae nulla potest intervenire quaestio.

Supposita XVI k. Febr. Sirmi CC. cons.

[16] *Idem AA. et CC. Diomedi.* Successores legata vel fideicommissa, si aes alienum hereditarium defuncti substantiae fines occupaverit, Falcidiae legis iussio peti, item Trebelliani senatus consulti praeceptum exigere non concedit.

[12] *Emperors DIOCLETIAN and MAXIMIAN to Justin.* It has been understood in several legal decisions that the *lex Falcidia* applies in gifts made between a husband and wife, when they fulfill the function of a trust.

Posted June 16, in the consulship of the Augusti themselves, for the fourth time and for the third time, respectively (290).

[13] *The same Augusti and the Caesars to Zethus. pr.* If that woman, of whom you indicate your son is a slave, has gained something as a result of the judgment of the deceased, who you say left him liberty in a trust (*fideicommissaria libertas*), not incorrectly should she, having been established as liable to do this, be urged to provide the liberty requested in the trust. 1. For he can seek the trust left to her to the extent that the value of the remaining property allows it after deducting the price for the slaves whom she was asked to manumit (consistent with the *lex Falcidia*).

Written May 11, at Heraclea, in the consulship of the Augusti (293).

[14] *The same Augusti and Caesars to Faustina.* Although you have entered upon your share of your father's inheritance and the right of action, which you contend is available to you for the reason that he owed you a great deal as the result of his administration of your tutorship, is extinguished as a result of its merging with the share for which you have succeeded that person, even so you are not prohibited from suing the co-heirs for the remaining shares, and you are required to turn over the farm you were charged to provide to the extent that the value of the remaining inheritance allows after deducting the (Falcidian) fourth part.

Given September 27,³²² at Viminacium, in the consulship of the Augusti (293).

[15] *The same Augusti and Caesars to Pomponius.* If your wife ordered the documents of estates belonging to a dowry lawfully remaining with you to be given to you by a trust directive (*precariis verbis*), or in a will or codicil, her successors will be compelled to implement her decision, since no question of the *lex Falcidia* can intervene when the documents of estates have been left to their owner.

Submitted³²³ January 17, at Sirmium, in the consulship of the Caesars (294).

[16] *The same Augusti and Caesars to Diomedes.* An order based on the *lex Falcidia* does not allow heirs to be petitioned for legacies or trusts, if debt has occupied the limits of the deceased's property, nor does the precept of the *SC Trebellianum*³²⁴ allow them to be exacted.

³²² Mommsen emends the date to August 27, 293. Connolly suggests 294 instead.

³²³ In this and other texts, Krüger replaces *supposita* in the manuscripts with *scripta*, "written."

³²⁴ The *SC Trebellianum* of 56 CE applied the same rules as applied under the civil law to enforce obligations connected with inheritances received through trusts.

S. xvi k. Febr. Sirmi CC. cons.

[17] *Idem AA. et CC. Gaio.* A coheredibus relicta legata, quatenus modus lege Falcidia praestitutus patitur, posse petere certissimi iuris est.

Supposita v k. Nov. Anchiali CC. cons.

[18] *Imp. Iustinianus A. Iohanni pp. pr.* Si quis quadringentorum forte solidorum habens substantiam iusserit heredem non aliter adire hereditatem, nisi prius trecentos octuaginta solidos cuidam persolvat vel aliam quantitatem, quae diminuere Falcidiae rationem potest, sancimus heredem, si adierit, legis Falcidiae beneficio sustentatum repleri quidem quod ad Falcidiam deest, et prius eo dato vel retento (sive una datio est, quae celebrari disposita fuerit, sive in multas dividitur personas) praefatae legis immutatum habere beneficium. 1. Si enim, cum mortis causa donatio procedat et haec modum legis Falcidiae excedat, heres post aditionem repetit eam pecuniam, quae ultra modum Falcidiae corporaliter quidem data est, lege autem in patrimonio testatoris permansit, quare non in praesenti casu et viventibus et morientibus providemus, et eorum ultima elogia conservantes et commodum hereditarium non minuentes?

D. k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[19] *Idem A. Iohanni pp.* Cum certum sit heredem, qui plenam fidem testatori exhibet, in solidum legata dependentem non posse postea rationem legis praetendentem Falcidiae repetitione uti, quia videtur voluntatem testatoris sequi, iubemus hoc simili modo firmum haberi, et si cautionem super integra legatorum solutione fecerit: quod veteribus legibus in ambiguitatem deductum est. in utroque etenim casu, id est sive solverit sive super hoc cautionem fecerit, aequitatis ratio similia suadere videtur.

D. xv k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc. anno secundo.

Submitted January 17, at Sirmium, in the consulship of the Caesars (294).

[17] *The same Augusti and Caesars to Gaius.* It is most certainly the law that one can seek legacies left to be paid by co-heirs to the extent that the limit established by the *lex Falcidia* allows.

Submitted October 28, at Anchiaus, in the consulship of the Caesars (294).

[18] *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* If anyone having property of say 400 solidi orders that the heir enter the inheritance only if he previously pays 380 solidi to some person, or another amount that can reduce the calculation of the Falcidian share, We ordain that the heir, if he enters upon the inheritance, being sustained by the benefit of the *lex Falcidia*, be recompensed as to what is missing for the Falcidian share, and, when this amount has been first given or retained – whether it is one transfer that has been ordered to be performed, or whether it is divided among many persons – he have the benefit of the aforementioned law undiminished. 1. For if, when a gift in anticipation of death should proceed and this exceed the limit of the *lex Falcidia*, the heir, after entering upon the inheritance, seeks the money back that has been physically given in excess of the limit of the *lex Falcidia* but has by law remained in the testator's patrimony, why do We not in the present case provide for both the living and the dead, both preserving the latter group's last pronouncements and not diminishing the advantage of the inheritance?

Given November 1, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[19] *The same Augustus to John, Praetorian Prefect.* Because it is certain that the heir who exhibits complete faithfulness to the testator by paying out the legacies in their entirety is not afterwards able to use the right in the *lex Falcidia* to seek them back by asserting the principle of the law, since he is seen as following the will of the testator, We order that this be considered firm in a similar manner if he has provided a written promise (*cautio*) for the entire payment of the legacies; in the old laws this has been ambiguous. For in each case, that is, whether he pays or provides a promise for this, a consideration of fairness seems to persuade similar solutions.

Given November 1, at Constantinople, in the second post-consulate of the viri clarissimi Lampadius and Orestes (532).

LI De Caducis Tollendis

[1] *Imp. Iustinianus A. senatui urbis Constantinopolitanae et urbis Romae. pr.* Et nomen et materiam caducorum ex bellis ortam et auctam civilibus, quae in se populus Romanus movebat, necessarium duximus, patres conscripti, in pacificis nostri imperii temporibus ab orbe Romano recludere, ut, quod belli calamitas introduxit, hoc pacis lenitas sopiret. 1. Et quemadmodum in multis capitulis lex Papia ab anterioribus principibus emendata fuit et per desuetudinem abolita, ita et a nobis circa caducorum observationem invidiosum suum amittat vigorem, qui et ipsis prudentissimis viris displicuit, multas invenientibus vias, per quas caducum ne fieret. 1a. Sed et ipsis testamentorum conditoribus sic gravissima caducorum observatio visa est, ut et substitutiones introducerent, ne fiant caduca et, si facta sint, apud certas personas recurrere disponent, vias recludentes, quas lex Papia posuit in caducis: quod et nos fieri concedimus. 1b. Et cum lex Papia ius antiquum, quod ante eam in omnibus simpliciter versabatur, suis machinationibus et angustiis circumcludens solis parentibus et liberis testatoris usque ad tertium gradum, si scripti fuerant heredes, suum imponere iugum erubuit ius antiquum intactum eis conservans, nos omnibus nostris subiectis sine differentia personarum concedimus. 1c. Cum igitur materiam et exordium caducorum lex Papia ab additionibus, quae circa defunctorum hereditates procedebant, sumpsit et ideo non a morte testatoris, sed ab apertura tabularum dies cedere legatorum senatus consulta, quae circa legem Papiam introducta sunt, concesserunt, ut, quod in medio deficiat, hoc caducum fiat, primum hoc corrigentes et antiquum statum renovantes sancimus omnes habere licentiam a morte testatoris adire hereditates similique modo legatorum vel fideicommissorum pure vel in diem relictorum diem a morte testatoris cedere.

2. Et cum triplici modo ea, quae in ultimis elogiis relinquuntur, contingebat deficere, consentaneum est et tempora eorum et nomina

Fifty-First Title Abolishing Escheated Property³²⁵

[1] *Emperor JUSTINIAN Augustus to the Senate of the City of Constantinople and of the City of Rome. pr.* We have considered it necessary, Conscript Fathers, to close off from the Roman world, in the peaceful times of Our empire, both the name and the substance of escheated property, which has arisen and been increased as a result of the civil wars that the Roman people waged against itself, so that the gentleness of peace might assuage what the calamity of war has introduced. 1. And just as the *lex Papia*³²⁶ was amended in many chapters by previous emperors and abolished from desuetude, in the same way, in connection with the procedure for escheated property (*caduca*) it should, as a result of Our efforts, lose its invidious vigor, which was not approved of by even the wisest men themselves, who found many ways to avoid property becoming (or being classified as) escheated. 1a. But even to the very writers of wills the procedure for escheated property has been seen to be so profoundly severe that they both include substitutions (for heirs), so that property not become escheated, and, if it has become so, make dispositions for it to return to certain persons, closing off the paths that the *lex Papia* established in the case of escheated property, which We also allow to happen. 1b. And since the *lex Papia*, though hemming in with its technicalities (*machinationes*) and restrictions the ancient law, which before it functioned simply in all matters, blushed to impose its yoke only regarding the ascendants and descendants of the testator up to the third degree, if they had been named as heirs, preserving the ancient law intact for them, We concede it (i.e., the ancient law) to all Our subjects without distinguishing among persons. 1c. Therefore since the *lex Papia* took its material and beginning of escheated property from the entering that proceeded in connection with the inheritances of the deceased, and, for that reason, the decrees of the Senate, which were introduced concerning the *lex Papia*, allowed (the time for) legacies to become due (to be calculated) not from the death of the testator, but from the opening of the will, so that, what might be flawed in the meantime might become escheated, first to correct this and to renew the ancient legal regime We ordain that everyone have permission to enter inheritances from (the time of) the death of the testator, and in a similar fashion that legacies or trusts left unconditionally (*pure*) or for a definite date (*in diem*) become due from the death of the testator.

2. And since it happened that what is left in final dispositions failed in three ways, it is proper (*consentaneum*) to make manifest their times and names, so

³²⁵ This law concerns the status of property bequeathed to people who either were no longer alive at the time of the opening of the will or were not legally entitled to receive it, such as unmarried men and women, who, under the *lex Papia Poppaea* of 9 CE were prohibited from receiving bequests unless they married within 100 days; see Ulpian, *Tit.* 17.1.

³²⁶ The *lex Iulia de maritandis ordinibus* (18 BCE), later amended by the *lex Papia Poppaea*, established penalties in inheritance rights for people who did not marry and/or have children.

manifeste exponere, ut, quod vel tollitur vel reformatur, non sit incognitum. 2a. Ea enim vel his relinquebantur, qui in rerum natura tunc temporis, cum condebantur extrema elogia, non fuerant, forte hoc ignorantibus testatoribus, et ea pro non scripto esse leges existimabant: vel vivo testatore is, qui aliquid ex testamento habuit, post testamentum ab hac luce subtrahebatur, vel ipsum relictum expirabat, forte quadam condicione, sub qua relictum erat, deficiente, quod veteres appellabant in causa caduci: vel mortuo iam testatore hoc quod relictum est deficiebat, quod aperta voce caducum nuncupabatur.

3. In primo itaque ordine, ubi pro non scriptis efficiebantur ea, quae personis iam ante testamentum mortuis testator donasset, statutum fuerat, ut ea omnia maneant apud eos, a quibus fuerant derelicta, nisi vacuatis vel substitutus suppositus vel coniunctus fuerat aggregatus: tunc enim non deficiebant, sed ad illos perveniebant, nullo gravamine nisi perraro in hoc pro non scripto superveniente. 3a. Quod et nostra maiestas quasi antiquae benevolentiae consentaneum et naturali ratione subnixum intactum atque illibatum praecipit custodiri in omne aevum valiturum.

4. Pro secundo vero ordine, in quo ea vertuntur, quae in causa caduci fieri contingebat, vetus ius corrigentes sancimus ea, quae ita evenierint, simili quidem modo manere apud eos, a quibus sunt derelicta, heredes forte vel legatarios vel alios, qui fideicommisso gravari possunt, nisi et in hunc casum vel substitutus vel coniunctus eos antecedit: sed omnes personas, quibus lucrum per hunc ordinem defertur, eas etiam gravamen quod ab initio fuerat complexum omnimodo sentire, sive in dando sit constitutum sive in quibusdam faciendis vel in modo vel condicionis implendae gratia vel alia quacumque via excogitatum. neque enim ferendus est is, qui lucrum quidem amplectitur, onus autem ei adnexum contemnit.

5. In novissimo autem articulo, ubi proprie caduca fiebant, secundum quod praediximus, et clausis tabulis tam existere heredes quam posse adire, sive ex parte sint sive ex asse instituti, censem et dies legatorum et fideicommissorum secundum quod praediximus a morte defuncti cedere: hereditatem etenim, nisi fuerit adita, transmitti nec veteres concedebant nec nos patimur, exceptis videlicet liberorum personis, de quibus Theodosiana lex super huiusmodi causis inducta loquitur: his

that what is removed or reformulated not be unknown. 2a. The laws deemed that those things be treated as not written that were left to those persons who had not been in the nature of things (alive) at that time when the final dispositions were being established, without the testators' perhaps knowing this; or that person, who, when the testator was alive, had something from the will, but after the will (was written), was withdrawn from the light; or the very thing that had been left became invalid, perhaps with some condition failing under which it had been left, which the ancient jurists termed "in the category of escheated property" (*in causa caduci*); or, when the testator was already dead, what was left was invalid (i.e., there were no eligible recipients), which was called escheated in plain terms (*aperta voce*).

3. And so in the first category, when those things were treated as if not written that the testator had given to persons dead before the will (was written), it had been established that all these things remain with those people who had been directed to pay them (*a quibus fuerant derelicta*), unless a substitute had been provided for the persons who were missing (*vacuatis*) or a co-recipient had been joined; for then they were not failing, but were passing to those people, with only a quite rare impediment arising to treat this as not written. 3a. Our Majesty instructs that this too be maintained intact and uncompromised, as it is consistent with ancient benevolence and supported by natural reason, to remain valid into every age.

4. But for the second category, in which those things are involved that happened to be in the category of escheated property, to correct the old law We ordain that what winds up in this situation remain similarly with those people directed to pay them, whether perhaps heirs, legatees, or others who can be burdened with a trust, unless either a substitute or co-recipient should have precedence over them in this circumstance. But all persons to whom a gain (*lucrum*) is brought through this category should perceive in every way the burden that had been included from the beginning, whether this was constituted in giving, performing some actions, in a duty (*modus*), or devised to fulfill some purpose (*condicio*) or in any other way. Nor is the person to be tolerated who embraces the gain but scorns the burden connected with it.

5. However, in the last case, in which property actually becomes escheated, We decree that while the wills remain closed the heirs can exist and be able to enter the inheritance, whether they have been appointed to part of it or to the entire estate, and that the due date for legacies and trusts proceed from the death of the deceased, in accordance with what We have pronounced. But neither the ancient jurists permitted nor do We allow the inheritance, unless it has been entered, to be transmitted, except clearly in the case of the persons of

nihilo minus, quae super his, qui deliberantes ab hac luce migrant, a nobis constituta sunt, in suo robore mansuris.

6. Libertatibus procul dubio et post praesentem sanctionem propter sui naturam, quae aditionem heredis expectat, ab adita hereditate una cum aliis, quae servis in testamento manumissis vel aliis legatis relicta sunt, competentibus. 6a. Excepto etiam usu fructu, qui sui natura ad heredes legatarii transmitti non patitur et neque a morte testatoris neque ab adita hereditate, quantum ad transmissionem, dies eius cedit. 6b. Sed haec quidem omnia in his observari sancimus secundum praefatam dispositionem, quae pure vel in diem certum relicta fuerint.

7. Sin autem aliquid sub condicione relinquatur vel casuali vel potestativa vel mixta, quarum eventus ex fortuna vel ex honoratae personae voluntate vel ex utroque pendeat, vel sub incerta die, expectare oportet condicionis eventum, sub qua fuerit derelictum, vel diem, ut tunc cedat, cum vel condicio impleatur vel dies incertus extiterit. quod si in medio is, qui ex testamento lucrum sortitus est, decedat vel eo superstitute condicio defecerit, hoc, quod ideo non praevaluit, manere disponimus simili modo apud eos, a quibus relictum est, nisi et hic vel substitutus relictum accipiat vel coniunctus sive heres sive legatarius hoc sibi adquirat, cum certi iuris sit et in institutionibus et legatis et fideicommissis et mortis causa donationibus posse substitui.

8. Sed ut manifestetur, pro qua parte manere oportet hoc, quod fuerit defectum, apud eos, ex quibus sit derelictum, sancimus, si quidem ad heredes lucrum perveniat, pro parte hereditaria fieri eius distributionem, cum et ab ipsis simili modo, si valuisset, praestaretur, nisi nominatim ab uno vel ex certis heredibus fuerat relictum: tunc enim, quemadmodum solus vel soli praestabant, ita et lucrum sentiant. 8a. Sin autem legatarii vel fideicommissarii sint vel mortis causa donatione honorati vel alia forte persona, quae fideicommisso praegravari potest, et hoc evanescat, manere hoc apud enumeratas personas sancimus pro virili omnimodo portione, id est pro numero personarum.

children, about whom the Theodosian law,³²⁷ which was introduced concerning such cases, speaks. The measures that have been established by Us concerning those persons who migrate from this light while deliberating (whether or not to accept an inheritance), will no less remain in force.

6. Awards of liberty become valid without doubt even after the present ordinance on account of their nature, which awaits entering (of the inheritance) by the heir, together with, from the time of the entering upon the inheritance, the other things that have been left to slaves manumitted in the will or left as legacies to others. 6a. An exception is made for usufruct, which by its own nature does not allow itself to be transmitted to the heirs of the legatee and becomes due (*dies eius cedit*), as far as its transmittal is concerned, neither from the testator's death nor from the entering into of the inheritance. 6b. But We ordain that all of these provisions be observed in accordance with the aforesaid disposition in those things that have been bequeathed unconditionally or for a definite time.

7. If, however, something should be left under a condition, either one depending on chance or power (*potestativa*) or a mixture of both, the outcome of which depends on fortune or on the will of the person honored or on both, or to become due on an uncertain day, one must await the outcome of the condition under which the bequest was made or the day, that it might then become due when either the condition should be fulfilled or the uncertain day should emerge. But if in the mean time the person should die who has acquired a gain from the will, or if while he is alive the condition fails, We dispose that what for that reason did not prevail shall remain in a similar manner with those who were charged to pay it, unless indeed this person or the substitute should accept the bequest, or a joint beneficiary (*coniunctus*), whether heir or a legatee, should acquire this for himself, since it is certain law that substitutions can be made in the appointment of heirs, in legacies, in trusts, and in gifts in anticipation of death.

8. But so that it might be made clear in what portion what had failed must remain with those who were charged to pay, We ordain, if indeed gain should accrue to the heirs, its distribution should take place in accordance with shares of the inheritance, since it was to be provided in a similar manner, if it had been valid, by these very people, unless it had been charged specifically to one or to certain heirs; for in that situation, an individual or individuals would feel the gain in the same measure as they used to provide it by themselves. 8a. But if there are legatees or trustees or people honored by a gift in anticipation of death or perhaps another person who can be burdened by a trust, and this disappears, We ordain that this remain with the enumerated persons completely in accordance with their full portion (*pro virili omnimodo portione*), that is, in accordance with the number of the persons.

³²⁷ C. 6.52.1.

9. Ne autem hoc, quod non ineleganter summi ingenii vir Ulpianus in hac parte cum omni subtilitate disposuit, praetereatur, nostra sanctione hoc apertius inducimus. 9a. Cum enim iam statuimus haec cum suis oneribus ad eum qui lucretur pervenire, sancimus, si quidem condicio vel aliud gravamen in dando sit constitutum, hoc omnimodo lucrantes pro modo lucri agnoscere. 9b. Sin autem in faciendo aliquid impositum est, si quidem hoc et per alium impleri possit, simili modo et a lucrante agnoscere, puta si honorata persona iubeatur insulam vel monumentum vel aliud tale suis sumptibus facere vel heredi vel legatario vel alii forte, quem testator voluerit, vel rem ab herede testatoris emere vel locationem vel fideiussionem subire, et si quid huiusmodi facti simile sit: nihil etenim refert, sive per eum, de quo testator locutus est, sive per alium eiusdem lucri successorem adimpleatur. 9c. Sin vero talis est verborum conceptio et facti natura, ut quod relictum est ab alio adimpleri non possit, tunc, etsi lucrum ad aliquem pervenerit, non tamen et gravamen sequi, quia hoc neque ipsa natura concedit neque testator voluerit. quid enim, si iusserit eum in locum certum abire vel liberalibus studiis imbui vel domum suis manibus extruere vel pingere vel uxorem ducere? Quae omnia testatoris voluntas in ipsius solius persona intellegitur conclusisse, cui et suam munificentiam relinquebat. 9d. In omnibus videlicet hoc obtinente, ut pro simili parte et lucrum sentiant et gravamen, ubi hoc possit procedere, subeant. 9e. Et hoc locum habere omni quidem modo in his, quae in causa caduci vel caduca secundum quod supra dictum est fiebant: in pro non scriptis autem non omnibus, sed quibusdam, quia eorum quaedam, etsi talia sunt, tamen cum suo onere veniebant, quae et nos in novi iuris compositione specialiter enumerari iussimus, ne quis veteris iuris prolixitatem quasi rebus necessariam vel pro eorum revolvat scientia.

10. His ita definitis, cum in superiore parte nostrae sanctionis in plurimis locis coniuncti fecimus mentionem, necessarium esse duximus omnem inspectionem huiusmodi articuli latius et cum subtiliore tractatu dirimere, ut sit omnibus et hoc apertissime constitutum. 10a. Non enim tantum coniunctivo modo quaedam relinquuntur, sed etiam disiunctivo. in his itaque, si quidem coheredes sunt omnes coniunctim vel omnes disiunctim et vel instituti vel substituti, hoc, quod fuerit quoquo modo vacuatum, si in parte hereditatis vel partibus consistat,

9. Lest, however, something be passed over which Ulpian, a man of the highest genius, not inelegantly arranged with all subtlety in this connection, by Our sanction We introduce this more openly. 9a. For since We have already established that these things with their burdens pass to the person who gains, We ordain, that if there is a condition or another obligation (*gravamen*) has been constituted in giving, those who gain must acknowledge this in proportion to their gain. 9b. If, however, something has been imposed in performing, if this can also be fulfilled through another, it shall be acknowledged by the one who gains, say if the person honored should be ordered to build a block of apartments (*insula*) or a tomb or some other such thing at his own expense for the heir or a legatee or perhaps another person whom the testator wishes, or to purchase an item from the heir of the testator or to undertake a lease or a suretyship, or if there should be anything similar to such an act; for it does not make any difference whether it should be fulfilled through the person about whom the testator spoke or another who is successor to the same gain. 9c. But if the composition of the words and the nature of the fact are of such a kind that what has been charged cannot be fulfilled by another, then, even if the gain passes to someone, even so the burden does not also follow, since the nature (of the matter) itself does not allow this and the testator did not wish it. For what if he ordered him to go away to a certain place or to be imbued with liberal studies or to build a house with his own hands or to paint or to take a wife? The testator's will is understood to have confined all of these things solely in the person of the very one to whom he also was bequeathing his munificence. 9d. But in all situations the specific rule obtains that they both feel the gain and undergo the burden in similar proportions, when this should be able to proceed. 9e. And this applies in every way in these cases that become the equivalent of escheated property or escheated property proper in accordance with what was said above: however, (this does) not (apply) in all those situations treated as if they had not been written, but in some, since certain of them, even if they are of such a kind, nevertheless would come with their own burden. We have ordered these to be enumerated specifically in the new arrangement of the law, lest anyone reintroduce the prolixity of the old law as though necessary in practice or consistent with his knowledge of these things.

10. Having made such definitions, since in the earlier part of Our sanction We have made mention in several places of a joint beneficiary (*coniunctus*), We have considered it necessary to distinguish more broadly and with a subtler treatment every theory of this category, so that this be as openly established as possible for everyone. 10a. For some things are bequeathed not only in a joint manner, but also in a divided one (*disiunctivo*). Thus in these cases, if the co-heirs have all been appointed or substituted jointly or separately, what has lapsed (*vacuatum*) in any way, if it should consist in a share or shares of the

aliis coheredibus cum suo gravamine pro hereditaria parte, etiamsi iam defuncti sunt, adquiratur. 10b. Et hoc et nolentibus ipso iure adcreseat, si suas portiones iam agnoverint, cum sit absurdum eiusdem hereditatis partem quidem agnoscere, partem vero respuere, secundum quod et in divinis nostri numinis decisionibus statutum est. 10c. Sin vero quidam ex heredibus institutis vel substitutis permixti sunt et alii coniunctim alii disiunctim nuncupati sunt, si quidem ex coniunctis aliquis deficiat, hoc omnimodo ad solos coniunctos cum suo veniat onere, id est pro parte hereditatis, quae ad eos pervenit. 10d. Sin autem ex his, qui disiunctim scripti sunt, aliquis evanescat, hoc non ad solos disiunctos, sed ad omnes tam coniunctos quam disiunctos similiter cum suo onere pro portione hereditatis perveniat. 10e. Haec ita tam varie, quia coniuncti quidem propter unitatem sermonis quasi in unum corpus redacti sunt et partem coniunctorum sibi heredum quasi suam praeoccupant, disiuncti vero ab ipso testatoris sermone apertissime sunt discreti et suum quidem habent, alienum autem non soli appetunt, sed cum omnibus suis coheredibus accipiunt. et haec in heredibus tantummodo statuenda sunt.

11. Ubi autem legatarii vel fideicommissarii duo forte vel plures sunt, quibus aliquid relictum sit, si quidem coniunctim hoc relinquatur et omnes veniant ad legatum, pro sua portione quisque hoc habeat. 11a. Sin vero pars quaedam ex his deficiat, eam omnibus, si habere maluerint, pro virili portione cum omni suo onere adcrecere vel, si omnes noluerint, tunc apud eos remanere, a quibus derelictum est: cum vero quidam voluerint, quidam noluerint, volentibus solummodo id totum accedere. 11b. Sin autem disiunctim fuerit relictum, si quidem omnes hoc accipere et potuerint et maluerint, suam quisque partem pro virili portione accipiat et non sibi blandiantur, ut unus quidem rem, alii autem singuli solidam eius rei aestimationem accipere desiderent, cum huiusmodi legatariorum avaritiam antiquitas varia mente suscepit, in uno tantummodo genere legati eam accipiens, in aliis respuendam esse existimans, nos autem omnimodo repellimus, unam omnibus naturam legatis et fideicommissis imponentes et antiquam dissonantiam in unam trahentes concordiam. 11c. Haec autem ita fieri sancimus, nisi testator apertissime et expressim disposuerit, ut uni quidem res solida, aliis autem aestimatio rei singulis in solidum praestetur. 11d. Sin vero non omnes legatarii, quibus separatim res relictæ sit, in eius acquisitionem concurrant, sed unus forte eam accipiat, haec solida eius sit, quia sermo testatoris omnibus prima facie solidum adsignare videtur, aliis

inheritance, shall be acquired for the other co-heirs with its burden in proportion to their share of the inheritance, even if they are already deceased. 10b. And by operation of law this shall accrue to them even if they are unwilling, if they have already acknowledged their portions, since it is absurd to acknowledge one part of an inheritance but to scorn another, in accordance with what also is established in the divine decisions of Our Divine Majesty.³²⁸ 10c. But if some of those who are appointed or substituted as heirs are mixed and some have been named jointly and others separately (*disiunctim*), if someone from the joint heirs should be lacking, this (i.e., this person's share) shall in every case come with its burden only to the other joint heirs, that is, in proportion to the share of the inheritance that passes to them. 10d. But if someone of those who have been named separately should disappear, this shall pass not only to the heirs named separately, but to all the heirs, both the joint ones as well as the separate ones in a similar manner along with its burden in proportion to the share of the inheritance. 10e. These quite varying dispositions exist, since the joint heirs have been brought together as if into one body on account of the unity of language and they take up the share of their joint heirs as if it were their own, while the separate heirs have been most openly distinguished by the testator's very words and have their own property but do not by themselves seek the property belonging to others, but they receive it with all their co-heirs. And these measures are to be established only for heirs.

11. When, however, there are by chance two or more legatees or trust beneficiaries to whom something has been bequeathed, if this should be bequeathed jointly and all come to the legacy, each one shall have this in accordance with his share. 11a. But if some share from these should lapse, it accrues to all, if they prefer to have it, in a full share with its burden, or, if all of them refuse it, then it remains with those who have been directed to pay it. But if some want it and others do not, the entire thing passes only to those wanting it. 11b. But if the bequest has been made separately, if all are able to and prefer to accept this, each one shall accept his share in a full portion and not fancy that one might desire to receive the property, but others individually its entire appraised value, since antiquity treated the avarice of such legatees with varying attitudes, accepting it in just one type of legacy, but in others judging that it is to be scorned. We, however, reject it altogether, imposing one nature on all legacies and trusts and bringing the ancient dissonance into a single concord. 11c. We ordain that these rules abide, unless the testator most openly and expressly provides that one person be provided the property in its entirety and the others individually (their share of the) full appraised value of the property. 11d. But if not all the legatees to whom property has been bequeathed individually concur in acquiring it

³²⁸ C. 6.30.20.

supervenientibus partem a priore abstrahentibus, ut ex aliorum quidem concursu prioris legatum minuatur, sin vero nemo alius veniat vel venire potuerit, tunc non vacuatur pars quae defecit nec alii ad crescit, ut eius qui primus accepit legatum augere videatur, sed apud ipsum qui habet solida res maneat nullius concursu deminuta. 11e. Et ideo si onus fuerit in personam eius, apud quem remanet legatum, adscriptum, hoc omnimodo adimpleat, ut voluntati testatoris pareatur. 11f. Sin autem ad deficientis personam onus fuerit collatum, hoc non sentiat is, qui non alienum, sed suum legatum imminutum habet. 11g. Et varietatis non in occulto sit ratio, cum ideo videtur testator disiunctim haec reliquisse, ut unusquisque suum onus, non alienum agnoscat. nam si contrarium volebat, nulla erat difficultas coniunctim ea disponere.

12. Quae autem antiquis legibus dicta sunt de his quae ut indignis auferuntur, et nos simili modo intacta servamus, sive in nostrum fiscum sive in alias personas perveniant. 13. Cum autem in superiore parte legis non aditam hereditatem minime quibusdam personis^{xiii} ad heredes transmitti disposuimus, necesse est, si quis solidam hereditatem non adierit, hanc, si quidem habeat substitutum, ad eum, si voluerit et potuerit, pervenire. quod si hoc non sit, vel ab intestato successores eam accipiant vel, si nulli sint vel accipere nolunt vel aliquo modo non capiant, tunc ad nostrum aerarium devolvatur.

14. Haec autem omnia locum habere censemus tam in testamentis sive scriptis sive sine scriptis habitis quam in codicillis et omni ultimo elogio vel si quid ab intestato fuerit derelictum nec non in mortis causa donationibus. 14a. Tantum etenim nobis superest clementiae, quod scientes etiam fiscum nostrum ultimum ad caducorum vindicationem vocari, tamen nec illi pepercimus nec Augustum privilegium exercemus, sed quod communiter omnibus prodest, hoc rei privatae nostrae utilitati praefendum esse censemus, nostrum esse proprium subiectorum commodum imperialiter existimantes.

15. Locum autem huic legi constituimus in his defunctorum elogiis, quae posthac composita fuerint: anteriores etenim casus suo Marte

^{xiii} <exceptis>

(i.e., the lapsed portion), but one perhaps should accept it, the entire property shall be his, since the testator's words are seen, *prima facie*, to assign it in its entirety to everyone, as others supervene and take part from a previous legatee, so that the legacy of a prior legatee is diminished by the addition (*concursum*) of others. But if no one else should come or can come (to accept the lapsed portion of the legacy or trust), then the share that has lapsed is not vacated, nor does it accrue to another, so that the portion of the person who first accepted the legacy increase, but the property in its entirety should remain with the very person who has it undiminished by the introduction of anyone else. 11e. And for that reason if the burden is ascribed to the person of the one with whom the legacy remains, he shall fulfill this completely so that the wish of the testator be obeyed. 11f. But if the burden has passed to the person of one whose right has lapsed, that person shall not feel it who does not have another's legacy, but his own undiminished. 11g. And the reason for the variation should not be hidden, since the testator is seen to have bequeathed these things separately for this reason, that each one acknowledge his own burden and not that of another. For if he wanted the contrary, there was no difficulty in making joint dispositions.

12. As to those provisions that are mentioned in the ancient laws concerning those things that are taken away from beneficiaries because they are deemed unworthy, We also maintain them untouched in a similar fashion, whether they should come to Our Treasury or to other persons. 13. Since, however, in an earlier part of the law (section 5) We have disposed that an inheritance not entered is not transmitted to the heirs, with the exception of certain persons, it is necessary, if someone does not enter an inheritance in its entirety, that this pass to a substitute, if he indeed has one, if he wishes and is able (to enter the inheritance). But if this should not be the case, either the heirs on intestacy shall receive it, or, if there should be no heirs or if they are unwilling to accept it or in some way should not receive, then it shall devolve to Our Treasury (*aerarium*).

14. We decree that these measures apply both in the case of wills, whether written or produced without writing, and in codicils and in every final expression (*elogium*), or if something has been bequeathed by an intestate person, as well as in gifts in anticipation of death. 14a. For We have such an abundance of clemency, because, although We know that Our Treasury is in the final instance called to claim escheated property, even so We have not spared it and do not exercise Our August privilege, but We decree that what benefits everyone in common is preferable to the interest of Our Privy Purse, judging, in Our imperial power, that the benefit of Our subjects is Our own affair.

15. However, We establish a place for this law in those expressions (*elogia*) of deceased persons that are composed henceforth; We allow earlier cases to be disposed on their own strength. 16. We have considered that all these

discurrere concedimus. 16. Haec omnia ad vos, patres conscripti, duximus esse sancienda, ut nemini maneat incognitus nostrae benivolentiae labor, sed edictis ex sollemnitate a nostris magistratibus propositis omnibus innotescat.

D. k. Iun. Constantinopoli dn. Iustiniano pp. A. IIII et Paulino vc. cons.

LII De His Qui Ante Apertas Tabulas Hereditates Transmittunt

[1] *Impp. Theodosius et Valentinianus AA. Hormisdæ pp.* Per hanc iubemus sanctionem in posterum filios seu filias, nepotes aut neptes, pronepotes aut proneptes a patre vel a matre, avo vel avia, proavo vel proavia scriptos heredes, licet non sint invicem substituti, seu cum extraneis seu soli sint instituti et ante apertas tabulas defuncti, sive se noverint scriptos heredes sive ignoraverint, in liberos suos, cuiuscumque sint sexus vel gradus, derelictam sibi hereditariam portionem posse transmittere memoratasque personas, si tamen hereditatem non recusant, nulla huiusmodi praescriptione obstante sibi tamquam debitam vindicare: quod scilicet etiam super legatis seu fideicommissis a patre vel matre, avo vel avia, proavo vel proavia derelictis locum habet: si quidem perindignum est fortuitas ob causas vel casus humanos nepotes aut neptes, pronepotes aut proneptes avita vel proavita successione fraudari aliosque adversus avitum vel proavitum desiderium vel institutum insperato legati commodo vel hereditatis gaudere. habeant vero solacium tristitiae suae, quibus est merito consulendum.

D. III non. April. post consulatum Protogenis et Asterii.

LIII Quando Dies Legati vel Fideicommissi Cedit

[1] *Impp. Severus et Antoninus AA. Agrippae.* Si competenti iudici annua legata vel fideicommissa tibi relicta probaveris, ab initio cuiusque anni exigendi ea habebis facultatem.

things must be ordained before you, Conscript Fathers, so that the labor of Our benevolence not be unknown to anyone, but so that it become known to everyone in the edicts formally published by Our magistrates.

Given June 1, at Constantinople, in the consulship of Our Lord Justinian, Ever Augustus, (Consul) for the fourth time, and the vir clarissimus Paulinus (534).

Fifty-Second Title Those Who Transmit Inheritances before the Opening of the Will

[1] *Emperors THEODOSIUS and VALENTINIAN Augusti to Hormisdas, Praetorian Prefect.* Through this ordinance We command that, in the future, sons or daughters, grandsons or granddaughters, or great-grandsons or great-granddaughters, by the father or mother, the grandfather or grandmother, or the great-grandfather or great-grandmother, who have been named as heirs, although they have not been substituted for one another, whether they have been appointed either with external heirs or by themselves, can, even before the opening of the will of the deceased, whether or not they know that they were named as heirs, transmit the portion of an inheritance left to themselves to their children, of whichever sex or degree they are, and that the aforementioned persons, as long as they do not refuse the inheritance — no prescription preventing them — shall claim it for themselves as if owed. This measure also applies to legacies and trusts left by the father or mother, grandfather or grandmother, or the great-grandfather or great-grandmother, if indeed (*si quidem*) it is quite unworthy that grandsons or granddaughters, or great-grandsons or great-granddaughters be deprived of their succession to the estate of a grandparent or great-grandparent because of chance causes or human tragedies, and that others against the wishes or arrangement of the grandparent or great-grandparent rejoice in the unexpected benefit of a legacy or inheritance. Indeed those whose interests deservedly are to be consulted should have a solace for their sadness.

Given April 3, in the post-consulate of Protogenes and Asterius (450).

Fifty-Third Title When a Legacy or Trust Falls Due³²⁹

[1] *Emperors SEVERUS and ANTONINUS Augusti to Agrippa.* If you prove to the appropriate judge that annuities have been left to you as legacies or trusts (*fideicommissa*), you will have the right (*facultas*) to exact them at the beginning of each year.

³²⁹ See D. 36.2.

Supposita III k. Iun. Saturnino et Gallo cons.

[2] *Idem AA. Prisco.* Agrum pluribus relictum nominatim animadvertimus et cautum, ut ad eum qui supervixisset res pertineret, quicumque igitur is fuit, ad heredem suum dominium transmisit nec tali fideicommisso adstringitur.

PP. xv k. Aug. Cilone et Libone cons.

[3] *Idem AA. Aeliae.* Si Pontianilla pervenit ad eam aetatem, cui legatum aut fideicommissum delatum erat, petitionem ad heredes transmisit, licet ante decesserit, quam consequeretur legatum vel fideicommissum.

PP. v k. Aug. Cilone et Libone cons.

[4] *Idem AA. Ammiae.* Cum uxori usus fructus fundi legatur et eius proprietas, cum liberos habuerit, nato filio statim proprietatis legati dies cedit nec quicquam obest, si is decedat.

PP. k. Aug. Antonino A. III et Geta item IIII cons.

[5] *Imp. Alexander A. Maximo. pr.* Ex his verbis: 'do lego Aeliae Severinae filiae et Secundae decem, quae legata accipere debebit, cum ad legitimum statum pervenerit', non condicio fideicommisso vel legato inserta, sed petitio in tempus legitimae aetatis dilata videtur. 1. Et ideo si Aelia Severina filia testatoris, cui legatum relictum est, die legati cedente vita functa est, ad heredem suum actionem transmisit, scilicet ut eo tempore solutio fiat, quo Severina, si rebus humanis subtracta non fuisset, vicesimum quintum annum aetatis impleret. 2. Non coeptum enim annum, sed impletum, si de emolumento relictii fideicommissi tractetur, expectandum esse prudentibus placuit.

PP. XIII k. Ian. Alexandro A. II et Marcello cons.

[6] *Imp. Diocletianus et Maximianus AA. et CC. Eusebio.* Si fideicommissum ab intestato fuerit sorori tuae relictum codicillis et, posteaquam dies fideicommissi cessit, ignorans fideicommissum decessit, actionem

Submitted³³⁰ May 30, in the consulship of Saturninus and Gallus (198).

[2] *The same Augusti to Priscus.* We note that a farm was left to several people by name and that it was promised that the property go to the one who had survived (i.e., the last survivor). Therefore whoever this was has transmitted ownership to his heir and is not bound by such a trust.

Posted July 18, in the consulship of Cilo and Libo (204).

[3] *The same Augusti to Aelia.* If Pontianilla has reached that age at which a legacy or trust had been provided, she has transmitted the claim to her heirs, although she died before she gained the legacy or trust.

Posted July 28, in the consulship of Cilo and Libo (204).

[4] *The same Augusti to Ammia.* Since the usufruct of a farm is bequeathed in legacy to a wife as well as its ownership, when she has children, the legacy of its ownership becomes due immediately when a son is born and there is no obstacle if he should die.

Posted August 1, in the consulship of Antoninus Augustus, for the third time, and also Geta, for the third time (208).³³¹

[5] *Emperor ALEXANDER Augustus to Maximus. pr.* From these words, "I give and bequeath to Aelia Severina my daughter and to Secunda³³² ten, which legacy she will be obliged to accept when she reaches lawful status," a condition is not deemed to be inserted into the trust or legacy, but the claim to be delayed until the time of her lawful age. 1. And for that reason if Aelia Severina, the testator's daughter, to whom the legacy was left, has died on the day when the legacy falls due, she has transmitted her claim to her heir, that is to say, that the payment occur at that time when Severina, if she had not been removed from human affairs, would complete her twenty-fifth year of life. 2. It was decided by the authorities (*prudentes*) that the beginning of the year was not to be awaited, but its completion, if it was a question of a payment for a trust that has been left.

Posted December 20, in the consulship of Alexander Augustus, for the second time, and Marcellus (226).

[6]³³³ *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Eusebius.* If a trust was left on intestacy to your sister in codicils and, after the

³³⁰ Krüger: "Written."

³³¹ In 208 Geta was Consul for the second time.

³³² Mommsen conjectures "... my daughter from Secunda" (*filiae e Secunda*).

³³³ Combine with C. 2.3.21, 6.30.7, which have the place as Thirallus.

huiusmodi adquiri potuisse dissimulare non potueris, salva scilicet ab intestato succedenti quarta portione.

Supposita k. Mai. Trallis AA. cons.

**LIIII Ut in Possessionem Legatorum vel Fideicommissorum
Servandorum Causa Mittatur et Quando Satisfari Debet**

[1] *Divus Pius Salvio.* Quoniam nihil actor amplius postulat, quam ut fideicommissi nomine satisfidetur, non debet is qui iuri dicendo praest subtile cognoscere, debetur nec ne fideicommissum, sed tantum decernere, ut satisfidetur.

Sine die et consule.

[2] *Divus Marcus Stratonicae.* Ipsi rerum experimentis cognovimus ad publicam utilitatem pertinere, ut satisfidationes, quae voluntatis defunctorum tuendae gratia in legatis, item fideicommissis inductae sunt, eorundem voluntate remitti possint. quocumque enim indicio voluntatis cautio legati seu fideicommissi remitti potest.

Sine die et consule.

[3] *Impp. Severus et Antoninus AA. Symphoro.* Si, postquam servandi legati seu fideicommissi gratia in possessionem inductus es, pignoris obligatio aut venditio ab herede intervenit, praecedere causam tuam, quam iure praetorio velut pignus habuisti, manifestum est.

PP. XI k. Dec. Dextro et Prisco cons.

[4] *Idem AA. Protagorae. pr.* Cum Artemidoram patri pupillorum tuorum heredem extitisse proponas, quamvis, ut fideicommissam hereditatem his cum moreretur restitueret, petita sit, nullam tamen adversus debitores hereditarios habent pupilli tui actionem. 1. Plane ut satis fideicommissorum Artemidora det, si modo testator id fieri non prohibuerit, apud suum iudicem conveni.

PP. III k. Iul. Laeto II et Cereale cons.

[5] *Imp. Alexander A. Paulinae.* Qui legati sive fideicommissi causa in possessionem mittuntur, non proprietatem nanciscuntur, sed ius

trust fell due, she died unaware of it, you could not hide that a claim for such (a trust) could have been acquired, of course without prejudice to the fourth share for the one succeeding on intestacy.

Submitted May 1, at Tralles, in the consulship of the Augusti (293).

Fifty-Fourth Title That One Be Sent in Possession To Preserve Legacies or Trusts, and When Security Should be Given³³⁴

[1] *The Deified (ANTONINUS) PIUS to Salvius.* Since the plaintiff is not asking anything more than that security be given for a trust, the person who is in charge of pronouncing judgment should not investigate subtly whether a trust is owed or not, but simply determine that security be given.

Without day and consul.

[2] *The Deified MARCUS to Stratonica.* We have learned by our very experience of affairs that it is a matter of public utility that security that has been provided in legacies as well as in trusts in order to protect the wish of the deceased can be remitted by the wish of the same persons. For by any indication of a wish the guarantee (*cautio*) for a legacy or a trust can be remitted.

Without day and consul.

[3] *Emperors SEVERUS and ANTONINUS Augusti to Symphorus.* If, after you have been brought into possession (of the inherited property) in order to preserve a legacy or a trust, the obligating of a pledge or a sale by the heir intervenes, it is manifest that your claim takes precedence, which under Praetorian law you have as a sort of pledge.

Posted November 21, in the consulship of Dexter and Priscus (196).

[4] *The same Augusti³³⁵ to Protagoras. pr.* Since you propose that Artemidora is the heir of the father of your wards, although she has been asked in a trust to restore the inheritance to them when she dies, even so your wards have no claim against debtors of the estate. 1. Of course, sue Artemidora before her judge so that she provide security for the trusts, as long as the testator did not prohibit this from happening.

Posted June 29, in the consulship of Laetus, for the second time, and Cerealis (215).

[5] *Emperor ALEXANDER Augustus to Paulina.* Those who are sent in possession for the sake of a legacy or trust do not acquire ownership but a right of pledge.

³³⁴ See D. 36.3.4. Under certain circumstances the beneficiary of a legacy or trust could be put into possession of the inherited property to enforce payment (Blume).

³³⁵ The emperor should be Antoninus Augustus (Caracalla).

pignoris. ut autem et post acceptum pignus satisfiat defuncti voluntati, competens iudex te adeunte providebit.

PP. III id. Aug. Iuliano et Crispino cons.

[6] *Idem A. Donato.* Certa est forma iurisdictionis, qua fideicommissi servandi causa in possessionem rerum, quae in causa hereditaria sunt aut dolo malo esse desierint, is, cui legati vel fideicommissi nomine satis non datur, mittitur vel in proprias res heredis, si fideicommisso satis non fit post sex menses, quam peti coeperit, secundum divi Antonini patris mei constitutionem.

PP. VI id. Ian. Fusco II et Dextro cons.

[7] *Idem A. Proculiano.* Scire debetis fideicommissi quidem et legati satisfactionem remitti posse divum Marcum et divum Commodum constituisse: ut autem boni viri arbitrato is, cui usus fructus relictus est, utatur fruatur, minime satisfactionem remitti testamento posse.

PP. X k. Mart. Fusco II et Dextro cons.

[8] *Idem AA. et CC. Iulio et Zenodoro.* Contra eos sive successores eorum, qui rem publicam administrantes per officii necessitatem civitati sub condicione relictis fideicommissis satis accipere debuerunt, quanti rei publicae interest satis acceptum non esse, dirigendam certum est actionem.

Supposita VII k. Mart. CC. cons.

LV De Suis et Legitimis Liberis et ex Filia Nepotibus ab Intestato Venientibus

[1] *Impp. Severus et Antoninus AA. Crispinae.* Si fratri tuo legitima heres esse potes, centum dierum praefinitione non excluderis ad acquirendam hereditatem.

However, the appropriate judge will, when you approach him, see to it that the wish of the deceased be complied with after the acceptance of the pledge.

Posted August 11, in the consulship of Julian and Crispinus (224).

[6] *The same Augustus to Donatus.* There is a certain rule of jurisdiction by which the person to whom security is not provided for a legacy or trust is sent, in order to preserve a trust, into possession of items of property that are part of the estate or have ceased to exist because of deliberate misconduct, or into the property belonging to the heir, if security is not provided for a trust six months after it was initially sought, in accordance with the constitution³³⁶ of the deified Antoninus (Caracalla) my father.

Posted January 8, in the consulship of Fuscus, for the second time, and Dexter (225).

[7] *The same Augustus to Proculianus.* You (plural) ought to know that the deified Marcus³³⁷ and the deified Commodus ruled in constitutions that the security for a trust and a legacy can be remitted. However, you should also know that the provision of security so that the person to whom a usufruct has been bequeathed use and enjoy (the property) by the standards of an upright man cannot be remitted in a will.

Posted February 20, in the consulship of Fuscus, for the second time, and Dexter (225).

[8]³³⁸ *The same Augusti and Caesars to Julius and Zenodorus.* It is certain that an action for the municipality's interest that the sureties were not taken should be directed against those who, while administering the municipality through the requirement of their office, ought to have accepted security to guarantee a trust left (to the municipality), or against their successors.

Submitted February 23, in the consulship of the Caesars (294).

Fifty-Fifth Title *Sui Heredes*, Legitimate Children, and Grandchildren from a Daughter Succeeding on Intestacy³³⁹

[1]³⁴⁰ *Emperors SEVERUS and ANTONINUS Augusti to Crispina.* If you can be the statutory heir (by the civil law) to your brother, you are not excluded by the prescription of 100 days to acquire the inheritance.³⁴¹

³³⁶ D. 36.4.5.16.

³³⁷ 2 above.

³³⁸ = C. 11.31.2, where the emperors are Diocletian and Maximian, and the addressees are Julius and Zenodorus, and where the action against the administrators' successors is omitted. The date in that text is November 25.

³³⁹ See D. 38.15.

³⁴⁰ Combine with C. 6.9.2, where the addressee is Crispinus.

³⁴¹ As Blume points out, a prescription of 100 days to acquire an inheritance was established for heirs granted succession under Praetorian law.

PP. III non. Nov. Antonino A. II et Geta II cons.

[2] *Impp. Diocletianus et Maximianus AA. Aviae.* Nepotes ex diversis filiis varii numeri avo succedentes ab intestato non virilibus portionibus, sed ex stirpibus succedunt.

S. III k. Mart. Hadrianopoli ipsis AA. IIII et III cons.

[3] *Idem AA. et CC. Frontoni.* Ut intestato defuncto filius ac nepos ex alio, qui mortis eius tempore in rebus humanis non invenitur, manentes in sacris pariter succedant, evidenter lege duodecim tabularum cavetur. quod et honorarii iuris observatio sequitur.

S. XV k. Iul. AA. cons.

[4] *Idem AA. et CC. Marcellae.* Intestato defuncto postumum suum heredem quam sororem licet consanguineam haberi potiore ordi successionum lege duodecim tabularum factus nimis evidenter demonstrat.

S. VI id. Dec. AA. cons.

[5] *Idem AA. et CC. Appiano.* Si te parens, in cuius fuisti potestate, solemniter in adoptionem dedit, cum filiis naturalibus adoptivi patris ante vel post quaesitis defuncto intestato succedere potes.

D. VI k. Ian. Sirmi AA. cons.

[6] *Idem AA. et CC. Posidonio.* Ex libera conceptus et servo velut spurcius habetur nec ut decurionis filius, quamvis pater eius naturalis manumissus et natalibus suis restitutus hunc fuit adeptus honorem, defendi potest.

Supposita VI id. Febr. CC. cons.

Posted November 3, in the consulship of Antoninus Augustus, for the second time, and Geta, for the second time (205).

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Avia.* Grandchildren from different sons succeeding their grandfather on intestacy in varying numbers do not succeed with equal portions, but in accordance with the shares due their fathers (*ex stirpibus*).³⁴²

Written February 27, at Adrianople, in the consulship of the Augusti themselves, for the fourth time and for the third time, respectively (290).

[3] *The same Augusti and the Caesars to Fronto.* It is clearly provided for in the law of the Twelve Tables that a son of the deceased and a grandson from another son, who at the time of his (the father's) death is not found in human affairs (i.e., is no longer alive), when they remain in the household (*manentes in sacris*, i.e., under the power of the *paterfamilias*), succeed equally on intestacy. The observance of Praetorian law (*ius honorarium*) follows this rule.

Written June 17, in the consulship of the Augusti (293).

[4] *The same Augusti and Caesars to Marcella.* The order of succession provided for in the law of the Twelve Tables quite obviously demonstrates that, when a man dies intestate, a posthumous *suus heres* is considered to have a stronger claim (to the inheritance) than a sister, even though she is from the same blood.

Written December 8, in the consulship of the Augusti (293).

[5] *The same Augusti and Caesars to Appianus.* If your male ascendant, in whose power you were, has formally given you in adoption, you can succeed with the natural children of your adoptive father, born either before or after (your adoption), when he dies intestate.

Given December 27, at Sirmium, in the consulship of the Augusti (293).³⁴³

[6] *The same Augusti and Caesars to Posidonius.* A son conceived from a free woman and a slave man is considered illegitimate and cannot be defended as the son of a decurion, even though his natural father, having been manumitted and restored to his birth rights (*natalibus suis restitutus*), has gained this office.

Submitted February 8, in the consulship of the Caesars (294).³⁴⁴

³⁴² Thus, a son would gain an entire share, whereas the children of a deceased son would divide that son's hypothetical share.

³⁴³ An alternative date is February 24, 294.

³⁴⁴ An alternative dating formula reads "given February 10."

[7] *Idem AA. et CC. Aemiliana.* Filium habere suum libertus in potestate non prohibetur, cum ob praeteritum statum ex legitimis nuptiis ingenuorum exemplo filios habere liberto non sit interdictum.

S. XVI k. Mart. Sirmi CC. cons.

[8] *Idem AA. et CC. Catoniae.* Apud hostes patre defuncto filia communis vobis, quo casu scientia mortis non postulatur, heres extitit sua et ad te transmisit successionem.

S. XII k. Dec. Nicomediae CC. cons.

[9] *Imppp. Valentinianus Theodosius et Arcadius AAA. Constantiano pp. Galliarum. pr.* Si defunctus cuiuscumque sexus aut numeri reliquerit filios et ex filia diem functa cuiuscumque sexus aut numeri nepotes, eius partis, quam defuncta filia superstes patri inter fratres suos fuisset habitura, duas partes consequantur nepotes ex eadem filia, tertia pars fratribus sororibusve eius quae defuncta est, id est filiis filiabusque eius, de cuius bonis agitur, avunculis scilicet sive materteris eorum, quorum commodo legem sancimus, ad crescat. 1. Haec eadem, quae de avi materni bonis constituimus, de aviae maternae sive etiam paternae simili aequitate sancimus: nisi forte avi ad elogia inurenda impiis nepotibus iusta se motos ratione dixerint et hoc fuerit legibus approbatum. 2. Non solum autem si intestatus avus aviave defecerit, haec nepotibus quae sancimus iura servamus, sed et si avus vel avia, quibus huiusmodi nepotes erunt, testati obierint et praeterierint nepotes aut exheredaverint, easdem et de iniusto avorum testamento et si quae filiae poterant vel de re vel de lite competere actiones nepotibus deferimus secundum iustum nostrae legis modum, quae de parentum inofficiosi testamenti competunt filiis.

D. v k. Mart. Mediolani Timasio et Promoto cons.

[7]³⁴⁵ *The same Augusti and Caesars to Aemiliana.* A freedman is not prohibited from having a son in his power, since a freedman is not forbidden because of his previous status to have children from lawful marriages on the analogy of free-born persons.

Written February 14, at Sirmium, in the consulship of the Caesars (294).

[8] *The same Augusti and Caesars to Catonia.* Your common daughter, when her father has died among the enemy, in which case (actual) knowledge of the death is not demanded, is a *sua heres* and has transmitted the succession to you (upon her death).

Written November 20, at Nicomedia, in the consulship of the Caesars (294).

[9]³⁴⁶ *Emperors VALENTINIAN, THEODOSIUS, and ARCADIUS Augusti to Constantianus, Praetorian Prefect of the Gauls.* *pr.* If a deceased person left children of either sex or any number and grandchildren from a deceased daughter of either sex or any number, the grandchildren of that same daughter shall gain two-thirds of the share that the deceased daughter would have gained as a survivor of her father along with her siblings (*inter fratres*), and the third part shall accrue to the brothers or sisters of the one who has died, that is, the sons and the daughters of the man whose property is at issue, namely, the maternal uncles and aunts of those in whose interest We ordain the law. 1. We ordain these same measures that We have established for the property of a maternal grandfather with similar fairness (for the estate) of a maternal grandmother or even a paternal one, unless perhaps the grandfathers say that they were moved by a just reason to burn up their expressions (*ad elogia inurenda*, to disinherit them) for undutiful grandchildren and this is approved by the laws. 2. We maintain the rights that We have ordained for grandchildren not only if the grandfather or grandmother dies intestate, but also if the grandfather or grandmother who will have such grandchildren dies with a will and passes over the grandchildren or disinherits them. We offer grandchildren the same claims both about an unjust will of the grandparents and if any actions could be available to a daughter either from the property (*res*) or from a lawsuit, in accordance with the just method of Our law, which is available concerning the undutiful wills of parents.³⁴⁷

Given February 25, at Milan, in the consulship of Timasius and Promotus (389).

³⁴⁵ = C. 8.46.8 (differently worded), where the date is April 16; Mommsen prefers this for the present constitution.

³⁴⁶ = C.Th. 5.1.4, with some variations of wording, from which some of this text has been restored.

³⁴⁷ The *querella inofficiosi testamenti*, or the complaint of an undutiful will, was available to certain heirs if they received less than one-fourth of what they would have received on intestacy.

[10] *Impp. Honorius et Theodosius AA. Maximo. pp.* Ubi aviarum successio morte interveniente discutitur, capitis deminutio materna quaerenda non est. tunc enim in huiusmodi hereditatibus filiorum status aut persona spectatur, quotiens de eius bonis, qui potestatem familiae potuit habere, tractatur.

D. v k. Oct. Ravennae Theodosio A. viiii et Constantio iii cons.

[11] *Impp. Theodosius et Valentinianus AA. ad senatum urbis Romae.* Si matre superstite filius vel filia, qui moritur, filios dereliquerit, omnimodo patri suo matrive ipso iure succedant. quod sine dubio et de pronepotibus observandum esse censemus.

D. viii id. Nov. Ravennae Theodosio xii et Valentiniano ii AA. cons.

[12] *Imp. Iustinianus A. Menae pp.* Quotiens aliquis vel aliqua intestatus vel intestata mortuus vel mortua fuerit nepotibus vel pronepotibus cuiuscumque sexus vel deinceps aliis descendentibus derelictis, quibus unde liberi bonorum possessio minime competit, et insuper ex latere quibuscumque agnatis, minime possint idem agnati quartam partem hereditatis mortuae personae sibi vindicare, sed soli descendentes ad mortui successionem vocentur. quod tantum in futuris, non etiam praeteritis negotiis servari decernimus.

D. k. Iul. Constantinopoli dn. Iustiniano A. pp. ii cons.

LVI Ad Senatus Consultum Tertullianum

[1] *Impp. Diocletianus et Maximianus AA. Vivianae.* Licet liberi matribus ab intestato ita demum per se heredes existant, si dari possint, tamen

[10]³⁴⁸ *Emperors HONORIUS and THEODOSIUS Augusti to Maximus, Praetorian Prefect.* When the succession to grandmothers is audited after a death has occurred, the change of status (*capitis deminutio*) of the mother is not to be investigated. For in such inheritances the status or person of the children is examined only when question arises about the property of a person who could have had power over the family.

Given September 27, at Ravenna, in the consulship of Theodosius Augustus, for the ninth time, and Constantius, for the third time (420).

[11]³⁴⁹ *Emperors THEODOSIUS and VALENTINIAN Augusti to the Senate of the City of Rome.* If a son or daughter who dies with a surviving mother leaves behind children, by the very operation of the law they shall by all means succeed their father or mother. We decree that this is to be observed without doubt also in the case of great-grandchildren.

Given November 7, at Ravenna, in the consulship of Theodosius, for the twelfth time, and Valentinian, for the second time, Augusti (426).³⁵⁰

[12]³⁵¹ *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect.* Whenever some man or woman dies intestate leaving behind grandchildren or great-grandchildren of either sex, or other descendants in turn to whom possession of the estate (*bonorum possessio*) under the (Praetorian) category “whence children” (*unde liberi*) does not apply,³⁵² and in addition collateral agnatic relatives, the same agnates shall not be able to claim for themselves the fourth part of the inheritance of the dead person, but only the descendants shall be called to the succession of the decedent. We determine that this be maintained only in future cases, but not in past ones.

Given July 1, at Constantinople, in the consulship of Our Lord Justinian, Ever Augustus, (Consul) for the second time (528).

Fifty-Sixth Title On the *Senatus Consultum Tertullianum*³⁵³

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Viviana.* Although children by themselves may be heirs to their mother on intestacy only if they are

³⁴⁸ = C.Th. 5.1.6, in which the recipient is the City Prefect. Seeck gives September 27, 420.

³⁴⁹ = C.Th. 5.1.8, with some differences in wording; combine with C. 6.30.18, 6.56.5, 6.60.3, 6.61.1, 8.55.9; C.Th. 4.1.1, 8.18.10; and perhaps also C. 1.14.2 and 3, 1.19.7, 1.22.5; C.Th. 1.4.3.

³⁵⁰ The date is restored from C. Th. 5.1.8, instead of November 6 in the edition of Haloander.

³⁵¹ Combine with C. 6.56.7, 8.58.2, which have June 1 as the date; this is preferred here by Lounghis *et al.*

³⁵² On the Praetorian edict *Unde liberi*, see C. 6.14.

³⁵³ See D. 38.17; Inst. 3.3. The Hadrianic *SC Tertullianum* provided that a woman with the *ius liberorum* (a free woman with three children or a freedwoman with four children) could inherit from her children on intestacy after the children's *sui heredes*, their father, and their brothers and sisters from the same father.

matres liberis, etiamsi infantes naturae concesserint, posse succedere nulla dubitatio est.

PP. x k. April. Tiberiano et Dione cons.

[2] *Idem AA. et CC. Rhesae.* In successionem filii vel filiae communis sine liberis et fratribus vel sororibus morientis pater manumissor, quia ei sit vetus ius servatum, matri praefertur.

S. VI id. Dec. CC. cons.

[3] *Imp. Constantinus A. Catullino proconsuli Africae.* Matres, quae puberes amiserunt filios, licet impuberibus eis tutores non petierunt, praescriptione non petiti tutoris ad excludendam eorum successionem minime debere praescribi certum est.

D. VI k. Aug. Constantino A. IIII et Licinio IIII cons.

[4] *Imppp. Gratianus Valentinianus et Theodosius AAA. Eutropio pp. pr.* Si qua mulier nequaquam religionem priori viro, ex quo filios seu filias non habet, nuptiarum festinatione praestiterit, ex iure quidem notissimo sit infamis, nisi huiusmodi maculam imperiale beneficium ei remittat. 1. Sin autem ei filii erunt seu filiae et impetraverit indulgentiam, infamiae abolitionem permittimus et ceterarum poenarum antiquationem, si facultatum omnium, quae fuerint tempore nuptiarum, medietatem filio filiaeve, filiis seu filiabus donaverit, quos habebat ex viro priore susceptos, pure scilicet et omni donationis sollemnitate completa nec retento quidem usu fructu. 2. Quem quidem semissem si duobus filiis seu filiabus pluribusve donaverit et sorte fatali unus vel una, seu alius vel alia ex isdem intestatus vel intestata obierit, semper ad superstites fratres vel sorores volumus pertinere. 3. Sin autem universae vel universi intestati diem obierint durae fortunae ad matrem solacia ex integro revertantur, ita scilicet, ut hunc semissem, quem filiis seu

able to talk,³⁵⁴ nevertheless there is no doubt that mothers can succeed their children, even if they have yielded to nature (i.e., died) while infants.

Posted March 23, in the consulship of Tiberianus and Dio (291).

[2]³⁵⁵ *The same Augusti to Rhesa.* In the succession to a common son or daughter dying without children and brothers or sisters, the father who manumitted (i.e., emancipated the child), since the ancient right has been maintained for him, is preferred to the mother.

Written December 8, in the consulship of the Caesars (294).

[3] *Emperor CONSTANTINE Augustus to Catullinus Proconsul of Africa.*³⁵⁶ It is certain that mothers, who have lost children over the age of puberty, although they did not seek *tutores* for them when they were under age, ought not to be prevented (from inheriting from them), under the prescription for excluding their succession for not seeking a *tutor*.

*Given July 27, in the consulship of Constantine Augustus, for the fourth time, and Licinius, for the fourth time (315).*³⁵⁷

[4]³⁵⁸ *Emperors GRATIAN, VALENTINIAN, AND THEODOSIUS Augusti to Eutropius, Praetorian Prefect. pr.* If, in her haste to remarry, any woman utterly fails to provide proper respect (*religio*) for her previous husband, from whom she does not have sons or daughters, she shall be infamous³⁵⁹ in accordance with most well-known law, unless an imperial benefit should remit this stain for her. 1. If, however, she has sons or daughters and gains an indulgence, We permit the abolition of her infamy and the annulment of the other punishments if she gives half of all the property that she had at the time of her marriage to her son or daughter or her sons or daughters that she had born from her previous husband, that is to say, unconditionally and having completed every formality of a donation, and not even retaining a usufruct. 2. If she gives this half to two or more sons or daughters and one son or another or one daughter or another from these passes away intestate, We want it always to go to the surviving brothers or sisters. 3. If, however, all of the sons or daughters pass away intestate, the solace of her harsh fortune shall revert to the mother in its entirety in such a way that she herself take again separately this half, which

³⁵⁴ Blume: "if the children were infants, the inheritance had to be accepted by a father or guardian."

³⁵⁵ Perhaps combine with C. 8.44.29, whose addressee is Rhesus.

³⁵⁶ Catullinus, attested in other laws, was proconsul of Africa 315-318.

³⁵⁷ The consular date is restored by Krüger; Haloander's edition has 354. Seeck gives July 27, 318.

³⁵⁸ pr. = C. 5.9.2; perhaps combine with C. 5.1.3, and other texts, which would have the date as June 17.

³⁵⁹ The term *infamis* designates persons involved in disgraced professions as well as certain people who have suffered legal disabilities as a result of criminal convictions.

filiabus donaverat, intestato diem filiis seu filiabus obeuntibus rursus ipsa separatim ab ultimi filii vel filiae hereditate praesumat.

PP. xv k. Ian. Gratiano v et Theodosio AA. cons.

[5] *Imp. Theodosius et Valentinianus AA. ad senatum urbis Romae. pr.* Mater, quae defuncto filio filiave sine liberis ex testamento vel ab intestato succedit, si matrimonium secundum post mortem filii vel filiae non contraxerit, omnia filii morte delata pleno iure conquirat. 1. Sin vero alterius elegerit coniugium mariti, extrinsecus quidem quaesita filio filiave simili firmitate possideat, rerum vero paternarum defuncti solo usu fructu humanitatis contemplatione potiat, proprietatem sorori et fratribus transmissura defuncti.

D. viii id. Nov. Ravennae Theodosio xii et Valentiniano ii AA. cons.

[6] *Idem AA. Florentio pp.* Omnem matri sive ab intestato sive iure substitutionis, si filius impubes moritur, denegandam volumus successionem, si ea legitima liberorum tutela suscepta ad secundas contra sacramentum praestitum adspiraverit nuptias, antequam ei tutorem alium fecerit ordinari eique quod debetur ex ratione tutelae gestae persolverit.

D. vi id. Iul. Constantinopoli Theodosio A. xvii et Festo cons.

[7] *Imp. Iustinianus A. Menae pp. pr.* Si quis vel si qua matre superstite et fratre vel legitimo vel sola cognationis iura habente intestatus vel intestata decesserit, non excludi a filii successione matrem, sed una cum fratre mortui vel mortuae, si superstes vel filius vel privignus ipsius sit, ad eam pervenire ad similitudinem sororum mortui vel mortuae: ita tamen, ut, si quidem solae sorores agnae vel cognatae et mater defuncti vel defunctae supersint, pro veterum legum tenore dimidiam quidem mater, alteram vero dimidiam partem omnes sorores habeant: sin vero matre superstite et fratre vel fratribus solis vel etiam cum sororibus

she had given to her sons or daughters, from the inheritance of the last son or daughter, when her sons or daughters pass away intestate.

Posted December 18, in the consulship of Gratian, for the fifth time, and Theodosius, Augusti (380).

[5]³⁶⁰ *Emperors THEODOSIUS and VALENTINIAN Augusti to the Senate of the City of Rome. pr.* A mother who, in accordance with a will or on intestacy, succeeds a deceased son or daughter without children, if she has not contracted a second marriage after the death of her son or daughter, should claim everything acquired at the death of her child in full right. 1. But if she chooses a marriage with another husband, she should possess property gained independently by her son or daughter with a similar firmness, but she should, in the contemplation of the human lot, only gain possession of a usufruct over the decedent's property inherited from the father, so as to transmit the ownership to the sister and brothers of the decedent.

Given November 7, at Ravenna, in the consulship of Theodosius, for the twelfth time, and Valentinian, for the second time, Augusti (426).

[6]³⁶¹ *The same Augusti to Florentius, Praetorian Prefect.* We wish all succession to be denied to a mother, whether on intestacy or by right of substitution, if her minor (*impubes*) son dies, if she, after undertaking the tutelage by law of her children, aspires to a second marriage against the oath she has given,³⁶² before she has provided for the appointment of another *tutor* for him (the son) and pays him what he is owed on the basis of the performance of the tutelage.

Given July 10, at Constantinople, in the consulship of Theodosius Augustus, for the seventeenth time, and Festus (439).

[7]³⁶³ *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect. pr.* If some man or woman dies intestate with a surviving mother and brother, either a successor under the (civil) law or only having the rights of a cognate relationship, the mother is not excluded from the succession to her child, but, along with the brother of the dead man or woman, if the survivor is either her son or stepson, she comes to this like the sisters of the dead man or woman, but under the condition that, if only agnatic or cognate sisters and the mother of the decedent man or woman survive, in accordance with the provision of the old law

³⁶⁰ = C.Th. 5.1.8 (with some differences in wording), from which the address to the Senate of the City of Rome is restored; combine with C. 6.55.11 and other passages mentioned in the note that text.

³⁶¹ = Nov. Theod. 11 and C. 8.14.6; combine with C. 6.58.10.

³⁶² Blume: see C. 6.35.2.

³⁶³ Combine with C. 6.55.12 (with the date July 1), 8.58.2.

intestatus quis vel intestata moriatur, in capita distribuatur eius hereditas nec liceat matri occasione sororum mortui vel mortuae ampliorem partem sibi vindicare, quam rata portio capitum exigit: patruo scilicet mortui vel mortuae eius^{xiv} filio vel nepote nullum ius ad eius hereditatem matre herede existente habentibus nec ex veteribus legibus vel ex constitutionibus partem matris minui. 1. Sin autem defuncta persona non solum matrem et fratres et sorores superstites habeat, sed etiam patrem, si quidem sui iuris decessit, quia patris persona interveniens matris iura superare videtur, omnibus pio animo providentes sancimus fratres quidem et sorores mortuae personae ad successionem proprietatis solos pro virili parte vocari, patri autem et matri usus fructus totius successionis bessem competere aequa lance inter patrem et matrem dividendum, reliqua parte usus fructus apud fratres et sorores remanente. 2. Sin vero defuncta persona in sacris patris constituta decesserit, pater quidem usum fructum, quem et vivente filio habebat, detineat donec vivat incorruptum, mater autem, quia hunc usum fructum habere vivente patre non potest totum apud patrem constitutum, una cum fratribus defunctae personae ad proprietatem vocetur, scilicet cum sororibus sola in dimidiam, cum fratribus vel promiscui generis secundum supra scriptam distributionem in virilem portionem. 3. Omnibus videlicet, quae de mulieribus ad secundas nuptias migrantibus sancita sunt, in suo statu durantibus.

D. k. Iun. Constantinopoli dn. Iustiniano A. pp. II cons.

LVII Ad Senatus Consultum Orfitianum

[1] *Imp. Alexander A. Evangelo.* Si intestatae mulieris consanguinei existant et mater et filia, ad solam filiam ex senatus consulto Orfitiano hereditas pertinet.

PP. xv k. Febr. Fusco II et Dextro cons.

^{xiv} elusve

the mother have one-half, and all the sisters the other half. But if some man or woman should die intestate with a surviving mother and only a brother or brothers or even with sisters, his (or her) inheritance is to be distributed by persons (*in capita*), nor is the mother to be permitted, on the opportunity of there being sisters of the deceased man or woman, to claim a larger share for herself than the proportional share of the persons demands. Certainly neither the paternal uncle of the dead man or woman nor his son or grandson have any right to the inheritance of that person when there is a surviving mother who is heir, nor is the mother's share diminished either in accordance with the old law or the constitutions (of emperors). 1. If, however, the deceased person should have not only a mother, brothers, and sisters as survivors, but also a father, if he (or she) has died while *sui iuris*, since the intervention of the person of the father is deemed to prevail over the rights of the mother, to provide for everyone with a pious spirit We ordain that the brothers and sisters of the deceased person are alone called to the succession of ownership with full shares, but that the father and mother gain the usufruct of two-thirds of the entire succession, to be divided equally between the father and mother, while the remaining part of the usufruct remains with the brothers and sisters. 2. But if the deceased person has died while established in the father's power (*in sacris*), the father shall hold onto the usufruct undiminished that he had while the son was alive as long as he should live, while the mother, since she cannot have the usufruct while the father is alive as it is entirely established with him, shall be called along with the brothers of the deceased person to ownership, that is to say, with the sisters alone into a one-half share (of the ownership), and if the siblings are of both genders in accordance with the distribution written above into a full share. 3. All the measures that have been ordained concerning women migrating to second marriages remain in effect.

Given June 1, at Constantinople, in the consulship of Our Lord Justinian, Ever Augustus, (Consul) for the second time (528).

Fifty-Seventh Title On the *Senatus Consultum Orfitianum*³⁶⁴

[1] Emperor ALEXANDER Augustus to Evangelus. If an intestate woman has siblings from the same father as well as a mother and a daughter, in accordance with the SC *Orfitianum* the inheritance goes to the daughter alone.

Posted January 18, in the consulship of Fuscus, for the second time, and Dexter (225).

³⁶⁴ See D, 38.17, Just. Inst. 3.4. The SC *Orfitianum* of 178 CE gave children the right to succeed their mother in preference to her other relations, including her brothers and sisters.

[2] *Impp. Diocletianus et Maximianus AA. et CC. Metrodoraē. pr.* Non pro numero superstitum mortis matris tempore, sed succedentium materna scinditur hereditas. 1. Quapropter si mater vestra te et uno fratre emancipatis, duobus autem aliis in patria positis potestate superstitibus diem functa est et hi, qui in potestate patris fuerant, priusquam maternam hereditatem sibi quaererent, rebus humanis exempti sunt, inter duos tantum viriles non ambigitur factas portiones.

S. VII k. April. Sirmi AA. cons.

[3] *Idem AA. et CC. Iulianae.* Matri intestatae defunctae secundum Orfitianum senatus consultum citra bonorum possessionem filia pro herede gerendo succedere non prohibetur.

S. XII k. Nov. AA. cons.

[4] *Imppp. Gratianus Valentinianus et Theodosius AAA. ad Hilarianum pp.* Quotiens de emancipati filii filiaeve successione tractatur, filiis ex his genitis deferatur intacta pro solido successio neque ulla defunctae patri matrique concedatur intestatae successionis hereditas.

D. XI k. Mart. Mediolani Merobaude II et Saturnino cons.

[5] *Imp. Iustinianus A. Demostheni pp. pr.* Si qua illustris mulier filium ex iustis nuptiis procreaverit et alterum spurium habuerit, cui pater incertus sit, quemadmodum res maternae ad eos perveniant, sive tantummodo ad liberos iustos sive et ad spurios, dubitabatur. 1. Sancimus itaque, ut neque ex testamento neque ab intestato neque a liberalitate inter vivos habita iustis liberis existentibus aliquid penitus ab illustribus matribus ad spurios perveniat, cum in mulieribus ingenuis et illustribus, quibus castitatis observatio praecipuum debitum est, et nominari spurios satis iniuriosum, satis acerbum et nostris temporibus indignum esse iudicamus et hanc legem ipsi pudicitiae, quam semper colendam

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Metrodora. pr.* The mother's inheritance is divided not in accordance with the number of survivors at the time of her death, but the number of successors. 1. For this reason, if your (plural) mother passed away with you and one brother emancipated, but two other survivors under the father's power, and the ones who had been in the father's power, before they sought the mother's inheritance for themselves, had been removed from human affairs, there is no doubt that there are only two whole portions (to be divided) between two persons.

Written March 26, at *Sirmium*, in the consulship of the Augusti (293).³⁶⁵

[3] *The same Augusti and Caesars to Juliana.* In accordance with the SC *Orfitianum* a daughter acting as heir (*pro herede gerendo*) without possession of the property³⁶⁶ is not prohibited from succeeding a deceased intestate mother.

Written October 21, in the consulship of the Augusti (293).

[4]³⁶⁷ *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS Augusti to Hilarius, Praetorian Prefect.* Whenever it is a question of the succession to an emancipated son or daughter, the succession is to be provided to the children born from them intact and in its entirety, and no inheritance to an intestate succession is to be granted to the deceased person's father or mother.

Given February 19, at *Milan*, in the consulship of *Merobaudes*, for the second time, and *Saturninus* (383).³⁶⁸

[5]³⁶⁹ *Emperor JUSTINIAN Augustus to Demosthenes, Praetorian Prefect. pr.* If any woman of *illustris* rank procreates a son from a proper marriage and has another, illegitimate one, the identity of whose father is uncertain, there was doubt as to the way in which the mother's property would pass to them, whether only to the legitimate children or also to the illegitimate ones. 1. Therefore We ordain that nothing at all should pass from mothers of *illustris* rank to illegitimate children when there are legitimate children surviving, either by a will or on intestacy, or by generosity carried out between living persons (gifts *mortis causa*), since in the case of women who are free born and of *illustris* rank, for

³⁶⁵ Mommsen suggests "in the consulship of the Caesars (294)" for this and the next constitution.

³⁶⁶ Blume: a child could inherit from a mother by civil law (as modified by the SC *Orfitianum*), but the possession of the property was something granted by Praetorian law.

³⁶⁷ = C.Th. 5.1.3, with somewhat different wording, and from which Hilarius as Urban Prefect is restored as addressee. Gothofredus suggests Hypatius as the addressee. Moreover, the C.Th. version, which Krüger prefers, refers to the succession of an emancipated daughter and her children.

³⁶⁸ The date is restored from the C.Th. version. Haloander's edition has February 15.

³⁶⁹ Combine with C. 5.27.10.

censemus, merito dedicamus. 2. Sin autem concubina liberae conditionis constituta filium vel filiam ex licita consuetudine ad hominem liberum habita procreaverit, eos etiam cum legitimis liberis ad materna venire bona, quae ea iure legitimo et in suo patrimonio possidet, nulla invidia est.

D. xv k. Oct. Chalcedone Decio vc. cons.

[6] *Idem A. Iuliano pp. pr.* Quidam ancillae suae per fideicommissum libertatem reliquit, eo autem, a quo libertas relicta est, moram in libertate praestanda faciente peperit ancilla. et esse quidem ingenuum puerum vel puellam, qui post moram nati sunt, omnes veteris iuris auctores consentiunt, dubitabatur autem inter eos, si matri morienti potest succedere. 1. Huiusmodi itaque dubitationem eorum decidentes ulterius eam procedere non patimur, sed sancimus eandem matris progeniem heredem ab intestato posse ei existere, salvo iure legitimo ex auctoritate senatus consulti Orfitiani proli servando et tam matre ex senatus consulto Tertulliano quam prole ex Orfitiano senatus consulto invicem ad suas hereditates venientibus.

D. k. Oct. Constantinopoli Lampadio et Oreste vv. cc. cons.

LVIII De Legitimis Heredibus

[1] *Imp. Alexander A. Cassio et Hermionae.* In successione titulo consanguinitatis vel in bonorum possessione, quae proximitatis nomine competit, tam fratres quam sorores pari iure esse, licet non eadem matre susceptae sunt, ius certum est. nec huic derogatur, quod amitas vestras ab avo vestro dotatas fuisse proponitis.

PP. non. Mai. Maximo II et Aeliano cons.

whom the observation of chastity is a special obligation, We judge that it is quite injurious for illegitimate children to be named, and also quite bitter and unworthy of Our times, and We justly dedicate this law to that very chastity that We decree is always to be cultivated. 2. If, however, a concubine of free status maintaining a licit relationship with a free man produces a son or daughter, there is no begrudging that they approach the mother's property that she possesses by lawful right and in her patrimony, along with the legitimate children.

Given September 17, at Chalcedon, in the consulship of the vir clarissimus Decius (529).

[6]³⁷⁰ *The same Augustus to Julian, Praetorian Prefect. pr.* Someone left liberty to his slave woman through a trust, but the slave woman gave birth while the person who was directed to grant liberty delayed in providing it. All the authors of the ancient law agree that the boy or girl who was born after the delay is free-born, but there was doubt among them whether he or she can succeed the mother when she dies. 1. And so cutting out such doubt We do not allow it to proceed any further, but We ordain that the same progeny of the mother can be her heir on intestacy, while maintaining for offspring without compromise the statutory right based on the *SC Orfitianum*, and with both the mother and the offspring coming in turn to their inheritances on the basis of the *SC Tertullianum* and the *SC Orfitianum*, respectively.

Given October 1, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

Fifty-Eighth Title Heirs under the Civil Law³⁷¹

[1] *Emperor ALEXANDER Augustus to Cassius and Hermione.* It is certain law that in succession based on consanguinity (a relationship between siblings with the same father) or on the possession of property, which accrues on the basis of proximity (to the decedent), both brothers and sisters have an equal right, although they have not been born of the same mother. Nor does the fact that you allege that your (plural) paternal aunts received dowries from your grandfather modify this rule.

Posted May 7, in the consulship of Maximus, for the second time, and Aelianus (223).

³⁷⁰ Combine with C. 7.4.14–16.

³⁷¹ See D. 38.16. This section deals with heirs whose rights to succeed were established by the *ius civile*, going back to the Twelve Tables, as opposed to the modifications in succession rights created by Praetorian law, or *ius honorarium*. At the end of C. 6, there is a text generally attributed to a Lombard king: "Book 6, Heirs under the Civil Law. The same Augustus and Caesars. Among those who have been born from an illicit or uncertain union, there is no succession or seeking of an inheritance, unless it should be shown by the same people that it was bequeathed or conceded in some way among them."

[2] *Idem A. Tatianae et aliis.* Si eius, quae vos heredes instituit, patri non quaesistis hereditatem posteaque mortuo patre ac repudiata eius hereditate defunctae successionem agnovistis, ea, quae bonorum sunt defunctae, ab his separari, quae patris vestri fuerunt, praeses provinciae non ignorabit.

PP. VI id. April. Gordiano A. et Aviola cons.

[3] *Imp. Decius A. Asclepiodotae. pr.* Consanguinitatis iure et feminas ad intestatorum successionem admitti posse explorati iuris est. 1. Proinde cum fratris tui intestato mortui ad te consanguinitatis iure hereditas pertineat, nulla ratione alterius fratris tui filii ad eandem successionem adspirare desiderant: nam et cessante iure agnationis in persona omnium praetorii iuris beneficio ad te potius, quae secundum gradum obtines, hereditas pertinet quam ad fratris tui filios, qui tertio gradu constituti sunt.

PP. II non. Dec. Decio A. et Grato cons.

[4] *Impp. Diocletianus et Maximianus AA. Caecilio.* Si aut nullum testamentum nepos patru tui ordinavit aut intra quattuordecim annos constitutus fecit et agnationis iure successio eius tibi delata est, etiam citra bonorum possessionis subsidium legitimo iure subnixus es.

PP. id. Iul. ipsis AA. IIII et III cons.

[5] *Idem AA. et CC. Cyrillae.* Ad intestati successionem agnationis iure quam proximitatis venientes haberi potiores certum est.

Supposita XVI k. Iul. Sirmi AA. cons.

[6] *Idem AA. et CC. Claudianae.* Defuncto, suis extantibus heredibus et abstinentibus vel repudiantibus hereditatem, frater iure consanguinitatis succedere potest.

S. prid. k. Ian. AA. cons.

[2] *The same Augustus*³⁷² *to Tatiana and others.* If you (plural) did not acquire the inheritance of the woman who established you as heirs for the benefit of your father, and afterwards, when the father died and you repudiated his inheritance, you acknowledged the succession to the deceased woman, the provincial governor will not be unaware that the property that belonged to the deceased woman is to be separated from the property that belonged to your father.

Posted April 8, in the consulship of Gordian Augustus and Aviola (239).

[3] *Emperor DECIUS Augustus to Asclepiodota. pr.* It is established law that under the right of consanguinity women too can be admitted to succession to the intestate. 1. Accordingly since by right of consanguinity the inheritance of your intestate deceased brother belongs to you, by no reason do the sons of your other brother desire to aspire to this same succession. For also since the right of agnatic relationship fails as to everyone's person, by the benefit of Praetorian law the inheritance belongs to you, who are in the second degree (*gradus*), rather than to the sons of your brother, who have been established in the third degree.

Given December 4, in the consulship of Decius Augustus and Gratus (250).

[4] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Caecilius.* If the grandson of your paternal uncle did not write a will or did so when he was less than 14 years old, and by right of agnatic relationship his succession has passed to you, you are protected by a lawful right even without the aid of possession of the inheritance (*bonorum possessio*).³⁷³

Posted July 15, in the consulship of the Augusti themselves, for the fourth time and for the third time, respectively (290).

[5] *The same Augusti and the Caesars to Cyrilla.* It is certain that those coming to the succession of an intestate person by right of agnatic relationship are considered ahead of those by cognate relationship (*proximitas*).

*Submitted June 16,*³⁷⁴ *at Sirmium, in the consulship of the Augusti (293).*

[6] ³⁷⁵ *The same Augusti and Caesars to Claudiana.* A brother can succeed a decedent by right of consanguinity although he has *sui heredes* when they abstain from or repudiate the inheritance.

Written December 31, in the consulship of the Augusti (293).

³⁷² The emperor should be Gordian.

³⁷³ *Bonorum possessio* was a remedy under Praetorian law that granted an estate to heirs not provided for in the *ius civile*.

³⁷⁴ Mommsen writes December 17, 293; Krüger substitutes "written" for "submitted."

³⁷⁵ Combine with C. 6.31.5.

[7] *Idem AA. et CC. Ammiano.* Patruo ac materterae tertio constitutis gradu non pariter intestati successio defertur, sed patris frater agnationis iure sorori matris anteponitur.

S. XVII k. Mart. Sirmi CC. cons.

[8] *Idem AA. et CC. Silano.* Si his, de quorum successione agitur, apud hostes defunctis secundum legis Corneliae beneficium iure agnationis adita hereditate vel petita bonorum possessione successisti, substantiam eorum vindicare non prohiberis.

S. non. Iul. Sirmi AA. cons.

[9] *Idem AA. et CC. Damagorae.* In successione intestatae sororem quam avum maternum haberi potiore non ambigitur.

S. VI k. Iul. Nicomediae CC. cons.

[10] *Impp. Theodosius et Valentinianus AA. Florentio pp.* Sciant qui ad successionem vocantur pupilli mortui, si defuncto eius patre tutorem ei secundum leges non petierint intra annum, omnem eis sive ab intestato sive iure substitutionis successionem eius, si impubes moritur, denegandam.

D. VI id. Iul. Constantinopoli Theodosio A. XVII et Festo cons.

[11] *Imp. Anastasius A. Constantino pp.* Si ab eo, qui ex sacro rescripto secundum nostram constitutionem fieri postulaverit emancipationem liberorum, petatum sit, quatenus ei, qui emancipandus emancipandave est, minime legitima iura per emancipationem extinguantur, eadem iura tam emancipato vel emancipatae contra personas alias hoc modo sibi coniunctas quam aliis itidem contra eum vel eam in hereditatibus vel successionibus et tutelis nec non ceteris servantur intacta.

[7] *The same Augusti and Caesars to Ammianus.* Succession on intestacy is not passed equally to a paternal uncle and a maternal aunt although both are related in the third degree, but the father's brother is preferred to the mother's sister by right of agnatic relationship.

Given February 13,³⁷⁶ at Sirmium, in the consulship of the Caesars (294).

[8] *The same Augusti and Caesars to Silanus.* If you have succeeded those whose succession is at issue when they have died among the enemy, in accordance with the benefit of the *lex Cornelia*³⁷⁷ by right of agnatic relationship, either by entering into the inheritance or by seeking possession of the inheritance, you are not prohibited from claiming their property (*substantia*).

Written July 7, at Sirmium, in the consulship of the Augusti (293).³⁷⁸

[9] *The same Augusti to Damagora.* There is no doubt that a sister is preferred to a maternal grandfather in the succession to an intestate woman.

Written June 26,³⁷⁹ at Nicomedia, in the consulship of the Caesars (294).

[10]³⁸⁰ *Emperors THEODOSIUS and VALENTINIAN Augusti to Florentius, Praetorian Prefect.* Those who are called to the succession of a deceased minor ward shall know that, if they had not sought a *tutor* for him within a year of the father's death in accordance with the laws, they are to be denied all succession to him, whether on intestacy or by right of substitution, if the minor child dies.

Given July 10, at Constantinople, in the consulship of Theodosius Augustus, for the seventeenth time, and Festus (439).

[11]³⁸¹ *Emperor ANASTASIUS Augustus to Constantine, Praetorian Prefect.* If a person, on the basis of a sacred rescript in accord with Our constitution,³⁸² has asked for emancipation of his children, and has (further) sought that this emancipation not extinguish the civil law rights of the male or female to be emancipated, (then) the same rights both for the emancipated man or woman are to be maintained intact against other persons related to them in this way as well as for others in turn against him or her in inheritances or successions, and in tutelage as well as in other matters.³⁸³

³⁷⁶ Mommsen writes February 14, 294.

³⁷⁷ The *lex Cornelia de captivis* (82-79 BC) treated as valid wills made when prisoners of war died in captivity (Blume: D. 49.15.22.3).

³⁷⁸ Mommsen writes "in the consulship of the Caesars" (294).

³⁷⁹ Mommsen writes "December 27, 294" to suit the location.

³⁸⁰ = Nov. Theod. 11; combine with C. 6.56.6, 8.14.6.

³⁸¹ Combine with C. 6.20.18, 8.48.5.

³⁸² C. 8.48.5.

³⁸³ Some editors have added, apparently based on C. 6.20.18, "tax payments are to be made, however, by these persons in accordance with the provisions made for emancipated persons, whenever such a case emerges, that is to say, when an emancipation has been completed."

D. xv k. Aug. Constantinopoli Probo et Avieno iuniorē cons.

[12] *Imp. Iustinianus A. Iohanni pp. pr.* Si maior quinquagenaria partum ediderit, si debet huiusmodi suboles suo patri sua constitui et hereditatem eius nancisci, a Caesariana advocazione interrogati sumus. 1. Et sancimus, licet mirabilis huiusmodi partus invenitur et raro contingit, nihil tamen eorum, quae probabiliter a natura noscuntur esse producta, respui, sed omne ius, quod ex quacumque lege liberis praestitum est, hoc merum atque immutilatum huiusmodi filiis vel filiabus servari in omnibus successionibus sive ex testamento sive ab intestato. 2. Et summam non absimiles aliis fiant, quos similes natura effecit, maxime cum et anteriore nostra lege huiusmodi nuptias permisimus, impares eas videri minime concedentes.

D. iix k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc. anno secundo.

[13] *Idem A. Iohanni pp. pr.* De emancipatis filiis, qui sacro rescripto patribus impertito hoc a suis genitoribus meruerunt, dubitatum est. cum enim Anastasiana lex iura fratribus legitima noscitur servare, si quis ex his sine testamento et liberis decesserit, utrumne ad fratrem vel sororem eius successio devolvatur an ad superstitem patrem, dubitabatur. 1. Huiusmodi dubitationem compendioso responso duximus esse finiendam ideoque sancimus ad similitudinem maternarum rerum aliarumque, de quibus a nobis iam lex posita est, et huiusmodi hereditatem iure quidem dominii ad fratres vel sorores pervenire in totum, usum fructum autem eius patri totum, sive totum priorem servaverit sive ad secundas migraverit nuptias, adquiri, sive per sacrum oraculum emancipatio procedat sive alio legitimo modo a sacris paternis fuerint absoluti. 2. Cum enim et pater utitur usu fructu et votum eius est ad alios filios suas res pervenire, quapropter, cum ex lege Anastasiana in alium articulum fratribus prospectum est, non a nobis in hac specie plenius eis subvenitur, ut pater habeat usum fructum, fratres autem

Given July 18, at Constantinople, in the consulship of Probus and Avienus the Younger (502).

[12] *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* We have been asked by the Society of Advocates (*advocatio*) of Caesarea whether, if a woman older than fifty has given birth, such an offspring ought to be established as a *suus heres* to his or her father and gain his inheritance. 1. And We ordain that, although such a birth is found to be miraculous and happens rarely, even so, none of those things that are plausibly known to be produced by nature be scorned, but every right that has been provided for children by any law be maintained unchanged and undiminished for sons or daughters of this type in all successions, whether in accordance with a will or on intestacy. 2. And in sum they should not be dissimilar from others whom nature has made similar, especially since We have permitted such marriages also in Our earlier law,³⁸⁴ not allowing them to be seen as unequal (to other marriages).

Given October 18, at Constantinople, in the second post-consulate of the viri clarissimi Lampadius and Orestes (532).³⁸⁵

[13]³⁸⁶ *The same Augustus to John, Praetorian Prefect. pr.* Doubt has been expressed about emancipated children, who have gained this status from their parents on the basis of rescripts imparted to their fathers. For since the law of Anastasius³⁸⁷ is known to maintain rights by civil law for siblings, if any of these passes away without a will and children, it was doubted whether his (or her) succession should pass to a brother or sister or to a surviving father. 1. We have considered that such doubt must be curtailed with a succinct response, and for that reason We ordain that, on the analogy of maternal and other property, about which a law has already been promulgated by Us,³⁸⁸ an inheritance of this sort with right of ownership pass in its entirety to brothers or sisters, but that its usufruct is acquired in its entirety by the father, whether he maintains his earlier marriage bed or migrates to a new marriage, whether the emancipation should proceed through a sacred imperial enactment (*oraculum*) or whether they are released from the father's power (*sacris paternis*) by another lawful means. 2. For since the father uses the usufruct and also his wish is that his property reach his other children, for what reason, since on the basis of the law of Anastasius provision has been made for siblings in another rule, are they not more fully helped by Us in this respect, that the father have the usufruct, while the brothers or sisters have ownership over the property

³⁸⁴ C. 5.4.27.

³⁸⁵ Krüger writes the date as October 18, 531. The day of the month is corrupt in the manuscripts.

³⁸⁶ Combine with C. 8.47.11, 8.48.6.

³⁸⁷ See C. 5.70.5; Inst. 3.5.1

³⁸⁸ C. 6.59.11.

vel sorores dominium rerum relictarum? 3. Exceptis maternis rebus, in quibus, si ex eadem matre fratres vel sorores sunt, eos solos vocari oportet: sin autem non supersint, tunc ad similitudinem aliarum rerum in totam fraternitatem dominium earum cedere, ut sit apertissimus in omnibus tractatus et non per differentiam personarum vel rerum vacillare noscatur.

D. k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[14] *Idem A. Iohanni pp. pr.* Lege duodecim tabularum bene Romano generi prospectum est, quae unam consonantiam tam in maribus quam in feminis legitimis et in eorum successione nec non libertis observandam esse existimavit, nullo discrimine in successione habito, cum natura utrumque corpus edidit, ut maneat suis vicibus immortale et alterum alterius auxilio egeat, ut uno semoto et alterum corrumpatur. 1. Sed posteritas, dum nimia utitur subtilitate, non piam induxit differentiam, sicut Iulius Paulus in ipso principio libri singularis, quem ad senatus consultum Tertullianum fecit, apertissime docuit. 2. Qui enim ferendum est ab intestato successione suas quidem filias ad similitudinem masculae subolis in parentis vocari successione et iterum germanas iure consanguinitatis eandem sibi vindicare praerogativam, deinceps autem legitimas feminarum personas, si iura consanguinitatis non possident, a successione legitima repelli, cum maribus eadem successio pateat? 3. Quare enim patris soror non ad successione filii fratris sui una cum masculis vocatur, sed aliud ius in amita, aliud in patruis observatur? vel qua ratione fratris filius ad successione patruis vocatur, germana autem eius ab eadem successione recluditur?

4. Huiusmodi itaque legis antiquae reverentiam et nos anteponi novitati legis censemus et sancimus omnes legitimas personas, id est per virilem sexum descendentes, sive masculini sive feminini generis sint, simili modo ad iura successione legitima ad successione intestatorum vocari secundum gradus sui praerogativam non ideo excludendas, quia consanguinitatis iura secundum germanae observationem non

left behind? 3. An exception is made for maternal property, in which, if there are brothers or sisters from the same mother, they alone must be called (to the inheritance). If, however, they should not survive, on the analogy of other property, ownership of it (the maternal property) must pass into the entire fraternity, so that its treatment be completely open in everything and it not be known to vary depending on differences of persons or property.

Given November 1, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).³⁸⁹

[14] *The same Augustus to John, Praetorian Prefect. pr.* The Roman race was well provided for in the law of the Twelve Tables, which judged that a single rule (*consonantia*) was to be observed both in the case of lawful (agnatic) males and females and in their succession, as well as in the case of freed-persons,³⁹⁰ with no discrimination maintained in succession, since nature produced each body, so that it remain immortal in its fortunes and one require the aid of the other, so that when one is removed the other is also ruined. 1. But posterity, while it has recourse to excessive subtlety, has not introduced a pious differentiation, as Julius Paulus most clearly showed in the very beginning of the single book that he wrote on the *SC Tertullianum*. 2. For how is it to be tolerated that in intestate succession one's own daughters (daughters who are *sui heredes*) are called to succession of their parent on the analogy (*in similitudinem*) of male offspring and again that sisters, by the right of having the same father (*consanguinitas*), claim for themselves the same prerogative, but then agnatic female persons (*legitimas feminarum personas*), if they do not possess the rights from having the same father, are repelled from statutory succession, when the same succession is open to males? 3. For why is the sister of the father not called along with the males to the succession of her brother's son, but one right is observed in the case of a paternal aunt, and another in paternal uncles? Or by what reason is the son of a brother called to the succession of a paternal uncle, but his sister from the same father (*germana*) is excluded from the same succession?³⁹¹

4. Thus We both decree that the reverence of such an ancient law be preferred to a novel law and ordain that all agnatic (*legitimae*) persons, that is descendants through the male sex, whether they are of the masculine or feminine gender, be called in a similar fashion to the rights of succession regarding the succession to intestate persons³⁹² in accordance with the privilege of their degree, not to be excluded for the reason that they do not have the rights of being from the same father (*consanguinitas*) pursuant to the rule for a sister

³⁸⁹ Haloander's edition has 532.

³⁹⁰ Blume translates as "children," emending the manuscripts' *libertis* with *liberis*.

³⁹¹ The point is that males and females were treated equally as descendants, but not as collaterals.

³⁹² Krüger deletes "regarding the succession to intestate persons."

habent. 5. Cum enim unius sanguinis iura remanent per virilem sexum incorrupta, quare naturae offendimus et legitimo iuri derogamus? cum et aliam maximam iniuriam res in se continet plerisque quasi vulnus intestinum incognitum. cum enim ad earum mulierum successionem masculi iure agnationis vocantur, quis patiatur earum quidem hereditatem ad eos legitimo iure deferri, ipsas vero neque invicem sibi neque masculis posse eodem iure succedere, sed propter hoc solum puniri, quod feminae natae sunt, et paterno vitio (si hoc vitium est) prolem innocentem gravari?

6. In his igitur casibus legem duodecim tabularum sequentes et novum ius novissimo iure corrigentes etiam unum gradum pietatis intuitu transferri ab iure cognationis in legitimam volumus successionem, ut non solum fratris filius et filia secundum quod iam definivimus ad successionem patrui sui vocentur, sed etiam germanae consanguineae vel sororis uterinae filius et filia soli et non deinceps personae una cum his ad iura avunculi sui perveniant, et mortuo eo, qui patruus quidem est fratris sui filius, avunculus autem sororis suae suboli, simili modo ab utroque latere succedatur, tamquam si omnes legitimo iure veniant, scilicet ubi frater et soror superstites non sunt. his etenim personis praecedentibus et hereditatem admittentibus ceteri gradus remanent penitus semoti. 7. Illo procul dubio observando, ut successio non ad stirpes, sed in capita dividatur et is gradus in ordinem legitimum transferatur: ceteris omnibus successionibus secundum ius usque ad praesens tempus observatum in suo statu manentibus. 8. Si qui autem casus iam evenerunt, secundum quod pristina iura volebant, eorum fiat distributio.

D. v k. Dec. post consulatum Lampadii et Orestis vv. cc.

[15] *Idem A. Iohanni pp. pr.* Meminimus antea divinam promulgasse constitutionem, per quam ad vestigia legis duodecim tabularum totam progeniem ex legitima subole descendantem sive masculinam sive femininam legitimo iure hereditatem adipisci sanximus, ut, quemadmodum ipsis a legitimis succeditur, ita et ipsae legitimarum personarum amplectantur successionem. 1. In qua constitutione unum gradum ex cognatis in ius legitimum reduximus, id est germanae filios

from the same father. 5. For since the rights of a single blood remain uncorrupted through the male sex, why do We offend nature and compromise an agnatic right? Since the matter contains another very great wrong in itself, the internal wound, as it were, is unknown to most. For when males are called by right of agnatic relationship to the succession of these women, what person would allow their inheritance to pass to them by lawful right, but the women themselves for their part not be able to succeed to the males in turn by the same right, but to be punished for this reason alone, that they were born women, and the innocent offspring to be burdened by their paternal flaw, if this is a flaw?

6. Therefore in these cases, following the law of the Twelve Tables and correcting new law with the newest law, We want, out of regard to piety, one degree to be transferred from the right of cognate relationship to agnatic succession, so that not only the son and daughter of a brother, in accordance with what We have already defined, be called to the succession of their paternal uncle, but also the son and daughter of a sister from the same father or one from the same mother (uterine sister) alone and not their descendants come to the rights of their maternal uncle, and when the one has died who is a paternal uncle to the children of his brother, but a maternal uncle to the offspring of his sister, he be succeeded from each side in a similar manner, as if they all came (to the inheritance) by agnatic right, that is to say, when a brother and sister do not survive. For when these persons take precedence and accept the inheritance, the other degrees remain completely removed. 7. Without doubt this is to be observed, that the succession be divided not by equal shares by generations (*ad stirpes*), but by persons (*in capita*) and that this degree be transferred into the order established by law. All other successions remain as they are in accordance with the law observed up to the present time. 8. If, however, any situations have arisen in accordance with what the ancient laws wanted, their distribution should take place.

Given November 27, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[15] *The same Augustus to John, Praetorian Prefect.* We remember that we have previously promulgated a divine constitution,³⁹³ through which We have ordained that, in accordance with the footsteps of the law of the Twelve Tables, the entire progeny descending from agnatic (*legittima*) offspring, whether male or female, acquire the inheritance by agnatic right (*legitimo iure*), so that, in whatever way they themselves are succeeded by agnatic relatives, so too should they themselves embrace the succession of agnatic persons (*legitimorum personarum*). 1. In that constitution We restored one degree from the cognate

³⁹³ 14 above.

et filias et sororis uterinae filios ac filias: quam constitutionem in suo robore permanere censemus, cum et in nostris institutionibus tenor eius a nobis relatus est. 1a. Sed subtiliore tractatu habito necessarium duximus, et si quid ex praetoria iurisdictione frugi inventum est, et hoc cum perfectissima definitione posito nostras leges ampliari. 1b. Cum igitur praetor filium emancipatum, licet subtili iure capite fuerat deminutus, attamen in patris successione sine ulla deminutione vocare manifestissimus est, non eodem autem iure ad fratrum suorum successionem ab eo vocabatur, sed nec filii eius iure legitimo suis patruis succedebant, necessarium duximus hoc primum corrigere et legem Anastasianam iusto incremento perfectam ostendere, ut emancipatus filius et filia non solum in paternis bonis ad suorum similitudinem succedant, sed etiam in fratrum vel sororum suarum successione, sive omnes emancipati sint sive permixti sui cum emancipatis, aequo iure invicem sibi succedant et non secundum legem Anastasianam parte aliqua deminuta. et haec quidem de filiis emancipatis sancire bellissimum nobis visum est.

2. Sed nec fratrem vel sororem uterinos concedimus in cognationis loco relinqui. cum enim tam proximo gradu sunt, merito eos sine ulla differentia, tamquam si consanguinei fuerant, cum legitimis fratribus et sororibus vocandos esse sancimus, ut secundo gradu constituti et legitima successione digni reperti aliis omnibus, qui sunt ulterioris gradus, licet legitimi sint, praecellant. et haec quidem de secundi gradus successione satis abundeque nobis cum summa utilitate disposita sunt.

3. Cum autem tertio gradui ex transversa linea fuerit locus, ubi patruis et filiis fratrum et sororum locum antiquitas dedicavit, una cum illis tam emancipati fratris quam emancipatae sororis filium tantummodo et filiam, sive emancipatos sive suos patribus constitutos, et neminem alium ulterius, nec non fratris uterini et sororis germanae vel uterinae filium et filiam tantummodo ex legitima linea invicem vocari censemus, sicut iam sanximus, ut omnes, qui vel ab antiquo iure vel a nostra liberalitate in legitimorum quidem positi sunt praerogativa, eodem autem

relatives into the agnatic right (*ius legitimum*), that is, the sons and daughters of a sister from the same father, and the sons and daughters of a sister from the same mother. We decree that this constitution remain in its force, since its provisions have been related in Our Institutes.³⁹⁴ 1a. But upon a more careful consideration, We have deemed it necessary that Our laws be improved with a most perfect definition of anything useful (*frugi*) that has been found from the Praetorian Edict. 1b. Since, therefore, although an emancipated child had been changed in status by a subtle legal principle, the Praetor nevertheless is most manifest in calling him in the father's succession without any change in status, still he was not called by him with the same right to the succession of his brothers, but his children (*fili*) by statutory right did not succeed their paternal uncles, We have considered it necessary to correct this first and to show the law of Anastasius³⁹⁵ brought to completion by a just amplification, so that an emancipated son and daughter not only succeed in the father's property on an analogy with *sui heredes*, but that they also succeed one another in turn with equal right in the succession of their brothers or sisters, whether all are emancipated or *sui heredes* are mixed in with emancipated children, without some part diminished in accordance with the law of Anastasius. It has seemed to Us most seemly to make these ordinances in connection with emancipated children (*fili*).

2. But We do not allow a brother and sister born from the same mother to be left in the place of cognates. For since they are in the same degree of proximity, We ordain that they rightly must be called, without any difference, with agnate (*legitimi*) brothers and sisters, as if they had been from the same father, so that, established in the second degree and found worthy of statutory succession, they precede all others who are of a remoter degree, although they might be statutory heirs. These dispositions have been made quite generously (*abunde*) and with the highest utility by Us about succession in the second degree.

3. Since, however, there is a place for the third degree from a collateral line, where antiquity dedicated a place for paternal uncles and children of brothers and sisters, We decree that along with them only the son and daughter of an emancipated brother and of an emancipated sister be called reciprocally, whether they themselves have been established as emancipated or are *sui heredes* to their fathers, and no other person further, as well as only the son and daughter of a brother from the same mother and a sister from the same father or mother as long as they are from the agnatic line, just as we have already ordained,³⁹⁶ so that all who by ancient law or by Our generosity have been placed in the privileged category of statutory heirs (*in legitimorum*

³⁹⁴ Just., Inst. 3.2.4.

³⁹⁵ See C. 5.70.5.

³⁹⁶ C. 6.48.14.6.

tertio gradu sunt, simili iure vocentur. 3a. Successionis videlicet iure et in hac parte servando, ut, si qui ex secundo gradu vocati renuntiaverint hereditati et noluerint eam adire nullusque alius sit in secundo gradu, qui succedere et potest et vult, tunc hi, quos praesenti lege enumeravimus ex tertio gradu, in locum recusantium succedant. 3b. Illo etiam observando, ut successio non ad stirpes, sed in capita dividatur: ceteris omnibus successionibus secundum ius usque ad praesens tempus observatum procedentibus et nullo ex cognatis supra memoratos gradus ad iuris agnatici formam redigendo, sed suum ordinem suamque proximitatem tenente incorruptam.

4. Quas autem personas ex iure cognationis in legitimas successiones transveximus, eas et tutelae gravamini vicissim supponimus, scilicet si et masculi sint et perfectae aetatis secundum nostrae constitutionis tenorem, ut non solum lucrum sentiant, sed etiam gravamini subiugentur. 5. Si qui autem casus iam evenerunt et per iudicalem sententiam vel amicalem transactionem sopiti sunt, nullam sentiant ex hac lege retractationem.

D. id. Oct. Constantinopoli dn. Iustiniano A. pp. IIII et Paulino vc. cons.

LVIII Communia de Successionibus

[1] *Imp. Diocletianus et Maximianus AA. et CC. Varianae.* Scire debuisti fratre emancipato potiore eam quae in familia mansit in alterius emancipati bonis non haberi, sed eos pariter, si sollemniter petierint bonorum possessionem, succedere.

S. xv k. Iun. Sirmi CC. cons.

[2] *Idem AA. et CC. Apollinario.* Si pater tuus propiori sobrino-tuo agnato constituto et intestato defuncto iure civili adita hereditate, vel hoc ab initio non interveniente sive capitis deminutione perempto sollemniter bonorum possessione admissa successit ac tibi patris tui

... *praerogativa*), but are in the same third degree, be called by a similar right. 3a. Of course the right of succession is to be maintained in this respect, that, if any from the second degree should be called and renounce the inheritance and be unwilling to enter it, and there should be no one else in the second degree who is both able and willing to succeed, then those whom We have enumerated in the present law from the third degree shall succeed in the place of those refusing. 3b. This is also to be observed, that the succession be divided not by generations but by persons; all other successions proceed in accordance with the law observed up to the present time, and no one from the cognate relatives beyond the degrees listed above is to be admitted (*redigendo*) to the rule of agnatic right, but holds onto his own rank and his own proximity unchanged.

4. We also subject to the burden of tutelage for their part the persons whom We have transferred from the right of cognate relationship into statutory successions, that is to say if they are males and are of full age in accordance with the provisions of Our constitution, so that they not only realize the gain, but that they also be subjected to the burden. 5. If, however, cases have even already arisen and have been put to rest through the verdict of a judge or a friendly settlement, they shall not undergo any reconsideration as a result of this law.

Given October 15, at Constantinople, in the consulship of Our Lord Justinian, Ever Augustus, (Consul) for the fourth time, and the vir clarissimus Paulinus (534).

Fifty-Ninth Title Common Issues Concerning Successions

[1]³⁹⁷ *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Variana.* You ought to have known that the woman (*eam*) who remained in the agnatic kinship group (*familia*) is not considered to have a stronger claim than an emancipated brother to the property of another emancipated brother, but that both succeed equally, if they formally seek the possession of the property (*bonorum possessio*).

Written May 18, at Sirmium, in the consulship of the Caesars (294).

[2] *The same Augusti and Caesars to Apollinarius.* If your father succeeded your first cousin once removed, established as an agnate and dying intestate, having approached the inheritance on the basis of the civil law, or when this

³⁹⁷ From the date, c. 1 should be placed after c. 5 in this title.

quaesita hereditas est, adire praesidem provinciae debes ac tutorem eius de tutela convenire.

D. XIII k. Iun. Veronae AA. cons.

[3] *Idem AA. et CC. Ulpianae.* Vitrico privigni successionem intestati civili vel honorario iure non deberi certissimum est.

S. xv k. Mart. Sirmi CC. cons.

[4] *Idem AA. et CC. Aurelio Asterio.* Servus successores habere non potest.

D. non. April. CC. cons.

[5] *Idem AA. et CC. Iustinae. pr.* Amitae, cui successisse filios suos proponis, hereditatem tuo nomine non recte petis. 1. Sed quoniam hos etiam intestatos diem functos adseveras, si quidem hi, quos privignos eiusdem amitae dicis, eorum consanguinei fuerint fratres, tam agnationis quam cognationis iure secundo gradu constitutos tibi praeferri non ambigitur. nam si amitini tui alio etiam patre nati numquam eorum matri privigni sunt, admisisse te bonorum possessionem probans eorum vindica successionem.

S. XII k. Mart. CC. cons.

[6] *Idem AA. et CC. Publiciano.* Avunculo priori, qui est in tertio gradu, quam consobrino, qui sequentem occupat, deferri successionem intestati certi iuris est.

Suppos. k. Oct. CC. cons.

[7] *Idem AA. et CC. Nicolao.* Adfinitatis iure nulla successio promittitur.

D. prid. non. Oct. CC. cons.

from the beginning did not happen or was prevented by a change in status (emancipation of the cousin), after gaining possession of the property in the customary way (by being admitted to the inheritance through Praetorian law), and your father's inheritance has been acquired for you, you ought to approach the provincial governor and sue his (the cousin's) tutor on his tutelage.

Given May 19, at Verona,³⁹⁸ in the consulship of the Augusti (293).

[3] *The same Augusti and Caesars to Ulpiana.* It is most certain that succession is not owed to a stepfather of an intestate stepson either by civil law or Praetorian law (*ius honorarium*).

Written February 15, at Sirmium, in the consulship of the Caesars (294).

[4]³⁹⁹ *The same Augusti and Caesars to Aurelius Asterius.* A slave cannot have successors.

Given April 5, in the consulship of the Caesars (294).

[5] *The same Augusti and Caesars to Justina. pr.* You are not correct in seeking in your own name the inheritance of your paternal aunt, to whom you claim her children succeeded. 1. But since you aver that they also have passed away intestate, if indeed those ones who you say are the stepsons of the same aunt were their brothers by the same father, there is no doubt that they, established in the second degree, are preferred to you both by right of agnatic and cognate relationship. For if your cousins were born from another father and are never⁴⁰⁰ stepsons of their mother, by proving that you have gained possession of the property, claim their succession.

Written February 18,⁴⁰¹ in the consulship of the Caesars (294).

[6] *The same Augusti and Caesars to Publicianus.* It is certain law that intestate succession is passed (*deferri*) to a maternal uncle, who is in the third degree, before a cousin, who occupies the following one.

Submitted⁴⁰² October 1, in the consulship of the Caesars (294).

[7] *The same Augusti and Caesars to Nicolaus.* No succession is promised by right of a relationship by marriage (*adfinitas*).

Given October 6, in the consulship of the Caesars (294).

³⁹⁸ More plausibly Beroea (Mommsen). The date is probably June 15, 293; compare C. 5.24.1.

³⁹⁹ Combine with C. 3.31.8 and 7.16.27, which have March 30, 294, as the date (so Mommsen for this constitution), as well as Consultatio 6.18, from which Aurelius is restored, and which also includes Sirmium as the place.

⁴⁰⁰ Mommsen writes "and these are not stepsons ..."

⁴⁰¹ Mommsen writes April 20, 294.

⁴⁰² Krüger writes "written."

[8] *Idem AA. et CC. Iustae.* Antequam scriptus cuiuscumque portionis capax repudiet hereditatem vel alia ratione quaerendae facultatem amittat, ei qui testamentum reliquit intestato nemo succedit. igitur perspicis, quod testamentariae successionis spe durante intestati bona defuncti non recte vindicentur.

S. VI id. Mart. Retiariae CC. cons.

[9] *Idem AA. et CC. Sopatro.* Ancillae dominus liberi hominis, cum quo contubernium haec habuit, per hanc commixtionem successionem vindicare non potest.

S. XV k. Ian. Nicomediae CC. cons.

[10] *Idem AA. et CC. Danuvio.* Nutritoribus hoc nomine nec civili nec honorario iure defertur hereditas.

S. VI k. Ian. CC. cons.

[11] *Imp. Iustinianus A. Demostheni pp. pr.* Sancimus, quemadmodum de his rebus, quae liberis in sacris constitutis ex occasione maritali acquisitae sunt, certus ordo destinatus est, ut, si quis ex his ab hac luce fuerit subtractus, pars eius, quam lucratus est, ad eius liberos vel nepotes vel pronepotes concedat, quibus non extantibus ad fratres suos ex eodem matrimonio progenitos vel, si etiam non supersint, ad fratres ex aliis nuptiis procreatos, cumque nemo eorum fuerit relictus, tunc ad patrem perveniat: ita et de his, quae materna linea per quascumque occasiones vel inter vivos vel per ultimas dispositiones vel ab intestato descendunt, similis ordo servetur, primo in filii vel filiae successione posteritate eius vocanda eaque non inventa fraterno consortio eiusdem vel alieni matrimonii secundum praedictum ordinem arcessito, tunc ad ultimum locum pater a legibus conclametur et sui filii non gratam hereditatem relictam, sed triste lucrum sibi lugeat acquisitum. 1. In omnibus videlicet casibus, in superstitute subole liberorum et fratribus adhuc viventibus, qui ad hereditatem defuncti patrem antecedunt, usu fructu rerum, quarum dominium ad eos pervenit, apud parentes remansuro.

D. XVI k. Oct. Chalcedone Decio vc. cons.

[8] *The same Augusti and Caesars to Justa.* Before a person capable (of receiving the inheritance) who is named as heir to any portion refuses the inheritance or loses the right to gain it by another means, no one succeeds on intestacy to the person who left the will. Therefore you see that while a hope for succession on the basis of the will endures, the property of the intestate decedent will not rightly be claimed.

Written March 10,⁴⁰³ at Retiaria, in the consulship of the Caesars (294).

[9]⁴⁰⁴ *The same Augusti and Caesars to Sopater.* The owner of a slave woman cannot claim succession to a free man with whom she maintained a domestic partnership (*contubernium*) on the basis of this relationship (*commixtio*).

Written December 18, at Nicomedia, in the consulship of the Caesars (294).

[10] *The same Augusti and Caesars to Danuvius.* Neither by civil law nor by Praetorian law does an inheritance pass (*defertur*) to childminders on this account.

Written December 27, in the consulship of the Caesars (294).

[11] *Emperor JUSTINIAN Augustus to Demosthenes, Praetorian Prefect. pr.* In whatever way a certain order has been established about the property that has been acquired for children in power (*in sacris*, under the father's power) on the occasion of a marriage, We ordain that, if any of these (children) is withdrawn from this light, his part that he has gained is to pass to his children, grandchildren, or great-grandchildren, and if there are not any of these, to his siblings (*fratres*) born from the same marriage, but if there are not any of these, to siblings born from other marriages. And when none of these is left, then it is to come to the father, so that a similar order be maintained as with that property that passes on the mother's line through any occasions, either (through gifts) between the living, or through final dispositions, or on intestacy: first, that one's posterity is to be called in the succession of a son or daughter; and if this is not found, the collective brothers and sisters are summoned, whether of the same or a different marriage, according to the aforementioned order; then the father is to be called by the laws in the final place, and he might mourn that a welcome inheritance of his child has not been left him, but that he has acquired a doleful gain. 1. Certainly in all cases, when there are surviving offspring of the children and (also) siblings still living, who come to the inheritance of the deceased earlier than the father, the usufruct over the property, the ownership of which passes to them, will remain with their male ascendants (*parentes*).

Given September 17, at Chalcedon, in the consulship of the vir clarissimus Decius (529).

⁴⁰³ Mommsen writes October 10, 294.

⁴⁰⁴ Combine with C. 3.32.28.

LX De Bonis Maternis et Materni Generis

[1] *Imp. Constantinus A. consulibus tribunis plebis senatui salutem.*
pr. Res, quae ex matris successione fuerint ad filios devolutae, ita sint in
 parentum potestate, ut fruendi dumtaxat habeant facultatem, dominio
 videlicet earum ad liberos pertinente. 1. Parentes autem, penes quos
 maternarum rerum utendi fruendique tantum potestas est, omnem
 debent tuendae rei diligentiam adhibere et quod iure filiis debetur in
 examine per se vel per procuratorem poscere et sumptus ex fructibus
 impigre facere et litem inferentibus resistere atque ita omnia agere, tam-
 quam solidum perfectumque dominium et personam gerant legitimam,
 ita ut, si quando rem alienare voluerint, emptor vel is cui res donatur
 observet, ne quam partem earum rerum, quas alienari prohibitum est,
 sciens accipiat vel ignorans.

2. Docere enim pater debet proprii iuris eam rem esse, quam donat
 aut distrahit: et emptori, si velit, fideiussorem licebit accipere, quia
 nullam poterit praescriptionem opponere filiis quandoque rem suam
 vindicantibus.

*D. xv k. Aug. Aquileia. recitata apud Vettium Rufinum pu. in senatu
 non. Sept. Constantino A. v et Licinio C. cons.*

[2] *Impp. Arcadius et Honorius AA. Florentino pu.* Quidquid avus avia,
 proavus proavia ex materna linea venientes nepoti nepti pronepoti
 pronepti testamento fideicommisso legato donatione vel alio quolibet
 titulo largitionis vel etiam intestati successione contulerint, pater filio
 filiaeve integra illibataque custodiat, ut vendere donare relinquere alteri
 obligare, sicut nec materna bona, non possit usu fructu dumtaxat ad
 eum pertinente, ita ut, quemadmodum ipse super his licentiam totius
 potestatis amittit, defuncto eo filio filiaeve praecipua computentur nec
 ab illis, qui ex patre sunt coheredes, vindicentur.

D. id. Oct. Mediolani Olybrio et Probino cons.

Sixtieth Title Property of the Mother and of the Mother's Family

[1]⁴⁰⁵ *Emperor CONSTANTINE Augustus sends greetings to the Consuls, Praetors, Tribunes of the Plebs, and the Senate.* *pr.* Property that has devolved to children from succession to their mother should remain in the power of male ascendants (*parentes*), such that they only have the right (*facultas*) of enjoying it, with the ownership over it belonging to the children. 1. However, the male ascendants, who only have the power to use and enjoy maternal property, are obliged to apply every care in maintaining it, and, either themselves or through a procurator, demand at a trial what by law is owed to the children and defray expenses diligently from the fruits, resist those bringing lawsuits, and take every action as if they wielded undivided and complete ownership and represented a lawful person (*personam legitimam*), so that, if they ever want to alienate property, the buyer or the person to whom the property is being given as a gift take care that he not knowingly or unknowingly accept a part of that property the alienation of which has been prohibited.

2. For the father is obliged to indicate that the property that he is donating or alienating is in his own private right. The buyer, for his part, if he should wish, will be allowed to accept a guarantor, since he will be able to oppose no prescription (of time) to children at any time claiming their property.

*Given July 18, at Aquileia, and recited before Vettius Rufinus, City Prefect, in the Senate, September 5, in the consulship of Constantine Augustus, for the fifth time, and Licinius Caesar (319).*⁴⁰⁶

[2]⁴⁰⁷ *Emperors ARCADIUS and HONORIUS Augusti to Florentius, Praetorian Prefect.* Whatever a grandfather or a grandmother, and great-grandfather or great-grandmother coming from the mother's side has provided a grandson or a granddaughter, or a great-grandson or great-granddaughter in a will, trust, legacy, gift, or any other category of generosity, or even by succession on intestacy, the father shall maintain it whole and uncompromised for his son or daughter, such that he not be able to sell, give as a gift, bequeath, or obligate it to another, just as with property not from the mother's side, with the usufruct alone belonging to him, so that, just as he himself loses discretion for his entire power over this property), when he dies, it should accrue to the son or daughter and it is not to be claimed by those who are co-heirs of the father (*ex patre*).

Given October 15, at Milan, in the consulship of Olybrius and Probinus (395).

⁴⁰⁵ = C.Th. 8.18.1, with different wording.

⁴⁰⁶ Seeck, following Krüger, gives July 18, 315 (*Const. A. IIII et Licinio IIII*).

⁴⁰⁷ = C.Th. 8.18.7.

[3] *Impp. Theodosius et Valentinianus AA. ad senatum urbis Romae.*
pr. Si viva matre emancipati sunt filii et postea mater decesserit, quoniam omni commodo destituitur pater nec retinet usum fructum, viriles ei inter filios, sive unus seu plures sunt, usus fructus tribuimus portiones. 1. Si vero mulier moriens alios ex filiis emancipatos a patre, alios in patria potestate dimiserit, in casu dispari utitur maritus defunctae beneficio, quod casui utrique praescripsimus, id est circa eorum quidem portionem, quos adhuc in sacris retinet, usum fructum ex legum auctoritate retinebit et praemium delatae, cum volet, emancipationis accipiet, in eorum vero parte, quos exisse de potestate viva matre constiterit, usum fructum virilis inter eos portionis secundum praescripta percipiet.

2. In nepotibus etiam vel neptibus hoc observandum esse censemus, ut maritus, qui uxore mortua, non extantibus filiis, cum solis nepotibus vel neptibus ex hac lege ad emolumentum vocandus est, si unus vel una pluresve nepotes ex filio uno vel pluribus, qui in potestate defecerunt, procreati sunt, hoc iure utatur, quod de filiis constitutum est. 2a. Nam licet hoc novum praesens lex constituat in nepotes, non est tamen ab re, ut in hoc casu deteriores esse nepotibus filii non sinantur. 2b. Habeat igitur avus veniens cum nepotibus in potestate durantibus usum fructum bonorum omnium, quae ex defunctae aviae successione delatae sunt. 2c. Cum vero his quoque libertatem emancipatione largitur, similiter et ab ipsis, sicut de filiis constitutum est, praemium manumissionis accipiat, vel si ex pluribus alteros manumittit alteros retinet, ex parte manumissorum legitimum praemium, ex parte vero in potestate manentium retineat usum fructum.

3. Quod si nepotes sint neptesve aut ex emancipato filio aut ex filia procreati aut ab ipso avia vivente sacris dimissi, idem avus virilis cum ipsis portionis habeat usum fructum. si vero ex nepotibus neptibusve tempore, quo in aviae successionem vocantur, alii in avi sunt potestate,

[3] ⁴⁰⁸ *Emperors THEODOSIUS and VALENTINIAN Augusti to the Senate of the City of Rome. pr.* If children have been emancipated while their mother is alive and afterwards the mother dies, since the father is deprived of every advantage and does not retain the usufruct, We grant him the usufruct over a portion equal to the shares of his children, whether there is one or several. 1. But if a woman when dying leaves behind (*dimiserit*) some of her children emancipated by their father and others in their father's power, the father uses the benefit of the deceased woman in the disparate case(s) that We have prescribed for each situation, that is, in connection with the portion of the ones whom he still retains in his household (*in sacris*, in his power), he will retain the usufruct in accordance with the authority of the laws, and, when he wishes, he will receive the reward for providing emancipation, but in the case of the share of those who it is established have departed from his power while the mother is alive, he will gain the usufruct of a portion equal to what they have received in accordance with what has been prescribed.

2. In the case of grandsons or granddaughters, We decree that this be observed, that the husband, who, when his wife has died and there are not any children surviving, is to be called to the gain (*emolumentum*) with the grandsons and granddaughters alone in accordance with this law, if one or more grandsons or granddaughters, born of one son or more, have died while in (their grandfather's) power,⁴⁰⁹ use the rule that was established concerning children. 2a. For although the present law should establish this new provision for grandchildren, it is still not irrelevant that in this case children not be allowed to be worse off than grandchildren. 2b. Therefore the grandfather coming with grandchildren remaining in his power is to have the usufruct over all the property that has been passed (*delata*) from the succession of the deceased grandmother. 2c. When indeed (he) bestows liberty on these too by emancipation, he should receive the reward for manumission similarly from those very people, just as it has been established concerning children, or, if out of a larger group he manumits some and retains others, from the group of those manumitted he should retain the statutory reward, but from those remaining in his power he should retain the usufruct.

3. But if grandsons or granddaughters have been produced either from an emancipated son or a daughter or have been dismissed by himself from his household (i.e., emancipated) while the grandmother is living, the same

⁴⁰⁸ = C.Th. 8.18.9, with some additional wording; combine with C. 6.55.11 (check passages listed there).

⁴⁰⁹ It is possible to imagine a situation in which they died in their father's power, if the grandfather had emancipated the father and the children predeceased the father; but this seems a bit of a stretch. See the *principium*.

id est mariti defunctae, alii sui iuris sint, circa personam quidem eorum, qui in potestate consistunt, et in usu fructu consequendo et in emancipationis praemio conquirendo ratio supra dicta servetur: in his vero, qui sui iuris sunt, facultas capiendi usus fructus virilis inter eos portionis habeatur.

4. Eadem autem et de pronepotibus sexus utriusque sancimus, manente definitione, quae de singulis sancita est, si filii sint pariter ac nepotes.

D. VIII id. Nov. Ravennae Theodosio XII et Valentiniano II AA. cons.

[4] *Imp. Leo A. Callicrati pp. per Illyricum. pr.* Omnem ambiguitatis confusionem amputantes hac liquida et compendiosa lege sancimus circa usum fructum maternarum rerum nullam esse differentiam, sive in priore matrimonio pater, ex quo filios habuit, permanere voluerit sive novercam filiis superduxerit: legibus, quae de maternis bonis latae sunt, suam habentibus firmitatem. 1. Patres igitur usum fructum maternarum rerum, etiamsi ad secundas migraverint nuptias, sine dubio habere debebunt: nec ullam filiis vel quibuslibet ex persona eorum contra patres improbam vocem accusationemque posse competere.

D. k. Sept. Anthemio A. II cons.

LXI De Bonis, Quae Liberis in Potestate Constitutis ex Matrimonio vel Aliter Acquiruntur, et Eorum Administratione

[1] *Imp. Theodosius et Valentinianus AA. ad senatum.* Cum venerandae leges vetuerint patribus iure potestatis adquiri, quidquid eorum filiis avus avia proavus proavia a linea materna venientes quocumque titulo contulissent, hoc quoque convenit observari, ut, quidquid vel uxor marito non emancipato vel maritus uxori in potestate positae quocumque

grandfather should have the usufruct over a portion equal to what they have received. But if from among the grandsons and granddaughters, at the time in which they are called to the succession of the grandmother, some are in the power of the grandfather, that is of the husband of the deceased woman, and others are *sui iuris*, the plan described above shall be maintained in connection with the person of those who are in power, both in gaining the usufruct and in acquiring the reward for the emancipation. But as to those who are *sui iuris*, the right to take the usufruct of a portion equal to what they have received is to be maintained.

4. We make the same ordinance concerning great-grandchildren of either sex, with the definition remaining that has been ordained for each group, if there are children and grandchildren at the same time.

Given November 6, at Ravenna, in the consulship of Theodosius, for the twelfth time, and Valentinian, for the second time, Augusti (426).

[4] *Emperor LEO Augustus to Callicrates, Praetorian Prefect for Illyricum.* pr. Chopping off every confusion of ambiguity We ordain by this pellucid and concise law that, in regard to the usufruct of maternal property, there is no difference whether the father wanted to remain in the prior marriage (i.e., not remarry) from which he had children, or whether he brought a stepmother for his children; the laws that have been passed concerning maternal property remain in effect. 1. Therefore fathers without doubt ought⁴⁰⁰ to have the usufruct over maternal property even if they migrate to second marriages; nor can children or anyone else representing them (*ex persona eorum*) avail themselves of any wicked words or accusations against their fathers.

Given September 1, in the consulship of Anthemius Augustus, for the second time (468).

Sixty-First Title Property That Is Acquired for Children in Power from Marriage or Otherwise, and Its Management

[1]⁴⁰¹ *Emperors THEODOSIUS and VALENTINIAN Augusti to the Senate.* Since the venerable laws forbade that whatever a grandfather, grandmother, great-grandfather, or great-grandmother who come from the maternal line have conferred on their children under any title, be acquired for the (children's) fathers by the right of their power, it is appropriate that this rule also be observed, that

⁴⁰⁰ Mommsen deletes *debeant*.

⁴⁰¹ = C.Th. 8.19.1; combine with C. 6.55.11 (and other passages listed there). This constitution extends earlier rules that permit inheritance to proceed despite the recipient being under a father's *potestas*.

titulo vel iure contulerit seu transmiserit, hoc patri nullatenus adquiratur: atque ideo in eius tantum, cui delatum est, iure durabit.

D. VII id. Nov. Ravennae Theodosio XII et Valentiniano II AA. cons.

[2] *Idem AA. Hierio pp.* Constitutionis novae capitulum clariore interpretatione sancimus, ut, quae per filios nepotes pronepotes itemque filias neptes proneptes, quamvis in potestate sint, minime adquiri decrevimus a marito vel uxore quocumque titulo collata sive ultima voluntate transmissa, nullus ad id quoque pertinere existimet, quod ab ipso parente datum vel ante nuptias donationis causa pro una ex memoratis personis praestitum fuerat, ut minime ad eum, si casus tulerit, revertatur (prospiciendum est enim, ne hac iniecta formidine parentum circa liberos munificentia retardetur): sed ut his potestatis iure ad parentes reversis cetera, quae ex substantia speciali coniugis ad superstitem devenerunt, quamvis idem in sacris sit, fructu tamen solo atque usu parentibus deputato, dominium ei qui a coniuge vel quae meruit reservetur, parente pro emancipationis etiam beneficio, si voluerit, sicut in maternis rebus vel quae per eandem lineam veniunt, praemium habituro.

D. x k. Mart. Felice et Tauro cons.

[3] *Idem AA. Florentio pp. pr.* Quod scitis prioribus continetur nec a filia quae in potestate est donationem ante nuptias patri nec a filio dotem adquiri, eo addito confirmamus, ut, defunctis his adhuc in potestate patris, si liberis extantibus moriantur, ad liberos eorum eadem res iure hereditatis, non ad patres iure peculii transmittantur nec per

whatever either a wife has provided or transmitted to an unemancipated husband under any right or title, or a husband has provided to a wife positioned in her father's power, is not at all to be acquired for the father; and for that reason it will remain only in the right of that person upon whom it was conferred.

Given November 7, at Ravenna, in the consulship of Theodosius, for the twelfth time, and Valentinian, for the second time, Augusti (426).

[2]⁴¹² *The same Augusti to Hierius, Praetorian Prefect.* We establish a chapter of a new constitution with a clearer interpretation, that no one should judge as belonging to what We have decreed is not acquired by a husband or wife through sons, grandsons, or great-grandsons, as well as daughters, granddaughters, or great-granddaughters, although they are in (the father's) power, under whatever title it was conferred or transmitted by a final will, that which had been given by the parent himself (as dowry) or as a gift before marriage provided for one of the persons mentioned, so that it not revert to him if a chance (*casus*) brings it – for care must be taken lest, as a result of the introduction of this fear, parents' munificence toward their children might be thwarted – but that, when this property has reverted to the male ascendants (*parentes*) by the right of their power, ownership over the other property that has passed to a survivor from the specific property of the spouse be reserved for the man or woman who has gained ownership of it from the spouse, although this same person is in power (*in sacris*), albeit with the enjoyment and use (*usufruct*) alone assigned to the male ascendants, while the father will have the reward for the benefit of emancipation, if he wishes, just as in the case of maternal property or what comes through the same line.

Given February 20, in the consulship of Felix and Taurus (428).

[3]⁴¹³ *The same Augusti to Florentius, Praetorian Prefect. pr.* We confirm what is contained in previous decrees, that neither a gift before marriage is acquired for the father from a daughter in power nor a dowry from a son, with this addition, that when these persons are deceased while still in the father's power, if they should die with surviving children, the same property should pass to their children by right of inheritance, not to the fathers by right of the *peculium*, nor of course are they to be acquired for the grandfather through grandchildren. 1. If, however, the same grandson meets his day without children but with both

⁴¹² Combine with C. 2.57.2, 5.3.17, 5.4.22, 5.11.6, 6.18.1, 6.24.11, which include Constantinople as the place of promulgation.

nepotes avo videlicet acquirendae. 1. Sin autem idem nepos superstitionibus tam patre quam avo paterno diem suum sine liberis obierit, eorum dominium, quae ad ipsum ex matre vel ab eius linea pervenerunt, non ad avum, sed ad patrem eius perveniat: usu fructu videlicet et in huiusmodi casibus avo, dum supererit, servando.

D. VII id. Sept. Constantinopoli Theodosio A. XVII et Festo cons.

[4] *Imp. Leo et Anthemius AA. Erythrio pp. pr.* Quaecumque res ad filium vel filiam, nepotes sive pronepotes utriusque sexus in potestate constitutos ex priore vel secundo aut tertio seu coniugio numerosiore pervenerint ex dote vel quacumque donatione seu hereditate legato vel fideicommisso, earum usque in diem vitae suae pater vel avus vel proavus usum fructum habeant: easdem res quocumque modo alienandi vel pignoris seu hypothecae iure obligandi facultate eis penitus interdicta, dominio videlicet earum ad filios et nepotes sive pronepotes utriusque sexus permanente, etiamsi ex eodem matrimonio procreati non sint, ex quo eadem res ad parentes eorum, qui quaeve in potestate sunt, fuerint devolutae. 1. Eo videlicet observando, ut morientium fratrum sororumve portiones, qui quaeve ex eodem matrimonio progeniti vel progenitae sunt, primo quidem ad liberos eorum, ut dictum est, si tamen fuerint, deinde his non extantibus ad superstites tantummodo fratres vel sorores eorum perveniant aut ad superstitem, si ex isdem fratribus sive sororibus unus unave remanserit. 2. Omnibus autem, qui ex eodem coniugio fuerint procreati, defunctis tunc demum ad eos, qui ex alio matrimonio sunt editi, easdem res pro virili parte venire statuimus: nullo autem ex memoratis personis existente parentes eorum eas percipere. 3. Parentibus vero, quorum sub potestate sunt, usum fructum dumtaxat habituris memoratas res iure potestatis alienandi vel obligandi licentiam denegamus, non prohibendis isdem liberis, quandoque sui iuris fuerint, nulla temporali praescriptione obsistente easdem res omnibus modis vindicare, nisi forte, postquam potestate parentum eos contigerit liberari, tantum temporis effluxerit, ut ex continua et inconcussa tenentis possessione eorum excludatur intentio.

D. v k. Mart. Marciano cons.

a surviving father and paternal grandfather, ownership of that property that came to him from the mother or her line should pass not to his grandfather, but to his father. Of course the usufruct in such cases is to be maintained for the grandfather while he survives.

Given September 7, at Constantinople, in the consulship of Theodosius Augustus, for the seventeenth time, and Festus (439).

[4]⁴⁴ Emperors LEO and ANTHEMIUS Augusti to Erythrius, Praetorian Prefect. **pr.** Whatever property has passed to a son or daughter, or to grandchildren or great-grandchildren of either sex in power from a first, second, third, or even later marriage, from a dowry or any type of gift, inheritance, legacy, or trust, the father, grandfather, or great-grandfather shall have the usufruct over it until the (last) day of life; but they are completely forbidden the right (*facultas*) to alienate the same property in any way or to obligate it by right of pledge or hypothec, while the ownership of it plainly remains with the children, grandchildren, or great-grandchildren of either sex, even if they have not been produced from the same marriage from which the same property had passed to the fathers of the persons of either sex who are in power. 1. Certainly this is to be observed, that the portions of dying brothers or sisters who have been produced from the same marriage should first pass to their children, as has been said, but only if there are any; then, if there are not, only to their surviving brothers or sisters, or to the survivor, if one remains from the same brothers or sisters. 2. However, when all who have been produced from the same marriage have deceased, We establish that only then does the same property in a full share (*pro virili parte*) come to those who have been born from a different marriage, but that, if none of the persons mentioned exists, their fathers take it. 3. But We deny male ascendants under whose power they are, since they will have only the usufruct, permission to alienate or obligate the property mentioned by right of their (the father's) power, while the same children, whenever they are *sui iuris*, are not to be prohibited from claiming the same property in every way, with no prescription of time blocking them, unless perhaps, after it has befallen them to be freed from the power of their fathers, so much time has flowed by that their assertion (*intentio*) is excluded by the continuous and unshaken possession of the one holding it (for thirty years).

Given February 26, in the consulship of Marcianus (472).

⁴³ Pr. = Nov. Theod. 14.1.8; combine with C. 5.9.5.

⁴⁴ Combine with C. 5.9.6, 6.20.17.

[5] *Idem AA. Nepoti magistro militum Dalmatiae. pr.* Non sine ratione de negotio, quod inter matrem familias, cuius vestra suggestio meminit, et germanum eius vertitur, magnitudo tua diversis legibus ex utraque parte prolatis nostram credidit consulendam esse clementiam, cum mulier diversis iuris lectionibus idem intellegi maritum et sponsum niteretur probare, germanus mariti nomen illi soli, qui nuptias contraxerit, recitatione constitutionis divorum retro principum Theodosii et Valentiniani, qua cavetur, quidquid maritus vel uxor in potestate constituti invicem sibi reliquerint, non patri adquiri, sed ad eorum ius pertinere, imponere. 1. Quamvis ergo significatione nominis maritus vel uxor post coeptum matrimonium intellegatur, ex quo videlicet inducta est dubietas, attamen, quia consequens est ambiguas atque legum diversis interpretationibus titubantes causas benigne atque naturalis iuris moderamine temperare, non piget nos in praesenti quoque negotio, de quo sublimitas tua suggestit, aequitati convenientem Iuliani tantae existimationis viri atque disertissimi iuris periti opinionem sequi. qui cum de dotali praedio tractatu proposito idem ius tam de uxore quam de sponsa observare arbitratus sit, licet lex Iulia de uxore tantum loquatur: qua ratione tam sponsaliciam donationem quam hereditatem, quam memoratus sponsus suam sponsam lucrari voluit, non adquiri patri, sed ad eam pervenire benignum esse perspeximus.

D. k. Iun. Leone A. v cons.

[6] *Imp. Iustinianus A. Demostheni pp. pr.* Cum oportet similem providentiam tam patribus quam liberis deferri, invenimus autem in veteris iuris observatione multas esse res, quae extrinsecus ad filios familias veniunt et minime patribus adquiruntur, quemadmodum in maternis bonis vel quae ex maritali lucro ad eos perveniunt, ita et in his, quae ex aliis causis filiis familias adquiruntur, certam introducimus definitionem. 1. Si quis itaque filius familias vel patris sui vel avi vel proavi

[5] *The same Augusti to Nepos, Master of Soldiers in Dalmatia. pr.* Not without reason has Your Greatness believed, concerning the business involving the mother of the family (*materfamilias*) whom Your report (*suggestio*) mentions and her brother (from the same father), after diverse laws have been cited by either side, that Our Clemency should be consulted, since the woman was attempting to prove that "husband" (*maritus*) and "fiancé" (*sponsus*) are understood as the same in different readings of the law, whereas the brother applied⁴⁵ the name of husband only to that person who has contracted a marriage, on the basis of the recitation of the constitution of the earlier deified Emperors Theodosius and Valentinian,⁴⁶ in which it was provided that whatever a husband or wife in power have left one another reciprocally is not acquired for the father but belongs to their right. 1. Therefore although by the (strict) meaning of the term, a husband or wife is understood after the marriage has begun, as a result of which, apparently, doubt has been introduced, even so, since it is logical to temper in a kindly fashion and with the guidance of natural law cases that are ambiguous and wavering because of different interpretations of the laws, We do not regret also in the present business, about which Your Sublimity has reported, to follow the opinion of Julian, a man of such a great reputation and a most eloquent expert in the law, which is consistent with fairness. Since he decided to observe the same rule concerning a dotal property, when the question was proposed, for both a wife and a fiancée, although the *lex Julia* only speaks about the wife, We have seen that, by this reasoning, it is kind that both a gift to a fiancée and an inheritance, which the aforementioned husband wanted his fiancée to gain, is not acquired for her father, but belongs to her.

Given June 1, in the consulship of Leo, for the fifth time (473).

[6] *Emperor JUSTINIAN Augustus to Demosthenes, Praetorian Prefect. pr.* Although similar foresight must be taken for both fathers and children, We find all the same in Our observation of the ancient law that there are many things that come from outside to children in the father's power and are not acquired for fathers, as in maternal property or what comes to them from a marital benefit⁴⁷ (*lucrum maritale*), as well as with those things that are acquired for children in power from other causes, We introduce a precise definition. 1. If any child in power, whether in the power of his father, grandfather,

⁴⁵ The manuscripts' *imponere* probably requires emendation.

⁴⁶ 1 above.

⁴⁷ *Materna bona* is property inherited from the child's mother. This exception, introduced by Constantine, was gradually extended to other property of non-paternal origin (*bona adventicia*), including dowry from the child's wife (cf. 4 and 5 above), the *maritale lucrum*.

in potestate constitutus aliquid sibi adquisierit non ex eius substantia, cuius in potestate sit, sed ab aliis quibuscumque causis, quae ex liberalitate fortunae vel laboribus suis ad eum perveniant, ea suis parentibus non in plenum, sicut antea erat sancitum, sed usque ad solum usum fructum adquirat, et eorum usus fructus quidem apud patrem vel avum vel proavum, quorum in sacris sit constitutus, permaneat, dominium autem filiis familias inhaereat ad exemplum tam maternarum quam ex nuptialibus causis filiis familias adquisitarum rerum. 1a. Sic etenim et parenti nihil derogabitur usum fructum rerum possidenti et filii non lugebunt, quae ex suis laboribus sibi possessa sunt, ad alios transferenda adspicientes vel extraneos vel ad fratres suos, quod etiam gravius multis esse videtur. 1b. Exceptis castrensibus pecuniis, quorum nec usum fructum patrem vel avum vel proavum habere veteres leges concedunt: in his enim nihil novamus, sed vetera iura intacta servamus. eodem observando etiam in his pecuniis, quae quasi castrensia pecunia ad instar castrensium pecuniarum accesserunt. 1c. Sub hac tamen definitione hunc legis articulum inducimus, ut in successione quidem earum rerum, quae extrinsecus filiis familias adquiruntur, iura eadem observentur, quae in maternis et nuptialibus rebus statuta sunt.

2. Non autem hypothecam filii familias adversus res patris viventis adhuc seu iam mortui sperare audeant nec ratiocinia eis super administratione inferre, sed tantummodo alienatione vel hypotheca suo nomine patribus denegata rerum, habeat parens plenissimam potestatem uti fruique his rebus, quae per filios familias secundum praedictum modum adquiruntur. 2a. Et gubernatio earum sit penitus impunita et nullo modo audeat filius familias vel filia vel deinceps personae vetare eum, cuius in potestate sunt, easdem res tenere aut quomodo voluerit gubernare, vel si hoc fecerint, patria potestas in eos exercenda est: sed habeat pater vel aliae personae, quae superius enumeratae sunt, plenissimam potestatem uti frui gubernareque res praedicto modo adquisitas.

2b. Et si quid ex usu earum pater avus vel proavus collegerit, habeat licentiam quemadmodum cupit hoc disponere et in alios heredes transmittere, vel si ex earum rerum fructibus res mobiles vel immobiles vel se moventes comparaverit, eas etiam quomodo voluerit habeat

or great-grandfather, acquires something for himself not from the property of the one in whose power he is, but from any other causes, that passes to him as a result of the generosity of fortune or his own labors, he shall acquire these things for his male ascendants not in full, as had been previously ordained, but only up to the usufruct, and the usufruct over these shall remain with the father, grandfather, or great-grandfather in whose power (*sacris*) he is, but the ownership shall accrue to the children in power, on the analogy of maternal property and property acquired for children in their father's power in connection with marriage. 1a. For in this way nothing will be diminished for the father possessing the usufruct over the property, and children will not grieve from seeing that things that are possessed by them as a result of their own labors are to be transferred to others, either outsiders or their own siblings, which is seen by many as even more burdensome. 1b. An exception is made for military *peculia*, whose usufruct the ancient laws do not allow the father, grandfather, or great-grandfather to have; for We make no innovation with respect to these, but We maintain the old rights intact. The same is to be observed also in these *peculia* that have come (to the child) as quasi military *peculia* on the analogy of a military *peculium*. 1c. Nevertheless, under this definition We introduce this provision of the law, that, in the succession to that property that is acquired from outside for children in their father's power, the same rights be observed that have been established for maternal and marriage property.

2. Children in their father's power should not dare to hope for a hypothec against the property of the father, whether still living or already dead, nor to subject their management to accounting, with only the alienation of the property or imposing an hypothec on it in their own name denied to fathers. The parent shall have the fullest power to use and enjoy that property that is acquired through children in power in accordance with the aforementioned means. 2a. And their management of it shall be altogether unpunished and in no way shall the son or daughter in the father's power or their successors (*deinceps personae*) dare to forbid that person, in whose power they are, to hold the same property or to manage it in whatever way he wants, or, if they do this, the father's power is to be exercised against them. But the father or other persons who have been listed above shall have the fullest power to use, enjoy, and manage that property acquired in the aforementioned way.

2b. And if the father, grandfather, or great-grandfather gains something from the use of this property, he shall have the license to dispose of this howsoever he desires and to transmit it to other heirs, or if from the fruits of this property he purchases movable, immovable, or self-moving property, he shall

et transmittat et in alios transferat sive extraneos sive liberos suos seu quamlibet personam. 2c. Sin autem res sibi memorato modo adquisitas parens noluerit tenere, sed apud filium vel filiam vel deinceps personas reliquerit, nullam post obitum eius licentiam habeant heredes alii patris avi vel proavi eundem usum vel quod ex hoc ad filios familias pervenit utpote patri debitum sibi vindicare, sed quasi diurna donatione in filium celebranda, qui usum fructum detinuit, quem patrem habere oportuerat, ita causa intellegatur et eundem usum fructum post obitum patris ipse lucretur, parente ius exactionis quasi sibi debitae a filio, qui usum fructum consensu eius possidebat, suae posteritati vel successioni minime transmittente, quatenus in omni pace inter se successio eius permaneat nec altercationis cuiusdam maxime inter fratres oriatur occasio.

3. Cum autem Constantiniana lege cautum erat, si filii familias ab his, qui eos in potestate habent, nexu paterno per emancipationem liberentur, debere patrem tertiam partem bonorum, quae adquiri non solent, quasi remunerationis gratia a filio accipere vel retinere, et ex hac causa iterum pars non minima substantiae liberorum adimebatur, sancimus huiusmodi casu interveniente et emancipatione liberis imposita non tertiam partem dominii rerum minime adquisitarum, sed dimidiam usus fructus apud maiores qui emancipationem donant residere: exceptis et in hoc casu castrensibus et quasi castrensibus tantummodo pecuniis, quibus nihil nec ex hac causa diminuitur. sic enim nec liberis cuiuscumque sexus aliquid dominii auferetur et patribus amplioris patrimonii usus fructus adsignabitur. 3a. Hoc obtinente et si in emancipatione sibi parentes hoc minime servaverint: sed nisi specialiter vel in emancipatione huic praemio renuntiaverint vel donatione facta sese et ab huiusmodi beneficio alienaverint et in liberos hoc transtulerint, manere ad eos etiam tacentes ius et beneficium usus fructus retinendi, ut post obitum eorum et usus fructus in omnibus memoratis causis ad eos perveniat, quorum dominium est, scilicet secundum, quod iam diximus, in successionibus eorum omnibus servandis, quae de maternis et nuptialibus bonis consultissimis legibus definita sunt.

4. Sed cum tacitas hypothecas tam veteres leges in quibusdam certis casibus introduxerunt quam nos in maternis ceterisque, quas servare necesse est, et dubitabatur, ex quo hypothecas competere oportet,

also have it in whatever way he wants and he shall transmit it and transfer it to others, whether outsiders, or his own children, or any person. 2c. But if the father does not wish to hold property acquired for himself in the manner mentioned, but leaves it with his son or daughter or their successors, other heirs of the father, grandfather, or great-grandfather shall have no license after his death to claim for themselves its use or what has accrued from it to the children in power, like it was owed to the father, but, as if a long-lasting gift were to be conferred on the child who retained the usufruct that the father was supposed to have had, the situation is to be understood in this way and he himself shall gain the same usufruct after the death of the father, with the father not transferring to his posterity or successors the right to exact the usufruct as if owed to himself by the child who on his consent possessed it, to the extent that his successors remain in complete peace among themselves and no occasion for any altercation at all arise among the siblings.

3. Since, however, it had been provided in the law of Constantine⁴¹⁸ that, if children in power (*fili familias*) should be freed by emancipation from the paternal bond by those who have them in their power, the father ought to receive from the child or retain one-third of the property, which is not customarily acquired (i.e., pass into ownership), as if for remuneration, and as a result of this reason a not insignificant part of the property belonging to the children was taken away a second time (*iterum*), We ordain that, when such a case occurs and emancipation has been imposed on the children, one-third of the ownership of the property not acquired not remain with the male ascendants who bestow emancipation, but half the usufruct; the only exception is made for military and quasi-military *peculia*, which are not even diminished on this basis. For in this way no ownership will be taken away from children of either sex and the usufruct of a larger patrimony will be assigned to fathers.

3a. This rule obtains even if in the emancipation the male ascendants have not reserved this for themselves; but unless they either have specifically renounced this reward in the emancipation or when making a gift have alienated themselves from such a benefit and have transferred it to their children, the right and benefit of retaining the usufruct remains with them even when they are silent, so that after their passing the usufruct in all the aforementioned situations accrues to those persons who have the ownership, that is to say, in accordance with what We have already said, in maintaining all the successions to those things that have been defined as maternal and marriage property by the most carefully considered laws.

4. But since the ancient laws have introduced tacit hypothecs in certain specific cases, just as We have in maternal and other property,⁴¹⁹ which must be maintained, and there was doubt from what time the hypothecs must apply,

⁴¹⁸ C. 6.60.1.

utrumne ab initio an ex eo tempore, ex quo male aliquid gestum est, compendiosa narratione interpretamur initium gerendae vel deserendae administrationis vel observationis esse spectandum et non tempus, ex quo male aliquid fuerit gestum.

Recitata septimo miliario in novo consistorio palatii dn. Iustiniani. d. III k. Nov. Decio vc. cons.

[7] *Idem A. Iuliano pp. pr.* Cum multa privilegia imperialibus donationibus iam praestita sunt, dignum incrementum et his offerre nostra dignata est clementia. 1. Si quis igitur a serenissimo principe vel a piissima Augusta sive masculus sive femina donationem sit consecutus vel consecuta sive mobilium sive immobilium seu se moventium rerum, in filiis familias tamen constitutus vel constituta, habeat huiusmodi res omni acquisitione absolutas et nemini eas adquirat neque earum usum fructum pater vel avus vel proavus sibi vindicet, sed ad similitudinem castrensium peculii omnem facultatem in eas filii vel filiae familias habeant. 2. Ut enim imperialis fortuna omnes supereminet alias, ita oportet et principales liberalitates culmen habere praecipuum.

D. proposit. XII k. April. Constantinopoli Lampadio et Oreste vv. cc. cons.

[8] *Idem A. Iohanni pp. pr.* Cum non solum in maternis rebus, quae filiis familias deferuntur, sed etiam de aliis omnibus, quae acquisitionem effugiunt, et maxime post novellam nostri numinis legem, quae omnia, quae extrinsecus ad filios familias perveniunt et non ex paterna substantia, non esse adquirenda patribus statuit, nisi tantummodo ad usum fructum, variae altercationes exortae sunt et varios eventus variosque continent tractatus et semper in iudiciis versantur, necesse est utiliter et apertissime omnia dirimere.

1. Sancimus itaque in omnibus rebus, quae fugiunt quidem domini acquisitionem, sed usus fructus tantummodo patri offertur vel aliis parentibus a filio familias cuiuscumque gradus vel sexus, sive pater adire filium familias integrae aetatis compellit et ille reclamandum

whether from the outset or from that time when something has been improperly administered, We decide, to explain it in brief, that one must look at the beginning of managing or deserting an administration or supervision, and not at the time when it was administered improperly.

Recited at the seventh milestone in the New Consistory of the Palace of Our Lord Justinian. Given October 30, in the consulship of vir clarissimus Decius (529).

[7] *The same Augustus to Julian, Praetorian Prefect. pr.* Although many privileges have already been bestowed by means of imperial donations, Our Clemency has deigned to offer an increase even to these. 1. Therefore if anyone, whether male or female, has gained a gift from the Most Serene Emperor or from the Most Pious Augusta, whether of movable, immovable, or self-moving property, but while children in power, he or she shall have such property free from every acquisition (by the *paterfamilias*) and not acquire it for anyone, and the father, grandfather, or great-grandfather shall not claim the usufruct over it for himself, but, similarly to a military *peculium* the sons or daughters in power shall have every right (*facultas*) over it. 2. For as the imperial fortune looms over all other ones, in the same way imperial generosity must have a lofty height.

Given and posted March 21,⁴²⁰ at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (530).

[8]⁴²¹ *The same Augustus to John, Praetorian Prefect. pr.* Since various disputes have arisen not only in connection with maternal property that is conferred on children in (a father's) power, but also with all other property that escapes acquisition (by the *paterfamilias*), and especially after the new law of Our Imperial Majesty,⁴²² which established that everything that comes to children in power from outside and not from the father's power is not to be acquired for the father except as to the usufruct alone, and (further since) various disputes have arisen involving differing outcomes and differing considerations, and they are always before the courts, it is necessary to sort everything out usefully and most openly.

1. And so We ordain that in all property that escapes acquisition of ownership (by the *paterfamilias*), but whose usufruct alone is offered to the father or other male ascendants by the child in power of any degree or sex, whether the father compels the child in power of full age to enter the property and that one

⁴¹⁹ Blumer; see C. 5.9.8.

⁴²⁰ Krüger writes "given March 18." This is adopted by Lounghis *et al.*

⁴²¹ Combine with C. 6.22.11.

⁴²² 6 above.

existimat, sive filius familias adire cupit et pater in contrarium inclinat, liberam habere licentiam et patrem ipsum sibi adire hereditatem recusante filio et omne sive damnum sive lucrum in suam habere fortunam, nullo ex hoc praeiudicio filio generando: sive e contrario patre recusante filius adire hereditatem voluerit, nullam acquisitionem nec usum fructum patri offerri, sed ipsum filium sibi imputare, si quid ex hoc contigerit: nulla actione neque contra patrem danda, ubi adversus eius voluntatem filius hereditatem vel legatum vel fideicommissum vel aliud quidquid ex quocumque titulo sive donationis sive contractus sibi adquirere maluerit, neque adversus filium simili modo actione extendenda, ubi recusante eo pater sua auctoritate haec sibi vindicet, huiusmodi additionis tramite ex praesenti lege patri competente. 1a. Sed habeat et pater omnem licentiam et actiones movere et ab aliis pulsari, ubi ad eum totum commodum pervenit, et filius simili modo in agendo et pulsando solus habeat et detrimentum et commodum, necessitate per officium patri imponenda tantummodo filio consentire vel agenti vel fugienti, ne iudicium sine patria voluntate videatur consistere. et haec quidem, si plenae aetatis filius est, qui paternam voluntatem sequi non patitur.

1b. Sin autem in secunda aetate adhuc filius est et hereditate ei delata pater consentire adeunti hereditatem noluerit vel patre volente ipse reclamaverit, si quidem recusaverit filius, licentiam damus patri simili modo hereditatem adire et eam pleno iure habere, his omnibus quae superius diximus locum habentibus. 1c. Sin autem patre recusante filius adire maluerit, damus quidem licentiam ei hoc facere, patre autem nolente res filii gubernare propter causae necessitatem habeat facultatem filius adire competentem iudicem et ex eo petere curatorem hereditati dari, per quem gubernatio rerum in eum delatarum procedat: in utroque casu in integrum restitutionis auxilio minime ei denegando.

2. Similique modo et in milite filio familias, qui recusaverit additionem hereditatis, quae ei ex castrensibus occasionibus perveniat, patri danda licentia adire hereditatem, ut ad ipsum perveniat pleno iure tam per usum fructum quam per dominium eandem hereditatem possessurum, quasi ipse pater ab initio fuisset heres institutus: eo videlicet subiacente omnibus oneribus hereditariis et omnia commoda habituro et ad filium

judges that he should refuse, or whether the child in power desires to enter it and the father inclines in the opposite direction, the father have full permission to enter the inheritance for himself when the child refuses and to have the entire loss or gain as part of his own fortune, and no prejudice is to be created as a result of this for the child. If, by contrast, the child wishes to enter the inheritance while the father refuses, no acquisition (of ownership) or usufruct is offered to the father, but the child himself counts it for his own if anything befalls him from this. No right of action is to be given against the father, when against his will a child prefers to acquire for himself an inheritance, a legacy, a trust, or any other thing from any title, whether a gift or a contract, nor in a similar manner is any action to be extended against the child, when, despite his refusal, the father claims these things for himself on his own authority, since a path for entering upon (the bequest etc.) is available to the father from the present law. 1a. But the father shall have all permission both to bring actions and to defend himself against others when the entire benefit comes to him, and the child in a similar fashion shall alone have both the loss and gain in bringing an action and in defending against one, with the necessity to be imposed on the father through his duty only to consent to the child's either bringing an action or defending himself against one, so that the judgment not be seen to exist without the father's wish. These rules apply if the child who does not bear following the father's wish is of full age.

1b. If, however, the child is still in the second age (from 14 to 25 for males), and, when an inheritance has been conferred on him, the father is unwilling to consent to his entering it, or, at the father's wish, he himself protests, if indeed the child refuses, We give permission to the father in a similar manner to enter the inheritance and to have it in full right, with all these provisions that We have mentioned above applying. 1c. If, however, despite the father's refusal the child prefers to enter (the inheritance), We certainly give him permission to do this, but when the father is unwilling to manage the property of the child, because of the necessity of the case the son shall have the right to approach a competent judge and ask him that a *curator* be appointed for the inheritance, through whom the management of the property that has been conferred on him might proceed; in either case the aid of a restoration of rights is not to be denied to him.

2. In a similar manner, in the case of a son in power serving as a soldier who refuses entering into an inheritance that comes to him from his military activities, the father is to be given permission to enter the inheritance, so that it might pass to him in full right, and he will possess the same inheritance, both through the usufruct and through ownership, as if the father himself had been designated as heir from the beginning. Certainly he is subject to all burdens associated with the inheritance, and he will have all the benefits, with no

nullo periculo redundante. et haec quidem in his casibus observanda sunt, quibus discordia inter patrem et filium vertitur.

3. Ubi autem in unum voluntas eorum concurrit, et pater usum fructum et filius habeat proprietatem, et in agentibus et in fugientibus pater quidem suscipiat actiones et moveat, cuiuscumque aetatis filius inveniatur, adhibeatur autem etiam filiorum consensus, nisi adhuc in prima sunt aetate constituti vel longe absunt, sumptibus videlicet a patre propter rerum incrementa faciendis. cum enim nuda proprietas apud filium invenitur, ex qua substantia possibile est eum sumptus litis dependere?

4. Sin autem aes alienum ex defuncti persona descendit, cum etiam apud veteres haec esse substantia intellegitur, quae post detractum aes alienum supersederit, habeat pater licentiam ex rebus hereditariis primum quidem mobilibus, sin autem non sufficiunt, et immobilibus sufficientem partem filii nomine venundare, ut ilico reddatur aes alienum et non usurarum onere praegravetur. 4a. Quod si pater hoc facere supersederit, ipse usuras vel ex redditibus vel ex sua substantia omnimodo dare compelletur.

4b. Sin autem legata vel fideicommissa sive annalia sive semel relictia imminet huiusmodi personis, si quidem tales redditus sunt, qui sufficiunt ad annalia legata, pater ex huiusmodi redditibus haec dependere compelletur. 4c. Sin autem non habet substantia sufficientem redditum ad legatorum vel fideicommissorum praestationem vel minime redditus vel alias accessiones contineat, sint tamen res mobiles vel immobiles, steriles quidem, non tamen inutiles, veluti domus in provinciis pretiosae vel ubicumque posita suburbana, ex quibus huiusmodi legata possunt explicari, licentia dabitur patri sufficientem partem eorum similiter filii nomine vendere et satisfacere legatis.

4d. Hoc procul dubio observando, ut et mancipia ipse usufructuarius aleret et omnia circa usum fructum faceret, quae nullo modo proprietatem possint deteriores facere, paterna reverentia eum excusante et a ratiociniis et a cautionibus et ab aliis omnibus, quae usufructuarii extranei a legibus exiguntur, secundum nostrae constitutionis tenorem,

risk redounding to the son. And these measures are to be observed in cases in which discord between the father and son is involved.

3. When, however, their wishes concur, the father shall have the usufruct and the child the ownership, and in bringing actions and defending against them the father shall take up actions and set them in motion, whatever age the child should be found to be; but the consent of the children should be sought, unless they are in the first age (below puberty) or are far away, with the expenses to be covered by the father on account of (his receiving) the income from the property. For since (only) the bare ownership is located with the child, from what resources is it possible for him to defray the expenses of a lawsuit?

4. If, however, debt passes from the person of the deceased, since even among the ancients what remains after subtracting the debt is understood to be the property (of the inheritance), the father shall have permission to sell in the name of the son a sufficient share from the inherited property, first from the movable property, but if this is not sufficient, also from the immovable property, so that the debt be paid back straightway and not be made heavier with the burden of interest. 4a. But if the father fails to do this, he will in every case be compelled to pay the interest, either from the revenues or from his own property.

4b. If, however, legacies or trusts, whether paid on an annual basis or left once and for all, loom over such persons, if the revenues are of such a kind as to suffice for annual payment of the legacies, the father will be compelled to pay these from such revenues. 4c. If, however, the property does not have sufficient income to provide the legacies or trusts or should not include income or other accretions (*accessiones*), but there should be movable or immovable property, infertile (*steriles*, i.e., not providing any income) to be sure, but not unuseful, such as expensive houses in the provinces or suburban estates situated anywhere, from which such legacies can be resolved (*explicari*), permission will be given to the father to sell a sufficient part of them in the name of the child in a similar manner and satisfy the legacies.

4d. Without doubt this is to be observed, that the usufructuary himself is to provide support for the slaves and to do everything in connection with the usufruct that in no way can make the property worse, while the reverence owed to a father excuses him from rendering accounts and providing written promises, as well as from all other things that are demanded from external usufructuaries by the laws, in accordance with the provisions of Our constitution, which we have already issued concerning such cases.⁴²³ 4e. However, the father must henceforth support the son himself or sons, or daughters, not on account of

⁴²³ C. 6. 61.6.2.

quam iam super huiusmodi casibus tulimus. 4e. Ipsum autem filium vel filios vel filias et deinceps alere patri necesse est non propter hereditates, sed propter ipsam naturam et leges, quae et parentibus alendos esse liberos imperaverunt et ipsis liberis parentes, si inopia ex utraque parte vertitur.

5. Sed pater quidem in praedictis tantummodo causis habeat licentiam recte res filiorum familias vendere filii nomine vel, si emptorem non invenerit, supponere, nullo modo licentia concedenda filiis easdem venditiones vel hypothecas retractare: non item licentia parentibus danda extra memoratas causas res, quarum dominium apud eorum posteritatem est, alienare vel pignori vel hypothecae titulo dare, sed si hoc fecerint, scituris, quod necesse est eos in legum laqueos incidere, quibus huiusmodi venditiones vel hypothecae sunt interdictae, exceptis videlicet rebus mobilibus vel immobilibus illis, quae onerosae hereditati sunt vel quocumque modo damnosae, quas sine periculo vendere patri cum paterna pietate licet, ut pretium earum vel in res et causas hereditarias procedat vel filio servetur. 5a. Filiis autem familias in his dumtaxat casibus, in quibus usus fructus apud parentes constitutus est, donec parentes vivunt, nec testari de isdem rebus permittimus, nec citra voluntatem eorum, quorum in potestate sunt, ulla licentia concedenda dominium rei ad eos pertinentis alienare vel hypothecae titulo dare vel pignori adsignare. melius enim est coartare iuveniles calores, ne cupidini dediti tristem exitum sentiant, qui eos post dispersum expectat patrimonium. cum enim, sicut dictum est, parentes alere eos secundum leges compelluntur, quare ad venditionem rerum suarum prosilire desiderant?

6. Ubi autem puerilis aetas patri licentiam praestat etiam sine consensu filii hereditatem nomine eius adire, si hoc fecerit, damus quidem filio in integrum restitutionem, postquam patria fuerit potestate liberatus vel adoleverit, patrem autem oneribus hereditariis, licet nomine filii adiit, modis omnibus illigamus: quare enim talem hereditatem adiit, qualem nec ipse nunc nec filius idoneam sibi esse existimat? 6a. Non autem filio damus licentiam, si in integrum restitutionem petat respuendam esse credens hereditatem, adhuc minoribus curriculis instantibus iterum per aliam restitutionem adire praefatam hereditatem, ne ludibrio leges ei fiant saepius eandem et amplecti et respuere cupienti. si enim quod pater fecit ratum non habuit et propter hoc restitutus est, quomodo ferendus videatur iterum iudicium amplectens, quod et post patris voluntatem contraria adfectione aspernandum esse existimavit?

the inheritances, but on account of nature itself and the laws that have ordered children to be fed by parents and parents by their very children, if poverty is an issue (*vertitur*) from either side.

5. But the father shall have permission only in the cases named above to sell licitly the property of children in power in the name of the child, or, if he does not find a buyer, to obligate it (*supponere*, for a loan), while in no way is permission to be conceded to children to rescind the same sales or hypothecs; likewise permission is not to be given to parents outside the aforementioned causes to alienate or give as a pledge or under title of a hypothec property whose ownership is with their posterity. But they will know that, if they do this, they must fall into the snares of the laws by which such sales and hypothecs have been forbidden, except, that is to say, for that movable or immovable property that is burdensome to the inheritance or in any way harmful, which the father is permitted to sell with paternal piety, so that the price for it might become part of the inherited property and interests (*in res et causas hereditarias procedat*) or be preserved for the child. 5a. We do not permit children in power only in those cases in which the usufruct has been established for male ascendants, to dispute (*testari*) about the same property, as long as the parents live, nor, against the will of those in whose power they are, is any permission to be conceded them to alienate the ownership of property belonging to them, to give it under the title of a hypothec, or to assign it as a pledge. For it is better to restrict youthful passions, lest surrendering to their desire they feel the sad result that awaits them after the dispersal of their patrimony. For since, as has been said, parents are compelled to support them in accordance with the laws, why do they long to jump headfirst to the sale of their property?

6. When, however, a childish age offers permission to the father even without the child's consent to enter an inheritance in his name, if he does this, We give the child (the right to) restoration of rights, after he is freed from his father's power or grows up, but we bind the father in all ways with the burdens of the inheritance, although he entered into it in the name of the child; for why did he enter an inheritance of such a kind that neither he himself now nor his son judges it suitable for themselves? 6a. We do not, however, give the child permission, if he, believing that the inheritance is to be scorned, should seek a restoration of rights when a lesser passage of years is still present (i.e., while he is still a minor), to enter the aforementioned inheritance through another restoration of rights, lest the laws become a mockery to him who again and again desires to embrace and scorn the same inheritance. For in what way does he seem to be tolerable, when he at a later time embraces the decision which he thought ought to be rejected even in opposition to his father's wishes?

6b. Sin vero pater quidem hereditatem repudiaverit infante filio constituto, ipse autem filius postea vel adhuc in sacris constitutus vel patria potestate liberatus adeundam esse crediderit eandem hereditatem, licentiam damus ei vel, si sui iuris efficiatur, tutoribus vel curatoribus eius hereditatem adire, nullo praeiudicio ex recusatione paterna ei generando: simili modo et in hac parte nulla ei vel tutoribus eius vel curatoribus licentia concedenda contra priorem suam voluntatem in integrum restitutionem petere. 6c. Quae et in legatis et fideicommissis tam specialibus quam per universitatem relictis et in aliis causis, quas supra enumeravimus, similibusque eis observanda sunt.

7. In servis autem, qui filiis familias donantur, sive in constante matrimonio sive ab extraneis sub ea condicione, ut statim eos in libertatem producant, nullum impedimentum paterna faciat auctoritas. qualis enim usus fructus potest ei adquiri, qui momentarius esse ostenditur? si enim in ipso momento necesse habet eum et possidere et libertate donare, in talem hominem qualis usus fructus patri potest adquiri?

D. IIII k. Aug. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

9-11. ...

LXII De Hereditatibus Decurionum Naviculariorum Cohortaliū Militum et Fabricensium

[1] *Imp. Constantinus A. Mastichiano praefecto annonae.* Si quis navicularius sine testamento et liberis vel successoribus defunctus sit, hereditatem eius non ad fiscum, sed ad corpus naviculariorum, ex quo fatali sorte subtractus est, deferri praecipimus.

PP. xv k. ... Lastronae Constantino A. VII et Constantio C. cons.

6b. But if the father repudiates the inheritance while the child is still an infant, but the child himself afterwards, while still in the household (*sacris*, the father's power) or after being freed from the father's power, believes he should enter the same inheritance, We give permission to him, or, if he should be made *sui iuris*, to his *tutors* or *curators*, to enter the inheritance, and no prejudice is to be created for him from his father's refusal. In a similar manner, in this connection, no permission is to be conceded to him or to his *tutors* or *curatores* to seek a restoration of rights contrary to his earlier wish. 6c. These provisions are also to be observed in legacies and trusts, both those bequeathed specifically and those bequeathed universally (*tam specialibus quam per universitatem relictis*), as well as in other cases that We have enumerated above.

7. In the case of slaves, however, that are given as gifts to children in power, whether in a continuing marriage or from outsiders under the condition that they (the children in power) bring them immediately into liberty, the father's authority shall create no impediment. For what sort of usufruct can be acquired for him that is shown to be momentary? For what kind of usufruct can be acquired for the father over such a person if in the very instant he must both possess him and bestow liberty on him?

Given July 29, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).⁴²⁴

Sixty-Second Title Inheritances of Decurions, Shipowners, Officials Serving the Praetorian Prefecture, and Workers in State Arms Factories

[1] *Emperor CONSTANTINE Augustus to Mastichianus, Prefect of the Food Supply.* If any shipowner has died without a will and without children or successors, We instruct that his inheritance not pass to the Treasury, but to the association of shipowners (*corpus naviculariorum*), from which he was removed by fatal lot.

Posted on the fifteenth day before the Kalends ... at Lastrona,⁴²⁵ in the consulship of Constantine Augustus, for the seventh time, and Constantius Caesar (326).⁴²⁶

⁴²⁴ Theodorus, *Epitome Novellarum* 22.36, cites ch. 11 of this title, indicating the loss of at least three constitutions.

⁴²⁵ Mommsen emends "June 17, at Verona."

⁴²⁶ The first Consul may be Constantius. Halbauter restored the date as "in the consulship of Constantius Augustus, for the seventh time, and Constan(tiu)s Caesar (for the third)" (354). Seck gives June 17, 326.

[2] *Imp. Constantius A. Bonoso magistro equitum.* Universis tam legionibus quam vexillationibus comitatensibus seu cuneis insinuare debebis, ut cognoscant, cum aliquis fuerit rebus humanis exemptus atque intestatus sine legitimo herede decesserit, ad vexillationem, in qua militaverit, res eiusdem necessario pervenire.

D. v id. Mai. Hierapoli Rufino et Eusebio cons.

[3] *Idem A. Rufino pp.* Si quis cohortali condicione gravatus sine testamento vel quolibet successore ultimum diem obierit, successionem eius non ad fiscum, sed ad ceteros cohortales eiusdem provinciae pertinere iubemus.

D. v k. Ian. Limenio et Catulino cons.

[4] *Imp. Theodosius et Valentinianus AA. Florentio pp.* Intestatorum curialium bona, si sine herede moriantur, ordinibus patriae eorum adipisci^{xv} praecipimus.

D. v id. Mart. Florentio et Dionysio cons.

[5] *Idem AA. Aureliano comiti rerum privatarum. pr.* Si quis fabricensis sine liberis vel legitimo herede decesserit non condito testamento, eius bona, cuiuscumque summae sint, ad eos pertinere, qui velut creatores decedentium attinentur, qui fisco pro intercepto respondere coguntur. 1. Hoc enim facto contingit, ut et rei publicae ratio salva permaneat et fabricenses collegarum suorum solaciis perfruantur, qui damnis ac detrimentis tenentur obnoxii.

D. prid. non. Nov. Constantinopoli Theodosio A. xvii et Festo cons.

^{xv} adipisci

[2] ⁴²⁷ *Emperor CONSTANTIUS Augustus to Bonosus, Master of the Cavalry.* You will be obliged to communicate to all the legions as well as to all the border detachments and cavalry units (*cunei*) so that they know, when someone is taken away from human affairs and dies intestate without a lawful heir, that his property must pass to the detachment in which he served

Given May 11, at Hierapolis, in the consulship of Rufinus and Eusebius (347).

[3] *The same Augustus to Rufinus, Praetorian Prefect.* If someone burdened by the condition of serving on the staff of a Praetorian Prefect (*cohortali conditione gravatus*) meets his final day without a will and without any successor, We order that his succession belong not to the Treasury, but to the other prefecture officials of the same province.

Given December 28, in the consulship of Limenius and Catulinus (349).

[4] *Emperors THEODOSIUS and VALENTINIAN Augusti to Florentius, Praetorian Prefect.* We instruct that the property of intestate decurions, if they should die without an heir, be acquired by the orders (councils) of their hometown.

Given March 11, in the consulship of Florentius and Dionysius (429).

[5] ⁴²⁸ *The same Augusti to Aurelianus, Count of the Privy Purse. pr.* If any arms maker dies without children or a legitimate heir without writing a will, his property, of whatever amount it might be, belongs to those persons who are bound as if the electors of the deceased, as they are compelled to respond to the Treasury on behalf of the one taken away. 1. For when this is done it happens both that the interests of the state remain unimpaired and that the arms makers, who are held liable for losses and shortfalls, enjoy the solaces provided by their colleagues.

Given November 4, at Constantinople, in the consulship of Theodosius Augustus, for the sixteenth time, and Festus (439).

⁴²⁷ = C.Th. 5.6.1.

⁴²⁸ = Nov. Theod. 6 (with some additional wording), which dates the law to 438; combine with C. 11.11.5.

Liber Septimus

I De Vindicta Libertate et apud Consilium Manumissione

[1] *Imp. Antoninus A. Tertio.* Eorum, qui apud consilium manumittuntur, post causam ab iudicibus probatam et manumissionem secutam non solet status in dubium vocari, si dicantur falsa demonstratione liberati.

PP. non. Oct. Gentiano et Basso cons.

[2] *Imp. Diocletianus et Maximianus AA. et CC. Sallustio.* Nihil civitati Romanae semel praestitae vel addere vel detrahere secundam manumissionem potuisse certissimum est.

D. prid. k. Mai. AA. cons.

[3] *Idem AA. et CC. Attiae.* Nec mulierem per maritum nec alium per procuratorem vindicta manumittere posse non est ambigui iuris.

[4] *Imp. Constantinus A. ad Maximum pu.* Apud consilium nostrum vel apud consules praetores praesides magistratusve earum civitatum, quibus huiusmodi ius est, adipisci potest patronorum iudicio sedula servitus libertatem.

II De Testamentaria Manumissione

[1] *Imp. Severus et Antoninus AA. Primo.* Si codicillos maior viginti annis fecisset, confirmationis tempus libertati non nocere certum est: nec enim potestas iuris, sed iudicii consideratur.

Seventh Book

edited by Noel Lenski

First Title Manumission by Rod and before a Council¹

[1] *Emperor ANTONINUS to Tertius.* The status of those who are manumitted before a council (*apud consilium*), after the case has been approved by the judges and the manumission has taken place, is not usually called into question should they (later) be said to have been freed upon false grounds.

Posted October 7, in the consulship of Gentianus and Bassus (211).

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Sallustius.* It is most certain that a second manumission could not have either added to or subtracted from Roman citizenship once it has been granted.

Given April 30, in the consulship of the Augusti (293).

[3] *The same Augusti and Caesars to Attia.* The law is not in doubt that no woman can manumit by the rod (*vindicta*) through a husband, nor anyone else through a procurator.

[4] *Emperor CONSTANTINE Augustus to Maximus, City Prefect.* A diligent slave may, with the consent of the patron, obtain liberty before Our council or before the Consuls, Praetors, governors or magistrates of those cities that have a right of that kind.

<Without subscription (319–323).²>

Second Title Testamentary Manumission³

[1] *Emperors SEVERUS and ANTONINUS Augusti to Primus.* If a person more than 20 years old should have written codicils, it is certain that the time of

¹ This title deals with manumission through an ancient judicial fiction involving application of a *vindicta*, and its late classical replacement taking place before a magistral *consilium*.

² Valerius Maximus Basilius was Urban Prefect of Rome between 319 and 323. This law was dated by Seeck to January 30, 320.

³ See D. 40.4.

Proposita.

[2] *Idem AA. Phileto.* Ex testamento defuncti libertates praestari non possunt hereditate non adita, vel si rei memoria propter crimen quod morte non intercidit damnata est.

[3] *Idem AA. Euphrosynae.* Libertas testamento data adita hereditate contingit, et si heres scriptus per in integrum restitutionem abstinuerit hereditate, nihil ea res libertati obest.

S. xvii k. Mai. Apro et Maximo cons.

[4] *Idem AA. Anchilao. pr.* Cum testamento directam libertatem pater tuus sit consecutus, quamvis ei heres extiteris, frustra tamen, rationes quas tempore servitutis gessit ut reddas, compelleris, cum non ea conditione acceperit libertatem. 1. Is autem, cui libertas sive fideicommissaria sive directa, si rationes reddidisset, relicta est, ante reliqua illata et ea, quae malo consilio amota sunt, ad libertatem non potest pervenire: sin autem non debitor ex rationibus fuerit repertus, post aditam hereditatem quasi puram libertatem consequitur.

Proposita vii k. Dec. Laeto ii et Cereale cons.

[5] *Imp. Alexander A. Quintiano.* In fraudem creditorum testamento datae libertates, quamvis debitori heres qui solvendo est extiterit, per legem Aeliam Sentiam non valent.

[6] *Imp. Gordianus A. Pisistrato.* Si hereditas eius, a quo testamento dicis te esse manumissum, ob aes alienum spernitur ab heredibus, conservandae libertatis gratia non iniusta ratione creditoribus hereditariis satis offerens iudicium testatoris servari tibi postulabis, maxime cum id etiam a divo Marco consultissimo principe sit constitutum: quod in extranea quoque persona observari oportet.

confirmation cannot prejudice the manumission (*libertati*); for it is not so much the force of the law as it is that of his decision that is considered.

Posted.

[2] *The same Augusti to Philetus.* Manumissions cannot be granted by the will of a decedent if the inheritance is not entered upon or if the memory of an accused person is condemned because of a criminal charge that did not pass away with his death.

[3] *The same Augusti to Euphrosyna.* When an inheritance has been entered into, a manumission granted in the testament takes immediate effect; even if the appointed heir subsequently gives up the inheritance through restoration of his rights (*restitutio in integrum*), that fact does not stand in the way of the manumission.

Written April 15, in the consulship of Aper and Maximus (207).

[4] *The same Augusti⁴ to Anchilaus, pr.* Since your father obtained direct manumission in a testament, although you are his heir, you cannot be compelled to render accounts of the transactions which he managed at the time of his slavery, since he was not granted his liberty upon that condition. 1. But a person to whom manumission is granted, either by way of a trust (*fideicommissum*) or directly, upon condition that he should render accounts cannot obtain such liberty until he has paid any arrears and has returned anything that has been removed by fraud. But if from an examination of the accounts he is not found to be a debtor, he receives unconditional manumission (*pura libertas*) after the inheritance has been entered upon.

Posted November 25, in the consulship of Laetus, for the second time, and Cerealis (215).

[5] *Emperor ALEXANDER Augustus to Quintianus.* If manumissions are made in a testament in defraud of creditors, they are invalid under the Lex Aelia Sentia even if the heir of the debtor is solvent.

[6] *Emperor GORDIAN Augustus to Pisistratus.* If the inheritance of the testator by whom you say you were testamentarily manumitted is refused by the heirs on account of debts, you ask with just reason, for the sake of preserving liberty, that the will of the testator be executed for your benefit provided you offer satisfaction to the creditors of the inheritance, especially since that was also provided for by the Deified Marcus, wisest of Emperors.⁵ This rule should be applied also in case of an external heir.

⁴ This ought to read Antoninus (Caracalla) only.

⁵ See Inst. 3.11.1.

[7] *Idem A. Iustae.* Contra voluntatem matris tuae libertatem in eum conferre, quem illa liberum fieri prohibuit, non debes, ne videaris iura pietatis violare.

PP. x k. Febr. Sabino II et Venusto cons.

[8] *Imp. Philippus A. et Philippus C. Gemello.* Cum testator libertatem tempore nuptiarum filii sui vel filiae servo dari iussit, non tempus praestandae libertati praestituit, sed potius condicioni locum fecit, ut non insecutis nuptiis libertas iure posci non possit.

[9] *Impp. Carus Carinus et Numerianus AAA. Mauro.* Servo tuo defunctus, licet te heredem scripsisse proponatur, tamen directam libertatem dare non potuit: iure enim directo libertatem servis alienis dare nemo potest.

PP. VI id. Nov. Caro et Carino cons.

[10] *Impp. Diocletianus et Maximianus AA. et CC. Germano.* Directis verbis iure data libertate non sola impositione pilei, sed adita hereditate, si nulla iuris impediatur constitutio, liberti constituuntur.

[11] *Idem AA. et CC. Laurinae.* Si iure non substitit testamentum, in hoc nec libertates (cum non fuisse additum, ut pro codicillis scriptum valeret, proponas) recte datas constabit.

PP. sub die XVI k. April. Sirmi AA. cons.

[12] *Idem AA. et CC. Rhizo. pr.* Si heredes iure facto testamento solemniter adierint hereditatem, ex testamento tibi libertas quaesita post colludentibus tam scriptis heredibus quam ab intestato vindicantibus successionem adimi non potuit. 1. Quod si sponte repudiaverunt sibi delatam successionem, omnia quae testamento fuerant scripta defecisse convenit. 2. Si vero, ut vos fraudarent libertate, collusisse eos praeses animadverterit, secundum haec quae divus Pius Antoninus constituit libertatibus consuli providebit.

S. k. Dec. Sirmi AA. cons.

[7] *The same Augustus to Justa.* You should not, contrary to your mother's wish, confer manumission upon him whom she forbade to be made free, lest you should appear to violate the laws of familial loyalty (*pietatis iura*).

Posted January 23, in the consulship of Sabinus, for the second time, and Venustus (240).

[8] *Emperor PHILIP Augustus and Caesar PHILIP to Gemellus.* When the testator ordered manumission to be granted to the slave on the occasion of his son's or daughter's wedding, he did not fix a time for the grant of manumission, but rather established the condition for it; thus, if no marriage takes place, manumission cannot be rightfully demanded.

[9] *Emperors CARUS, CARINUS, and NUMERIAN Augusti to Maurus.* Though it is stated that he appointed you heir, the decedent could not confer direct manumission on your slave. For no one can give direct manumission to another's slaves.

Posted November 8, in the consulship of Carus and Carinus (283).

[10] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Germanus.* By law slaves become freedmen through a grant of manumission in direct words not only through the imposition of the cap of liberty (*pileus*), but also by an acceptance of the inheritance, provided no constitution forbids this.

[11]⁶ *The same Augusti and Caesars to Laurina.* It is clear that, if the testament is not in conformity with law, no bequests of liberty made in it will stand even if made properly – for you state that the will contains no provision that it should be valid as a codicil.

Posted under date March 17, at Sirmium, in the consulship of the Augusti (293).

[12] *The same Augusti and Caesars to Rhizus. pr.* If heirs under a legally executed testament have entered on the inheritance in the usual form, the manumission granted you under the testament cannot subsequently be taken away by collusion between the appointed heirs and those claiming the estate by intestacy. 1. But if the heirs voluntarily repudiated the estate offered them, then, it is agreed, all written provisions of the testament have failed. 2. But if the governor should learn that they have colluded so as to defraud you of your manumission, he will, according to the decision of the deified Antoninus Pius, take care that your liberty is protected.

Written December 1, at Sirmium, in the consulship of the Augusti (293).

⁶ Combine with C. 2.32.2, which is dated "in the consulship of the Augusti" (294), likely the correct year given that Diocletian is known to have been in Heraclea in March 293.

[13] *Idem AA. et CC. Martiali*. Statuliberis datam libertatem adimi ab herede non posse certum est: nec alienatio nec usucapio statulibero, quominus existente condicione libertatem consequatur, nocere potest.

[14] *Imp. Theodosius et Valentinianus AA. Florentio pp.* Directas libertates Graecis verbis liceat in testamentis relinquere, ut ita libertates directae datae videantur, ac si legitimis verbis eas testator dari iussisset.

D. prid. id. Sept. Constantinopoli Theodosio A. XVII et Festo cons.

[15] *Imp. Iustinianus A. Iohanni pp. pr.* Cum constitutio divi Marci declarat, si quis testamento condito vel sine testamento moriens, ut locus fiat ab intestato successioni, libertates reliquerit, nemo autem adire vult defuncti hereditatem eo, quod suspecta esse videtur, et si fuerint libertates forsitan et sine scriptis fideicommissariae relictæ, licere vel cuilibet extraneo vel uni ex servis, qui et ipse libertate donatus est et pro sua periclitatur condicione, adire hereditatem sub hac condicione et satisfatione, quod et creditoribus omnibus satisfaciat et libertates imponat his, quibus voluerit testator, variae dubitationes ex hac constitutione emeruerunt.

1. Nam si res hereditariae herede minime invento venierint, an et post venditionem earundem rerum possibile est vel servum vel quemlibet alium adire et recuperare quidem ab emptoribus res, satisfacere autem creditoribus et libertatibus, quaerebatur. 1a. Et licet divus Severus semel rebus venditis hoc non admisit, nobis tamen Ulpiani sententia admonente placuit maxime propter libertates, ne depereant, et post venditionem rerum annale remedium dare divi Marci constitutioni, intra quod et creditoribus omnibus satisfiat et emptores nihil novi patiantur, qui annalem saepe sentiebant rescissionem, et licere servo, qui libertate donatus est, vel alii cuidam extraneo vel ante venditionem rerum vel post venditionem, intra annale tamen tempus, adire hereditatem et res recuperare, prius satisfatione danda, ut tam creditoribus quam libertatibus satisfaciat.

[13] *The same Augusti and Caesars to Martialis.* It is certain that manumission granted to conditionally freed slaves (*statuliberi*) cannot be taken away by the heir. Neither alienation nor usucapion are able to prejudice any conditionally manumitted freedman from obtaining manumission as long as the condition is met.

[14] *Emperors THEODOSIUS and VALENTINIAN Augusti to Florentius, Praetorian Prefect.* It is permitted to leave direct manumissions in testaments in the Greek language, such that such bequests shall be considered as direct manumissions just as if the testator had ordered them in legal (Latin) words.

Given September 12, at Constantinople, in the Consulship of Theodosius Augustus, for the seventeenth time, and Festus (439).

[15] *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* A constitution of the deified Marcus⁷ declares that if a man dies leaving an official testament or dies without one in such a way that intestate succession takes place, and if he should grant manumissions, but no one wants to accept the inheritance of the deceased because it appears to be suspect, and if manumissions have perchance been willed in trust (*libertates fideicommissariae*) even without any writing, any external heir, or one of the slaves who was himself granted freedom and is in jeopardy now as far as his condition is concerned, is permitted to accept the inheritance upon the condition and upon giving security that he will satisfy all creditors and will grant manumission to those to whom the testator wanted it granted. Nevertheless, various doubts have arisen out of this constitution.

1. For it was asked whether, if the property of the estate were sold upon finding no heir, it is possible for a slave or someone else to enter on the inheritance after such sale, and recover the property sold from the purchasers, upon satisfying creditors and granting manumissions. 1a. And though the deified Severus held that this could not be done after the property had once been sold, We have decided, following the opinion of Ulpian, especially in order that manumissions may not be lost, to order that a remedy of a year after the sale should be added to the provisions of the constitution of the deified Marcus, during which time all the creditors may be satisfied. No new burden is thereby imposed on purchasers, who are often obliged to submit to a rescission within the year. The slave to whom manumission had been granted, or any external heir, may, before the sale or within a year afterward, accept the inheritance and recover the property, first giving security that he will satisfy all creditors as well as complete all manumissions.

⁷ = *Nov. Theod.* 16.1.8. Combine with C. 5.28.8, 6.23.21.

⁸ See *Inst.* 3.11.1.

1b. Sin autem libertatibus quidem omnibus satisfacere quis polliceatur, creditoribus autem non in solidum, sed in partem solvere creditum, illi autem huiusmodi pactionem admiserint, sancimus et in huiusmodi casu consultissimi principis locum habere constitutionem et eum modis omnibus admittendum censemus, maxime cum ex voluntate creditorum hoc interponitur: nolentibus etenim creditoribus admitti talem petitionem nullo concedimus modo.

2. Si vero quidam ex servis libertatem amplexi fuerint, alii autem censuerint esse respuendam, et in hunc casum extendenda est divi Marci oratio et procul dubio et in hac specie audiendus est petitor hereditatis et maneat liberum arbitrium servorum, sive ad libertatem venire volunt sive in servitutem remanere. 2a. Licet enim Romanam civitatem recusare nemini servorum licet, tamen in hoc casu, ne propter quorundam indevolutionem alii maneant in servitute, volentibus quidem omnibus servis licere in libertatem pervenire, nolentibus autem quibusdam vel recusantibus spontaneam servitutem imminere oportet et, quem patronum habere noluerint, dominum suum, forsitan et acerbum, sentiant.

3. Sin vero non omnes libertates adimplere pollicitus fuerit, sed certum numerum servorum ex his, qui ad libertatem venire iussi sunt, melius est, si quidem res hereditariae sufficiunt ad implendos creditores, etiam omnibus servis dare libertatem, etsi hoc non pollicitus est, si autem deest in exsolvendis creditoribus, humanius est, ut saltem pauci veniant ad libertatem.

4. Sed hoc quidem antiquis dubitationibus remedium invenimus. bellissimam autem repletionem praefatae constitutioni donantes sancimus: si non unus veniat hereditatis petitor, sed plures, si quidem uno momento uterque vel ampliores, omnibus detur licentia communiter hereditatem adire, prius satisfactione ab omnibus danda, ut creditoribus et libertatibus satisficiant. 4a. Sin autem per intervalla temporum hoc fiat, qui primus veniat habeat praerogativam, si etiam satisfactionem praestare potest: illo enim cessante hoc facere alii gradatim secundum tempora petitionis succedant, et hoc intra annale tempus observetur.

5. Sin autem uno pollicente quosdam liberos facere, non autem totos, alius emergerit satisfactionem paratus idoneam praestare, quod omnibus creditoribus et omnibus libertatibus satisficiat, aequissimum est eum admitti, ut omnes libertates indistincte celebrentur. quod privilegium damus non solum servo, qui libertate donatus est, sed etiam ei, cui nulla libertas relicta est, ut aliquid venustum eveniat, ut per eum,

1b. But if anyone promises to complete all the manumissions and to pay the debts not in full but in part and the creditors consent to this agreement, We ordain that even in such case the constitution of the most wise emperor should apply, and We direct that by all means he should be admitted to the inheritance, especially since that is done by the consent of the creditors; but We permit no such claim to be made if the creditors are unwilling.

2. But if some of the slaves should accept manumission while others think it should be rejected, the legal proposal (*oratio*) of the deified Marcus shall certainly be extended to this case also, and in such a case the one who claims the inheritance must be heard, but the slaves shall have free choice to accept manumission or remain in servitude. 2a. For although no slave is permitted to reject Roman citizenship, still in such a case, in order that some of the slaves may not remain in servitude on account of the irreverence of others, all of those who are willing may obtain manumission, but those who are unwilling or refuse it shall remain in voluntary slavery, and learn to know the one whom they refused to have as patron as their master, and that perhaps a harsh one.

3. And even if he does not promise to complete all of the manumissions but (only for) a certain number of the slaves from those who were ordered to receive manumission, it is better, if the property of the inheritance suffices to satisfy the creditors, to grant manumission even to all the slaves, although he has not promised this. But if the property is insufficient to pay the creditors, it is more humane that at least a few receive manumission.

4. So far a settlement of ancient doubts. And perfecting the aforesaid constitution still more, We ordain that if there should be not one but several claimants of the inheritance, since two or more may claim it at the same moment, all shall have the right to accept the inheritance jointly, though first they must all give security that they will satisfy creditors and make the manumissions provided for. 4a. But if they claim it at different times, the first one making the claim shall have the first right, provided he can furnish the security; if he fails to do so, the others follow him in right successively, according to the time in which they respectively make their claim. And this shall be done within a year.

5. Moreover, if one of them promises to manumit some of the slaves but not all of them, but another appears ready to give the proper security to satisfy all creditors and make all the required manumissions, the latter should, in justice, receive the inheritance, so that all the manumissions may be granted without distinction. This privilege is extended not only to a slave to whom a bequest of manumission was made, but also to one to whom manumission was not bequeathed, so that the desirable thing may happen when manumission is

cui libertas relicta non est, aliis libertas imponatur. 6. Sed si quidem, antequam prior hereditarias res et libertatem accipiat, hoc eveniat, secundo petitori vel tertio vel deinceps ampliores libertates pollicentibus fieri locum censemus. 7. Sin autem iam rebus servo, qui primus petiit hereditatem, datis et libertatibus ab eo quibusdam servis hereditariis impositis quidam alius servus hereditarius vel liber extraneus hoc facere maluerit, licebit quidem ei hoc impetrare et sub maioribus pollicitationibus et satisfactionibus hereditatem accipere: sed prior in libertate petitor maneat, licet res ab eo abstrahantur. his omnibus intra annum secundum quod dictum est celebrandis, ex quo prior petitor iudicem adierit.

III De Lege Fufia Caninia Tollenda

[1] *Imp. Iustinianus A. Menae pp.* Servorum libertates in testamento relictas tam directas quam fideicommissarias ad exemplum inter vivos libertatum indistincte valere censemus, lege Fufia Caninia de cetero cessante nec impediante testantium pro suis servis clementes dispositiones effectui mancipari.

D. k. Iun. Constantinopoli dn. Iustiniano pp. A. II cons.

III De Fideicommissariis Libertatibus

[1] *Imp. Severus et Antoninus AA. pr.* Cum proponas hereditatem eius aditam non esse, a quo tibi fideicommissariam libertatem relictam dicis, et ab intestato alium quam qui scriptus erat hereditatem possedissee, si non a legitimo quoque herede fideicommissaria libertas repetita est, nullo iure praestari eam ab eo qui rogatus non est desideras. 1. Plane si pecunia accepta heredem institutum omisisse hereditatem docueris, libertatem tibi praestare cogetur.

PP. XIII k. Mart. Laterano et Rufino cons.

granted to others through him who did not receive it himself. 6. If these different claims are made before the first claimant receives the property of the inheritance and his manumission, We ordain that preference must be given to the second, third, or other claimant who promises the most manumissions. 7. And even if the property has already been turned over to the first claimant of the estate and he has completed the manumission of some of the estate slaves, but another of the estate slaves or some free external heir prefers to implement this, he shall be permitted to do so and receive the inheritance on the condition that he give promise and guarantee of even more manumissions; but the first claimant shall retain his liberty, although the property is taken from him. All this shall be done within a year from the time that the earlier claimant makes application to the judge.

<Without subscription (531-532).>⁹

Third Title Repeal of the Lex Fufia Caninia¹⁰

[1] *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect.* We ordain that a bequest of manumissions made in a testament, either directly or indirectly by way of trust, shall be just as valid as a manumission bestowed among the living, and the Lex Fufia Caninia shall cease to be valid in the future and shall not prevent indulgent orders by testators, in favor of their slaves, to be carried into effect.

Given June 1, at Constantinople, in the consulship of Our Lord Justinian, Father of his Country, Augustus, for the second time (528).

Fourth Title Manumissions Granted by Trust¹¹

[1] *Emperors SEVERUS and ANTONINUS Augusti. pr.* Since you state that the inheritance of the man who you say left you manumission in a trust (*fideicommissum*) was not accepted and that someone other than the appointed heir has taken possession of the estate on intestacy, then, if the manumission granted in trust was also not sought from the statutory (*legittimus*) heir, you ask without right that it should be granted by one who was not directed to give it. 1. Of course, if you prove that the appointed (*institutus*) heir refrained from accepting the inheritance in exchange for money, he will be compelled to give you freedom.

Posted February 17, in the consulship of Lateranus and Rufinus (197).

⁹ Lounghis *et al.* date to between 531 and 534.

¹⁰ See Inst. 1.7.

¹¹ See D. 40.5.

[2] *Imp. Antoninus A. Valerio.* Quamvis codicilli, quibus avunculo defunctae legatus esse videaris, falsi pronuntiati sunt, tamen si ante motam criminis quaestionem iustam libertatem es a legatario consecutus, posterior eventus non infirmat ita datam libertatem. plane secundum divi Hadriani constitutionem datur heredi viginti aureorum repetitio.

D. XVIII k. Aug. eodem Antonino A. ... cons.

[3] *Imp. Alexander A. Lucio.* Cum libertatem mulieribus sub condicione datam proponas, quid dubium est eos, qui ex his ante impletam eam eduntur, servos nasci et pertinere ad heredes iure domini? his enim demum succursum est, qui post moram praestandae libertatis progeniti sunt, ut liberi et ingenui viderentur.

[4] *Idem A. Arriano.* Si voluntate domini in libertate morata est, cui fideicommissaria libertas debita fuerit, secundum senatus consultum et constitutiones ad id pertinentes civis Romana facta ingenuos peperit. sed si numquam ab ea libertas petita est, sibimet imputare debet, cum interea ex ea progeniti servi sint.

[5] *Idem A. Dionysio.* Minor annis lege definitis nec per fideicommissum libertatem supremis suis relinquere potest nisi his, quorum causam probare potest.

[6] *Idem A. Maximo.* Deberi etiam alienae ancillae fideicommissariam libertatem placuit: nec deficit hoc debitum, si interim domina, si modo nihil ex iudicio eius, qui quaeve reliquit libertatem, percepit, noluit vendere, quia possit tempore procedente, ubicumque occasio redimendae ancillae fuerit, praestari libertas.

[2] *Emperor ANTONINUS Augustus to Valerius.* Although the codicils in which you appear to have been bequeathed to the uncle of the deceased have been pronounced forged, still if you acquired just freedom from the legatee therein before investigation of this charge was commenced, the subsequent event does not invalidate a manumission thus given. But of course, according to the constitution of the deified Hadrian, the heir has the right to recover 20 gold pieces (*aurei*).

Given July 15, in the consulship of the same Antoninus Augustus ... (213).¹²

[3] *Emperor ALEXANDER Augustus to Lucius.* Since you state that conditional manumission was given to certain female slaves, can there be any doubt that the offspring born to them before the fulfillment of the condition are born slaves and belong to the heirs by right of ownership (*iure domini*)? Relief is granted only to those who are born following delay (*mora*) in the granting of freedom, making such offspring free and free-born.

<Without subscription (222?).>¹³

[4] *The same Augustus to Arrianus.* If a female slave, to whom liberty was owed in trust (but was not formally conveyed), lived (*morata est*) in freedom with the consent of the master, according to the pertinent decree of the senate and constitutions, she became a Roman citizen and bore free-born children. But if she never claimed her liberty, it is her fault that the offspring born in the meantime are slaves.

<Without subscription (222?).>

[5]¹⁴ *The same Augustus to Dionysius.* A minor under the age fixed by law cannot grant through his will a manumission even in a trust except to those toward whom he can be proven to have just cause.

<Without subscription (222?).>

[6] *The same Augustus to Maximus.* It is agreed that a manumission in trust may be owed even to another person's slave girl. Nor does this obligation lapse if her female owner (*domina*) refused in the meantime to sell her provided she received nothing under the will of the testator who bequeathed the manumission in trust, since the manumission may be granted in the course of time whenever the occasion for redeeming the slave girl may arise.¹⁵

¹² The consular date is uncertain; 205 or 208 are also possible. The calendar date is also problematic since *xviii k. Aug.* calculates to July 15, a date properly rendered *id. Iul.*

¹³ This constitution is subscribed "*pp. iiii k. mai. lamp. et horest. vv. cc. ss.*" (posted April 29 in the consulship of *virii clarissimi* Lampadius and Orestes = 531) in Vercelli, Bibl. Cap. 127. Krüger speculates that the consular date may be in error given the rarity with which Justinianic constitutions are subscribed "posted," and thus that the calendar date may be correct, in which case the consular date may follow that of law 5 from this title.

¹⁴ This constitution seems to combine with C. 2.3.8, which is addressed to *Aurelio Dionysio* and has the subscription *pp. prid. Id. Sept. Alexandro A. Cons.*, i.e., September 12, 222.

¹⁵ = Inst. 2.24.2.

[7] *Idem A. Nicomedi.* Hi, quibus per fideicommissum libertas supremis iudiciis relinquitur, eorum liberti efficiuntur, a quibus manumittuntur.

PP. k. April. Fusco et Dextro cons.

[8] *Idem A. Eutycheti.* Cum proponas fideicommissariam libertatem ita tibi datam, si uxori testatoris placuisset, licet non adeunte¹ hereditatem ad filium solida hereditas pertinere coepit, non refragante tamen uxore testatoris potes petere libertatem.

PP. xv k. Sept. Fusco et Dextro cons.

[9] *Idem A. Mercuriali.* Fideicommissaria quidem libertas ita tibi relicta, cum testatoris filius ad annum vigensimum quintum pervenisset, non intercidit, licet heredem intra praestitutam aetatem decessisset proponas: tempore quippe, quo, si viveret, praefinitam aetatem impleturus foret, spem libertatis non intercidere vetus placitum est.

PP. k. April. Pompeiano et Peligno cons.

[10] *Impp. Valerianus et Gallienus AA. Daphno. pr.* Etsi non adscripta libertate testator servum suum tutorem filiis suis dederit, receptum est et libertatis et pupillorum favore, ut per fideicommissum manumisisset eum videatur. 1. Et si non suum proprium, sed alienum servum conditionem eius sciens tutorem adscripserit, aequae fideicommissariam libertatem datam, nisi aliud evidenter defunctum sensisse appareat, prudentibus placuit.

PP. III k. Mart. Saeculare et Donato cons.

[11] *Impp. Diocletianus et Maximianus AA. et CC. Flaviano. pr.* Si servus fuisti ac tibi per fideicommissum libertas relicta fuerit, pervides sine manumissione te ad libertatem pervenire non potuisse. 1. Quapropter si verbis precariis constitutus servus libertatem accepisti, adiri praeses provinciae oportet, ut causa cognita, si tibi deberi libertatem perspexerit, ad manumittendum eum qui debet urgeat vel, si latitet, contra latitantem interposito decreto tibi prospiciat.

Sine die et cons.

[12] *Idem AA. et CC. Irenaeo.* Ex verbo 'commendo' testamento vel codicillis non videri fideicommissariam libertatem relictam auctoritate iuris declaratur.

S. xvii k. Mai. Sirmi CC. cons.

¹ <ea>

[7] *The same Augustus to Nicomedes.* Those to whom manumission in trust is bequeathed in a last will become the freedmen of those by whom they are manumitted.

Posted April 1, in the consulship of Fuscus and Dexter (225).

[8] *The same Augustus to Eutychetes.* Since you state that manumission in trust was granted you upon condition that this should meet the approval of the wife of the testator, you may claim your freedom if the wife of the testator does not object, even if she does not accept her part of the inheritance and it all falls entirely to the son.

Posted August 18, in the consulship of Fuscus and Dexter (225).

[9] *The same Augustus to Mercurialis.* If manumission in trust was left you in such a way that it would take effect when the testator's son reached his twenty-fifth year, such bequest did not fail, though you state that the son died before the time fixed. It was long ago decided that the hope for freedom should not be cut off during the time that, had he lived, he would have arrived at the age fixed.

Posted April 1, in the consulship of Pompeianus and Pelignus (231).

[10]¹⁶ *Emperors VALERIAN and GALLIENUS Augusti to Daphnus. pr.* Although a grant of liberty was not added when the testator appointed his slave as *tutor* for his sons, it is the accepted opinion that, through partiality for freedom and for minors (*et libertatis et pupillorum favore*), the testator is considered as having granted manumission in trust. 1. Even if fully aware of his status he appointed not his own slave but another's as guardian, it has been accepted by jurists that he equally granted manumission in trust, unless the deceased would appear clearly to have felt otherwise.

Posted February 27, in the consulship of Saecularis and Donatus (260).

[11] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Flavianus. pr.* If you were a slave, and manumission was bequeathed to you by way of a trust, you can see that you cannot have attained freedom without manumission. 1. Hence if, while you were a slave, you received manumission by a request in trust (*verbis precariis*), you should go before the provincial governor, so that he can hold a hearing and, if he finds that freedom is due you, he may compel the party whose duty it is to grant it, or if that person hides, look after your interests by issuing a decree against him.

Without date or consuls.

[12] *The same Augusti and Caesars to Irenaeus.* It is declared by the authority of law that no manumission in trust is bequeathed by the words "I commend" (*commendo*) contained in a testament or codicils.

Written April 15, at Sirmium, in the consulship of the Caesars (294).

¹⁶ Combine with C. 5.28.5.

[13] *Idem AA. et CC. Pythagoridæ.* Si te, donatam ante matrimonium uxori suae, post ei legato relicto manumitti testamento seu codicillis verbis precariis a successoribus voluit, tam hos ad redemptionem et manumissionem quam eam, quae in capiendis relictis defuncti consensit iudicio, teneri tibi que fideicommissariam debere libertatem non ambigitur.

S. VII id. Dec. CC. cons.

[14] *Imp. Iustinianus A. Iuliano pp. pr.* Cum inter veteres dubitabatur, si fideicommissariam libertatem possibile esset relinqui servo, qui adhuc in ventre portaretur et homo fieri speraretur, nos vetus iurgium decedentes libertatis favore censemus et fideicommissariam nec non directam libertatem suam firmitatem habere sive in masculo sive in femina, quae adhuc in ventre vehatur materno, ut cum libertate solem respiciat, etsi mater sua adhuc in servitute constans eum vel eam ediderit. 1. Sin autem plures creati vel creatae sint, sive unius fecit mentionem sive pluraliter nuncupavit, nihilo minus omnes ad libertatem ad prima veniant cunabula, cum in ambiguis sensibus melius est, et maxime in libertate, favore eius humaniorem amplecti sententiam.

D. k. Oct. Constantinopoli Lampadio et Oreste vv. cc. cons.

[15] *Idem A. Iuliano pp.* Ancillam seu servum, cum fideicommissaria libertas eis relicta sit, sancimus, si mora a debitore libertatis facta fuerit, sententia praesidis eripi ad libertatem et nullo facto aut voluntate ab herede expectanda, sed talem habere eos libertatem, quasi ab ipso testatore directis verbis fuerint libertatem consecuti, cum satis impium atque absurdum est heredes testatoris differre voluntates, maxime cum ad libertatem respiciant.

D. k. Oct. Constantinopoli Lampadio et Oreste vv. cc. cons.

[16] *Idem A. Iuliano pp. pr.* Si quis in suo testamento rogaverit suum heredem ex liberis ancillae suae quam nominaverit unum quem elegerit ad libertatem perducere et, cum ancilla unum vel plures enixa est, heres neque dum superest in libertatem aliquem adduxerit vel, cum deliberat, quis ad libertatem producendus est, ab hac luce fuerit subtractus: dubitabatur ab antiquis, utrumne omnes an quidam aut nemo ex his

[13] *The same Augusti and Caesars to Pythagorides.* If the testator made a gift of you to his wife before his marriage, and afterwards left a legacy to his wife and also expressed a desire by request in a trust in his testament or codicils that you should be manumitted by his successors, there is no doubt both that the successors are bound to purchase and manumit you and that his wife, who after all consented to his will by accepting what was left to her from the deceased, is also bound and owes you manumission in trust.

Written December 7, in the consulship of the Caesars (294).

[14]¹⁷ *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect.* Since it was disputed among the ancients whether manumission in trust could be left to a slave who was still being carried in the mother's womb and was expected to be born, in deciding the ancient dispute We decree, through partiality for liberty (*libertatis favore*), that manumission in trust and direct manumission granted to a male or female still in the mother's womb shall be valid, so that the child may see the light of day as a free person, although its mother is still in bondage when she gives birth to him or her. 1. And in case birth is given to several children, male or female, then whether mention is made of one child or of more than one, all shall alike be free when entering their first cradle, since it is better in a doubtful case to adopt the most humane construction of the intention, especially when liberty is involved, through partiality for it.

Given October 1, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[15]¹⁸ *The same Augustus to Julian, Praetorian Prefect.* When manumission in trust is bequeathed to a male or female slave and the grant of manumission is delayed by the one who owes it, such slave shall be snatched away into liberty by the order of a judge without waiting for any action or any desire of the heir. These slaves shall have freedom the same as though they received a direct grant of manumission from the testator, since it is impious and absurd that heirs should delay to comply with the testator's wish, particularly in a case involving liberty.

Given October 1, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[16]¹⁹ *The same Augustus to Julian, Praetorian Prefect. pr.* In case a testator in his testament asked his heir to manumit one of the children of a certain female slave, to be selected by the heir, and once the female slave had given birth to one or more children, the heir did not manumit one of them while he still lived, or, while deliberating which child to manumit, he died, it was much disputed among the ancients whether all the children or one or none of them should

¹⁷ Combine with C. 6.57.6 and 7.4.15.

¹⁸ Combine with C. 6.57.6 and 7.4.14.

¹⁹ Combine with C. 7.4.17 and 7.7.2.

ad libertatem perveniant. sed veteris quidem iuris altercatio multa sibi super huiusmodi casibus resonavit.

1. Nos autem heredis malignitatem coercentes, si non voluntatem testatoris adimpleverit et mox, cum potuerit, non elegerit unum ex liberis ancillae et eum libertate donaverit, sancimus compelli non solum eum, sed etiam heredes vel successores eius omnes ancillae liberos in libertatem producere. 2. Neque enim hoc contrarium est sententiae testatoris: cum enim omnimodo quendam ex his liberum esse disposuit et non ad certum corpus, sed ad omnes respexit, si non paretur eius voluntati, sine dubio ex sententia testatoris omnes ad libertatem perveniunt.

3. Similemque esse definitionem censemus, et si non ab herede, sed a legatario vel fideicommissario testator rogaverit libertatem imponi. 4. Sic etenim iusto timore heredes vel legatarii vel fideicommissarii perterriti et voluntatem testatoris adimplere procurent et sibi non ex omnium libertate quandam adferri patiantur iacturam. quod si reclamaverint, sibi tale dispendium imputent, non ex nostra lege, sed ex sua lugentes instantia.

D. xv k. Dec. Constantinopoli Lampadio et Oreste vv. cc. cons.

[17] *Idem A. Iuliano pp. pr.* Cum quidam servum suum ita legavit, ut legatarius libertatem ei imponat, et heres ad huiusmodi legatum improbe versatus servum dare legatario dedignatus est, ut etiam lite pulsetur, et iudex non in ipsum servum, sed in aestimationem litis condemnationem proferat: veteris iuris interpretes dubitabant, ne quid obstaculum libertati ex hac causa procedat et, si placuerit eandem deberi libertatem, a quo danda est utrumne ab herede an a legatario, et si heres imponat libertatem, an legatarius, quod ex pecuniaria condemnatione accepit, firmiter detinet sive totum sive ex parte sive etiam nihil.

1. Talem itaque altercationem reserantes miramur, quare iudex, qui praepositus est in praedicta causa, non omnimodo condemnationem in servum, sed in aestimationem eius fecerat, cum ipsius vitium etiam huiusmodi altercationi praebuit occasionem. 2. Unde si talis quaestio emergerit, nullum quidem iudicem ita esse stultum putamus, ut huiusmodi proferat condemnationem, sed si legatarius immineat, quatenus ei servus restituatur, et post litem contestatam duorum mensum

receive freedom. But this ancient legal dispute has had considerable resonance beyond cases of this sort.

1. We, however, in order to keep any evil intention of the heir in check, ordain that if he fails to carry out the testator's wish, and fails as soon as possible to choose one of the children of the female slave and to manumit him or her, he as well as his heirs and successors shall be compelled to give manumission to all the female slave's children. 2. Nor is this contrary to the testator's intention. For since he provided, in a general way, that one of the children should be free, and he made no reference to a particular one but had them all in mind, then if his wish is not carried out, all without a doubt receive freedom in accordance with the testator's will.

3. The same rule shall apply if the testator asked freedom to be given not by the heir but by a legatee or trustee. 4. For thus the heirs, legatees, or trustees will be induced by fear to see to it that the testator's wish is carried out in order not to suffer loss through the manumission of all the slaves. But if they refuse, they may blame themselves for the loss, grieving not because of Our law but because of their own stubbornness.

Given November 17, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[17]²⁰ *The same Augustus to Julian, Praetorian Prefect. pr.* In case someone bequeathed his slave upon condition that the legatee should manumit him, and the heir acted dishonestly in connection with this legacy and refused to give the slave to the legatee so that he was sued, and the judge gave judgment not for the slave himself but for his value, it was disputed among interpreters of the ancient law whether any obstacle was thereby put in the way of manumission; and if it were determined that he should be manumitted, it was disputed by whom that was to be done, whether by the heir or the legatee; and if by the heir, whether the legatee would retain all or part or none of the money he received through the judgment.

1. In settling such a dispute We are puzzled why a judge presiding in such a case should give judgment for the value instead of directly for the slave, for his failing gave rise to the dispute. 2. Hence if any such case arises, We think no judge will be so stupid as to give a judgment of that kind, but if the legatee insists that the slave be rendered to him and two months elapse after joinder of issue, We ordain that the slave shall immediately be confiscated into liberty

²⁰ Combine with C. 7.4.16 and 7.7.2.

spatium effluxerit, censemus ilico ad libertatem eripi servum, et illum quidem liberum esse, heredem autem pro sua indevotione omnes expensas, quas legatarius in litem fecit, in quadruplum ei condemnari, iure patronatus integro legatario servando.

D. Constantinopoli xv k. Dec. Lampadio et Oreste vv. cc. cons.

V De Dediticia Libertate Tollenda

[1] *Imp. Iustinianus A. Iuliano pp.* Dediticia condicio nullo modo in posterum nostram rem publicam molestare concedatur, sed sit penitus deleta, quia nec in usu esse reperimus, sed vanum nomen huiusmodi libertatis circumducitur. nos enim, qui veritatem colimus, ea tantummodo volumus in nostris esse legibus, quae re ipsa obtinent.

D. ... Lampadio et Oreste cons.

VI De Latina Libertate Tollenda et per Certos Modos in Civitatem Romanam Transfusa

[1] *Imp. Iustinianus A. Iohanni pp. pr.* Cum dediticii liberti iam sublati sunt, quapropter imperfecta Latinorum libertas incertis vestigiis titubans et quasi per saturam inducta adhuc remanet et non inutilis

and shall become free, but also that the heir on account of his disrespect shall in addition be condemned to pay fourfold the amount of the expenses incurred by the legatee in the litigation, and that the legatee shall retain the right of patronage unimpaired.

Given November 17, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

Fifth Title The Abrogation of Manumission as a Prisoner of War²¹

[1] *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect.* The condition of prisoner of war (*dediticia condicio*) shall not be permitted to trouble Our state in any manner in the future but shall be entirely abolished, because We find it no longer in use, and the empty name of this kind of freedom is used deceptively. We who cultivate the truth want only those things that really exist to be in Our laws.

Given ... in the consulship of Lampadius and Orestes (530).²²

Sixth Title The Abrogation of Latin Freedom and Its Transformation into Roman Citizenship through Certain Methods²³

[1] *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* Since the condition of freedmen with the status of prisoners of war (*dediticii liberti*) has already been abolished, why should imperfect Latin liberty remain, faltering

²¹ Blume: "There were three classes of freedmen under the ancient Roman law, reduced, as shown by the next two titles, to one by Justinian. The lowest class, having what was called the *dediticia libertas*, was composed of liberated slaves that had been punished by their proprietors by chains, or had been branded, or had been convicted on a criminal charge, or had been committed to prison or a gladiatorial school or had been delivered to fight. Such slaves, when manumitted, never became either Latins or Roman citizens, and were merely considered as enemies who had surrendered at discretion. They could not take under a will in any form, or make a will, and they were forbidden, under penalty of being again reduced to slavery, to reside in Rome or within the hundredth milestone from Rome. Gaius 1.13; 15; 25; 27."

²² Lounghis *et al.* date to between late February and December 31, 530.

²³ Blume: "The second class of freedmen, that frequently referred to in title 6 herein, was composed of those who had what was called the Latin right, and were called Latini Juniani - Latini, because they were assimilated in status to Latin colonists; Juniani, because they owed their freedom to the Junian law, before the enactment of which they were slaves. Gaius 1.22. This condition arose in a number of ways, some of which are enumerated in C. 7.6, *infra*. ... They could not dispose of their property by will, or take by direct devise or bequest, or be appointed testamentary guardian, although they could take property under a trust. Gaius 1.23-24; Ulpian 20.14. All of their property belonged, at death, to their patron, just as peculium - special property - of a slave. Gaius 3.56. Men of this class, though during life they lived as free persons, yet as they drew their last breath they were considered as losing their liberty along with their life, Inst. 3.7.4; which meant that they could make no testament, but all their property went to their patrons."

quidem pars eius deminuitur, quod autem ex ipsa rationabile est, hoc in ius perfectum deducitur? 1. Cum enim Latini liberti ad similitudinem antiquae Latinitatis, quae in coloniis missa est, videntur esse introducti, ex qua nihil aliud rei publicae nisi bellum accessit civile, satis absurdum est ipsa origine rei sublata imaginem eius derelinqui. 1a. Cum igitur multis modis et paene innumerabilibus Latinorum introducta est condicio et leges diversae et senatus consulta introducta sunt et ex his difficultates maximae emergebant tam ex lege Iunia quam ex Largiano senatus consulto nec non ex edicto divi Traiani, quorum plenae quidem fuerant nostrae leges, non autem in rebus fuerat eorum experimentum: studiosissimum nobis visum est haec quidem omnia et Latinam libertatem resecare, certos autem modos eligere, ex quibus antea quidem Latina competebat libertas, in praesenti autem Romana defertur condicio, ut his praesenti lege enumeratis et cives Romanos nascentibus ceteri omnes modi, per quos Latinorum nomen inducebatur, penitus conquiescant et non Latinos pariant, sed ut pro nullis habeantur. 1b. Quis enim patiatur talem esse libertatem, ex qua in ipso tempore mortis in eandem personam simul et libertas et servitium concurrunt et, qui quasi liber moratus est, eripitur non tantum in mortem, sed etiam in servitutem?

1c. Sancimus itaque, si quis per epistulam servum suum in libertatem producere maluerit, licere ei hoc facere quinque testibus adhibitis, qui post eius litteras sive in subscriptione positas sive per totum textum effusas suas litteras supponentes fidem perpetuam possint chartulae praebere. et si hoc fecerit, sive per se scribendo sive per tabularium, libertas servo competat quasi ex imitatione codicilli delata, ita tamen, ut et ipso patrono vivente et libertatem et civitatem habeat Romanam.

2. Sed et si quis inter amicos libertatem dare suo servo maluerit, licebit ei quinque similiter testibus adhibitis suam explanare voluntatem et quod liberum eum esse voluit dicere: et hoc sive inter acta fuerit testificatus sive testium voces attestationem sunt amplexae et litteras tam publicarum personarum quam testium habeant, simili modo servi ad

with uncertain footsteps and brought on all jumbled up, as it were? Why should not the useless part thereof be dismantled and the rational part brought into a state of legal perfection? 1. For since Latin freedmen appear to have been created on the model of the ancient Latin status, which was conferred on colonies and out of which the state experienced nothing but civil war, it would be absurd that when the origin of such an institution had been removed, its image should persist. 1a. Since, therefore, Latin status arose in many, almost innumerable ways, and different statutes and decrees of the Senate were enacted out of which many difficulties have emerged – out of the *lex Junia*, as well as the *SC Largianum*, and the edict of the deified Trajan²⁴ – Our laws were full of these, yet there was no real experience of them in the real world. It therefore seemed to Us extremely important to eliminate all of these as well as Latin liberty itself, but to select certain means which formerly gave rise to Latin liberty but which at present give Roman status, so that, by enumerating these in the present law as producing Roman citizens, all remaining means, through which the Latin name used to be imposed, may be laid entirely to rest and may no longer give rise to Latins but be held as nullities. 1b. For who could tolerate liberty to be such that a man should be both free and slave at the moment of death, and that one who lived as a free man should not only be snatched into death, but into slavery as well?

1c. We therefore ordain that if anyone prefers to manumit his slave by letter (*per epistulam*), he may do so in the presence of five witnesses who can verify the document by adding their signatures to it below the writing of the author, whether he has merely signed the document or has written out the whole thing. And if he does so through a letter, written by himself or by a secretary (*tabularius*), the slave's manumission is valid as if he received it through a codicil, but he shall be both free and a Roman citizen even while his patron is still alive.

2. But if anyone prefers to give liberty to his slave in the presence of friends (*inter amicos*), he may make his wish known likewise in the presence of five witnesses and state that he wants the slave to be free. And whether he attested this on the public records or whether the witnesses' declarations contained its attestation, provided they have the signature of public secretaries and

²⁴ The *SC Largianum*, passed in the consulship of Lupus and Largus (42 *ca*), regulated the order of succession to Junian Latins in three degrees: the manumissor; the manumissor's children, provided they had not been disinherited; the manumissor's external heirs, see Gaius 3.63–65. The net effect was to render the Junian Latin intestate, as if he had reverted to slavery upon death. The Edict of Trajan further stipulated that any Junian Latin who attained full freedom unbeknownst to his master by grant of the Emperor nevertheless reverted to Junian status at death, see Inst. 3.7.4.

civitatem producantur Romanam quasi ex codicillis similiter libertatem adipiscentes.

3. Sed scimus etiam hoc esse in antiqua Latinitate ex edicto divi Claudii introductum, quod, si quis servum suum aegritudine periclitantem sua domo publice eiecerit neque ipse eum procurans neque alii eum commendans, cum erat ei libera facultas, si non ipse ad eius curam sufficeret, in xenonem eum mittere vel quo poterat modo eum adiuvere, huiusmodi servus in libertate Latina antea morabatur et, quem ille moriendum dereliquit, eius bona iterum, cum moreretur, accipiebat. 3a. Talis itaque servus libertate necessaria a domino et nolente re ipsa donatus fiat ilico civis Romanus nec aditus in iura patronatus quondam domino reservetur. quem enim a sua domo suaque familia publice reppulit neque ipse eum procurans neque alii commendans neque in venerabilem xenonem eum mittens neque consueta ei praebens salaria, maneat ab eo eiusque substantia undique segregatus tam in omni tempore vitae liberti quam cum moriatur nec non postquam iam fuerit in fata sua concessus.

4. Similique modo si quis ancillam suam sub hac condicione alienaverit, ne prostituatur, novus autem dominus impia mercatione eam prostituendam esse temptaverit, vel si pristinus dominus manus iniectionem in tali alienatione sibi servaverit et, cum ad eum fuerit reversa, ipse ancillam prostituerit, ilico in libertatem Romanam eripiat et, qui eam prostituerit, ab omni patronatus iure repellatur. qui enim ita degener et impius constitutus est, ut talem exerceret mercationem, quomodo dignus est vel ancillam vel libertam eam habere?

5. Sed et qui domini funus pileati antecedunt vel in ipso lectulo stantes cadaver ventilare videntur, si hoc ex voluntate fiat vel testatoris vel heredis, fiant ilico cives Romani. et ne quis vana liberalitate iactare se concedatur, ut populus quidem eum quasi humanum respiciat multos pileatos in funus procedentes adspiciens, omnibus autem deceptis maneant illi in pristina servitute publico testimonio defraudati: fiant itaque et hi cives Romani, iure tamen patronatus patronis integro servando.

said witnesses, these slaves shall receive Roman citizenship in like manner as though they received manumission by codicil.

3. We also know that this too was introduced by the edict of the deified Claudius in connection with the ancient Latin status, that if a man should publicly expel his mortally ill slave from his house, neither caring for him nor entrusting him to another, even though he could have sent him to a hospital (*xenonem*) or helped him in some other way in the absence of sufficient means to care for him personally, a slave in this situation used to remain in Latin liberty in an earlier age, and when he died, the master used to receive his property, though he had abandoned the slave to die. 3a. Therefore, such a slave, who has been endowed with liberty of necessity with an unwilling master but by the situation itself, shall by this very act immediately become a Roman citizen; and the former master shall retain no rights as patron. When such former master throws him publicly out of his house and family, neither caring for him, nor entrusting him to another, nor sending him to a venerable hospital, nor furnishing him the customary allowance, the slave shall remain entirely independent from his former master and his property both for the remainder of his life as a freedman, and upon his death, and after he has yielded to his fate.²⁵

4. So, too, if a man transfers his female slave upon condition that she shall not be prostituted, but the new master attempts through impious dealing to give her over to prostitution, or if the former owner has reserved the right to her recovery in such case, and he, upon her return to him, himself prostitutes the slave, she shall immediately gain her freedom as a Roman citizen, and he who prostituted her shall lose all rights as patron. For how could a man who is so degenerate and impious as to engage in such dealing be worthy to have her either as his slave or his freedwoman?

5. And if any slaves wearing a cap of liberty (*pileati*) march in front of a funeral procession of their master or are seen fanning the corpse standing at his bier, whether this be by the wish of the testator or of his heir, they shall immediately become Roman citizens. Indeed, it shall not be permitted that any person can boast about granting empty manumissions so that people might respect him as humane when they see how many liberty-cap wearers process in his funeral, but then, once everyone has been deceived, those who were cheated in a public spectacle remain in their former servitude. Therefore these too shall become Roman citizens, but patronal rights shall be fully preserved for the patrons.

²⁵ For Claudius' ruling, see D. 40.8.2; Justinian repeats the same in the context of his long Novel on second marriages, Nov. 22.12.

6. Illo procul dubio observando, ut, si quis sive in testamento sive vindicta quendam manumiserit, licet hoc dixerit vel scripserit, quod voluerit esse Latinum, supervacua adiectio Latinitatis aboleatur et fiat civis Romanus, ne modi, qui ab antiqua observatione in civitatem Romanam homines producebant, per privatorum voluntates deminui videantur.

7. Sed et si sub condicione quidam libertatem suo servo reliquerit et adhuc pendente condicione extraneus heres libertatem ei imposuerit, non ut antea Latinus, sed civis fiat Romanus. et si quidem condicio defecerit, ipsius heredis, qui libertatem imposuit, maneat libertus. sin autem fuerit adimpleta, ne eripiaturs forsitan liberis et cognatis ius patronatus, orcinus libertus videatur et ad eum iura patronatus perveniant, cui leges concedunt.

8. Illud etiam satis acerbum nobis visum est, quod putabat antiquitas, si in liberali iudicio superatus fuerat servus a domino, deinde servi pretium ab aliquo ei solutum est, in Latinitate eum remorari. quemadmodum enim rationabile est et pretio eum perfrui et mortis liberti tempore denuo eum in servitutem deducere, cum non sint ambo casus sibi consentanei? et in praesenti igitur casu libertas Romana ei accedat iure patronatus minime subnixa, quia ipse quodammodo sibi libertus invenitur.

9. Sed et si quis homini libero suam ancillam in matrimonio collocaverit et dotem pro ea conscripserit, quod solitum est in liberis personis solis procedere, ancilla non Latina, sed civis efficiatur Romana. si enim hoc, quod frequentissime in cives Romanas et maxime in nobiles personas fieri solet, id est dotalis instrumenti conscriptio, et in hac persona adhibita est, necessarium est consentaneum effectum huiusmodi scripturae observari. 10. Similique modo si dominus inter acta quendam servum filium suum nominaverit, voci eius quantum ad liberam condicionem credendum est. si enim ipse tali adfectione fuerat accensus, ut etiam filium servum suum nominare non indignetur, et hoc non secreto neque inter solos amicos, sed etiam actis intervenientibus et quasi in iudicii figura nominaverit, quomodo potest eum servum iterum saltem morientem habere? sed producaturs et ipse in civitatem Romanam, vera liberalitate et non falso sermone domini sui sustentatus.

11. Ille etiam novissimus antiquae Latinitatis modus in civitatem Romanam translatus eligendus est, si quis instrumenta, ex quibus servus ostendebatur, vel dederit servo vel corruperit. 11a. Sed ne

6. Further, let it be observed that, if anyone manumits a slave in his will or by the staff and he says or writes that he wants the slave to be a Latin, the fruitless addition of Latinity shall be expunged and the slave shall become a Roman citizen, lest the methods which, according to ancient rules led to Roman citizenship, might be impaired by the wishes of private individuals.

7. And if a man bequeaths freedom to his slave upon some condition, and before the condition has been fulfilled an external heir grants him freedom, the latter shall not become a Latin, as formerly happened, but a Roman citizen. And if the condition fails, he shall remain the freedman of the heir who gave him his freedom. But if the condition is fulfilled, lest the right of patronage be removed from the children and relatives, the slave shall be regarded as a freedman of the testator (*libertus orcinus*), and the rights of patronage shall accrue to the person to whom the laws grant them.

8. This, too, seems harsh to Us: The ancients used to think that if a slave was defeated by his master in an action for his freedom, and someone subsequently paid the price of the slave to the master, that the slave should remain a Latin. For how can it be reasonable that the master should enjoy the price and at the time of the death of the freedman again reduce the latter to the condition of servitude? These matters are not in harmony. In this case too, therefore, the slave shall receive Roman freedom, which rests on no right of patronage, since the freedman is found to be like a freedman of himself.

9. And if anyone gives his female slave in marriage to a free man and underwrites a dowry for her – which is a custom only among free persons – the female slave shall become not a Latin but a Roman citizen. For because the act of underwriting a dowry, which frequently occurs among Roman citizens and particularly among persons of nobility, is also employed in the case of this female slave, it is necessary that a suitable effect be given to this document.²⁶ 10. Similarly, if a master gives to his slave the title of son in official records, such statement must be credited as meaning that the slave is free. For if the master is moved by such feelings of affection as not to consider it unworthy to call his slave his son, and does so not secretly and among friends only, but in official records, as though expressing his last wish, how may he again have him as a slave when he dies? So such slave shall become a Roman citizen, buoyed up by the true liberality of his master rather than by false speech.²⁷

11. And the last method too which gave rise to Latin freedom shall be adopted as a method to confer Roman citizenship, namely when a master gives the documents which prove a man to be a slave, to his slave or when he destroys them.

²⁶ At Nov. 22.11 Justinian also grants that masters who collude in the marriage of their female slaves passively consent to their manumission.

²⁷ See Inst. 1.11.12.

furandi occasio servis forsitan detur et sua malignitate in libertatem perveniant, talis modus certa et indubitata probatione manifestetur, ut testibus praesentibus non minus quinque dominus instrumenta vel det famulo suo vel deleat aut alio modo corrumpat. et ex eo igitur modo civitatem Romanam ei competere censemus, salvo iure patronatus tam in hac specie quam in ceteris, nisi ubi specialiter hoc patronis denegavimus.

12. His tantummodo casibus ex omni iure antiquae Latinitatis electis ceteri omnes, qui in libris prudentium vel constitutionibus enumerati sunt, penitus conquiescant nec Latini ab eis procedant, sed maneat, ut dictum est, servi in sua condicione nec tali remedio abuti concedantur. 12a. Et ne in posterum aliquod ius Latinae libertatis nostris legibus incurrat, lex Iunia taceat Largiano senatus consulto cessante, sileat edictum divi Traiani, quod ea sequebatur, et si qua alia lex vel senatus consultum vel etiam constitutio loquitur de Latinis, ea inefficax quantum in eam partem remaneat et triplex antea via libertatis, quae multiplices introducebat ambages, uno directo tramite discat ambulare. quod si aliqua lex vel constitutio libertatis faciet mentionem, non autem Latinitatis, ea pro civitate Romana loqui intellegatur. 13. Sed si quidem liberti iam mortui sunt, et bona eorum quasi Latinorum his quorum intererat adgregata sunt, vel adhuc vivunt, nihil ex hac lege innovetur, sed maneat apud eos iure antiquo firmiter detenta et vindicanda. in futuris autem libertis praesens constitutio locum sibi vindicet.

D. k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

VII De Servo Communi Manumisso

[1] *Imp. Iustinianus A. Iuliano pp. pr.* In communes servos eorumque libertatem et quando cuidam domino pars libertatem imponentis adcrevit nec ne, et maxime inter milites, qui huiusmodi imponunt libertatem, multa ambiguitas exorta est apud veteres iuris auctores. 1. Et inventa est constitutio apud Marcianum in institutionibus divi Severi, per quam idem imperator disposuit necessitatem imponi heredi militis comparare partem socii et servum libertate donare. 1a. Sed et alia

11a. But lest an opportunity for theft be given to slaves and they receive liberty through wickedness, this method must be made manifest through certain and undoubted evidence, so that the master must give the documents to his slave or erase or otherwise destroy them in the presence of not less than five witnesses. Therefore, also by this method Roman citizenship may be acquired, leaving the right of patronage unimpaired in this case as well as in all other cases, unless We have specially denied such right to patrons.

12. Having singled out these instances only from among the methods which formerly conferred Latin status, all others enumerated in books of jurists or in constitutions shall be entirely obsolete. No Latins shall be created thereby, but slaves shall, as stated, retain their status as such, and the misuse of such methods shall not be permitted. 12a. And lest hereafter anything relating to Latin liberty come up in Our laws, the *lex Junia* shall be silent, the *SC Largianum* shall cease to have validity, the edict of the deified Trajan which followed these shall be quiescent, and if any other statute or decree of the Senate or constitution speaks of Latins, they shall have no effect as to such provision, and the former threefold road to liberty which introduced manifold detours, shall learn to proceed along a single direct path. But if any statute or constitution makes mention of liberty without specifying anything about Latinity, it shall be understood to speak in favor of Roman citizenship. 13. If, however, there are freedmen who have already died and their property has been turned over as that belonging to Latins to those who had claims, or if they happen still to be alive, let nothing be altered in accordance with this law, but let such goods continue to be detained and recovered by these same according to ancient right. But the present constitution shall apply to all future freedmen.

Given November 1, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Seventh Title A Manumitted Slave Owned in Common

[1] *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect. pr.* A great dispute arose among the ancient authorities of law concerning slaves owned in common and their manumission: when does the share of the owner-in-common who alone grants manumission accrue to another owner who does not grant it, and when not? And particularly what about soldiers who grant liberty in such cases? 1. A constitution of the deified Severus was found in the *Institutes* of Marcian by which that emperor ordained that it was necessary for an heir of a soldier²⁸ to purchase the portion of the other co-owner and grant liberty to the slave. 1a. But another constitution of the Emperors Severus

²⁸ That is, a soldier who was co-owner of a slave and manumitted him in his will.

constitutio Severi et Antonini principum reperta est, ex qua generaliter necessitas imponebatur socio partem suam socio vendere, quatenus libertas servo imponatur, licet nihil lucri ex substantia socii morientis alii socio accedat, pretio videlicet arbitrio praetoris constituendo, secundum ea, quae et Ulpianus libro sexto fideicommissorum et Paulus libro tertio fideicommissorum refert, ubi et hoc relatum est, quod Sextus Caecilius iuris antiqui conditor definivit socium per praetorem compelli suam partem vendere, quatenus liber servus efficiatur: quod et Marcellus apud Iulianum in eius digestis notat: hocque et Marcellum, cum Iulianum notaret, rettulisse palam est.

1b. His itaque apud veteres iuris auctores inventis decedentes tales altercationes generaliter sancimus, ut nulla inducatur differentia militis seu privati in servis communibus, sed in omnibus communibus famulis, sive inter vivos sive in ultima dispositione libertatem quis legitimam imponere communi servo voluerit, hoc faciat, necessitatem habente socio vendere partem suam, quantam in servo possidet, sive dimidiam sive tertiam sive quantamcunque, et si plures sint socii, uno ex his libertatem imponere cupiente alios omnes necessitatem habere partes suas, quas in servo possident, vendere ipsi, qui libertatem servo imponere desiderat, vel heredi eius (licet ipse communis servus institutus sit), si hoc moriturus dixerit, ita tamen, ut omnimodo ipse qui partes alias comparavit vel heredes eius libertatem imponant.

2. Sin autem socius vel socii recusaverint pretium accipere, licentiam ei damus offerre hoc per publicas personas et sigillo impresso in aedem sacram deponere et sic habere facultatem servum libertate donare et eum habere plenissimam libertatem et civitate Romana perfrui et nullum timere ex sociis. sibi etenim imputent, si, cum liceret lucrari pretium, hoc accipere differunt.

3. Sed ne circa peculium servi aliqua fuerit dubitatio, peculium eius in omnes socios pertinere iubemus ex partibus, pro quibus quisque et dominium servi possidet: licentia concedenda ei, qui libertatem moriens imponit, etiam eius peculium quod ei attingit liberto concedere. iura autem patronatus procul dubio pro suo ordine ad eum venire qui libertatem donavit.

4. Sin autem servus ratiociniis suppositus sit, ne ratiocinia pereant vel libertas impediatur, praesidem provinciae vel competentem iudicem tempus statuere, intra quod debet ratiociniis ante factis et debitis, quae ex his apparuerint, redditus ita ad libertatem venire.

5. Ne autem quantitas servilis pretii sit incerta, sed manifesta, sancimus servi pretium sive ancillae, si nulla arte sunt imbuti, viginti solidis

and Antoninus has been found which, in general terms, imposed on one partner the necessity to sell his share to his co-partner if manumission is granted to the slave, even though no profit accrues to the one partner from the estate of the other who is dying – in which case the price must be determined at the discretion of the Praetor, according to what Ulpian says in his sixth book *On Trusts* and Paulus in his third book *On Trusts*. There it is also reported what Sextus Caecilius (Africanus), a founder of ancient law, stated, that a partner is compelled by the Praetor to sell his share if a slave is set free, as Marcellus also notes on Julian in his *Digests*. And evidently Marcellus also reported this when he annotated Julian.

1b. Finding these statements in the books of the ancient founders of law, and settling such disputes, We ordain generally that there shall be no difference between slaves owned in common by soldiers and those owned by private persons, but in all cases involving slaves owned in common, if one partner wants to manumit the slave in a lawful manner, either among the living or by a last will, he may do so, and the co-partner is required to sell the share in however much of the slave he owns, whether a half, a third, or any other amount. And if there are several partners, and one of them desires to grant liberty, all the others are required to sell the shares which they own in the slave to the co-owner who desires to grant such liberty or to his heir, if a co-owner expressed that wish as he lay dying, even if the slave owned in common is made the heir. A co-owner who has (thus) purchased the other shares, or his heirs, must grant liberty.

2. Nevertheless, if one or more co-owners refuse to receive the price, the one who desires to grant liberty may tender it through public secretaries (*per publicas personas*) and deposit it, sealed, in a sacred building (*in aedem sacram*, presumably a church), and thus he has power to manumit the slave who thereupon shall have complete freedom, enjoy Roman citizenship, and fear nothing from the other co-owners. For the latter may blame themselves if they delay in accepting the price, from which they might have benefited.

3. And that no doubt may exist as to the *peculium* of the slave, We order that it shall belong to all the partners in proportion to the shares according to which each holds ownership of the slave. Permission must be given to the partner who bequeaths such liberty upon his death to give his share of the *peculium* to the freedman. The rights of patrons belong without question to the party who grants the manumission, as is normal.

4. If the slave was engaged in managing accounts, then, in order that these may not be lost or his manumission delayed, the governor or pertinent judge shall fix a time within which he shall be manumitted, provided an account has been rendered and the amounts shown to be due have been paid.

5. In order, moreover, that the price of a slave not be left uncertain and that it may be definitely known, We ordain that male or female slaves, shall be valued

taxari, his videlicet, qui usque ad decimum annum suae venerunt aetatis, in decem tantummodo solidis ponendis: sin autem aliqua arte praediti sunt exceptis notariis et medicis, usque ad triginta solidos pretium eorum redigi sive in masculis sive in feminis. 5a. Sin autem notarius sit vel medicus sive masculus sive femina, notarius quidem usque ad quinquaginta, medicus autem usque ad sexaginta taxetur. 5b. Sin vero eunuchi sint servi communes maiores decem annis, si quidem sine arte sint, in quinquaginta solidos computentur, sin autem artifices, usque ad septuaginta: minores etenim decem annis eunuchos non amplius triginta solidis aestimari volumus. 5c. Et eorum partem competentem socii accipientes libertatem eis per competentes iudices imponere compellentur.

6. Sin autem, uno ex sociis libertatem sive imponere sive relinquere servo cupiente et pretium dante alter vel alteri ex his ipsi velle dixerint libertatem imponere et pretium dare, melior quidem causa erit eius, qui primus ad hanc rationem pietatis perveniet. 6a. Si tamen sub obtentu libertatis et ipsi ad haec prosiluerint, tunc iudicem competentem omnes compellere sine pretio ei libertatem imponere: peculio quidem in omnes secundum partem dominii distribuendo, iura autem patronatus secundum sui naturam omnibus qui libertatem imposuerunt aequaliter habentibus. 7. Ius enim ad crescendi, quod antiqua iura in communibus servis manumittendis introducebant, nullius esse momenti nec in posterum frequentari penitus concedimus.

D. k. Aug. Lampadio et Oreste vv. cc. cons.

[2] *Idem A. Iuliano pp. pr.* Cum apud omnes iuris peritos hoc placitum est, ut servus communis apud unumquemque dominum partim sit proprius partim alienus, ut ex hac causa possit et ipse legato honorari et ipse legari, huiusmodi incidit quaestio. 1. Duo vel plures domini communem servum habebant, sed unus ex his ipsi servo suam partem quam in eo habebat legavit. et semel accepta dubitationis occasione hoc vetustas in magnum extollit certamen.

2. Cum igitur nos sensum huiusmodi legati crebra indagatione adgredientes duplicem esse eum opinamur: aut enim putavit testator liberum fieri posse ex parte servum, qui huiusmodi legatum ei reliquit, aut, si hoc minime cogitavit, adfectu socii fecit, ut ei adquiratur, heredes autem suos eundem servum possidere minime voluit, ut sit manifestum a suo patrimonio penitus esse eum alienatum: in tali itaque comparatione nos,

at 20 solidi if they have not been trained in a trade, provided that those who have only reached their tenth year shall only be valued at 10 solidi; if they have learned a trade, they shall, except in case of notaries and physicians, be valued up to 30 solidi, whether they are male or female. 5a. If they happen to be a notary or a doctor, whether they are male or female, the notary shall be valued up to 50 solidi, but the doctor up to 60 solidi. 5b. But if such slaves owned in common happen to be eunuchs, they shall, if older than 10 years and without a trade, be valued at 50 solidi; if they have a trade up to 70 solidi; eunuchs less than 10 years old shall be valued at not more than 30 solidi. 5c. And co-owners upon receiving their proper proportion will be compelled by the appropriate judges to grant liberty.

6. Moreover, if one of the co-owners wants to give or bequeath liberty to a slave and pay the price, and another or others of the co-owners want to do the same, the one who first undertakes this act of piety (*rationem pietatis*) shall have preference. 6a. If they all are eager to do so only on the pretence of granting liberty, the appropriate judge will compel them all to grant liberty without receiving the price. The *peculium* of the slave should be divided among all in proportion to their ownership, but the rights of patronage shall, according to the natural principle, be enjoyed equally by all who granted manumission. 7. The right of accrual (*ius adcrendi*), which the ancient laws introduced in connection with the manumission of slaves owned in common, shall no longer exist and have no further application in the future.²⁹

Given August 1, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[2] *The same Augustus to Julian Praetorian Prefect. pr.* Since it was agreed by all jurists that a slave owned in common partially belonged and partially did not belong to each owner, and that hence the slave could be gifted with a legacy as well as himself being given as a legacy, the following question arose: 1. Two or more owners had a slave in common, but one of them bequeathed the part he owned to the slave himself. Once this matter had given occasion for doubt, a mighty dispute arose among the ancients.

2. We have repeatedly looked into the intent involved in such a legacy and think that it may be construed in two ways: the testator who left this legacy either thought that the slave could be made free in part, or, if he did not think that, through affection for his co-owner, he wanted him to have his share. He did not, in any event, want his heirs to have the slave, as it is clear that the

²⁹ As Blume notes: "A man cannot be partly free and partly slave. But an owner of half cannot free the other half. Hence, under the ancient law, if a co-owner purported to free the slave, the manumission did not take effect. The act was not always void; if the purported manumission was formal, i.e. by the rod or by testament, the effect was simply to vest the share of the freeing owner in the other owner by way of accrual."

qui fautores libertatis sumus, sic ambiguam testatoris interpretamur voluntatem, tamquam si voluit eum libertate in suam partem donare. 3. Et cum iam de communibus servis manumittendis statuimus, quid in huiusmodi casibus fieri oportet, ex illius sanctionis tenore et huiusmodi species sit definita. fiat itaque liber, ex parte quidem testatoris secundum eius voluntatem, ex altera autem parte ex nostra definitione, pretio secundum praedictae constitutionis tenorem vel sociis ab herede praestando vel, si accipere noluerint, tam offerendo quam signando et periculo eorum deponendo, cum sat abundeque imperiale est humaniorem sententiam pro durioribus sequi.

D. Constantinopoli xv k. Dec. Lampadio et Oreste vv. cc. cons.

VIII De Servo Pignori Dato Manumisso

[1] *Imp. Severus et Antoninus AA. Proculo.* Licet dotale mancipium vir qui solvendo est possit manumittere, tamen si te pignori quoque datum mulieri apparuerit, invita ea non posse libertatem adsequi non ambigitur.

PP. xii k. Mai. Antonino A. II et Geta II cons.

[2] *Idem AA. Abascanto.* Libertas a debitore fisci servo data, qui pignori non est ex conventionem speciali, sed tantum privilegio fisci obligatus, non aliter infirmatur, quam si hoc fraudis consilio effectum detegatur.

[3] *Idem AA. Antonio.* Ab eo, qui bona sua pignori obligavit, quae habet quaeque habiturus esset, posse servis libertatem dari certum est. non idem iuris est in his servis, qui pignoris iure specialiter traditi vel obligati sunt.

PP. iii k. Ian. Pompeiano et Avito cons.

[4] *Imp. Alexander A. Sabiniano.* Si, ut proponis, consentiente creditore, cui pignoris iure cum aliis mancipiis obligatus fuisti, a debitore manumissus es, potuisti ad libertatem pervenire.

slave was effectually severed from the testator's other property. Sponsors of liberty as We are, We have weighed the matter and interpret the ambiguous wish of the testator to mean that he wanted to give the slave liberty as to his share. 3. And since We have already decided what should be done in case of the manumission of slaves owned in common, cases like the present shall be governed according to the tenor of that law. Let the slave, therefore, be free as to the share of the testator, according to the latter's wish. As regards the other share, according to Our pronouncement, the price must be paid by the heir to the co-owners following the arrangement in said constitution, and if they refuse to receive it, it shall be tendered, sealed, and deposited at their risk, since it is the proper thing for an Emperor to prefer a humane interpretation to one that is harsh.

Given November 17, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

Eighth Title The Manumission of a Slave Tendered as a Pledge

[1] *Emperors SEVERUS and ANTONINUS, Augusti to Proculus.* Although a solvent husband may manumit a slave given to him as a dowry, there is no doubt that, if it appears that you were also tendered (by the husband) as a pledge (*pignus*) to the wife, you cannot obtain liberty without her consent.

Posted April 20, in the consulship of Antoninus Augustus and Geta, for the second time (205).

[2] *The same Augusti to Abascantus.* Liberty bestowed by a debtor of the Treasury upon a slave, who is not pledged to the Treasury by special agreement, but upon whom it has only a general lien by reason of its privileges,³⁰ is not invalid unless it is shown that such liberty was granted with intent to defraud.

[3] *The same Augusti to Antonius.* It is certain that liberty can be given to slaves by a master who obligates his current and future property as a pledge. The law is not the same regarding those slaves who were specifically delivered or obligated by way of pledge.

Posted December 30, in the consulship of Pompeianus and Avitus (209).

[4] *Emperor ALEXANDER Augustus to Sabinianus.* If, as you state, you were manumitted by the debtor with the consent of the creditor to whom you were pledged along with other slaves, you were able to obtain your liberty.

³⁰ The Fiscus had a general lien on the property of its debtor, but the present rescript shows that manumissions were favored over its claims.

PP. VI id. Mai. Alexandro A. cons.

[5] *Idem A. Extricatiano.* Si creditoribus satisfactum fuerit, ancillae, quae pignori obligatae a debitore manumissae erant, liberae fiunt. nam ipse manumissor si fraudem se fecisse creditoribus, ut revocet libertates, audeat dicere, audiri non debet nec heredes eius.

PP. III k. Iun. Maximo II et Aeliano cons.

[6] *Idem A. Auctori.* Si tutor tuus de pecunia tua servos emptos manumisit, quoniam huiusmodi servi sicut ceterae res pupillaribus pecuniis emptae iure pignoris ex constitutione divorum parentum meorum obligati sunt favore pupillorum, liberi facti non sunt.

[7] *Imp. Gordianus A. Iulianae.* Sive cum nupsisses mancipia in dotem dedisti, sive post datam dotem de pecunia dotis maritus tuus quaedam comparavit, iuris rationibus dominia eorum ad eum pervenerunt. ideoque frustra quaestionem super statu manumissorum conaris inferre, qui eius facti, qui comparavit vel in dotem accepit, ab eo iure potuerunt manumitti.

VIII De Servis Rei Publicae Manumittendis

[1] *Imp. Gordianus A. Epigono.* Si ita, ut lege municipali constitutionibusque principum comprehenditur, cum servus publicus esses, ab ordine consentiente etiam praeside provinciae manumissus es, non ex eo, quod is quem dederas vicarium in fugam se convertit, iugo servitutis, quod manumissione evasisti, iterato cogaris succedere.

[2] *Idem A. Hadrianae.* Si decretum ordinis auctoritas rectoris provinciae comprobavit, quo is libertatem acceperat, cui postea fueras, ut proponis, matrimonio copulata, natam ex huiusmodi matrimonio et civem Romanam esse et in patris potestate non est incertae opinionis.

Posted May 10, in the consulship of Alexander Augustus (222).

[5] *The same Augustus to Extricationus.* If the creditors have been paid, the female slaves who were manumitted by the debtor became free even though pledged to such creditors. For neither the manumitter nor his heirs should be heard if, in order to revoke the manumissions, he presumes to say that he defrauded the creditors.

Posted May 30, in the consulship of Maximus, for the second time, and Aelianus (223).

[6] *The same Augustus to Auctor.* If your guardian manumitted slaves who had been bought with your money, such slaves did not become free, since they, just as other property bought with the money of minors, are bound by a (tacit) right of pledge in favor of the minors, according to the constitution of my deified parents.

[7] *Emperor GORDIAN Augustus to Juliana.* Whether you gave slaves as a dowry when you were married, or, after the dowry was given, your husband purchased some with the money given as dowry, he was owner of them according to the rules of law. Therefore you are striving in vain to bring an inquest about the status of the slaves who were manumitted; these became the property of him who purchased them or received them as a dowry and could legally be manumitted by him.

Ninth Title The Manumission of Municipal Slaves³¹

[1] *Emperor GORDIAN Augustus to Epigonus.* If you were manumitted by the municipal order with the consent of the provincial governor in accordance with municipal law and imperial constitutions, you will not be again compelled to submit to the yoke of servitude, from which you escaped by manumission, because the slave whom you gave as a substitute fled.

[2] *The same Augustus to Hadriana.* If the governor (*rector*) of the province approved the decree of the municipal order by which the man, whom, as you state, you afterwards married, received his liberty, there is no room for doubt that the girl born of this marriage is a Roman citizen and under paternal power.

³¹ See D. 40.3.

[3] *Imp. Diocletianus et Maximianus AA. et CC. Philadelpho. pr.* Titulo non praecedente, quibus dominia servorum quaeri solent, municipum libertus servus non efficitur. 1. Si itaque secundum legem veti libici,ⁱⁱ cuius potestatem senatus consulto Iuventio Celso iterum et Neratio Marcello consulibus facto ad provincias porrectam constitit, manumissus civitatem Romanam consecutus es, post vero ut libertus tabularium administrando libertatem quam fueras consecutus non amisisti, nec actus tuus filio ex liberis ingenuo suscepto, quominus decurio esse possit, obfuit.

D. xv k. April. Ravennae AA. cons.

X De His Qui a Non Domino Manumissi Sunt

[1] *Imp. Antoninus A. Corneliano.* Eum, qui servos alienos ac si suos manumittit, ut pretium eorum dominis, si hoc elegerint, deponat, quanti sua interest, saepe rescriptum est.

PP. k. Mart. Antonino A. IIII et Balbino cons.

[2] *Imp. Alexander A. Mercuriali.* Felicissima, quam mandante te servos emisse dicis, si dominium servi quem manumisit nondum ad te transtulerat, frustra petis, ut denegata libertate eius quem manumissum dicis possessio tibi tradatur.

[3] *Idem A. Pompeio militi.* Qui tibi hereditatem vendidit, antequam res hereditarias traderet, dominus earum perseveravit et ideo manumittendo libertatem servo hereditario praestitit.

PP. vi k. Aug. Agricola et Clemente cons.

[4] *Imp. Valerianus et Gallienus AA. Zoilo.* Si non proprietatem donaveras, sed ministerium ancillae dederas, libertatem mancipio dando ea, quae precarium usum haberet, dominio tuo nihil praeiudicavit. nemo enim alienum servum, quamvis ut proprium manumittat, ad libertatem producere potest.

ⁱⁱ veteris rei publicae

[3]³² *Emperors DIOCLETIAN and MAXIMIAN Augusti, and the Caesars to Philadelphus. pr.* In the absence of a preceding title by which ownership claims over slaves are normally asserted,³³ a freedman of municipal citizens does not become a slave. 1. And so, if you were manumitted and gained Roman citizenship according to the law of the old municipality, the authority of which was extended to the provinces by a decree of the Senate under the consulship of Juventus Celsus, for the second time, and Neratius Marcellus,³⁴ but subsequently you managed the public archive (*tabularium*) while a freedman, you did not lose the freedom which you had secured. Moreover, your occupation did not prevent your son, who was born free of free parents, from becoming a decurion.

Given March 18, at Ravenna, in the consulship of the Augusti (290 or 293).

Tenth Title Those Manumitted by One Who Is Not their Owner

[1] *Emperor ANTONINUS Augustus to Cornelianus.* It has often been stated in rescripts that a man who manumits the slaves of others as if they were his own could pay to the owners the value of the slave, or of the interest which they have therein if they (the owners) should choose this.

Posted March 1, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2] *Emperor ALEXANDER Augustus to Mercurialis.* If Felicissima, who you say purchased slaves pursuant to your mandate, did not deliver to you ownership of the slave whom she manumitted, it is useless for you to ask that this manumission should be revoked and that possession of the man who you say was manumitted be transferred to you.

[3]³⁵ *The same Augustus to Pompeius, a soldier.* The man who sold you an inheritance remained its owner until he delivered it to you, and accordingly he conferred freedom on the slave in the inheritance by manumitting him.

Posted July 27, in the consulship of Agricola and Clement (230).

[4] *Emperors VALERIAN and GALLIENUS Augusti to Zoilus.* If you did not transfer ownership, but simply loaned the service of a female slave, the woman (i.e., the borrower), who merely had use by sufferance (*precarium usum*), could not prejudice your right to the slave by manumitting her. For no one can give liberty to the slave of another, even if he manumits him as if he were his own.

³² Combine with C. 6.8.1, whence the subscription is restored.

³³ See C. 7.14.6 for almost the same phrase.

³⁴ 129 CE, see D. 40.3.1.

³⁵ = C. 4.39.6, whence Pompeius' occupation is restored; that constitution concerns alienation by sale.

PP. x k. Aug. Saeculare et Donato cons.

[5] *Imp. Diocletianus et Maximianus AA. Marcellinae.* Si tradita sunt ex donatione mancipia, ius manumittendi donatrix non habuit.

PP. v k. Mai. Maximo et Aquilino cons.

[6] *Idem AA. et CC. Mido.* Si pater servum vestrum, licet vobis minoribus viginti annis consentientibus, manumisit, ei libertatem praestare non potuit.

S. non. Mart. CC. cons.

[7] *Imp. Constantinus A. ad Bassum. pr.* Si non a dominis libertas detur mancipio alieno, si quidem ab his iudicibus impetrabitur, quibus dandi ius est, sine ulla trepidatione poenae facilis dissolutio est. 1. Si vero iubentibus nobis quicquam lege actum esse doceatur et non dominus, ut alienum mancipium manumitteretur, petisse probetur, tunc eodem, qui in conspectu nostro libertatem monstrabitur consecutus, ei protinus ad cuius proprietatem pertinet restituto is, qui mancipium alienum fallendo principis conscientiam manumisit, mancipia duo cogatur domino eius dare, cuiusmodi sexus aetatis atque artis constiterit esse manumissum, et alia tria fisco eadem ratione similia. 2. Quae multa non semper imponitur, sed potius conquiescit, si forte manumissus inferentem sibi quaestionem status obiecta legitima praescriptione potuerit excludere, cum sibi amissi mancipii damna debeat imputare, qui in perniciem suam gesta taciturnitate firmaverit.

PP. id. Iul. Constantino A. v et Licinio C. cons.

XI Qui Manumittere Non Possunt et Ne in Fraudem Creditorum Manumittatur

[1] *Imp. Alexander A. Antiocho.* Certum ius est non alias directas libertates per legem Aeliam Sentiam, quae sunt in fraudem creditorum manumissorum, revocari, nisi et consilium fraudis hoc animo manumittentis

Posted July 23, in the consulship of Saecularis and Donatus (260).

[5] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Marcellina.* If the slaves were delivered as a gift, the woman who donated them had no right to manumit them (thereafter).

Posted April 27, in the consulship of Maximus and Aquilinus (286).

[6] *The same Augusti and the Caesars to Midus.* If your father manumitted your slave, he was not able to grant him liberty even though you gave your consent while you were less than 20 years old.³⁶

Signed March 7, in the consulship of the Caesars (294).

[7]³⁷ *Emperor CONSTANTINE Augustus to Bassus. pr.* If liberty is given to another's slave by a non-owner, even if this is done pursuant to the authority of judges who had the right to grant permission to do so, this act is easily cancelled without any fear of penalty. 1. If, however, it is made to appear that this was done legally through Our order, and a non-owner is proven to have petitioned Us to manumit another's slave, then the slave who appears to have received liberty through Our court will be restored to his proper owner immediately, and he who by obfuscating the Emperor's understanding of the situation manumitted another's slave shall be compelled to give to the slave's owner two slaves of the same sex, age, and trade as the one manumitted, and to give three additional, similar slaves to the Treasury according to the same principle. 2. This penalty is not always imposed, indeed it does not obtain if perchance the manumitted person can show that the owner's right to question his status is barred by the legal period of prescription, for a man who ratifies the loss of his slave by his silence has no one but himself to blame.

Posted July 15, in the consulship of Constantine Augustus, for the fifth time, and Licinius Caesar (319).

Eleventh Title Those Who Cannot Manumit, and That No Manumission Be Made in Fraud of Creditors³⁸

[1] *Emperor ALEXANDER Augustus to Antiochus.* The law is certain that direct manumissions made in fraud of the manumitter's creditors are not to be revoked by the Lex Aelia Sentia unless the manumitter had the intent to defraud and loss results to creditors who want to recover their property. It has

³⁶ The constitution appears to presume that the manumitter's children had been emancipated.

³⁷ = C.Th. 4.9.1.

³⁸ See D. 40.9.

et eventus damni suum recipere volentium sequatur. inter creditores autem etiam eos numerandos esse, quibus fideicommissum debetur, olim placuit.

PP. III id. Nov. Maximo II et Aeliano cons.

[2] *Idem A. Nataliano.* Servos meos nec per interpositam personam ad libertatem producere homines peculii sui posse mandatis comprehenditur.

[3] *Idem A. Iustinae.* Divo Marco auctore amplissimus ordo censuit, ne quis spectaculo, quod edatur, actorem suum alienumve servum manumitteret et, si factum esset, pro infecto haberetur.

[4] *Idem A. Felicissimo.* Si minor annis viginti ad libertatem praestandam homines tradidisti, senatus consulto quod gestum est irritum constituitur.

PP. III id. Mai. Iuliano et Crispino cons.

[5] *Idem A. Prisco.* Si in fraudem eorum quae fisco debebantur probari potest libertas data, non valet. sed si pecuniam is, quem patrem tuum appellas, emptori dederit et ab eo redemptus ad libertatem productus est, nihil videtur bonis defuisse eius, qui fisci debitor dicitur.

[6] *Impp. Diocletianus et Maximianus AA. et CC. Olympio.* Nec fideicommissariam libertatem a pupilla sua servis debitam tutorem posse praestare certi iuris est. unde si hos, quos tu rogata manumittere fueras certo aetatis tuae tempore, ad libertatem non produxisti, sed tutor manumisit, remanserunt in servitute.

[7] *Idem AA. et CC. Zotico.* Si debitor ex administratione curae dominus tuus non solvendo constitutus fideicommissariam tibi reliquit libertatem, cum in fideicommissariis libertatibus eventum inspicere tantum obtinuerit, nihil eius voluntas tibi prodesse potest.

long been agreed that the term "creditors" also includes those to whom a trust (*fideicommissum*) is due.

Posted November 11, in the consulship of Maximus, for the second time, and Aelianus (223).

[2] *The same Augustus to Natalianus.* It is understood from Our mandates that My slaves (i.e., *servi Caesaris*) cannot, even by the mediation of other persons, manumit slaves that are part of their own *peculium*.

[3] *The same Augustus to Justina.* On motion of the deified Marcus, the exalted Senate decreed that no one should manumit his manager or another's slave during a spectacle being given, and, if done, the act should be considered invalid.³⁹

[4] *The same Augustus to Felicissimus.* If you, while less than 20 years old, delivered slaves in order that they might be manumitted, the transaction is declared invalid by decree of the Senate.

Posted May 13, in the consulship of Julian and Crispinus (224).

[5] *The same Augustus to Priscus.* If a manumission can be shown to have been made in fraud of debts due to the Treasury, it is invalid. But if the man, whom you call your father, gave money to the purchaser and was purchased by him and manumitted, the property of the man who is said to be a debtor of the Treasury does not appear to have been diminished.

[6] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Olympius.* The law is certain that a *tutor* cannot grant liberty to slaves even when it is owed them in trust from his minor female ward. Hence, if you did not give freedom to those slaves whom you had been requested to manumit at a certain time of your life, the slaves remain in servitude, notwithstanding the manumission made by your *tutor*.

[7] *The same Augusti and Caesars to Zoticus.* If your master, who owed a debt as a result of his acting as *curator* and became insolvent, left you a bequest of freedom in trust, his bequest can be of no advantage to you, since in cases of manumission in trust only the final accounting is considered.

³⁹ Blume: "If such slave, participating at a spectacle, should be asked to be manumitted by the multitude on account of approval of his conduct, it would be hard to resist, and if done would, in a manner, be done under compulsion."

XII Qui Non Possunt ad Libertatem Pervenire

[1] *Impp. Severus et Antoninus AA. Torquato. pr.* Cum divus pater meus constituerit a praesidibus provinciarum vel qui coercendorum malefactorum potestatem habent in perpetua vincula damnatos ad libertatem produci non posse, hi, qui intra tempora poenae liberi et heredes esse iussi sunt aut legatum fideicommissumve acceperunt, neque libertatem adipisci nec quicquam eorum quae his data sunt capere possunt. 1. Quod si poenae tempus compleverint, iam omni vinculo exsoluti et quasi ad pristinam vel simplicem servitutis condicionem redacti et libertatem et si qua testamentis dominorum illo tempore defunctorum acceperunt, sine ulla quaestione praeteritae poenae consequantur.

D. xvi k. Iul. ipsis Antonino et Vero AA. cons.

[2] *Impp. Valerianus et Gallienus AA. Theodoro. pr.* Is quidem, qui testamento vetitus est manumitti, ad libertatem non potest pervenire. 1. Sed in proposito interest, utrumne eos, quos cum filio educatos esse testator expresserit, propter familiare ministerium et usum filiorum necessarium et venire et manumitti noluerit, an quasi male meritis poenam inrogaverit. 2. Nam priore casu, morte eius cui consulebatur obsequii necessitate finita, libertas potest pervenire, posteriore id, quod poenae causa in servos statutum est, necesse est vires suas obtinere, quando divis parentibus meis placuerit eiusmodi testamentorum leges perpetuam servitutem male meritis servis inrogare, ut nec per suppositum emptorem ad libertatem produci possint.

XIII Pro Quibus Causis Servi Praemium Accipiunt Libertatem

[1] *Impp. Diocletianus et Maximianus AA. Firmino.* Quoniam religiosa sollicitudo ad augendam provocandamque fidei observationem iuris

Twelfth Title Those Who Cannot Receive Freedom⁴⁰

[1] *Emperors SEVERUS and ANTONINUS Augusti to Torquatus. pr.* Since my deified father decided⁴¹ that those (slaves) condemned to perpetual chains by provincial governors or by others who have the power to punish malefactors cannot be given liberty, those who are ordered to be manumitted and become heirs or who receive a legacy or trust while still undergoing punishment cannot obtain liberty or receive anything bequeathed to them. 1. But if they have served out the time of punishment and are entirely freed from bonds and restored to what can be called their former or simple status of slavery, they may receive both liberty as well as any property left them at that time in the testament of their deceased masters, without any reference as to past punishment.

Given June 16, in the consulship of the same Antoninus and Verus (161?),⁴²

[2] *Emperors VALERIAN and GALLIENUS Augusti to Theodorus. pr.* A slave forbidden by a testament to be manumitted cannot receive liberty. 1. But it is important to distinguish here whether the testator did not want the slaves, whom he stated to have been brought up with his sons, to be sold or manumitted because of household service and necessary use for his sons, or because he wanted to inflict deserved punishment on them. 2. For in the former case, if the party whose interests were consulted has died and the need of service is ended, liberty may be given. But in the latter, the punishment fixed for the slaves must be carried out, since my deified parents decided that orders of this sort given in wills should be able to impose perpetual slavery on ill-deserving slaves, so that they cannot obtain liberty even through a suppositious purchaser.⁴³

Thirteenth Title For What Reasons Slaves Receive Liberty as a Reward

[1]⁴⁴ *Emperors DIOCLETIAN and MAXIMIAN Augusti to Firminus.* Since scrupulous solicitude for increasing and stimulating the observance of fidelity should be rewarded by law, if you persisted with uncorrupted efforts and

⁴⁰ See D. 40.9.

⁴¹ The decision attributed here to "my deified father" may be a rescript issued by the "fratres imperatores," i.e., Marcus Aurelius Antoninus and Lucius Verus (see Papinian, D. 48.19.33).

⁴² The heading and subscription of this law are inconsistent. Krüger believed that the subscription was devised by Cuiacius, lacked ancient authority, and should be considered inauthentic; hence the rescript would date to 193-211. Other scholars have resolved the conflict differently.

⁴³ A third party commissioned by the slave, with the consent of the master, to buy the slave with the slave's own money and free him or her immediately, see D. 40.1.4-5.

⁴⁴ Combine with C. 1.19.1, where the recipient is named "Firmina."

praemio adfici debet, si ad ulciscendam caedem domini incorruptis probationibus ac strenuo nisu constiteris, libertatem, quam his qui dominorum caedem vindicant iam pridem senatus consulto et statutis principum praestari sancitum est, etiam tu pro tam ingentibus meritis non ex ipso facto, sed additione et sententia praesidis reportabis.

PP. VII id. Dec. Diocletiano IIII et Maximiano III AA. cons.

[2] *Imp. Constantinus A. ad Ianuarinum.* Servi, qui monetarios adulterinam monetam clandestinis sceleribus exercentes detulerint, civitate Romana donantur, ut eorum domini pretium a fisco percipiant.

D. XII k. Dec. Romae Crispo et Constantino CC. II cons.

[3] *Idem A. ad populum.* Si quis servus raptus virginis facinus dissimulatione praeteritum aut pactione transmissum detulerit in publicum, libertate donetur.

D. prid. k. April. Aquileia Constantino A. VI et Constantino C. cons.

[4] *Imppp. Gratianus Valentinianus et Theodosius AAA. ad Syagrium pp.* Si desertorem servus prodiderit, libertate donetur.

PP. id. Iul. Romae Gratiano V et Theodosio AA. cons.

XIIII De Ingenuis Manumissis

[1] *Imp. Alexander A. Phileto.* Si ingenuum te et testamento manumissum esse dicas, apud suos iudices causam agere debes, si tamen iustum contradictorem habes, id est eum, qui se patronum tuum esse dicit, memor senatum censuisse, ut, qui post manumissionem originem

persistent striving to avenge the murder of your master, you will be rewarded with liberty for such prodigious services, for long ago a decree of the Senate and the statutes of emperors provided that freedom should be given to those who avenge the murder of their masters. You will not receive liberty (automatically) through the performance of this deed, but by approaching the governor and obtaining his judgment.

Posted December 7, in the consulship of the Augusti Diocletian, for the fourth time, and Maximian, for the third time (290).⁴⁵

[2]⁴⁶ *Emperor CONSTANTINE Augustus to Januarinus.* Slaves who report coiners engaged in producing counterfeit money through secret crimes are rewarded with Roman citizenship, and their masters shall receive the value of such slaves from the Treasury.

Given November 20, at Rome, in the consulship of the Caesars Crispus and Constantine, for the second time (321).

[3]⁴⁷ *The same Augustus to the people.* If a slave reports in public the crime of capturing a virgin which has been passed over through deceit or let slip through an agreement, he shall be rewarded with liberty.

Given March 31, at Aquileia, in the consulship of Constantine Augustus, for the sixth time, and Constantine Caesar (320).⁴⁸

[4]⁴⁹ *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS Augusti to Syagrius, Praetorian Prefect.* If a slave reports a (military) deserter, he shall be given liberty.

Posted July 15, at Rome, in the consulship of the Augusti Gratian, for the fifth time, and Theodosius (380).

Fourteenth Title Free-born Persons Who Are Manumitted⁵⁰

[1] *Emperor ALEXANDER Augustus to Philetus.* Since you say that you are free-born and also manumitted by a testament, you should bring action before a judge having jurisdiction. But if you have a legal opponent, that is, a person who claims to be your patron, remember that the Senate has decreed that, whoever claims his original status after manumission, must leave at the house

⁴⁵ C. 1.19.1 reveals that the law was given on October 8, the date given by Mommsen.

⁴⁶ = C.Th. 9.21.2; combine with C. 9.24.1. C. epitomates C.Th. Seeck dates to November 20, 318.

⁴⁷ = C.Th. 9.24.1.4. C. epitomates C.Th. and alters the wording to grant unencumbered liberty rather than Latin status, which C. 7.6.1 had abolished.

⁴⁸ Seeck dates this law to April 1, 326.

⁴⁹ = C.Th. 7.18.4.1; combine with C. 12.45.1. C. epitomates C.Th. Seeck dates to June 18, 380.

⁵⁰ See D. 40.14.

repetierint, ea quae de domo manumissoris habent ibi relinquant. in qua causa etiam legata ut liberto data esse iuris prudentibus placuit.

[2] *Imp. Gordianus A. Pompeiae.* Ingentiam natam neque nutrimentorum sumptus neque servitutis obsequium faciunt ancillam neque manumissio libertinam.

PP. v id. Mai. Sabino II et Venusto cons.

[3] *Imp. Philippus A. Felicissimo.* Si aviam tuam manumissam postea ingentiam sollemniter constitit statumque eius iustae sententiae tuetur auctoritas, filios eius quamvis ante sententiam susceptos ingentiam libertatem non immerito flagitare, si cum peritioribus tractatum habuisses, facile cognosceres.

[4] *Imp. Diocletianus et Maximianus AA. et CC. Agrippae.* Cum cognatum tuum ingentium, factum Palmyrenae factionis dominatione velut captivum, distractum esse dicas, praeses provinciae ingentitati suae reddi eum efficiet.

S. IIII id. Ian. AA. cons.

[5] *Idem AA. et CC. Crescenti, pr.* Defamari statum ingentiorum seu errore seu malignitate quorundam periniquum est, praesertim cum adfirmes diu praesidem unum atque alterum interpellatum a te vocitasse diversam partem, ut contradictionem faceret, si defensionibus suis confideret. 1. Unde constat merito rectorem provinciae commotum adlegationibus tuis sententiam dedisse, ne de cetero inquietudinem sustineres. 2. Si igitur adhuc diversa pars perseverat in eadem obstinatione, aditus praeses provinciae ab iniuria temperari praecipiet.

D. prid. non. April. AA. cons.

of his manumitter whatever he received from it. Those learned in the law (*iuris prudentes*) agree that legacies left to a man as a freedman are of that nature.⁵¹

[2] *Emperor GORDIAN Augustus to Pompeia*. A free-born woman becomes a slave neither by the expenses on her support nor by her service as a slave, nor does she become a freedwoman by manumission.

Posted May 11, in the consulship of Sabinus, for the second time, and Venustus (240).

[3] *Emperor PHILIP Augustus to Felicissimus*. If, after your grandmother was manumitted, she was solemnly declared to be a free-born woman, and her status is protected by the authority of a legal verdict, you may easily come to know, if you consult those learned in the law, that her children, though born prior to the verdict, justly demand the right of free-born persons.

[4] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Agrippa*. Since you say that your free-born relative was in effect made captive by the rule of the Palmyrene faction⁵² and was sold, the provincial governor will take care that he is restored to his free-born status.

Written January 10, in the consulship of the Augusti (293).

[5] *The same Augusti and Caesars to Crescens, pr.* It is very wicked to defame the status of free-born persons, whether through the error or the ill will of others, especially since, according to your statement, you have solicited one governor and then another, who have summoned your opponent for some time to make objection if he was confident of his claims. 1. Hence it is clear that the provincial governor, moved by your allegations, justly decided that you should no longer suffer disturbance in the future. 2. If, therefore, your opponent still perseveres in his obstinacy, when you approach the provincial governor, he will compel him to abstain from his outrageous conduct (*iniuria*).

Given April 4, in the consulship of the Augusti (293).

⁵¹ Blume: "A man who was manumitted was not barred to claim that he was in fact free-born. He was, under a former law, limited to a period of five years after the manumission to make such claim, unless he did not discover his proofs until after that period, and he could then appeal directly to the emperor (D. 40.14.2 and 4). But that law was repealed by Justinian, C. 3.22.6 ... Such person, however, must return to the manumitter all that he received from or through him, D. 40.14.2.1; D. 40.14.3-5."

⁵² In the 260s Palmyra became a virtual regent over Rome's eastern territories under its rulers Odenathus and later his wife Zenobia and son Vaballathus until they were suppressed under Aurelian in 273.

[6] *Idem AA. et CC. Dionysio.* Scientis condicionem liberum non posse fieri servum evidentissimi iuris est. cum igitur proponas patrem pupilorum, quorum precibus fecisti mentionem, velut liberum te penes se habuisse, ministerium, licet in actu longi temporis, non praecedente vero titulo, quibus dominia quaeri solent, mutare tuam condicionem minime potuit.

S. VII k. Mai. AA. cons.

[7] *Idem AA. et CC. Matronae.* Si te ac filios tuos ingenuos esse constat, natalium veritas vos tuetur. nam qui servitutis moverat quaestionem, apud acta causae renuntiando ad ingenuitatis probationem nec nocere quicquam nec prodesse potest.

S. XV k. Iul. AA. cons.

[8] *Idem AA. et CC. Callimorpho.* Ingenui nascuntur, libertini manumissione tantum constituuntur: pactum autem nec servis nec libertinis ingenuitatem adsignat nec his, qui transactioni non consenserunt, quicquam praeiudicare potest.

S. IIII k. Ian. AA. cons.

[9] *Idem AA. et CC. Potamoni. pr.* Libertina matre procreatam ingenuis nasci natalibus evidenti ac manifesti iuris est. 1. Cum igitur te matre libertina editam, dehinc ab hostibus captam postliminio reversam proponas et nunc tibi servitutis moveri quaestionem, consequens est adiri praesidem provinciae, qui de causa liberali cognoscet iure laturus sententiam, sciens neque huiusmodi matris condicionem neque captivitatem reversis de statu pristino quicquam posse detrahere.

[10] *Idem AA. et CC. Athenodora.* Ad recognoscendos singulos nomina comparata publico consensu, ob celandos natales ingenuis si mutantur, minime nocet, natosque, licet in ministerio servitutis, liberae conditionis non servos possessio, sed status ingenuos edi perficit.

[11] *Idem AA. et CC. Maximae.* Si vestram possessionem nullus praecessit titulus, sed ingenui constituti operas mercede placita locastis, nec

[6] *The same Augusti and Caesars to Dionysius.* The law is very plain that a free man cannot become the slave of a man who knows his status. Since therefore you state that the father of the minors whom you mention in your petition retained you as a free man (*velut liberum*) at his house, your service (*ministerium*) in no way alters your condition even if it was performed over a long period (*in actu longi temporis*) but with no previous title by which ownership claims are normally asserted.

Written April 25, in the consulship of the Augusti (293).

[7] *The same Augusti and Caesars to Matriona.* If it is clear that you and your sons were free-born, the true facts of your birth protect you. For whoever initiates an inquest into servile status can neither prejudice nor benefit your proof of free birth by making a denunciation in the records of the case.

Written June 17, in the consulship of the Augusti (293).

[8] *The same Augusti and Caesars to Callimorphus.* Freeborn persons are so by reason of birth; freedmen become such only by manumission. But a pact cannot give free-born status, either to slaves or to freedmen, nor can a pact prejudice those who did not consent to the settlement.

Written December 29, in the consulship of the Augusti (293).

[9] *The same Augusti and Caesars to Potamo. pr.* It is plain and clear law that the (female) offspring of a mother who is a freedwoman is born with free-born rights. 1. Since, therefore, you state that you were borne by a mother who was a freedwoman, and that thereafter you were captured by the enemy and subsequently returned with the resumption of your civil rights (*postliminium*), but that now an inquest into servile status is raised against you, it is proper to go before the provincial governor, who will try the case for freedom and who will give judgment according to law in full knowledge of the fact that neither the status of a mother like yours nor captivity can detract from the original status of those who return.

[10] *The same Augusti and Caesars to Athenodora.* If names obtained for the recognition of individuals through public consent should be changed for purposes of concealing the birth status of free-born people, this in no way prejudices them, and those born of free status (*liberae condicionis*), even if they are in the service of slavery, are rendered free-born by virtue of their status, rather than slaves by virtue of their being in possession.

[11] *The same Augusti and Caesars to Maxima.* If no title underlies the fact that you are in possession, but as established free-born persons you hired out your

statui quicquam vestro derogatum est nec ad conventionis implendam fidem sollemniter agere prohibemini.

S. non. Mart. CC. cons.

[12] *Idem AA. et CC. Quietae.* Ad mutandum liberae statum commissum plagii nihil promovet, sed abductam natales, quibus nata est, post hunc etiam casum obtinere convenit.

S. III k. Dec. CC. cons.

[13] *Idem AA. et CC. Menandro.* Ingenuum se contendendo nec probando non amittit libertinitatem.

S. VII id. Dec. CC. cons.

[14] *Idem AA. et CC. Aristoteli.* Status ingenuae ex eo solo, quod velut ancilla sponsaliorum nomine data proponitur, praeiudicari nulla ratione potest.

S. VII k. Ian. CC. cons.

XV Communia de Manumissionibus

[1] *Imp. Iustinianus A. Iuliano pp. pr.* Sancimus, si proprietarius servo, cuius usus fructus ad alium pertinebat, libertatem imposuit, non secundum antiquam observationem et libertatem cadere et eum sine domino intellegi esse, sed nec inveniri personam, cui res ad se venientes adquirat: sed si tam proprietarius quam usufructuarius libertatem ei consentientes imposuerant, pleno iure liberum eum effici et, si quid postea sibi adquisierit, hoc in bonis suis habere.

1. Sin autem proprietarius solus libertatem imposuerit usufructuario minime consentiente, sit quidem ille, qui libertatem a proprietario accepit, inter liberos proprietarii connumeratus et, si quid in medio possedit, hoc sibi adquirat, sibi habeat, suae posteritati relinquat, salvo patronatus iure per omnia custodiendo, nisi et hoc ei legibus fuerit remissum. 1a. Ipse tamen libertus quasi servus apud usufructuarium permaneat, donec usufructuarius vivit vel usus fructus non legitimo modo peremptus est. etenim si finem usus fructus quocumque modo

work for an agreed price, your status is not prejudiced, nor are you prohibited from suing in the usual manner to have the agreement made with you fulfilled.

Written March 7, in the consulship of the Caesars (294).

[12] *The same Augusti and Caesars to Quirita.* Kidnapping does not change the status of a free woman, but it is right that, even after this incident, the abducted woman retains the rights with which she was born.

Written November 29, in the consulship of the Caesars (294).

[13] *The same Augusti and Caesars to Menander.* A freedman who contends that he is free-born but fails to prove it does not thereby lose his status as freedman.

Written December 7, in the consulship of the Caesars (294).

[14] *The same Augusti and Caesars to Aristoteles.* The status of a free-born woman can in no manner be prejudiced by the sole fact that she is stated to have been given as a slave in an engagement gift.⁵³

Written December 26, in the consulship of the Caesars (294).

Fifteenth Title General Rules Concerning Manumissions

[1]⁵⁴ *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect. pr.* We ordain that if an owner (*proprietaryus*) gives liberty to a slave over whom another has a usufruct, the grant shall not, according to the old regulation, be void and the slave be considered to be without a master,⁵⁵ so that there would be no one for whose benefit he may acquire any property he might receive. Rather, if both the owner and the usufructuary agree to give him liberty, he will become completely free, and any property acquired by him thereafter shall be his own.

1. But if the owner alone gives liberty without the consent of the usufructuary, the slave who receives liberty from the owner will be the owner's freedman, and any property of which he later gains possession he acquires for himself, holds for himself, and may leave to his own posterity, while preserving all rights of the patron intact, unless these also were legally ceded to him. 1a. Such a freedman shall, however, remain like a slave (*quasi servus*) in the household of the usufructuary while the latter lives or until the usufruct is lost in some lawful manner. For if the usufruct ends in some way, the freedman may

⁵³ See C. 7.16.16.

⁵⁴ Combine with C. 7.7.1.

⁵⁵ Blume: "A slave in whom a usufruct exists, if freed by the proprietor, does not become free, but is a slave without a master. Ulpian [*Tituli*] 1.19. It is this rule that Justinian corrects."

accipiat, tunc facultas ei tribuitur quo maluerit degere modo. si vero adhuc superstitute usufructuario ab hac luce fuerit libertus exemptus, hereditas eius legitimum tramitem sequatur.

2. Sin autem usufructuarius tantummodo libertatem imposuerit, si quidem hoc modo, ut cedat usu fructu proprietario, plenissimum ius habeat in servo propriarius et omnia ei servus adquirat secundum ea, quae generaliter in servos et dominos constituta sunt. 2a. Sin vero gratias agendo usufructuarius eum ab usu fructu liberaverit et libertate donaverit, tunc maneat quidem servus proprietario suo adnexus, sed non necessitas ei imponatur, donec vivit usufructuarius vel usus fructus constare potest, observare proprietarium et quaedam ministeria ei adimplere, sed iudices nostri eum in quiete tueantur. post usufructuarii autem mortem vel usus fructus quocumque modo interemptionem tunc serviat quidem domino et omnia, quae in medio ad eum perveniunt, haec suo domino adquirat. 2b. Et sit ex nostra constitutione haec separatio inter servos et liberos et non secundum ius antiquum idem servus remaneat et nullum respiciat dominum.

3. Illud quoque huic legi adicimus, ut explosa antiqua personarum differentia liceat parentibus tam feminis quam masculis, filiis filiabus sive in sacris constitutis sive emancipatis cuiuscumque gradus, mandatum imponere, quatenus servos in libertatem producant sive apud iudicem sive in sacris ecclesiis sive secundum alium quem mandator voluerit legitimum modum. cum enim et in successionibus et in aliis paene omnibus nulla est inter liberos discretio, oportet hoc observari et in praesenti casu maxime pro libertate, quam et fovere et tueri Romanis legibus et praecipue nostro numini peculiare est.

D. xv k. April. Lampadio et Oreste vv. cc. cons.

[2] *Idem A. Iuliano pp.* Si quis servo suo libertatem imponat sive in ecclesia sive ad quaecumque tribunal vel apud eum, qui libertatem imponere legibus habet licentiam, sive in testamento vel alio ultimo elogio directam vel fideicommissariam, nullo coartetur modo eorum qui ad libertatem veniunt aetatem requirere. neque enim eum tantummodo civitatem Romanam adipisci volumus, qui maior triginta annis extitit, sed quemadmodum in ecclesiasticis libertatibus non est huiusmodi

live in whatever manner he wishes. If the freedman dies while the usufructuary is still alive, his estate goes the path provided for it by law.

2. If, on the other hand, only the usufructuary gives liberty and in a manner merely to yield the usufruct to the owner, the owner acquires complete right over the slave and any property acquired by the slave is acquired for the owner according to the general provisions made for slaves and masters. 2a. If the usufructuary, however, frees the slave from the usufruct through gratitude and gives him liberty, the slave remains bound to his owner, but he need not attend on the owner or perform services for him during the life of the usufructuary or during the time that the right to the usufruct is in force; Our judges shall protect the slave from being disturbed. But after the death of the usufructuary or after the usufruct ceases in any manner, he must serve his master, and all property which he acquires during that time is acquired for the benefit of his master. 2b. Let this then be the distinction between slaves and freedmen according to Our constitution, and let the same man not, according to the ancient law, be a slave but have no master.

3. We also make the following addition to this law: now that We have rejected the old differences between persons, We permit parents, male or female, to impose a mandate on sons and daughters of all degrees, both those still in the household and those emancipated, to give liberty to slaves, whether before a judge, in sacred churches, or in any other legal mode, as the author of the order wishes.⁵⁶ For since no distinction exists between children in connection with successions and in almost all other things, that should be true also in the present instance, especially because it involves liberty, which it is the mission of Roman laws and especially of Our Divine Majesty to foster and protect.

Given March 18, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[2] *The same Augustus to Julian, Praetorian Prefect.* If a man manumits his slave in church, before any tribunal, before a magistrate who has power to grant liberty, or by testament or other last will, whether he does so directly or by way of trust, he shall in no way be compelled to look into the age of those who are manumitted. For We wish that not only a slave who is more than 30 years should attain Roman citizenship, but We also ordain that, just as no

⁵⁶ Blume: "It was a general rule that a man could not manumit a slave through someone else, not even an agent. A father, however, could manumit through a son in his power, since in that case the manumission by such son was the same as though it had been done by the father himself. But the latter could not manumit through an emancipated son, since the latter was no longer a member of his family. And since a mother did not have her children in her 'power,' she could not manumit through them. The present law changes these rules entirely; either parent is permitted to manumit through children emancipated or unemancipated."

aetatis differentia, ita in omnibus libertatibus, quae a dominis imponuntur sive in extremis dispositionibus sive per iudices vel alio legitimo modo, hoc observari sancimus, ut sint omnes cives Romani constituti: ampliandam enim magis civitatem nostram quam minuendam esse censemus.

D. k. Aug. Lampadio et Oreste vv. cc. cons.

[3] *Idem A. Iohanni pp. pr.* Si quis sine uxore constitutus ancillam suam nomine habeat concubinae et in eadem usque ad mortem consuetudine permanserit et forsitan liberos ex ea sustulerit, sancimus omnimodo non concedi heredibus defuncti eandem vel liberos eius, si etiam liberos habuerit, in servitutem deducere, sed post mortem domini sub certo modo eripiat in libertatem una cum subole sua, si etiam eam forsitan habuerit. 1. Ipsi etenim domino, dum superest, damus licentiam quomodo voluerit uti tam ancilla sua quam etiam ex ea progenita subole et in suo ultimo elogio quidquid voluerit contra eos disponere, id est sive quasi servos eos aliis legare sive in servitute heredum nominatim relinquere. sin autem taciturnitate eos praeterierit, tunc post mortem eius ad libertatem eripiantur, ut sit domini mors libertatis eorum exordium. 2. Omnibus etenim uxores habentibus concubinas vel liberas vel ancillas habere nec antiqua iura nec nostra concedunt.

D. k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

XVI De Liberali Causa

[1] *Imp. Antoninus A. Saturninae.* Rem quidem illicitam et inhonestam admisisse confiteris, quia proponis filios ingenuos a te venundatos, sed quia factum tuum filiis obesse non debet, adi competentem iudicem, si vis, ut causa agatur secundum ordinem iuris.

PP. v id. Febr.

[2] *Idem A. Vereniano.* Si hi, quos servos tuos esse dicis, liberi esse a diversa parte dicuntur, de statu eorum more solito quaeri oportet: nec enim res iudicata, qua de proprietate eorum pronuntiatum est, opponi causae liberali potest.

D. non. Febr. Romae Messala et Sabino cons.

[3] *Imp. Alexander A. Quirino.* Si liber homo alienae ancillae contubernium sequatur, licet ei fuerit denuntiatum, ut se abstineret, servus domini mulieris non fit.

difference as to age exists in ecclesiastical manumissions, so no difference as to age shall exist in any manumissions made by owners, whether by last will or by judges, or in any other legal manner, and all alike shall become Roman citizens. For We think that We should increase rather than diminish Our state.

Given August 1, in the consulship of the viri clarissimi Lampadius and Orestes (530).

[3] *The same Augustus to John, Praetorian Prefect. pr.* If a man who is without a wife keeps his female slave as a concubine and continues in this habit up to his death, and if perchance he has children by her, We ordain that the heirs of the deceased shall have no right to reduce her, or whatever children she has, to slavery. But she and whatever offspring she has shall under a certain condition be taken into freedom after the master's death. 1. We permit the master while living to put both his female slave and any offspring born to her to any employment he wishes and to dispose of them in his last will as he desires. He may bequeath them as slaves to others or leave them as slaves to the heirs individually. But if he has passed them over in silence, they shall be taken into freedom after he dies, so that the death of the master becomes the beginning of their liberty. 2. Nevertheless, men who have wives are not permitted either by the ancient or the present laws to have concubines, whether free or slave.

Given November 1, at Constantinople in the post-consulate of Lampadius and Orestes (531).

Sixteenth Title Cases for Freedom⁵⁷

[1] *Emperor ANTONINUS Augustus to Saturnina.* By stating that you sold your free-born sons, you acknowledge having committed an illegal and dishonorable act. But because your act ought not to prejudice the sons, please go before the pertinent judge so that the case may be tried according to the rule of law.

Posted February 9.

[2] *The same Augustus to Verenianus.* If the men who you say are your slaves are claimed by your opponent to be free, an inquest into their status should be held in the usual manner; for an adjudication as to who owns them cannot be set up as a defense in an action for their freedom.

Given February 5, at Rome, in the consulship of Messala and Sabinus (214).

[3] *Emperor ALEXANDER Augustus to Quirinus.* If a free man takes up a domestic partnership (*contubernium*) with another's female slave, he does not become the slave of the owner of the woman, even if he was warned to keep away from her.

⁵⁷ See D. 40.12.

PP. non. Febr. Fusco et Dextro cons.

[4] *Idem A. Iucundo.* Si is, quem in servitutem petebas, liber quamvis absente te causa cognita pronuntiatus est, secunda in servitutem petitio eius dari tibi non debet. sed si, posteaquam cognovisti de sententia iudicis, appellasti, an iure lata sit, in auditorio quaeretur.

[5] *Idem A. Sabino. pr.* Non ideo minus in libertatem proclamare potest ea, quam ancillam tuam esse dicis, quia eam vendente fisco comparasti. 1. Sed nec hoc ad praescriptionem operatur, quod venditionis tempore maior viginti annis fuit, cum aetatis adlegatio non alias possit praescriptionem adversus civem Romanum accommodare, quam si participandi pretii gratia consensum servituti dedisse probetur. 2. Probationis sane onus, cum ex servitute in libertatem adseritur, ad se recipit. qui si adfirmationem suam non impleat, inconcussum possessionis ius obtinebis.

[6] *Imp. Valerianus et Gallienus AA. et Valerianus nobilissimus Caesar Vausumetio.* Nec si volens scripsisses servum te esse, non liberum, praeiudicium iuri tuo aliquid comparasses: quanto nunc magis, cum eam scripturam dare compulsum te esse testaris?

P.

[7] *Imp. Aurelianus A. Secundo.* Si ab eo cuius servus fuisti manumissus es, frustra libertatis controversiam sustines, maxime ab herede eius qui manumisit, cum, etsi iure libertas non processit, respectu tamen aditae hereditatis voluntatem defuncti suo consensu firmare debuit.

[8] *Imp. Diocletianus et Maximianus AA. Veneriae.* Cum adfirmes placuisse quondam domino tuo, ut pro te et filia tua dato nummo certae quantitatis vos manumitteret, et te tantummodo liberavit, aditus rector provinciae hortabitur eum salva reverentia, quam patrono liberti solent exhibere, placito suo stare.

Posted February 5, in the consulship of Fuscus and Dexter (225).

[4] *The same Augustus to Jucundus.* Even if it was during your absence that the man whom you claim as your slave was pronounced free in a trial, you should not be granted a second action to have him declared a slave.⁵⁸ But if you appealed after you learned the decision of the judge, the question will be investigated in court (*in auditorio*) as to whether the decision was made according to law.

[5] *The same Augustus to Sabinus. pr.* The woman who you say is your slave has no less right to defend her liberty simply because you bought her at a sale held by the Treasury. 1. Nor is her claim barred because she was more than 20 years old at the time of the sale. Such an allegation as to age is no defense against Roman citizenship unless it is shown that she sold herself into servitude for the purpose of sharing in the price. 2. Of course the burden of proof, since she asserts her liberty while in servitude, falls on her. And if she does not prove her allegation, you will retain the undisturbed right of possession.

[6] *Emperors VALERIAN and GALLIENUS Augusti, and Valerian the Most Noble Caesar to Vausumetius.* Not even if you had voluntarily stated in writing that you were a slave and not free would you have prejudiced your right. This holds all the more since you testify that you made such a statement under compulsion.

Posted ...

[7] *Emperor AURELIAN Augustus to Secundus.* If you were manumitted by the man whose slave you were, the suit you face calling your liberty into question is useless, especially as it is lodged by the heir of the manumitter. For although liberty was not given in a prescribed fashion (*iure*),⁵⁹ he is still bound to uphold the will of the decedent by his consent since he accepted the inheritance.

[8] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Veneria.* Since you state that your former master agreed to manumit you and your daughter for a fixed sum of money that was given to him, and he has only liberated you, if you go before the provincial governor, he will exhort the man to abide by his agreement provided you demonstrate the reverence that freedmen ought to show their patrons.

⁵⁸ See C. 7.16.27.

⁵⁹ Rather, it was granted only informally.

PP. prid. ... Sept. Maximo II et Aquilino cons.

[9] *Idem AA. et CC. Proculo.* Cum precum tuarum conceptio, licet eum contra quem supplicas ex ancilla natum esse expresserit, tamen nomini cognomen, quo liberi dumtaxat nuncupantur, addiderit et non servum esse, sed servili macula adpersum comprehenderit, contra eum qui servus non est supplicasse te intellegitur.

[10] *Idem AA. et CC. Stratio.* Liberos privatis pactis vel actus quacumque administrati ratione non posse mutata condicione servos fieri certi iuris est.

D. III non.

[11] *Idem AA. et CC. Faustino.* Non mutant servi statum, si ad civiles honores illicite atque improbe adspiraverint. unde si status moveatur quaestio, intellegere vobis licet nihil prodesse posse, quod pater vester honores civiles gessit. sollemnibus itaque ordinatis apud praesidem provinciae de statu vestro cognoscetur.

[12] *Idem AA. et CC. Secundo.* Si liberum te natum aliquis comparavit, statum retines, quem antea habuisti. si vero ex ancilla editum naturalis pater idemque dominus distraxit ac post emptori pretium solvisti, non idcirco libertatem consecutus es.

PP. XVIII k. Mart. AA. cons.

[13] *Idem AA. et CC. Antistiae.* Principaliter de statu defuncti agi non potest. si vero ex peculio quondam eius, quem tibi bona reliquisse commemoras, res vindicentur vel eius filiis moveatur status quaestio, haec omnia sollemniter praesidali notione decidi debent.

Posted August (or September) ...,⁶⁰ *in the consulship of Maximus, for the second time, and Aquilinus (286).*

[9] *The same Augusti and the Caesars to Proculus.* Although your petition states that the one against whom you are appealing was born of a slave-woman, its very formation adds a personal name (*cognomen*) to a family name (*nomen*), which is precisely what identifies free people, and includes the statement that he is not a slave but is tainted with the mark of slavery (*macula servitutis*; i.e., his ancestor was a freed slave). It is therefore understood that you have appealed against a man who is not a slave.

[10] *The same Augusti and Caesars to Strathus.* The law is certain that free persons cannot be made slaves, with a change in their legal condition, by private pacts or by virtue of any transaction for the administration of business.⁶¹

*Given the 2nd (or 4th) of ...*⁶² (293).

[11] *The same Augusti and Caesars to Faustinus.* Slaves do not change their status by unlawfully and dishonestly aspiring to civic office. Hence you must know that if the question of status is raised, you gain no advantage from the fact that your father held civic office. Trial as to your status will, accordingly, be held before the provincial governor after the usual preliminaries are arranged.
<Without subscription (293).>

[12] *The same Augusti and Caesars to Secundus.* If you are free-born, but someone bought you, you retain the status which you had before. But if you were born of a female slave, and your natural father, who was also your master, sold you, you did not acquire your liberty by later paying the purchaser the price.

Posted February 14, in the consulship of the Augusti (293).

[13] *The same Augusti and Caesars to Antistia.* When a person is dead, a suit cannot be brought in which the principal issue is to determine his status. But if a suit is lodged to recover property from the former *peculium* of the man whom you allege to have bequeathed you his estate, or if an inquest is made into the status of his sons, these matters must be decided through an investigation by the governor in the usual way.

⁶⁰ The transmitted subscription reads, "PP prid ... Sept," i.e., either September 4 (non.) or 12 (id.) or August 31 (kal.).

⁶¹ See C. 2.4.26, 7.14.8.

⁶² The transmitted subscription reads, "D. IIII non."

D. v k. Mai. AA. conss.

[14] *Idem AA. et CC. Quintianae.* Lite ordinata in possessione libertatis is, de cuius libertate quaeritur, constituitur et interim pro libero habetur.

D. IIII k. Mai. Heracleae AA. conss.

[15] *Idem AA. et CC. Palladio.* Nec ommissa professio probationem generis excludit nec falsa simulata veritatem minuit, cum itaque ad examinationem veri omnis iure prodita debeat admitti probatio, aditus praeses provinciae sollemnibus ordinatis, prout iuris ratio patitur, causam liberalem inter vos decidi providebit.

[16] *Idem AA. et CC. Diogeniae.* Si ministerium quasi libera exhibuisti ac te nesciente quasi ancilla in dotem data conscriptum instrumentum est, nihil haec libertati tuae nocere potuerunt, maxime cum te minorem aetate fuisse commemorares et placuerit minores viginti annis nulla ratione mutare statum ac pro liberis servos fieri, ne ante libertatem inconsulte amittant, quam aliis propter aetatis rationem sine consilio praestare non possunt.

PP. VI id. Mai. Hadrianopoli AA. conss.

[17] *Idem AA. et CC. Regino. pr.* Multis rationibus, natalibus ingenuis fratribus natis, post delictis vel casibus intervenientibus singulorum causae status separantur. 1. Nihil itaque prohibet eundem et tibi non movere quaestionem et eos, quos fratres tuos adseveras, in servitutem vindicare sive retinere. 2. Igitur ad demonstrandam fratrum tuorum libertatem aliae sunt probationes necessariae: nam quod tibi non movetur quaestio libertatis, eorum non idoneam constat habere probationem.

S. x k. Iun. AA. conss.

[18] *Idem AA. et CC. Zotico.* Ad probationem ingenuitatis ab eo, contra cuius successores postulas, facta tibi locatio non sufficit, nec tamen hoc solum ad servitutis vinculum argumentum est idoneum.

S. id. Iul. Philippopoli AA. conss.

Given April 27, in the consulship of the Augusti (293).

[14] *The same Augusti and Caesars to Quintiana.* After a preliminary surety has been given (*lite ordinata*), the person whose liberty is under inquest is in possession of liberty and is in the meanwhile treated as a free man.

Given April 28, at Heraclea, in the consulship of the Augusti (293).

[15] *The same Augusti and Caesars to Palladius.* Neither does a failure to declare a birth exclude proof of origin, nor does a false declaration diminish the truth. Since, accordingly, all proof offered legally should be admitted for investigation into the truth, the provincial governor will, when you go before him, see that, after the usual preliminary arrangements as the rule of law demands, the case for freedom is decided between you.⁶³

<Without subscription (293).>

[16] *The same Augusti and Caesars to Diogenia.* If you performed service as a free person and a document was executed giving you in dowry as a female slave without your knowledge, these things cannot prejudice your liberty. This is especially so since you state that you were a minor, and it is agreed that minors under 20 years cannot in any manner change their status from free persons to slaves, in order that they may not inconsiderately lose the freedom that they cannot, on account of their age, even give to others without consent.

Posted May 10, at Adrianople, in the consulship of the Augusti (293).

[17] *The same Augusti and Caesars to Reginus. pr.* When there are several free-born brothers, the status of one may thereafter be entirely different from that of the others for any number of reasons, as for example crimes they commit or intervening circumstances. 1. Hence nothing prevents one and the same man from not bringing an inquest against you even while he attempts to recover or retain in slavery persons who you claim are your brothers. 2. Therefore other proofs are necessary to show the freedom of your brothers, since the fact that no inquest into freedom is brought against you does not offer suitable proof in their instances.

Written May 23, in the consulship of the Augusti (293).

[18] *The same Augusti and Caesars to Zoticus.* The fact that the man against whose heirs you direct your petition leased you some property is not sufficient proof that you are free-born, but it alone is also not suitable evidence to reduce you to slavery.

Written July 15, at Philippopolis, in the consulship of the Augusti (293).

⁶³ Compare P. Tebtynis 285.

[19] *Idem AA. et CC. Paulo.* Principaliter causam eius de quo supplicas esse quam tuam perspicimus. nam cum te eum ad libertatem produxisse profitearis, illius interest magis sollemniter suum tueri statum et consequenter tua etiam agetur causa: nam si ab eo, contra quem fundis preces, servus dicatur eique libertas ex manumissione tua vindicetur, probatio servitutis originis et beneficium manumissionis libertatem illi adsignans tuum etiam ius patronatus tuetur. si vero consentiat servituti, tunc iure concesso adito praeside provinciae eum invitum etiam defendere poteris.

[20] *Idem AA. et CC. Aeternali.* Sicut semel praestitam libertatem revocari non licet, sic per ea, quae non manumittendi causa domini cum servis propriis agunt, nihil sibi detrahunt.

S. VI k. Sept. AA. cons.

[21] *Idem AA. et CC. Thallusae.* Eam, quae in possessione libertatis non sine dolo malo reperitur, in servitutem constitutae simile habere praeiudicium edicto perpetuo 'si controversia erit, utrum ex servitute in libertatem petatur an ex libertate in servitutem' sui conceptione manifeste probatur, nec quicquam ancillae dolus proprii iuris dominis aufert.

S. non. Oct. Sirmi AA. cons.

[22] *Idem AA. et CC. Pardaleae.* Parentes natales, non confessio adsignat. quapropter si ex ancilla nata post ad libertatem manumissa pervenisti, te velut ex altera natam ancilla servam professa quaesitam manumissione libertatem huiusmodi simulatione vel errore amittere minime potuisti, cum servi nascantur ratione certa, non confessione constituentur.

D. v k. Dec. AA. cons.

[23] *Idem AA. et CC. Musciae.* Si tibi testamento directa libertas a domino relicta est et ex eo successerunt scriptae filiae, non idcirco, quod secundum eius voluntatem vel contra de filiis uni praestas obsequium, ceterae filiae tuam rescindere possunt libertatem.

[19] *The same Augusti and Caesars to Paulus.* We think that the man concerning whom you appeal had the main interest in the case rather than you. For since you acknowledge that you set him free, it is more in his interest to protect his status in the usual manner. Your case, too, will thereby be litigated suitably. For if the man against whom you lodge your petitions says he is a slave, and if your grant of liberty through manumission is upheld for him (i.e., the former slave), the proof of his origin as a slave and of the gift of manumission assign liberty to him and protect your right of patronage. But if he consents to slavery, you have a right under the law to go before the provincial governor and defend him even against his wish.

<Without subscription (293).>

[20] *The same Augusti and Caesars to Aeternalis.* Just as liberty once granted cannot be revoked, so masters lose nothing through transactions with their own slaves not entered into for the purpose of manumission.

Written August 27, in the consulship of the Augusti (293).

[21] *The same Augusti and Caesars to Thallusa.* By the working of the Perpetual Edict: "If there is a controversy whether a slave is claimed from slavery into liberty or from liberty into slavery," it is clearly shown that, in a case where it appears that a woman is in possession of liberty through fraud, the same preliminary order (as to burden of proof) will be made as in a case where a party is in actual slavery. Furthermore, the fraud of the female slave in no way diminishes the rights of the master.

Written October 7, at Sirmium, in the consulship of the Augusti (293).

[22] *The same Augusti and Caesars to Pardalea.* Your parents, not your confession, determine your birth. Thus if you were born of a female slave but became free through manumission, you could not lose the freedom you obtained in manumission through deception or error by professing that you were a slave born of some other female slave. For slaves are created by birth according to certain rules, not made such by confession.

Given November 27, in the consulship of the Augusti (293).

[23] *The same Augusti and Caesars to Muscia.* If direct liberty was left you in the testament of your master, and the daughters appointed heirs therein succeeded to his estate, the fact that you offer service (*obsequium*) to one of the daughters, whether in accordance with the master's wish or not, gives the others no right to rescind your liberty.

[24] *Idem AA. et CC. Sebastiano.* Interrogatam et professam apud acta se esse ancillam huiusmodi factum defensionem libertatis non excludit.

S. IIII k. Ian. AA. cons.

[25] *Idem AA. et CC. Licentiano.* Sicut praetermissa instrumenta manumissionis recte factae nullum adferunt praestitae libertati vitium, ita si servum ad libertatem produxisti, instrumentorum amissio nihil ei nocere potest.

S. v id. Febr. CC. cons.

[26] *Idem AA. et CC. Molento.* Sicut datam libertatem manumissis adimere patronus non potest, ita manumissionis instrumentum praestare cogitur.

S. VII id. Mart. CC. cons.

[27] *Idem AA. et CC. Aurelio Asterio. pr.* Arrianus si mota quaestione a Leonide liber fuit pronuntiatus, in servitutem a victo iterum non recte petitus est. 1. Coheres etiam tibi ab Arriano datus colludens cum eo sive heredibus ipsius, qui status moverat quaestionem, nihil tibi obfuit, nec quae in confessionem inter eos venerunt, statum veritatis vel nomen substantiae defuncti mutare potuerunt.

D. III k. April. Sirmio CC. cons.

[28] *Idem AA. et CC. Eurymedonti.* Avi paterni magistratu functi dignitas ad libertatis probationem nihil nepoti prodest, si quidem in liberali causa matris, non patris inspicitur condicio. sed nec materni avi sola sufficit, cum, licet avia quoque libera probari possit, multis tamen ex causis status mutari consueverit.

Sirmi IIII id. April. AA. cons.

[29] *Idem AA. et CC. Troilae.* De ancilla matre natam et ab eo redemptam, in cuius fuit contubernio, si non manumittitur, in servitute permanere non ambigitur.

<Without subscription (293).>

[24] *The same Augusti and Caesars to Sebastianus.* If a woman was asked whether she was a female slave and in the public records professed that she was, this fact does not bar a defense of her liberty.

Subscribed December 29, in the consulship of the Augusti (293).

[25] *The same Augusti and Caesars to Licentianus.* Just as the omission to execute documents showing a properly performed manumission does not vitiate the grant of liberty, so if you gave freedom to a slave, the loss of the documents cannot injure him.

Written February 9, in the consulship of the Caesars (294).

[26] *The same Augusti and Caesars to Molentus.* Just as a patron cannot deprive those whom he manumitted of liberty, so he must furnish a document of manumission.

Written March 9, in the consulship of the Caesars (294).

[27]⁶⁴ *The same Augusti and Caesars to Aurelius Asterius. pr.* If Leonides brought an inquest and Arrianus was pronounced free, the defeated party could not legally bring action against him as a slave a second time.⁶⁵ 1. And if the man appointed by Arrianus as your co-heir conspired with him (Leonides) who had brought the inquest or with his heirs, that did not prejudice you. Also the agreement between them could not change the truth or the legal nature of the property of the decedent.

Given March 30,⁶⁶ at Sirmium, in the consulship of the Caesars (294).

[28] *The same Augusti and Caesars to Eurymedon.* The fact that his paternal grandfather had the honor of holding a magistracy cannot aid a grandson in proving his liberty since in an action involving liberty the status of the mother, not of the father, is considered. Not even the status of the maternal grandfather will alone suffice since, though the maternal grandmother may be shown to have been free, still, status is accustomed to be changed for many reasons.

Given April 10, at Sirmium, in the consulship of the Augusti (294?).

[29] *The same Augusti and Caesars to Troila.* A woman born of a female slave mother who was purchased by the man with whom she lives in a domestic partnership still remains a slave, unless she is manumitted.

<Without subscription (294).>

⁶⁴ Combine with C. 3.31.8, 6.59.4; *Consultatio* 6.18.

⁶⁵ See C. 7.16.4.

⁶⁶ C. 6.59.4 reports March 7.

[30] *Idem AA. et CC. Eutychio.* Solo obsequii non praestiti velamento data libertas rescindi non potest.

[31] *Idem AA. et CC. Corsianae.* Si tibi servitutis improbe moveatur quaestio, sollemnibus ordinatis de calumnia vel iniuria, prout vindictae viam elegeris, habita contestatione, posteaquam servus non esse fueris pronuntiatus, adversus eam sententiam postulare potes, tunc demum de his etiam quae direpta probaveris restitutionem, cum pro libertate fuerit pronuntiatum, petiturus.

S. v id. Oct. CC. Conss.

[32] *Idem AA. et CC. Athenaidi.* Subscriptio filii domini manumittentis nec addere secuta nec omissa detrahare libertati quicquam potest.

D. non. Nov. CC. conss.

[33] *Idem AA. et CC. Melitianae.* Licet accepta pecunia dominus te manumisit, tamen tributa libertas rescindi non potuit.

S. IIII id. Nov. CC. conss.

[34] *Idem AA. et CC. Hermionae.* Libera concubinatus ratione non constituitur ancilla.

D. id. Nov. CC. conss.

[35] *Idem AA. et CC. Atellio.* Non idcirco minus, quod pupilli res velut tutor administrasse dicitur, ex eius persona servitutis pati quaestionem potest.

Sirmi non. Dec. CC. conss.

[36] *Idem AA. et CC. Theodoraе.* Post certi temporis ministerium ancillae liberam eam esse cum ea paciscendo conventionis obtemperandi legi domina nullam habet necessitatem. utque hoc verum est, ita e contrario si filios suos constituta cum his libera in ministerium tibi tradere promississe probetur, parere placitis non compellitur.

[30] *The same Augusti and Caesars to Eutychius.* Liberty once granted cannot be revoked under the sole pretense that obedient service (*obsequium*) was not rendered.

<Without subscription (294).>

[31] *The same Augusti and Caesars to Corsiana.* If an inquest into servile status was dishonestly begun against you, after you have been pronounced to be no slave you may duly offer surety and commence an action for vexatious litigation or outrage (*de calumnia vel iniuria*), whichever path for vengeance you choose, and bring suit against this verdict. At that point, when a decision in favor of liberty has been rendered, you may also demand restitution of any property which you can prove was seized.

Written October 11, in the consulship of the Caesars (294).

[32] *The same Augusti and Caesars to Athenais.* The signature of the son of a master who is granting manumission cannot add anything to the grant of freedom by being subjoined, nor detract from it by being omitted.⁶⁷

Given November 5, in the consulship of the Caesars (294).

[33] *The same Augusti and Caesars to Melitiana.* Although your master manumitted you for the money he received, liberty once granted could not be rescinded.

Written November 10, in the consulship of the Caesars (294).

[34] *The same Augusti and Caesars to Hermione.* A female slave is not made free by reason of concubinage.

Given November 13, in the consulship of the Caesars (294).

[35] *The same Augusti and Caesars to Atellius.* An inquest into servile status is by no means precluded against a person because he as *tutor* is said to have managed the property of a minor ward (*pupillus*).

December 5, at Sirnium, in the consulship of the Caesars (294).

[36] *The same Augusti and Caesars to Theodora.* A female slaveowner who makes an agreement (*paciscendo*) with a female slave that the latter should be free after a certain time of service has no legal obligation to comply with the agreement. And just as that is true, so, on the contrary, if it is proven that a woman and her sons are free, and she promised to put them into your service, she is not compelled to comply with the agreement.

<Without subscription (294).>

⁶⁷ Blume: "The practice in Greek law was for the heir to sign the documents. Hence the question arose whether that was necessary also under Roman law."

[37] *Idem AA. et CC. Olympio.* Si filium tuum liberum genero vendidisti, qui tam proxima necessitudine coniunctus condicionis ignorantiam simulare non potest, utrisque sociis criminis accusator deest.

[38] *Idem AA. et CC. Philoserapi.* Non idcirco minus, quod te lime-narcha creato nemo contradixit, rei publicae nomine moveri tibi status quaestio potest.

D. xvi k. Ian. Nicomediae CC. cons.

[39] *Idem AA. et CC. Eutychio.* Liberos velut servos profitentes statum eorum mutare non posse constat.

S. vii k. Ian. Sirmi CC. cons.

[40] *Exemplum sacrarum litterarum ad Verinum.* Iuxta edicti nostri continentiam in liberalibus quoque negotiis, sive de libertinitate sive de ingenuitate moventur, absente nihilo minus una parte causam discuti et pro iustitiae ratione sententiam proferri nihil prohibet.

[41] *Impp. Constantinus et Licinius AA. ad Titianum praesidem Cappadociae.* Iubemus omnes epistulas actricis, quas ad Aelium tamquam principalem fecerat, inanes et vacuas esse atque in irritum devocari ac de ingenuitate eiusdem Aelii requiri nec mulieri id obesse, quod ad eum tamquam decurionem ac principalem scripserit, vel id, quod idem se finxerit decurionem vel principalem, maxime cum non solum testium professione et cognationis eius, quae iugum servile agnoscit, verum etiam voce propria eiusdem Aelii apud aliud iudicium patuerat, quod condicionis servilis videretur.

[42] *Imp. Constantinus A. ad Maximum pu.* Placuit eos qui nascuntur matrum condicionibus uti, quarum mox visceribus exponuntur. ante litem vero nati suo omnes nomine in quaestionem vocentur, quoniam hos solos, qui in lite nati erunt, omnem fortunam matrum

[37] *The same Augusti and Caesars to Olympius.* If you sold your free son to your son-in-law, who is connected by such close family ties that he cannot pretend ignorance of the son's status, neither partner in the crime can accuse the other.

<Without subscription (294).>

[38] *The same Augusti and Caesars to Philoserapis.* An inquest into your status cannot be impeded simply because no one objected when you were made overseer of the harbor (*limenarches*).

Given December 17, at Nicomedia, in the consulship of the Caesars (294).

[39] *The same Augusti and Caesars to Euty chius.* It is clear that those representing free persons as slaves cannot change their status.

Written December 26, at Sirmium, in the consulship of the Caesars (294).⁶⁸

[40] *A copy of an imperial letter to Verinus.* According to the contents of Our edict, if a case involving freedom is brought, whether by reason of manumission or free birth, there is nothing to hinder the full investigation of it and the rendition of a judgment according to the rule of justice, even if one of the parties is absent.

[41] *Emperors CONSTANTINE and LICINIUS Augusti to Titianus, Governor of Cappadocia.* We order that all letters of the female plaintiff which she addressed to Aelius as chief civic magistrate (*principalis*) shall be null and void and considered of no effect, and inquiry must be made whether the same Aelius is free-born. Nor shall it be an objection against the woman that she wrote to him as decurion and chief civic magistrate, or that the latter pretended to be decurion or chief civic magistrate. This is especially so because it was revealed that he appears to be of servile status not only from the confession of witnesses and of his own relations, who acknowledge his servile status, but also through Aelius' very own report in a different suit.⁶⁹

[42]⁷⁰ *Emperor CONSTANTINE Augustus to Maximus, City Prefect.* It is agreed that children have the status of their mother who gave them birth. But all those born before the commencement of a suit (against the mother) must be summoned to an inquest in their own name, for only those who were born during the suit ought to have the same fate as their mother and either be handed over

⁶⁸ Sirmium seems wrong, since the court was then at Nicomedia; but the origin of the mistake is uncertain. Mommsen relocates the constitution to Nicomedia. On the constitution's content, see D. 1.5.8.

⁶⁹ Seeck dates this constitution to May 14, 316.

⁷⁰ = C.Th. 4.8.4. C. epitomates C.Th.

complecti oportet et aut iustis tradi dominis aut libertate cum lucis auctoribus frui.

D. prid. id. Iun. Sirmio Probiano et Iuliano cons.

XVII De Adsertione Tollenda

[1] *Imp. Iustinianus A. Menae pp. pr.* Lites super servili condicione movendas ad clementiorem tam examinationem quam terminum transferimus iubentes, si quis vel adhuc serviens liberum se esse dixerit vel in libertate commorans ad servitutem vocatus fuerit, adsertoris difficultatem in utroque casu cessare ipsumque per se ad intentiones eius qui dominum sese adserit respondere et, si ex possessione libertatis ad servitutem ducitur, etiam procuratorem dare minime prohiberi, quod his, qui ex servitute ad libertatem prosiluerint, penitus interdiximus: illis legibus, quae dudum et secunda et tertia vice adsertorias lites examinari praecipiebant, in posterum conquiescentibus, cum sit iustum primam definitionem in suis manere viribus, cum provocatio nulla oblata fuerit: qua porrecta, ad similitudinem aliorum negotiorum iudex, ad quem res ex provocatione ducitur, eam examinabit, cuius et ipsius iudicium ad secundam exquisitionem minime deducetur occasione legum, quae super adsertoriis litibus positae sunt.

1. Super peculio etiam eorum vel aliis rebus aut causis veterem defensoris observationem tollimus, praecipientes illorum tantummodo peculia, qui ex possessione servitutis super libera condicione litigant, aliasque res quae vindicantur in tuto pro dispositione iudicis collocari.

2. Omnes vero, qui pro libertate periclitantur, si quidem possint fideiussorem dare, eum exigi: sin vero re vera datio eius impossibilis eis sit hocque iudici manifeste ostendatur, iuratoriae cautioni committi: scientes quod, si post huiusmodi expositionem afuerint et edictis citati in absentia nihilo minus per unum annum duraverint, omnimodo servituti obnoxii erunt et eius dominio, qui litem eis intulit, sine ulla dubitatione adsignabuntur. 3. Scire vero eos volumus, qui aliquem ad servitutem vocant, quod, si post primam accusationem in quocumque

to their rightful masters or allowed to enjoy liberty together with those who brought them into the world.

Given June 12, at Sirmium, in the consulship of Probianus et Julian (322).

Seventeenth Title Abolishing the Sponsorship of Liberty

[1] *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect. pr.* We alter the conduct of suits concerning servile status to a milder method of proof and termination by ordering that, if a person still in slavery claims to be free, or a person enjoying freedom is claimed as a slave, the difficulty of (needing) a sponsor (*adsertor*) in either case is eliminated, and he may himself defend against the assertions of the party who claims to be the master. And if he is in possession of liberty and is claimed into slavery, he may even appoint a procurator (to conduct the suit for him), which We entirely forbid for a man in slavery who claims liberty.⁷¹ The laws which formerly directed suits of sponsors to be examined a second and a third time shall hereafter lose force since it is just that the first judgment can stand on its own merits when no appeal is offered.⁷² If one is offered, then, as in other cases, the judge to whom the appeal is taken shall look into it, but his judgment shall in no way be brought to a second investigation by the prompting of the laws passed on sponsorship suits.

1. We also abolish the ancient rule for defendants (*defensores*) concerning their *peculium* and other property and suits, directing that the *peculium* of those – and of those only – who are in slavery and sue for their freedom and other property claimed shall be put in safekeeping to await the final decision of the judge.

2. All, however, whose liberty is called into question shall furnish a surety (*fideiussor*) if they are able. If, however, it is truly impossible for them to furnish one and this is clearly shown to the judge, they shall give their own written promise under oath, knowing that, if after this investigation they absent themselves and remain absent for a year even after being cited in edicts, they shall be subject to servitude and shall be assigned to the ownership of the one who brought the suit. 3. Nevertheless, We want those who claim anyone into slavery to know that, after the first accusation has been made in any court or through

⁷¹ Blume: "A *procurator* differed from an *assertor* (sponsor or defender) in that the former carried on a suit at the risk of the principal, the latter at his own risk."

⁷² Blume: "The statement in the law of this title about a second and third investigation of a cause involving liberty needs some comment, since the general rule was that a judgment once closed and not appealed from was *res judicata*. Reference to a second investigation is made in *Quintil. Inst.* 5.21; 11.1.78. Buckland, *Roman Law of Slavery*, 668–9, after referring to the various sources touching on this subject, states it as his opinion that they point to a conjecture that there was a rule, of which the source is now lost, requiring all such suits to be gone through twice or oftener, before different triers, before a final decision was reached. The law as to security, in force prior to Justinian, is not clear."

iudicio vel ex divali iussione factam et admonitionem ei oblatam, qui servus esse dicitur, in alio iudicio eum accusaverint (praeterquam si eius occasionem ipse qui servus esse dicitur praestiterit), etsi domini sint, suo iure privabuntur.

D. III id. Dec. dn. Iustiniano pp. A. II cons.

[2] *Idem A. Iohanni pp. pr.* Expeditam antea quaestionem, in praesenti autem ex nostra lege, quam de adsertione tollenda posuimus, in quamdam difficultatem incidere periclitantem, compendioso remedio fulciendam esse censemus. 1. Cum enim per adsertores super libertate iudicium agitabatur, si in medio adsertore litem agente adsertus ab hac luce fuerit subtractus, necessitas imponebatur nihilo minus adsertori litem implere, ut emptor, si victus erat et pro libertate fuerat pronuntiatum, habeat regressum adversus venditorem, ut ei quasi liberae personae venditor reddat id, quod emptionali instrumento continebatur vel natura contractus exigebat.

2. In praesenti autem, quia adsertorum vana nomina reiecta sunt, si persona, pro cuius condicione lis agitur, mortua fuerit, quemadmodum iudicium potest adimpleri una tantummodo persona in iudicium veniente? 3. Sancimus itaque in praesenti casu licentiam esse emptori adversus suum auctorem venire, quatenus vel ostendat venditor servum se vendidisse vel, si non potuerit, quasi libera persona vendita evictionis periculum ad eum revertatur.

D. k. Sept.

XVIII Quibus ad Libertatem Proclamare Non Licet et de Rebus Eorum, Qui ad Libertatem Proclamare Non Prohibentur

[1] *Imp. Gordianus A. Proculo. pr.* Dispar causa est eius, qui dissimulata condicione sua distrahi se passus est, et eius, qui pretium participatus est. nam superiori quidem non denegatur libertatis defensio, posteriori autem, et si civis Romanus sit et participatus est pretia,^{III} libertas denegatur. 1. Eandemque et in eo distinctionem adhibendam, cui fideicommissaria libertas debetur, meritissimo iuris auctores responderunt.

PP. k. Mai. Gordiano A. et Aviola conss.

^{III} [et participatus est pretia]

an imperial order and after the one who is said to be a slave has been notified, if they accuse him in another court, they shall be deprived of their right even if they should be the owners, except in case the person said to be a slave is the one who occasioned this.

Given December 11, in the consulship of Our Lord Justinian, Ever Augustus, for the second time (528).

[2] *The same Augustus to John, Praetorian Prefect. pr.* We have decided to use a brief remedy to shore up a question that used to be simple but has now run into a certain difficulty because of the law which We issued to abolish sponsorship.

1. When a suit concerning liberty was prosecuted by a sponsor, if the person who was claimed as a slave died while the sponsor was conducting his suit, the sponsor was nevertheless required to finish the suit so that the buyer of the slave, if he was defeated and judgment was given in favor of liberty, might have recourse against the seller. This way the seller, as a vendor of a free person, might be compelled to return to the buyer whatever was specified in the deed of purchase and whatever else the nature of the contract demanded.

2. But, since the very name of sponsor is at present abolished as superfluous, if the person on account of whose status a suit is prosecuted should die, how can a trial be finished when only one person is able to be present at the trial?

3. Hence, We ordain that, in such case, the buyer may have immediate recourse against the vendor, and the latter must either show that he sold a slave, or, if he cannot do so, he must stand the loss as the seller of a free person.

Given September 1 (531).

Eighteenth Title Those Who Are Not Permitted to Claim Liberty and the Property of Those Who Are Not Forbidden to Claim Liberty⁷³

[1] *Emperor GORDIAN Augustus to Proculus. pr.* The case of a man who allows himself to be sold by concealing his status is different from that of a man who shares in the price. For the right to defend his liberty is not denied to the former, but freedom is denied to the latter even if he is a Roman citizen. 1. And the juriconsults have quite rightly responded that the same distinction is to be observed in the case of one who is owed fiduciary (*fideicommissaria*) liberty.

Posted May 1, in the consulship of Gordian and Aviola (239).

⁷³ See D. 40.13.

[2] *Imp. Diocletianus et Maximianus AA. et CC. Melanae.* De latronum familia descenditibus ex largitione principali vel auctoritate fiscali servis factis retro principes libertatem denegari decreverunt.

[3] *Imp. Constantinus A. ad Maximum pu. pr.* Si quis in libertatem proclamaverit, id, quod apud se esse eius qui se dominum dicit profitebitur, quoniam de eo non dubitatur, reddi ac referri iudex protinus pronuntiabit.

1. Quod vero petitur, si fuerit negatione dubium, per cautionem conservabitur ac petitio differetur, ut, si fuerit approbata libertas, (quoniam et ipsis, qui his rem commiserunt, medendum est) gestarum rerum ab eodem ratio atque omne quod debebitur reposcatur, ut servitute depulsa qui pro domino quondam fuerat habeat, quod ut servo domini iure largitus est et quae ex earum rerum quaestu ac fructibus conciliata sunt et quae de furtivis compendiis obscure capta ac parata sunt, cum liberum esse non oporteat, quod apud servum dominus peculii nomine collocaverat.

2. Ea vero, quae testamento vel donatione quaesita sunt aut quae ex earum rerum emolumentis empta confectaque sunt, eidem ingenuo deputentur. quae tamen universa exacto libertatis iudicio, quae a supra dictis rebus discernantur, in sequestro esse oportet, ut his ab utroque deductis atque in medio iure collocatis ad eorum proprietatem uterque contendat.

D. XV k. Iun. Thessalonica Severo et Rufino cons.

XVIII De Ordine Cognitionum

[1] *Imp. Alexander A. Vitalio.* Cum et ipse confessus es status controversiam pati, qua ratione postulas, priusquam de condicione constaret tua, accusandi tibi tribui potestatem contra eum, qui te servum esse contendit? cum igitur, sicut adlegas, statu generis fretus es, iuxta ius

[2] *Emperors* DIOCLETIAN and MAXIMIAN *Augusti* and the *Caesars* to *Melana*. Emperors decreed formerly that those who descend from a family of brigands (*latrones*) who were made slaves through the imperial exchequer (*ex largitione principali*) or the authority of the Treasury (*auctoritate fiscali*) cannot be freed.

[3]⁷⁴ *Emperor* CONSTANTINE *Augustus* to *Maximus*, *City Prefect*. *pr.* If a person claims liberty but he acknowledges that property in his possession belongs to the party who claims to be his master, the judge must order such property to be immediately returned and restored since it is not in dispute.

1. But if the status of the property stands in doubt by reason of denial, it shall be protected through a written promise (*per cautionem*), and the claim thereto deferred. If the finding shall be in favor of liberty for the claimant, an account of his doings can be demanded from him, and whatever he owes can be reclaimed – since the interests of those who entrust things to slaves must be protected. Once the claim to enslavement has been rejected, the one who formerly occupied the position of master may receive back what he gave as master to one supposedly his slave together with what was acquired through the profits and fruits of that property, and whatever furtive profits he (the supposed slave) secretly took; for whatever a man lent his slave as *peculium* should not also be “freed.”

2. But whatever property was obtained (by the supposed slave) under a testament or gift, and whatever was bought or produced with the income therefrom, must be turned over to the free man (*ingenuus*).⁷⁵ But once the trial for liberty is concluded, all the property which had been separated out from the above-mentioned items should be sequestered so that, now that it has been taken out of the hands of both parties and placed in the possession of the court, both parties can contend for its ownership.

Given May 18, at *Thessalonica*, in the consulship of *Severus* and *Rufinus* (323).⁷⁶

Nineteenth Title The Order of Trials

[1] *Emperor* ALEXANDER *Augustus* to *Vitalius*. Since you yourself have acknowledged that a dispute as to your status has been raised, how can you ask, before your status has become clear, that you should be given permission to make an accusation against the party who contends that you are his slave? Inasmuch as you rely, as you say, on the status of your progenitors, you should follow ordinary law and go before the governor, who can first try the case for

⁷⁴ = C.Th. 4.8.6.4–7; combine with C. 8.46.10.

⁷⁵ From Constantine onward, *ingenuus* could be used both of free-born individuals and of freedmen.

⁷⁶ Seeck dates to February 15, 323.

ordinarium praesidem pete, qui cognita prius liberali causa ex eventu iudicii, quid de crimine statuere debeat, non dubitabit.

PP. V id. M. ... Maximo II et Aeliano cons.

[2] *Idem A. Galliae.* Si de hereditate et libertate controversia est, prius agi causa libertatis debet. sed si de hereditate agatur, ordinanda quidem est causa libertatis, sed sufficit ei, qui libertate utitur, ad victoriam de hereditate secundum se pronuntiatum.

PP. v id. Aug. Maximo II et Aeliano cons.

[3] *Idem A. Valeriano.* Si crimen aliquod inferatur ei, quam ingenuam esse dicis, ante liberalis causa suo ordine agi debet, cognitionem suam praeside praebente, quoniam necesse est ante sciri, si delictum probatum fuerit, ut in liberam et ingenuam an ut in ancillam constitui oportet.

PP. VI k. Dec. Maximo II et Aeliano cons.

[4] *Imp. Gordianus A. Menedemo. pr.* Si status controversiam pateris, lite prius liberali terminata, si pro te fuerit pronuntiatum, agere etiam adversus eum, qui se dominum tuum esse contendit, non prohiberis. 1. Quod si ideo te ab accusatione elidet, quasi servum non proprium sed alienum, liberale quidem iudicium cessat, causae autem examinatio apud eum qui iudicat ostendet, utrumne accusatio induci debeat propter statum personae, an evanescat.

D. x k. Dec. Gordiano A. et Aviola cons.

[5] *Imp. Diocletianus et Maximianus AA. et CC. Alpheo.* Cum status quaestionem tibi moveri et te debita velle petere commemoras, ordinarium est prius sollemnibus interpositis, si hoc iuris admiserit ratio, causam liberalem apud praesidem provinciae decidi, ut, si liber fueris vel servus non esse pronuntiat, tunc tibi iure debita restitui iubeat, cum hoc incerto, utrumne tibi libero constituto an domino tuo, si servum te sententia declaraverit, debeat, ad solutionem debitorem tuum urgueri non oporteat.

S. prid. k. Mai. Beraci AA. cons.

freedom and, based on the result of the trial, will not be in doubt as to how he should decide regarding the accusation.

Posted M[arch] (or M[ay]) 11, in the consulship of Maximus, for the second time, and Aelianus (223).

[2] *The same Augustus to Gallia.* If there is a dispute as to liberty and as to an inheritance, the issue as to liberty should be tried first. But if an action for an inheritance shall be brought, the case in favor of freedom is to be presupposed,⁷⁷ but the plaintiff who is in enjoyment of liberty wins a sufficient victory if he receives a favorable decision as to the inheritance.

Posted August 9, in the consulship of Maximus, for the second time, and Aelianus (223).

[3] *The same Augustus to Valerianus.* If a criminal accusation is brought against the woman who you say is free-born, the issue as to her liberty should be tried first in proper order by the governor granting a hearing; for if a delict is proven, it is necessary to know first of all whether the charge should go against a free and free-born person or against a female slave.

Posted November 26, in the consulship of Maximus, for the second time, and Aelianus (223).

[4] *Emperor GORDIAN Augustus to Menedemus.* If you are undergoing a trial regarding your status, once the suit has been settled, provided the decision is in your favor, you are not forbidden to sue the man who claimed to be your master. If, however, he opposes to your accusation the fact that you are not his, but another's slave, the suit as to your liberty fails of course, but an examination of the case by the judge will show whether an accusation (against him) should be introduced or dismissed based on (your) personal status.

Given November 22, in the consulship of Gordian Augustus and Aviola (239).

[5] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Alpheus.* Since you state that an inquest into your status has been raised but that you want to sue for what is owed to you, it is customary, after arranging the usual preliminaries – if the law permits that – to first try the issue of liberty before the governor. This way he may order payment of the amount owed to you only if you have been pronounced free or not to be a slave. For your debtor should not be compelled to pay while it is uncertain whether the debt is due to you as a free man or to your master, in case the decision should pronounce you to be slave.

Written April 30, at Beracis,⁷⁸ in the consulship of the Augusti (293).

⁷⁷ After *litis ordinatio*, the person whose liberty was in question was to be considered free for purposes of the trial. The wording of this constitution is obscure and possibly corrupt.

⁷⁸ Berancis. Or Heraclea?

[6] *Idem AA. et CC. Alexandriae.* Si res tuas raptas vel amotas esse dicis ab his, quos servos tuos esse contendis, hique in libertatem proclamaverunt, causa liberalis prius adversus eos et tunc damni dati rerumque amotarum lis apud praesidem provinciae contestanda est, ut, si quidem liberi vel servi non esse pronuntientur, tunc demum damni dati et amotarum rerum procedere possit adhibita probatione condemnatio, si vero secus, quaestio rerum amotarum evanescat.

D. III k. Ian. Sirmi AA. cons.

[7] *Imp. Constantinus A. ad Bassum. pr.* Si quando negotium status fuerit exortum, si ab eius parte qui dicitur servus aliquid dicatur dominus abripuisse, prius considerari placet, utrum de possessione servitutis in libertatem reclamandum putet an vero ex possessione libertatis in servitutem vocatur.

1. Ac si eum de obsequiis servilibus libertatem constiterit flagitare, ante decidi status convenit causam atque ita praebere direptorum negotiorum, si res exegerit, audientiam.

2. Quod si ei qui ad servitutem vocatur quicquam direptum esse memoretur, universa quae constiterit ablata ita demum reddi convenit ei, qui servus esse contenditur, si modo salvam rem futuram per idoneos fideiussores promiserit. 3. Nam si tales non potuerit dare, tunc ea convenit, de quibus in iudicio tractabitur, sequestrari in eum diem, in quo controversia sopietur, ita ut ex isdem, si alia facultas esse non poterit, tantum litis sumptibus et alimoniae hominis subministretur, quantum moderato iudicis arbitrio fuerit aestimatum. 4. Cum autem necdum lite de statu mota res ab aliquo direptae sint et sententia de restituenda possessione rerum lata ille, ne sententiae satisfaceret, de statu controversiam movit, necessitatem habebit et sine satisfactione easdem res reddere et tunc causam liberalem secundum iuris ordinem exercere.

XX De Collusione Detegenda

[1] *Impp. Diocletianus et Maximianus AA. Theodora.* Cum servum matris tuae et stupro violasse dominam suam et turpis coniunctionis maculam excogitandae ingenuitatis collusionem ac falsae captivitatis velamento apud competentem iudicem obtegere voluisse proponas nec

[6] *The same Augusti and Caesars to Alexandria.* Since you state that your things were robbed or removed by those whom you contend to be your slaves, but these claim that they are free, a case as to their freedom must be held first before the provincial governor, and the issue as to damages and the removal of the goods only later. In this way, if they are pronounced free or not to be slaves, judgment may be rendered for damage done and for things taken after proof has been supplied. But if they are not so pronounced, the inquest into the removal of the property must disappear.

Given December 30, at Sirmium, in the consulship of the Augusti (293).

[7] *Emperor CONSTANTINE Augustus to Bassus. pr.* If a suit as to status is commenced and the party claimed to be a slave asserts that the party claiming to be his master has taken something from him, it should be first considered whether the alleged slave thinks he is possessed as a slave and is attempting to reclaim liberty, or whether he is in enjoyment of liberty and is being claimed into servitude.

1. Indeed, if it is evident that he is in a state of servile subordination and claims liberty, the question as to his status should be decided first, and a hearing as to the property taken should be offered only if required.

2. If, on the other hand, something has been taken from a man who is claimed into servitude, everything that has been taken from him will be returned to him only provided he promises, with sufficient sureties, that the property will be kept safely. 3. For if he cannot give sureties, the property in controversy must be sequestered until the day when the dispute is settled, but in such a way that, if there are no other resources, the expenses of the litigation and the support of the man must be paid from that property in an amount equitably fixed by the judge. 4. But if things are taken from a man when no question as to his status has yet been raised and the property has been ordered returned, but the defeated party then raises the question as to status so as to escape satisfying the judgment, it will be necessary to restore the property without receiving any surety, and thereafter to try the question as to liberty according to law.

<Without subscription (317-319).>⁷⁹

Twentieth Title Detection of Collusion⁸⁰

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Theodora.* Since you state that a slave of your mother violated his mistress through criminal fornication (*stuprum*) and then attempted to cover up this disgraceful connection before the appropriate judge by colluding (with her) to pretend he was

⁷⁹ Seeck dates this constitution to July 15, 319.

⁸⁰ See D. 40.16.

libertatem ei matrem tuam dedisse, sed in solam ingenuitatem eum nudae voluntatis mendacio producere enisam adseveres, servum esse palam est, quando etiam divi Pii rescriptum super captivitate emissum, quam non intercessisse significas, ingenuum fecisse non videatur, nec adseveratio consensus tui ingenuitatis ius tribuere potuit.

PP. XIII k. Iul. Diocletiano IIII et Maximiano III AA. cons.

[2] *Idem AA. et CC. Milesio.* Libertinae condicionis constitutis privatis pactis mutare statum non licere Ninniano senatus consulto contra collusorem poena statuta praemioque detegenti promisso manifeste declaratur.

D. v k. Dec. CC. cons.

XXI Ne De Statu Defunctorum Post Quinquennium Quaeratur

[1] *Imp. Severus et Antoninus AA. Niconi.* Aditus competens iudex causam praescriptionis examinabit et, si Domitiae patronum, qui civis Romanus in diem mortis vixit, ante quinque annos, quam lis bonorum mulieris inchoaretur, vita decessisse constiterit, libertae status ex persona manumissoris non retractabitur.

[2] *Idem AA. Maximo.* Si is, qui te heredem fecit, propter matris conditionem servus dicitur et mater ante quinque annos litis motae vita decessit, praescriptioni locus erit, cum quaeri de statu non possit, nisi

free-born and fabricating a false story that he had been in captivity, and since you allege that your mother did not give him freedom but only endeavored to support him in his claim to free-born status by a pure and willing lie, it is plain that he is a slave. For the rescript the deified Pius issued concerning captivity – which you say did not occur – does not make him free-born, and the allegation (by him) that you too gave your consent could not grant him the right of free-born status.

Posted June 18, in the consulship of Diocletian, for the fourth time, and Maximian, for the third time, Augusti (290).

[2] *The same Augusti and the Caesars to Miliesius.* It is plainly declared by the SC *Ninnianum* that it is not permitted for freedman status to be changed through private pacts, and a penalty is established against anyone who colludes to do so and a reward promised to those who report them.⁸¹

Given November 27, in the consulship of the Caesars (294).

Twenty-First Title The Status of Decedents Shall Not be Questioned after Five Years⁸²

[1] *Emperors SEVERUS and ANTONINUS Augusti to Nicon.* The appropriate judge, when appeal is made to him, will examine the matter of prescription (loss of a claim through statutory limitation), and if it is evident that the patron of Domitia, who lived as a Roman citizen at the time of his death, departed this life more than five years before the suit over the property of his wife was begun, her status as a freedwoman cannot be reinvestigated by inquiring into the status of her manumitter.⁸³

[2] *The same Augusti to Maximus.* If he who appointed you as heir is said to be a slave on account of the status of his mother, and the mother departed this life more than five years before the commencement of suit, such suit is barred by

⁸¹ Blume: "The Ninnianian senate decree, mentioned in the second law of this title, is probably the law passed in the time of Domitian, mentioned in D. 40.16.1. It is there stated that if any one proved that a slave had been made free and declared free-born by collusion, he had the right to claim the man as his slave. Some reward is referred to in C. 7.20.2, in case of collusion to have a freedman declared a free-born person. The character of the reward is not stated. In the note to this law in the *Basilica* (48.23.2), the reward is stated to be that the detector of such collusion has the rights of patronage as to such freedman. That this was formerly true appears from D. 2.4.8.1. But under C. 6.4.4.26, the right was confined to that of reverence."

⁸² See D. 40.15.

⁸³ Blume: "Death did not of itself terminate inquiry into a man's status, where that was not the principal issue. C. 7.16.13. But it was early made the general rule that a man's status should not be attacked after he had been dead five years. The rule seems to have first been laid down by an edict of the Emperor Nerva. D. 40.15.4. But there was evidently a subsequent senate decree to the same effect, such decree being referred to in C. 7.21.4.7 and 8."

de condicione matris retractaretur. haec ita, si, quamdiu vixit, sine interpellatione ut civis Romana egit.

PP. id. Sept. Antonino A. II et Geta C. II cons.

[3] *Imp. Alexander A. Olympiadi.* Quamvis defunctus sit maritus quondam tuus, cui status quaestio inferebatur, causa tamen etiam post obitum eius propter emolumentum successionis durat eamque apud eum, qui de hereditate vel de singulis rebus iudicaturus est, decidi oportet.

[4] *Idem A. Marciano. pr.* Si is, quem servum tuum fuisse et a fratre tuo manumissum atque heredem scriptum proponis, ut civis Romanus vixit nec intra quinquennium post mortem eius status quaestionem movere coepisti, intellegis neque heredibus ab eo scriptis neque his, quos liberos esse voluit, controversiam te contra formam senatus consulti facere posse. 1. Quod si prius, quam id spatium temporis excederet, agere coepisti, et peculium eius more iudiciorum persequi et cum manumissis ordinata lite secundum formam edicti experiri non prohiberis.

PP. v id. Iun. Modesto et Probo cons.

[5] *Imp. Gordianus A. Severo.* Quod est constitutum post quinquennium de statu defunctorum quaestionem incipere non posse, ad speciem emancipationis, iure nec ne perfecta sit, minime pertinet.

[6] *Impp. Valerianus et Gallienus AA. Pollae. pr.* Si mater tua quasi ingenua communi opinione vixit et quinquennium a die mortis eius excessit, potes rem publicam et pupillos, si tibi status quaestionem movere temptaverint, nota praescriptione repellere. 1. An autem pro ingenua in diem mortis egerit, in iudicio requiretur. quod si varietas interveniat, posteriora tempora spectari convenit.

PP. VI id. Iun. Saeculare II et Donato cons.

prescription, since inquiry into his status cannot be made except by reexamining the status of his mother. This is true, however, only if the latter lived her life as a Roman citizen without interruption.

Posted September 13, in the consulship of Antoninus Augustus, for the second time, and Geta Caesar, for the second time (205).

[3] *Emperor ALEXANDER Augustus to Olympias.* Although your former husband is deceased, an inquest into his status was being conducted, and the action against him survives even after his death because the benefit of his inheritance is at stake. It should be decided by the judge, who will adjudicate concerning the estate or the individual property therein.

[4] *The same Augustus to Marcianus. pr.* If the man whom you state to have been your slave and who was manumitted by your brother and appointed by him as his heir lived as a Roman citizen, and you did not begin to bring an inquest into his status within five years of his death, you must know that you cannot raise a dispute either against his appointed heirs or against (slaves) whom he wanted to be free, which would be contrary to the rule of the decree of the Senate. 1. But if you commenced suit before that period of time expired, you are not forbidden to go after his *peculium* and to try an action, properly instituted, against those manumitted by him in accordance with the rule of the edict.

Posted June 9, in the consulship of Modestus and Probus (228).

[5] *Emperor GORDIAN Augustus to Severus.* The provision that an inquest as to the status of decedents may not be commenced after five years does not apply to an instance of emancipation and whether it was carried out legally or not completed.

[6] *Emperors VALERIAN and GALLIENUS Augusti to Polla. pr.* If your mother was widely believed to have lived as a free-born person and five years have passed since the day of her death, you may, by the well-known prescription, defeat the municipality as well as minor wards if they attempt to bring any inquest into status against you. 1. But it will be investigated in court whether she lived as a free-born person at the time of her death. But if that differed at various times, the later time governs.

Posted June 8, in the consulship of Saecularis, for the second time, and Donatus (260).

[7] *Impp. Diocletianus et Maximianus AA. Heliodoro.* Si pater tuus veluti ingenuus vixit nec status controversiam, quasi fisci servus esset, apud praesidem provinciae, qui super huiusmodi quaestionibus iudicare solet, sed apud curatorem rei publicae non competentem iudicem passus est, postque mortem eius quinquennium fluxit, status tuus ex praescriptione, quae ex senatus consulto emanat, protectus est.

[8] *Idem AA. et CC. Theodoro.* Repetitio peculii rerum servi tui, si nullo iusto titulo intercedente corpora ab aliquo possideantur, nulla temporis praescriptione mutilabitur. nec enim senatus consultum, quo super non retractandis defunctorum statibus sancitum est, intervenit, si defunctus in fuga conversatus atque latitans decessit.

D. x k. Dec. Mel. Diocletiano et Maximiano AA. cons.

XXII De Longi Temporis Praescriptione, Quae pro Libertate et Non Adversus Libertatem Opponitur

[1] *Impp. Diocletianus et Maximianus AA. et CC. Muciano.* Mala fide morato in libertate diu prodesse non potest temporis praescriptio. unde cum confitearis fuga te ab eo cuius meministi recessisse, intellegis ex hoc solo sine dolo malo in possessione te libertatis non esse.

D. x k. Sept. AA. cons.

[2] *Idem AA. et CC. Carterio.* Praestat firmam defensionem libertatis ex iusto initio longo tempore obtenta possessio. favor enim libertatibus debitus et salubris iam pridem ratio suasit, ut his, qui bona fide in possessione libertatis per viginti annorum spatium sine interpellatione morati essent, praescriptio adversus inquietudinem status eorum prodesse deberet, ut et liberi et cives fiant Romani.

D. vii k. Iul. Antiochiae Constantio III et Maximiano III CC. cons.

[3] *Exemplum sacrarum litterarum Constantini et Licinii AA. ad Dionysium vice praefectorum agentem.* Solam temporis longinquitatem,

[7] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Heliodorus.* If your father lived as a free person, and he experienced a dispute over his status and whether he was a fiscal slave not in the court of the provincial governor, who usually judges this sort of inquest, but only before the curator of the municipality, who is not an appropriate judge, and now five years have elapsed since his death, your status is protected by reason of the bar prescribed by the decree of the Senate.

[8] *The same Augusti and the Caesars to Theodorus.* The right to reclaim property which was part of the *peculium* of your slave will not be barred by lapse of time if the several articles thereof are in the possession of anyone without lawful ground of title. Nor does the decree of the Senate forbidding the reexamination of the status of decedents apply if the decedent was a fugitive and died while in hiding.

Given November 22, at Mel.,⁸⁴ in the consulship of Diocletian and Maximian Augusti (299?).

Twenty-Second Title Long-Time Prescription, Which May Be Used in Favor of but Not Opposed to Liberty

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Mucianus.* Prescription of time is no defense for a man who has for a long time remained in liberty in bad faith. Hence, since you acknowledge that through flight you left the man whom you mention, you understand that by that alone you are not in possession of liberty without fraud.

Given August 23, in the consulship of the Augusti (293).

[2] *The same Augusti and Caesars to Carterius.* Possession of liberty which began legally and continued for a long time furnishes a full defense. For partiality for freedom and sound reasoning led to the conclusion long ago that those who should remain in possession of liberty for twenty years in good faith without interruption should be protected against disturbance as to their status by that period of prescription and should become free and be Roman citizens.

Given June 25, at Antioch, in the consulship of Constantius and Maximianus, for the third time, Caesars (300).

[3] *Copy of an imperial letter of the Emperors CONSTANTINE and LICINIUS Augusti to Dionysius, Vice Prefect.*⁸⁵ It is in accordance with justice that no

⁸⁴ Perhaps Melitene, but Med(iolanum) has also been conjectured.

⁸⁵ That is, Vicar. Seeck gives May 13, 314, for the date.

etiāsi sexaginta annorum curricula excesserunt, libertatis iura minime mutilare oportere congruit aequitati.

D. III k. Mai. Volusiano et Anniano cons.

XXIII De Peculio Eius Qui Libertatem Meruit

[1] *Imp. Diocletianus et Maximianus AA. et CC. Rufino.* Longe diversam causam eorum, qui a superstitionibus manumittuntur, item illorum, quibus testamento libertas relinquitur, esse dissimulare non debueras, cum superiore quidem casu concessum tacite peculium, si non adimatur, posteriore vero, nisi specialiter fuerit datum, penes successorem remanere sit iuris evidentis.

S. v non. Oct. CC. cons.

XXIII De Senatus Consulto Claudiano Tollendo

[1] *Imp. Iustinianus A. Hermogeni magistro officiorum. pr.* Cum in nostris temporibus, in quibus multos labores pro libertate subiectorum sustinuimus, satis esse impium credidimus quasdam mulieres libertate sua fraudari et, quod ab hostium ferocitate contra naturalem libertatem inductum est, hoc a libidine nequissimorum hominum inferri, Claudianum senatus consultum et omnem eius observationem circa denuntiationes et iudicum sententias conquirere in posterum volumus, ne, quae libera constituta est, vel semel decepta vel infelici cupidine capta vel alio quocumque modo contra natalium suorum ingenuitatem deducatur in servitutem et sit pessimum dedecus cognationis suae fulgori, ut, quae forsitan decoratos dignitatibus habeat cognatos, haec in alienum cadat dominium et dominum pertimescat forsitan cognatis suis inferiorem, quod et in libertis observari oportet: semel etenim libertate potitam per tale dedecus in servitutem reduci religio temporum meorum nullo patitur modo.

1. Sed ne servi vel adscripticii putent sibi impunitum esse tale conamen, quod maxime in adscripticios verendum est, ne liberarum mulierum nuptiis ab his excogitatis paulatim huiusmodi hominum condicio

length of time, even though a period of sixty years has passed, should alone bar a claim of liberty.

Given April 29, in the consulship of Volusianus and Annianus (314).

Twenty-Third Title The *Peculium* of One Who Has Gained Liberty

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Rufinus.* You should not overlook the fact that the situation of those who are manumitted by living persons is very different from that of those to whom liberty is left by testament, for in the case of the former there is an implied grant of the *peculium*, provided it is not taken from them (expressly), but the law is plain that in the case of the latter, the *peculium* remains the property of the decedent's successor, unless it has been specially granted (to the freedman).

Written October 3, in the consulship of the Caesars (294).

Twenty-Fourth Title Abolishing the *Senatus Consultum Claudianum*⁸⁶

[1] *Emperor JUSTINIAN Augustus to Hermogenes, Master of the Offices. pr.* Since We have in Our times gone to much trouble to further the liberty of Our subjects, We thought it quite impious that some women should be deprived of their liberty, and that a practice introduced by the ferocity of enemies, contrary to natural liberty, should also be the result of the caprice of worthless men. Therefore, We wish the *SC Claudianum*, and all its regulations regarding notices and judicial sentences, hereafter to be void, in order that a free woman, whether she was deceived or overpowered by an unfortunate passion or however else, might not be led into slavery contrary to her birthright and thus bring the worst disgrace upon her honored relatives, with the result that she who might have relatives decorated with titles might become the property of another and fear a master who may be inferior to her own relatives. This shall also apply to freedwomen, for the spirit of Our time does not tolerate that a woman who has once had freedom should be reduced to slavery by such disgrace.

1.⁸⁷ But in order that slaves and enrolled tenants (*adscripticii*) may not think that such efforts (to marry free women) will go unpunished – which is especially to be feared in the case of *adscripticii* – and in order that the number of

⁸⁶ The *SC Claudianum* of 52 CE had permitted the master of a male slave to enslave any free woman who continued to have sexual relations with his slave even after thrice being ordered to desist. See Tac. *Ann.* 12.53; Gaius 1.84, 91, 160; Inst. 3.12.1; C. Th. 4.12.2–5, 7.

⁸⁷ = C. 11.48.24. Possibly to be combined with C. 1.3.53, 5.17.11, 9.13.1

decreseat, sancimus, si quid tale fuerit vel a servo vel adscripticio perpetratum, liberam habere potestatem dominum eius sive per se sive per praesidem provinciae talem servum vel adscripticium castigatione competenti corrigere et abstrahere a tali muliere. quod si neglexerit, sciat in suum damnum huiusmodi desidiam reversuram.

XXV De Nudo ex Iure Quiritium Tollendo

[1] *Imp. Iustinianus A. Iuliano pp.* Antiquae subtilitatis ludibrium per hanc decisionem expellentes nullam esse differentiam patimur inter dominos, apud quos vel nudum ex iure Quiritum vel tantummodo in bonis reperitur, quia nec huiusmodi esse volumus distinctionem nec ex iure Quiritum nomen, quod nihil aenigmate discrepat nec umquam videtur neque in rebus apparet, sed est vacuum et superfluum verbum, per quod animi iuvenum, qui ad primam veniunt legum audientiam, perterriti ex primis eorum cunabulis inutiles legis antiquae dispositiones accipiunt. sed sit plenissimus et legitimus quisque dominus sive servi sui sive aliarum rerum ad se pertinentium.

XXVI De Usucapione pro Emptore vel Transactione

[1] *Imp. Antoninus A. Flaviano.* Mancipia tua si ab eis distracta sunt, qui ius vendendi non habuerunt, vindicare ea potes. nec enim usucapi ab emptoribus potuerunt, cum illicita venditione furtum contractum sit.

PP. id. Aug. Antonino A. IIII et Balbino cons.

[2] *Imp. Alexander A. Marcellino.* Si contra defuncti voluntatem servos, quos propter perfectae artis peritiam heredibus suis defunctus servari testamento praecepit, tutores vendiderunt, usucapi non potuerunt.

D. v non. Mart. Iuliano et Crispino cons.

this class of men may not gradually decrease by their intermarriage with free women. We ordain that if anything of that kind is done by a slave or *adscripticius*, his owner shall have the free power, either personally or through the provincial governor, to correct such a slave or *adscripticius* by proper chastisement and to take him away from such a woman. If he neglects this, he may know that such laziness will redound to his own loss.

<Without subscription (531-534).>

Twenty-Fifth Title Abolishing Naked Ownership through Quiritary Right⁸⁸

[1] *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect.* By this judgment We eliminate a trifling ancient nicety and allow for no difference between owners who have either naked ownership through Quiritary right or rights over property (*in bonis*), since We wish no such distinction to exist. The term "through Quiritary right" (*ex iure Quiritum*) does not differ from a riddle and is nowhere seen in the real world, but it is an empty and superfluous term by which the minds of young men who come to their first lecture on law are terrified as they receive useless provisions of ancient laws during their elementary classes. But let each owner be a complete legal owner whether of a slave or of other property belonging to him.

<Without subscription (530-531).>

Twenty-Sixth Title Usucapion by the Buyer or through Settlement⁸⁹

[1] *Emperor ANTONINUS Augustus to Flavianus.* If your slaves were sold by those who had no right to sell, you may reclaim them. Nor could they be usucapied by the purchasers, since the unlawful sale constituted a theft.

Posted August 13, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2] *Emperor ALEXANDER Augustus to Marcellinus.* If *tutores* sold slaves contrary to the wish of the deceased, who in his testament directed them to be kept for his heirs because of their special skill, title to them could not be acquired by usucapion.

Given March 3, in the consulship of Julian and Crispinus (224).

⁸⁸ This constitution allows transfer of ownership of *res Mancipi* by simple handover, *traditio*.

⁸⁹ See D. 41.4.

[3] *Idem A. Nepotillae.* Si matrem eius, cuius nomine quaestionem pati dicis, bona fide emptam possidere coepisti, etiamsi ipsa in causam furtivam incidit, tamen postea conceptum apud te partum usucapere potuisti.

[4] *Idem A. Achilleo.* Venditioni ancillae consensum dedisse diversam partem si probaveris, retractando contractum, quem ipsa ratum habuit, non audietur. sed et hac probatione cessante si bona fide emptam ancillam venditore bona fide distrahente temporis spatio usuceperis, intentio proprietatem vindicantis tenere non potest.

PP. III id. April.

[5] *Imp. Gordianus A. Marino. pr.* Si partem possessionis mala fide possessor venumdedit, id quidem, quod ab ipso tenetur, omnimodo cum fructibus recipi potest, portio autem, quae distracta est, ita demum recte petitur a possidente, si sciens alienam comparavit vel bona fide emptor nondum complevit usucapionem. 1. Violenter autem possessione amissa, priusquam in domini potestatem perveniat, usucapio emptori, etsi bona fide mercatus est, non competit.

PP. XII k. April. Pio et Pontiano cons.

[6] *Imp. Philippus A. cum consilio collocutus dixit:* Cum sit probatum rem pignori fuisse obligatam et postea a debitore distractam, palam est non potuisse eam quasi furtivam usucapi.

Sine die et consule.

[7] *Imp. Diocletianus et Maximianus AA. et CC. Pecudi.* Sciens servum alienum citra domini voluntatem venumdans furtum committit, quod rei vitium, priusquam ad dominum eius revertatur possessio, non permittit usucapionem fieri, licet bona fide possideatur.

D. v id. Febr. CC. cons.

[8] *Idem AA. et CC. Severo.* Ex causa transactionis habentes iustam causam possessionis usucapere possunt.

[3] *The same Augustus to Nepotilla.* If you purchased and began in good faith to possess the mother of the boy concerning whom a suit is brought against you, even if she herself became part of the case for theft, you could usucapt a child she conceived afterward while with you.

[4] *The same Augustus to Achilleus.* If you prove that your opponent gave his consent to the sale of the female slave, he will not be heard when he rescinds an agreement which he ratified. Nevertheless, even if that proof is lacking, but the female slave was bought in good faith, and the seller sold her in good faith, and if you have usucaptured her by the passage of time, the claim of ownership on the part of your opponent cannot hold.

Posted April 11.

[5] *Emperor GORDIAN Augustus to Marinus. pr.* If a bad faith possessor has sold part of his possession, the portion retained by him together with its fruits may indeed be recovered, but the portion sold by him may legally be reclaimed from the possessor only if he bought it knowing it belonged to someone other than the seller, or if the good faith buyer had not yet finished usucapturing it. 1. But if possession is lost by force, the period of usucaption does not begin for the buyer, even though he bought it in good faith, before the property has come back into the power of the owner.

Posted March 21, in the consulship of Pius and Pontianus (238).

[6] *Emperor PHILIP Augustus speaking in council said:* Since it has been proven that the property was pledged and was thereafter sold by the debtor (contrary to the terms of the pledge), it is plain that, as stolen property, it could not thereafter be usucaptured.

Without date or consul.

[7] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Pecudes.* One who knowingly sells another's slave without the consent of the owner commits theft. That defect in the property, even though it was possessed in good faith, prevents usucaption before possession returns to the owner.

Given February 9, in the consulship of the Caesars (294).

[8]⁹⁰ *The same Augusti and Caesars to Severus.* Those who have just cause for possession by reason of a settlement (*transactio*) are able to usucapt.

⁹⁰ Possibly to be combined with C. 4.38.9, given March 25, 294, at Sirmium.

[9] *Idem AA. et CC. Gaio.* Eum, qui a pupillo sine tutoris auctoritate distrahente comparavit, nullum temporis spatium defendit. sed si locupletior factus emptoris pecunia post pubertatem occasionem iuris ad iniquum trahat compendium, doli mali submovebitur exceptione.

S. VIII id. Dec. CC. cons.

XXVII De Usucapione pro Donato

[1] *Imp. Alexander A. Macedonio.* Sive fuit dominus, qui tibi loca de quibus supplicasti donavit, sive a non domino bona fide donata suscepisti eaque usucepisti, auferri tibi quod iure quaesitum est non potest.

PP. v id. Mart.

[2] *Imp. Diocletianus et Maximianus AA. et CC. Capioni.* Donantem ancillam alienam nihil domino deminuere non est ambigui iuris: furtum etiam contrahere citra voluntatem domini contractantem, ut eius rei nec usucapio possit procedere.

S. v id. April. AA. cons.

[3] *Idem AA. et CC. Rhodano.* Irritam facere donationem perfectam nemini licet. utque hoc verum est, sic error falsae causae ratione fidei bonae non defenditur. quod et in dominio pro usucapione quaerendo servatur.

XXVIII De Usucapione pro Dote

[1] *Imp. Alexander A. Taurino.* Res mobiles in dotem datae, quamvis alienae, si sine vitio tamen fuerunt, a bona fide accipiente pro dote usucapiuntur.

[9]⁹¹ *The same Augusti and Caesars to Gaius.* No passage of time protects a person who has purchased something from a minor ward who was alienating (the property) without the authorization of a *tutor*. But if, upon reaching puberty, the youth has been enriched by the money of the buyer and turns the legal situation into a chance for unjust enrichment, he will be defeated by the defense of malicious intent (*exceptio doli mali*).

Subscribed December 6, in the consulship of the Caesars (294).

Twenty-Seventh Title Usucapion Pursuant to a Gift⁹²

[1] *Emperor ALEXANDER Augustus to Macedonius.* Whether it was the owner who gave you the places about which you petitioned, or you received them as a donation in good faith from a non-owner and usucapted them, they cannot be taken from you because they were lawfully acquired.

Posted March 11.

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Capito.* The law is clear that one who gives away another's female slave takes nothing from the rights of the owner. In fact, a man who handles property to make contracts without the owner's consent commits theft, and no prescription (of lapse of time) can apply thereto.

Written April 9, in the consulship of the Augusti (293).

[3] *The same Augusti and Caesars to Rhodanus.* No one has power to annul a completed gift. And just as that is true, so, too, a mistake caused by a false cause (for obtaining possession) is not cured by good faith. This applies to acquisition of ownership by usucapion.

Twenty-Eighth Title Usucapion Pursuant to a Dowry⁹³

[1] *Emperor ALEXANDER Augustus to Taurinus.* Movable property given in a dowry may be usucapted by one who receives it in good faith as a dowry, even if it belongs to someone else, provided there was no defect otherwise.

⁹¹ = C. 5.59.3, which omits the second sentence.

⁹² See D. 41.6.

⁹³ See D. 41.9.

XXVIII De Usucapione pro Herede

[1] *Imp. Antoninus A. Zoilo.* Cum pro herede usucapio locum non habeat, intellegis neque matrem tuam, cui heres extitisti, neque te usu mancipia ex ea causa capere posse.

PP. VII k. Iul. Romae Laeto et Cereale cons.

[2] *Imp. Diocletianus et Maximianus AA. et CC. Marinae.* Nihil pro herede posse usucapi suis existentibus heredibus obtinuit.

PP. v k. Febr. AA. cons.

[3] *Idem AA. et CC. Diocletiano.* Opinione falsa mortis pro herede possessio rerum absentis procedere non potest.

[4] *Idem AA. et CC. Serapioni.* Usucapio non praecedente vero titulo procedere non potest nec prodesse neque tenenti neque heredi eius potest, nec obtentu velut ex hereditate, quod alienum fuit, domini intentio ullo longi temporis spatio absumitur.

D. VII k. Ian. CC. cons.

XXX Communia de Usucapionibus

[1] *Imp. Alexander A. Sabino.* Qui ex conducto possidet, quamvis corporaliter teneat, non tamen sibi, sed domino rei creditur possidere. neque enim colono vel conductori praediorum longae possessionis praescriptio quaeritur.

PP. VII k. April. Alexandro A. II et Marcello cons.

**Twenty-Ninth Title Usucapion by One Acting in
Place of the Heir⁹⁴**

[1] *Emperor ANTONINUS Augustus to Zoilus.* Since usucapion by one acting in place of the heir (*pro herede usucapio*) is not permissible, neither your mother, whose heir you are, nor you yourself can acquire slaves by such method.

Posted June 25, at Rome, in the consulship of Laetus and Cerealis (215).

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Marina.* The law is that when there are heirs, nothing can be usucapted by one acting in place of the heir.

Posted January 28, in the consulship of the Augusti (293).

[3] *The same Augusti and Caesars to Diocletianus.* Possession as heir of the property of an owner who is absent and falsely believed dead cannot be valid.

[4] *The same Augusti and Caesars to Serapio.* In the absence of good title usucapion cannot occur, nor can it benefit either the possessor or his heir. Furthermore, the pretense that another's property was part of an inheritance does not bar the owner's claim regardless of how long a span of time it was held.

Given December 26, in the consulship of the Caesars (294).

Thirtieth Title General Rules of Usucapion⁹⁵

[1] *Emperor ALEXANDER Augustus to Sabinus.* If someone holds possession under a lease, although he has physical control of the thing, he is thought to possess it not for himself but for its owner. Therefore a tenant farmer (*colonus*) or lessee of real properties (*conductor praediorum*) may not sue for prescriptive acquisition through long-term possession.

Posted March 26, in the consulship of Alexander Augustus, for the second time, and Marcellus (226).

⁹⁴ See D. 41.5. Blume: "Formerly any person might take possession of an inheritance when no heir had done so and acquire title by prescription within one year. Gaius 2.52–3. Neither good faith nor color of title was required. The reason for such speedy acquisition of title in this manner was, as Gaius 2.55 tells us, that the ancients wished heirs to enter on an inheritance with all speed, so that they might perform the sacred rites for the deceased, and so that creditors might have someone who would satisfy their claims. But a senate decree was passed under Hadrian prohibiting the acquisition of a prescriptive title in this manner against the true heir. Gaius 2.57. A person might, however, take possession as heir and acquire a prescriptive title against persons who were not in fact heirs."

⁹⁵ See D. 41.3; Inst. 2.6.

[2] *Idem A. Onesimae.* Iam pridem quidem Mancipium, de quo supplicas, comparasse te dicis: sed si cogitaveris fisci mei rem usucapi non posse, respondere te actionibus fisci mei intellegis nec alias posse proprietatem obtinere, quam si non ex ancilla fiscali natum fuisse constiterit.

PP. non. Mart. Pompeiano et Peligno cons.

[3] *Imp. Alexander A. Pantherio.* Si mala fide servum tuum sciens Antiochus tenuit, intentionem tuam contra successorem eius, licet bona fide possidet, propter initii vitium usucapio non absumpsit.

XXXI De Usucapione Transformanda et de Sublata Differentia Rerum Mancipi et Nec Mancipi

[1] *Imp. Iustinianus A. Iohanni pp. pr.* Cum nostri animi vigilantia ex iure Quiritum nomen et substantiam sustulerit et communes exceptiones in omni loco valeant, id est decem vel viginti vel triginta annorum vel si quae sunt aliae maioris aevi continentes prolixitatem, satis inutile est usucapionem in Italicis quidem solis rebus admittere, in provincialibus autem recludere. sed et si quis res alienas, Italicas tamen, bona fide possidebat per biennium, miseri rerum domini excluderentur et nullus eis ad eas reservabatur regressus. quae et nescientibus dominis procedebant: quo nihil inhumanius erat, si homo absens et nesciens tam angusto tempore suis cadebat possessionibus.

1. Ideo per praesentem legem et in Italicis solis rebus, quae immobiles sunt vel esse intelleguntur, sicut annalem exceptionem, ita et usucapionem transformandam esse censemus, ut tantummodo et hic decem vel viginti annorum vel triginta et aliarum exceptionum tempora currant, huiusmodi angustiis penitus semotis.

2. Cum autem antiqui et in rebus mobilibus vel se moventibus, quae fuerant alienatae vel quocumque modo, bona fide tamen, detentae, usucapionem extendebant, non in Italico solo nexu, sed in omnem orbem terrarum, et hanc annali tempore concludebant, et eam duximus esse

[2] *The same Augustus to Onesima.* You say that you bought the slave mentioned in your petition a long time ago. But if you stop to think that no property belonging to my Treasury (*fisci mei res*) can be usucapted, you will realize that you must answer in the action brought by the Treasury, and that you could not gain ownership unless it happens that he was not born of a female slave belonging to the Treasury.

Posted March 7, in the consulship of Pompeianus and Pelignus (231).

[3] *The same Augustus to Pantherius.* If Antiochus knowingly had possession of your slave in bad faith, your claim against his heir is not barred by usucaption even if he possessed the slave in good faith, for the beginning (of his possession) was flawed.

**Thirty-First Title The Transformation of Usucaption,
and Eliminating the Distinction between *Res Mancipi* and
*Res Nec Mancipi***

[1]⁹⁶ *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* Since the vigilance of Our Mind abolished the name and substance of Quiritary right,⁹⁷ and the common defenses (*exceptiones*) are valid in every place – that is to say those relating to the lapse of ten, twenty, and thirty years, and those relating to the lapse of a still greater period – it is not beneficial that usucaption should exist as to Italic land but should be precluded from provincial land. Moreover, if a man in good faith had possession of another's property that was Italic for a period of two years, the unfortunate owners of the property were barred without any right to reclaim it. And this used to happen to owners even without their knowledge. There was nothing more cruel than that a man who was absent and without knowledge should lose his possessions by the lapse of such a short period of time.

1. We therefore ordain through this present law that both the one-year defense and also usucaption should be transformed for property on Italic land which is either immovable or interpreted as such. In this way here too the time period of ten or twenty or thirty years or of other defenses must lapse, and the brief period should be entirely abolished.

2. But the ancients also used to extend the application of usucaption to things movable and self-moving that were transferred or held (*detentae*) in some fashion, provided it was in good faith, and they used to fix the period for such usucaption at one year not just in connection with Italic land but anywhere in the world. We have thought it best to correct this too, so that, if a man in good

⁹⁶ Combine with C. 3.34.13.

⁹⁷ C. 7.25.1.

corrigendam, ut, si quis alienam rem mobilem seu se moventem in quacunque terra sive Italica sive provinciali bona fide per continuum triennium detinuerit, is firmo iure eam possideat, quasi per usucapionem ei adquisitam.

3. Hoc tantummodo observando, ut in his omnibus casibus ab initio bona fide eam capiat, secundum quod exigit longi temporis praescriptio, et ut continuetur ei possessio etiam anterioris iusti possessoris et connumeretur in decennium vel viginti annorum spatium vel triennium, quod in rebus mobilibus observandum esse censemus, ut in omnibus iusto titulo possessionis antecessoris iusta detentio, quam in re habuit, non interrumpatur ex posteriore forsitan alienae rei scientia, licet ex titulo lucrativo ea coepta est. 4. Ita etenim ampliatur quidem longi temporis materia, quae ei subdita est, minuitur autem usucapionum compendiosa dominis iactura et eius iura nocentia. 5. Cum etiam res dividi mancipi et nec mancipi sane antiquum est et merito antiquari oportet, sit et rebus et locis omnibus similis ordo, inutilibus ambiguitatibus et differentiis sublatis.

D. xv k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

XXXII De Adquirenda et Retinenda Possessione

[1] *Impp. Severus et Antoninus AA. Attico.* Per liberam personam ignorantique quoque adquiri possessionem et, postquam scientia intervenerit, usucapionis condicionem inchoari posse tam ratione utilitatis quam iuris pridem receptum est.

PP. vi k. Dec. Dextro II et Prisco cons.

[2] *Imp. Alexander A. Gauro.* Minus instructus est, qui te sollicitum reddidit, quasi in vacuum possessionem eius, quod per procuratorem emisti, non sis inductus, cum ipse proponas diu te in possessione fuisse omniaque ut dominum gessisse. licet enim instrumento non sit comprehensum, quod tibi tradita sit possessio, ipsa tamen rei veritate id consecutus es, si sciente venditore in possessione fuisti.

faith holds another's movable or self-moving property on any land, whether Italic or provincial, for a continuous period of three years, he shall have it in his own right as having been acquired by usucapion.

3. This only must be complied with, namely, that in all cases he takes possession in good faith from the beginning in keeping with the requirement of long time prescription, and that his possession follow immediately upon that of a previous just possessor, and that it be counted in a ten- or twenty-year period, or alternatively a three-year period – which We ordain should be observed in connection with movable property – so that in all cases the just holding (*detentio*) of property which a predecessor had based on a just title shall not be interrupted by the later knowledge that the property might belong to another, even if the possession initially arose as a result of a gift. 4. In this manner, the subject matter of long time (prescription) and that which is subject to it is increased, while the many losses to owners from short term usucapion and its pernicious rights are diminished. 5. Likewise, since the division of property into *res mancipi* and *res nec mancipi* is ancient and should justly be superannuated, the same rule should apply both to things and to all places, and useless ambiguities and distinctions should cease.

Given October 18, at Constantinople, in the consulship of Lampadius and Orestes (531).

Thirty-Second Title Acquiring and Retaining Possession⁹⁸

[1] *Emperors SEVERUS and ANTONINUS Augusti to Atticus.* Expediency (*utilitas*) dictates, and the law has long permitted, that possession may be acquired through a free person even for a man who has no knowledge thereof, and that the condition for usucapion may start after knowledge (of such possession) is obtained.

Posted November 26, in the consulship of Dexter, for the second time, and Priscus (196).

[2] *Emperor ALEXANDER Augustus to Gaurus.* The man who made you fearful that you were not brought into quiet possession of the property which you bought through a procurator is not well informed. For you yourself state that you have long been in possession and have been managing everything as owner. Although the document of purchase did not state that possession was delivered to you, still you obtained it by the truth of the matter if you were in possession and the seller knew this.

⁹⁸ See D. 41.2.

[3] *Imp. Decius A. Rufo.* Donatarum rerum a quacumque persona infanti vacua possessio tradita corpore quaeritur. quamvis enim sint auctorum sententiae dissentientes, tamen consultius videtur interim, licet animi plenus non fuisset adfectus, possessionem per traditionem esse quaesitam: alioquin, sicuti viri consultissimi Papiniani responso continetur, ne quidem per tutorem possessio infanti poterit adquiri.

PP. v k. April. Decio A. II et Grato cons.

[4] *Impp. Diocletianus et Maximianus AA. Nepotianae.* Licet possessio nudo animo adquiri non possit, tamen solo animo retineri potest. si igitur desertam praediorum possessionem non derelinquendi adfectione transacto tempore non coluisti, sed ex metus necessitate culturam eorum distulisti, praeiudicium tibi ex transmissi temporis iniuria generari non potest.

PP. k. Aug. ipsis IIII et III AA. cons.

[5] *Idem AA. Mennoni.* Cum nemo causam sibi possessionis mutare possit proponasque colonum nulla extrinsecus accedente causa ex colendi occasione ad iniquae venditionis vitium esse prolapsum, praeses provinciae inquisita fide veri domini tui ius convelli non sinet.

[6] *Idem AA. et CC. Valerio.* Si nulla iusta ex causa ingressum agrum sive vineas eum cuius meministi praeses reppererit nec ulla praescriptione vestra interpellatur petitio, restituere te possessioni cum omni causa non dubitabit.

S. id. April. AA. cons.

[7] *Idem AA. et CC. Asyncrito.* Improbata possessio firmum titulum possidendi nullum praestare potest. unde ingredientem in vacuum possessionem alieni fundi non consentiente domino vel actore, qui eius rei concedendi potestatem habuit, causam iustam possessionis adipisci non potuisse certum est.

PP. v id. Dec. AA. cons.

[3] *Emperor DECIUS Augustus to Rufus.* Quiet possession of property gifted to a small child (*infans*) by any person is acquired when it is transferred physically (*corpore*). Indeed, although the opinions of authorities differ, it nevertheless seems preferable that possession is obtained through transfer even if there was no fully formed sentiment of intent (*animi plenus adfectus*). Otherwise, as stated in the response of the learned Papinian, legal possession could not be acquired for a small child even through a tutor.

Posted March 28, in the consulship of Decius Augustus, for the second time, and Gratus (250).

[4] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Nepotiana.* Although possession as owner cannot be acquired by mere intent (*nudo animo*), it may nevertheless be retained by intention alone (*solo animo*). Therefore, if you failed to cultivate estates, which you left deserted for a period now passed, without any intention to abandon them, but you simply deferred their cultivation through the compulsion of some fear (*necessitate metus*), no prejudice can arise against you because of the injustice of a bygone time (*ex transmissi temporis iniuria*).

Posted August 1, in the consulship of the same Augusti, for the fourth and third time (290).

[5] *The same Augusti to Mennon.* Since no one by himself can change the legal basis upon which he holds possession, and you state that your tenant (*colonus*), without any intervening title but through the mere occasion of his cultivation of the property, committed the wrongful act of selling it, the provincial governor, after inquiry into the true facts, will not permit you to be deprived of ownership of the property.

[6]⁹⁹ *The same Augusti and the Caesars to Valerius.* When the governor learns that the man you mention invaded your field or vineyards without lawful title, and your claim is not interrupted by prescription, he will not hesitate to restore its possession and all its belongings to you.

Written April 13, in the consulship of the Augusti (293).

[7] *The same Augusti and Caesars to Asyncritus.* Dishonest possession gives no firm title for possession. Hence it is certain that, if someone invaded the quiet possession of another's farm without the consent of the owner or manager who had the power to grant rights over it, he was not able to acquire just cause for his possession.

Posted December 9, in the consulship of the Augusti (293).

⁹⁹ Possibly to be combined with C. 6.2.10.

[8] *Idem AA. et CC. Cyrillo.* Per procuratorem utilitatis causa possessionem et, si proprietas ab hac separari non possit, dominium etiam quaeri placuit.

PP. XVIII k. Mart.^{iv} Sirmi CC. cons.

[9] *Idem AA. et CC. Sergio.* Nec ex vera venditione possessionem, quam non fuerat emptor adeptus, improbe retinere potest: ac multo minus is, qui adseveratione falsa velut emptor, cum sine obligatione pignoris pecuniam mutuo dedisset, fundum inrumpens alienum retinendi iustam habet causam.

P.P. III non. April. Sirmi CC. cons.

[10] *Imp. Constantinus A. ad Maternum.* Nemo ambigit possessionis duplicem esse rationem, aliam quae iure consistit, aliam quae corpore, utramque autem ita demum esse legitimam, cum omnium adversariorum silentio ac taciturnitate firmetur: interpellatione vero et controversia progressa non posse eum intellegi possessorem, qui, licet corpore teneat, tamen ex interposita contestatione et causa in iudicium deducta super iure possessionis vacillet ac dubitet.

PP. XI k. Febr. Triveris Volusiano et Anniano cons.

[11] *Imp. Arcadius et Honorius AA. Petronio vicario Hispaniarum.* Vitia possessionum a maioribus contracta perdurant et successorem auctoris sui culpa comitatur.

D. XV k. Ian. Mediolano Caesario et Attico cons.

[12] *Imp. Iustinianus A. Iohanni pp. pr.* Ex libris Sabinianis quaestionem in divinas nostri numinis aures relatam tollentes definimus, ut, sive servus sive procurator vel colonus vel inquilinus vel quispiam alius, per quem licentia est nobis possidere, corporaliter nactam possessionem cuiuscumque rei eam dereliquerit vel alii prodiderit, desidia forte vel dolo, ut locus aperiatur alii eandem possessionem detinere, nihil penitus domino praeiudicium generetur, ne ex aliena malignitate alienum damnum emergat, sed et ipse, si liberae condicionis est, competentibus actionibus subiugetur, omni iactura ab eo restituenda domino rei vel ei, circa quem neglegenter vel dolose versatus est.

1. Sin autem necdum sub manibus procuratoris vel coloni vel inquilini vel servi possessio facta est, sed ipse eam accipere desidia vel dolo

^{iv} XVI k. Mart. (Mommson)

[8] *The same Augusti and Caesars to Cyrillus.* For the sake of expediency, it is agreed that possession may be acquired through a procurator, and if ownership cannot be separated from possession, it too may be acquired thus.¹⁰⁰

Posted February 14, at Sirmium, in the consulship of the Caesars (294).

[9] *The same Augusti and Caesars to Sergius.* Even pursuant to a true sale, a buyer cannot dishonestly retain possession which he never obtained. But so much the less does someone have a lawful cause of detention if he invaded someone else's farm after pretending to be a buyer under a false claim, when he lent money without demanding (the farm as) a pledge.

Posted April 3, at Sirmium, in the consulship of the Caesars (294).

[10] *Emperor CONSTANTINE Augustus to Maternus.* No one doubts that the basis of possession is twofold: the first aspect exists through law, the second through physical occupation; both are ultimately legal only when confirmed by the silence and muteness of all adversaries. Hence, while a suit and controversy is pending, a man cannot be considered to have possession who, though he has physical control, is uncertain and doubtful as to his right of possession by reason of the suit and the joinder of issue.

Posted January 22, at Trier, in the consulship of Volusianus and Annianus (314).

[11] *Emperors ARCADIUS and HONORIUS Augusti to Petronius, Vicar of the Spanish diocese.* Defects in possession initiated by predecessors continue, and fault follows the successor of the person who initiated it.

Given December 18, at Milan, in the consulship of Caesarius and Atticus (397).

[12] *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* Settling a dispute contained in the books of Sabinus and brought to the ears of Our Divine Majesty, We order that if a slave, procurator, bound or resident tenant (*colonus vel inquilinus*), or anyone else through whom possession may be acquired, either abandons the physical possession of any property or turns it over to someone else, whether negligently or deceitfully, so that opportunity is given to another to take possession, no prejudice shall result to the owner. Damages should not be inflicted on one man through the evil intention of another, but he himself will, if free, be subject to proper actions, and must make good all loss to the owner or to him toward whom he acted negligently or deceitfully.

1. But if possession has not yet come into the hands of the procurator, bound or resident tenant, or slave, but he neglects to accept it, whether through sloth

¹⁰⁰ See C. 4.27.1.

supersedit, tunc ipse qui eum transmisit ex mala sua electione praeiudicium circa possessionem patiat, ex memoratarum personarum vel machinatione vel negligentia accedens. 2. Hoc etenim tantummodo sancimus, ut dominus nullo modo aliquod discrimen sustineat ab his quos transmiserit, non ut etiam lucrum sibi per eos adquirat, cum et antiqua regula, quae definivit deteriore conditionem per servum domini nullo fieri modo, tunc locum habet, cum de damno dominus periclitetur, non cum sibi lucrum per servum adquiri desiderat: salva videlicet et in hoc casu domino rei vel ei, qui ad eam detinendam praefatas transmiserit personas, adversus eas omni actione, si qua ex legibus ei competit servata.

XXXIII De Praescriptione Longi Temporis Decem vel Viginti Annorum

[1] *Imp. Severus et Antoninus AA. Iuliano pp. pr.* Cum post motam et omissam quaestionem res ad nova dominia bona fide transierint et exinde novi viginti anni intercesserint sine interpellatione, non est inquietanda quae nunc possidet persona, quae sicut accessione prioris domini non utitur, qui est inquietatus, ita nec impedienda est, quod ei mota controversia sit. 1. Quod si prior possessor inquietatus est, etsi postea per longum tempus sine aliqua interpellatione in possessione remansit, tamen non potest uti longi temporis praescriptione. 2. Quod etiam in re publica servari oportet.

D. III et Antonino AA. cons.

[2] *Imp. Diocletianus et Maximianus AA.* Longi temporis praescriptio his, qui bona fide coeptam possessionem continuatam nec interruptam inquietudine litis tenuerunt, solet patrocinari.

PP. v k. Dec. Maximo II et Aquilino cons.

[3] *Idem AA. et CC. Antonio.* Si vineae, quas mater tua vitrico in dotem dedit, tuae proprietatis sunt nec ulla praescriptio ex transacti temporis prolixitate adolevit, praeses provinciae restitui tibi eas efficiet.

or deceit, then the man who sent him to take possession must suffer the loss as to his possession as the result of his bad selection (of an agent) and thus yield to the trickery or negligence of the previously listed persons. 2. For We ordain only that an owner shall suffer no loss through the agents whom he has sent, not that he may also make a profit through them. Indeed, the ancient rule which holds that the condition of the master shall not be made worse by a slave also applies only when the master is in danger of loss, not when he seeks to make a profit through his slave. But, even in this case, every action permissible by the laws is to be preserved for the owner of the property or for the one who sent the previously listed persons with the purpose of gaining possession.

<Without subscription (531-533).>

Thirty-Third Title Long-Time Prescription of Ten or Twenty Years

[1] *Emperors SEVERUS and ANTONINUS Augusti to Julian, Praetorian Prefect.* pr. When, after a dispute has been raised and abandoned, the property passes to a new owner in good faith, and from then on a new period of twenty years elapses without interruption, the person who now possesses it should not be disturbed. Just as he does not seek to join his possession to that of the prior owner who was disturbed, so also he should not be prejudiced because a dispute was raised against his predecessor. 1. But if the prior possessor is disturbed, although he thereafter remains in possession for a long time without interruption, he cannot benefit from long-time prescription. 2. This rule applies to a municipality as well.

Given in the consulship of [Severus], for the third time, and Antoninus, Augusti (202).

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti.* Long-time prescription usually protects those who have held possession that was begun in good faith and that continued and was not interrupted by the disturbance of a suit.

Posted November 27, in the consulship of Maximus, for the second time, and Aquilinus (286).

[3] *The same Augusti and the Caesars to Antonius.* If the vineyards which your mother gave to your stepfather as a dowry belong to you, and the time elapsed has not ripened into completed prescription, the provincial governor will cause them to be restored to you.

<Without subscription (293).>

[4] *Idem AA. et CC. Hermo.* Diutina possessio iure tantum successionis sine iusto titulo obtenta prodesse ad praescriptionem hac sola ratione non potest.

PP. IIII id. April. AA. cons.

[5] *Idem AA. et CC. Sotericho.* Nec petentem dominium ab eo, cui petentis solus error causam possessionis sine vero titulo praestitit, silentii longi praescriptione depelli, iuris evidentissimi est.

S. Sirmi XI k. Mai. AA. cons.

[6] *Pars epistolae Diocletiani et Maximiani AA. et CC. ad Primosum praesidem Syriae.* Si fraude et dolo, licet inter maiores annis, facta venditio est, hanc confirmare non potuit consequens tempus, cum longi temporis praescriptio in malae fidei contractibus locum non habeat.

Accepta.

[7] *Idem AA. et CC. Anthaeae.* Longi temporis praescriptione munitis instrumentorum amissio nihil iuris aufert nec diuturnitate possessionis partam securitatem maleficium alterius turbare potest.

D. prid. k. Ian. AA. cons.

[8] *Idem AA. et CC. Celso. pr.* Si is contra quem supplicas matris tuae quondam mancipia quasi filius ex causa tantum adoptionis defendit, adfectio destinatae illicitae adoptionis ad horum dominium ei quaerendum sola non sufficit. 1. Quapropter mancipia petere non prohiberis nullam timens temporis praescriptionem, si hoc tantum initio procedente is contra quem supplicas horum possessionem adeptus est.

[9] *Idem AA. et CC. Demostheni.* Emptor bona fide contra praesentem decennii praescriptione, cuius initio contestationem haberi sufficit,

[4] *The same Augusti and Caesars to Hermus.* Lasting possession alleged only pursuant to the right of succession as heir without any just title (*sine iusto titulo*) cannot alone serve as a basis for prescription.

Posted April 10, in the consulship of the Augusti (293).

[5] *The same Augusti and Caesars to Soterichus.* The law is very plain that one who claims ownership from another, to whom without just title only an error of the claimant gave any ground for his possession, cannot be defeated by prescription of a long quietude.

Written April 21, at Sirmium, in the consulship of the Augusti (293).

[6] *Part of a letter of DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Primosus, Governor of Syria.* If a sale was made through fraud and deceit, even though among persons of the age of legal majority, the subsequent time could not confirm it since long-time prescription does not apply to contracts made in bad faith.

Received (293).

[7] *The same Augusti and Caesars to Anthea.* Loss of documentation does not prejudice the right of parties who are protected by long-time prescription, nor can the wicked act of another disturb the security acquired by length of possession.

Given December 31, in the consulship of the Augusti (293).

[8] *The same Augusti and Caesars to Celsus. pr.* If the man against whom you complain lays claim to the former slaves of your mother as if he were her son, but only on the grounds of adoption, her desire to effect an intended but illegal¹⁰¹ adoption does not of itself suffice for him to claim ownership of them. 1. Therefore you are not prohibited from suing for the slaves by fear of any prescription of time, provided that the man against whom you complain gained possession of them through this starting point alone.

<Without subscription (294).>

[9] *The same Augusti and Caesars to Demosithenes.* Against a person present (in the province, as a plaintiff), a buyer in good faith rightly demands to win his suit by using a defense of prescription of ten years. After the claimant has satisfied the premise of his claim, it is sufficient for there to be a declaration

¹⁰¹ In general women were prohibited from adopting, the exception being if they had lost their children, Inst. 1.11.10; C. 8.47.5; Gaius 1.104. Because the woman in question had a son, her intent to adopt another was barred.

posteaquam suam impleverit intentionem petitor, adhibita probatione iustae possessionis defensu^v absolvi recte postulat.

[10] *Idem AA. et CC. Regino.* Nec bona fide possessionem adeptis longi temporis praescriptio post moram litis contestatae completa proficit, cum post motam controversiam in praeteritum aestimetur.

PP. v id. Dec. CC. cons.

[11] *Imp. Iustinianus A. Menae pp.* Super longi temporis praescriptione, quae ex decem vel viginti annis introducit, perspicuo iure sancimus, ut, sive ex donatione sive ex alia lucrativa causa bona fide quis per decem vel viginti annos rem detinuisse probetur, adiecto scilicet etiam tempore prioris possessoris, memorata longi temporis exceptio sine dubio ei competat nec occasione lucrativae causae repellatur.

D. k. Iun. dn. Iustiniano PP. A. II cons.

[12] *Idem A. Iohanni pp. pr.* Cum in longi temporis praescriptione tres emergebant veteribus ambiguitates, prima propter res, ubi positae sunt, secunda propter personas, sive utriusque sive alterutrius praesentiam exigimus, et tertiae, si in eadem provincia vel si in eadem civitate debent esse personae tam petentis quam possidentis et res, pro quibus certatur: omnes praesentis legis amplectimur definitione, ut nihil citra eam relinquatur.

1. Sancimus itaque debere in huiusmodi specie utriusque personae tam petentis quam possidentis spectari domicilium, ut tam is qui domini vel hypothecae quaestionem inducit quam is qui res possidet domicilium in uno habeant loco, id est in una provincia. hoc etenim nobis magis eligendum videtur, ut non civitate concludatur domicilium, sed magis provincia, et si uterque domicilium in eadem habet provincia, causam inter praesentes esse videri et decennio agentem excludi. 2. De rebus autem, de quibus dubitatio est, nulla erit differentia, sive in

^v <defensus> posteaquam ... [defensus]

(*contestatio*) of the beginning of the prescriptive period along with proof of his just possession.¹⁰²

<Without subscription (294).>

[10] *The same Augusti and Caesars to Reginus.* Long-time prescription does not benefit those that acquire possession in good faith if it was completed after a delay in the joinder of issues, since it is reckoned backward from the commencement of a suit.¹⁰³

Posted December 9, in the consulship of the Caesars (294).

[11] *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect.* As to long-time prescription which applies after ten or twenty years, We ordain clearly by this enactment that, if it is proven that someone has held property in good faith for ten or twenty years pursuant to a donation or any kind of gift, and moreover the time of possession of any prior occupant is also joined to his own, the above-mentioned defense of prescription should suffice for him, nor shall he be defeated because the title is based on a gift.

Given June 1, in the consulship of Our Lord Justinian, Ever Augustus, for the second time (528).

[12] *The same Augustus to John, Praetorian Prefect. pr.* Three doubts arose among the ancients in connection with long-time prescription: the first as to the property and its location, the second as to the persons and whether the presence of one or both is required, the third whether the claimant and the possessor should personally be in the same province or in the same city territory as the property in dispute. We shall consider all of these questions in the present law, so that nothing will be left outside of its scope.

1. Therefore, We ordain that in a matter of this kind the domicile of both parties, both of the claimant and of the possessor, must be considered in order to establish whether the man who claims ownership or hypothecation as well as the man who is in possession of the property have their domicile in one place, that is to say, in the same province. And indeed it appears to Us preferable that the domicile to be considered should be circumscribed not by a city territory but by a province, and if both have their domicile in the same province, the case shall be considered as between persons who are present, and the claimant will be defeated by a prescription of ten years. 2. But in the case of properties concerning which there is some doubt, there shall be no

¹⁰² Blume: "This law appears to contemplate that the defense of prescription should be set up in the beginning of the suit. But, as appears from C. 8.35.9, that does not appear to have been absolutely necessary, since it was a defense in bar."

¹⁰³ See C. 3.32.26.

eadem provincia sint sive in vicina vel trans mare positae et longo spatio separatae.

3. Sin autem non in eadem provincia uterque domicilium habeat, sed alter in alia, alius in altera, tunc ut inter absentes causam disceptari et locum esse viginti annorum exceptioni. nihil enim prohibet, sive in eadem provincia res constitutae sint sive in alia, super his controversiam in iudicio provinciali moveri et multo magis in hac florentissima civitate. 3a. Quid enim prodest in ipsa provincia esse possessionem an in alia, cum ius vindicationis incorporale est et, ubicumque res positae sunt, et dominium earum et vinculum ad dominum vel creditorem possit reverti? ideo enim nostri maiores subtilissimo animo et divino quodam motu ad actiones et earum iura pervenerunt, ut incorporales constitutae possint ubicumque ius suum et effectum corporalem extendere.

3b. Sit igitur secundum hanc definitionem causa perfectissime composita et nemo posthac dubitet, neque inter praesentes neque inter absentes quid statuendum sit, ut bono initio et possessione tenentis et utriusque partis domicilio requisito sit expedita quaestio pro rebus ubicumque positis, nulla scientia vel ignorantia expectanda, ne altera dubitationis inextricabilis oriatur occasio. 4. Eodem observando et si res non soli sint, sed incorporales, quae in iure consistunt, veluti usus fructus et ceterae servitutes.

D. v k. Dec. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

XXXIII In Quibus Causis Cessat Longi Temporis Praescriptio

[1] *Impp. Diocletianus et Maximianus AA. Marcellinae.* Si is, cui colendum fundum dedisti, post instrumenta, quibus dominium ad te pertinere probari posset, per novercam tuam subtraxit, hoc solo praescriptione temporis defendi non potest.

[2] *Idem AA. et CC. Dionysio.* In servorum proprietatis negotio cum usucapio locum habeat, ad quaestionem longi temporis praescriptionis superfluo pervenitur.

differentiation whether they are in the same province, or in a neighboring one, or in places across the sea and separated by long distance.

3. If, however, both parties do not have their domicile in the same province, but one is in one, the other in another, the case shall be decided as one between absent persons, and the prescriptive period of twenty years applies. But there is nothing to prevent the parties from bringing an action as to the property in the provincial courts, let alone in this flourishing city, whether such property is located in the same province or not. 3a. For of what advantage would it be for the property to be in one province rather than in another when the right to sue for its ownership is incorporeal and its ownership or a lien on it may be returned to the owner or creditor wherever it may be located? In fact, for this reason Our forebears created actions and laws governing them with a logical and almost divinely inspired mind, so that these incorporeal rights might extend their power everywhere with corporeal effect.

3b. Let the matter, therefore, be definitely settled according to this provision, and let no one hereafter doubt as to how this question of presence or absence is to be decided, so that when the points of a good beginning of title, of the possession of the holder, and of the domicile of both parties have been examined, the suit may be settled as to property wherever situated, without further inquiry into knowledge or ignorance (of adverse possession), lest further occasion for inextricable doubt arise. 4. The same rules shall apply even if the property is not landed but is incorporeal, consisting of a right, such as usufructs and the other servitudes.

Given November 27, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Thirty-Fourth Title In What Cases Long Time Prescription Does Not Apply

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Marcellina.* If the man to whom you gave a farm for cultivation later stole, with the help of your step-mother, the documents that could prove ownership vested in you, through that alone he cannot be protected by the prescription of time.

[2]¹⁰⁴ *The same Augusti and the Caesars to Dionysius.* When usucapion is applied in a matter involving the ownership of slaves, inquiry into long-time prescription is superfluous.

¹⁰⁴ See C. 7.14.6, dated to April 25, 293.

[3] *Idem AA. et CC. Apollinario.* Unus individuum commune pro solido possidens intervallo temporis, quominus socius portionem vindicare vel eum communi dividundo iudicio provocare possit, non defenditur, cum neque familiae erciscundae iudicium neque communi dividundo actio excluditur longi temporis praescriptione.

III k. April. Sirmi CC. cons.

[4] *Idem AA. et CC. Liviae.* Hereditatem quidem petentibus longi temporis praescriptio nocere non potest. verum his, qui nec pro herede nec pro possessore, sed pro emptore vel donato seu alio titulo res quae hereditariae sunt vel fuerunt possident, cum ab his successio vindicari non possit, nihil haec iuris definitio noceat.

III id. Sept.

[5] *Idem AA. et CC. Zosimo.* Si puerum non pro derelicto habitum, sed ab hostibus vulneratum sumptibus tuis, sicut adseveras, liberum existimans curasti, longi temporis praescriptione, quominus dominus eius offerens erogata recte vindicet, defendi non potes.

XXXV Quibus Non Obiciatur Longi Temporis Praescriptio

[1] *Imp. Alexander A. Venuleio veterano.* Tempus expeditionis adversus petitiones, si quae competisse iuste probari possunt, praescriptionem non parit.

PP. VI non. Iul. Iuliano et Crispino cons.

[2] *Imp. Diocletianus et Maximianus AA. Aurelio archiatro. pr.* Cum per absentiam tuam eos, de quibus quereris, in res iuris tui intruisse adseveres teque ob medendi curam comitatu nostro discedere non posse palam sit, praefectus praetorio nostro accitis his quos causa contingit inter vos cognoscat. 1. Non necessario autem petis ex longi temporis diuturnitate praescriptionem tibi non opponi, quando iustae absentiae ratio et necessitatis publicae obsequium ab huiusmodi praeiudicio te defendat.

PP. XII k. Mart. Nicomediae Maximo II et Aquilino cons.

[3] *The same Augusti and Caesars to Apollinarius.* One who is in exclusive possession of property owned in common is not protected by lapse of time so as to prevent his co-owner from claiming his portion or suing him in an action of partition (*communi dividundo iudicium*), since neither an action to divide an inheritance (*familiae erciscundae iudicium*) nor the action to partition is barred by long-time prescription.

Given May 29, at Sirmium, in the consulship of the Caesars (294).

[4] *The same Augusti and Caesars to Livia.* Long-time prescription cannot injure those claiming an inheritance. But this provision of the law should not injure those who claim not as heir or as possessor, but are in possession of property, which belongs or belonged to an inheritance, as its purchaser, donee, or pursuant to another title, since an inheritance cannot be reclaimed from these.

September 11.

[5] *The same Augusti and Caesars to Zosimus.* If, as you assert, you cured at your expense a slave-boy who had not been abandoned but was wounded by the enemy, while you thought he was free, you cannot set up the defense of long-time prescription against his owner who reclaims him and offers you the amount paid out.

Thirty-Fifth Title Those Against Whom Long-Time Prescription Cannot Be Used as a Defense

[1] *Emperor ALEXANDER Augustus to Venuleius, a veteran.* The time during which a soldier is engaged in an expedition does not give rise to prescription against a claim of his that can be shown to be just.

Posted July 2, in the consulship of Julian and Crispus (224).

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Aurelius, Chief Physician. pr.* Since you assert that the men against whom you complain forcibly invaded property belonging to you during your absence, and since it is plain that you could not depart from Our (imperial) court on account of your duties as physician, Our Praetorian Prefect will summon the men in question and will try the dispute between you. 1. But you unnecessarily ask that the plea of long time prescription not be permitted to be set up against you, for justifiable absence and the performance of public duty protects you against any prejudice of this sort.

Posted February 18, at Nicomedia, in the consulship of Maximus, for the second time, and Aquilinus (286).

[3] *Idem AA. Numidio correctori Italiae.* Non est incognitum id temporis, quod in minore aetate transmissum est, in longi temporis praescriptione non computari. ea enim tunc currere incipit, quando ad maiorem aetatem dominus rei pervenerit.

PP. III id. Sept. ipsis III et III AA. cons.

[4] *Idem AA. et CC. Crispino.* Si possessio inconcussa sine controversia perseveraverit, firmitatem suam teneat obiecta praescriptio: quam contra absentes vel rei publicae causa vel maxime fortuito casu nequaquam valere decernimus.

PP. III k. Mart. Hannibaliano et Asclepiodoto cons.

[5] *Idem AA. et CC. Ianuario.* Neque mutui neque commodati aut depositi seu legati vel fideicommissi vel tutelae seu alii cuilibet personali actioni longi temporis praescriptionem obici posse certi iuris est.

S. k. Febr. AA. cons.

[6] *Idem AA. et CC. Doleo.* Ab hostibus captus ac postliminio reversus actione in rem directa vel qualibet alia dominium vindicando temporis adversarii possessionem frustra times, cum adversus eos, qui restitutionis auxilio quacumque ratione iuvantur, huiusmodi factum non opituletur.

VI id. Nov. Heracleae CC. cons.

[7] *Idem AA. et CC. Cassandro.* Praescriptione bona fide possidentes adversus praesentem annorum decem, absentem autem viginti muniuntur. quod tempus, si ex alicuius persona de petitorum parte restitutionis praetendatur auxilium, deducto eo, quo, si quid fuerit gestum, succurri solet, residuum computari rationis est.

[8] *Imp. Iustinianus A. Menae pp.* Sancimus his solis militibus, qui expeditionibus occupati sunt, ea tantummodo tempora, quae in eadem expeditione percurrunt, in exceptionibus declinandis opitulari: illis temporibus, per quae citra expeditionum necessitatem in aliis locis vel

[3] *The same Augusti to Numidius, Corrector of Italy.* It is not unknown that the time passed while one is a minor does not count toward long-time prescription. For the latter begins to run when the owner of the property comes of age.

Posted September 11, in the consulship of the same Augusti, for the fourth and third time (290).

[4] *The same Augusti and the Caesars to Crispinus.* If undisturbed possession has continued without controversy, a plea of prescription is valid. But We decree that it has no force against persons absent on public business or especially by reason of an act of chance (*fortuitus casus*).

Posted February 26, in the consulship of Hannibalianus and Asclepiodotus (292).

[5] *The same Augusti and Caesars to Januarius.* The law is certain that long-time prescription cannot be set up in an action on a loan (*mutuum*), loan for use (*commodatum*), deposit, legacy, trust, guardianship, or any other personal action (*actio personalis*).

Written February 1, in the consulship of the Augusti (293).

[6] *The same Augusti and the Caesars to Doleus.* Having been captured by the enemy and returned with the resumption of civil rights (*postliminium*), it is unnecessary for you to fear the long-time possession of your opponent when you bring a direct action *in rem* or some other action to recover ownership. For this fact offers no support against those who for some reason are benefited by the aid of restoration of rights (*restitutionis auxilio*).

Given November 8, at Heraclea, in the consulship of the Caesars (294).

[7] *The same Augusti and the Caesars to Cassander.* Good faith possessors are protected against those present in the province by a prescription of ten years and against those absent from the province by prescription of twenty years. If the claimant invokes the aid of restitution, the rule is that you deduct the time for which such aid is usually extended because of business done (for the public), then the remainder is counted (to make up the prescriptive period).

[8]¹⁰⁵ *Emperor JUSTINIAN to Menas, Praetorian Prefect.* We ordain that only soldiers engaged in an expedition may be aided by the time occupied in the expedition, and by that time alone, to defeat a defense (of prescription). The time during which they are not on expedition and while they live in other

¹⁰⁵ = C. 2.50.8 (April 8); combine with C. 6.21.17.

in suis aedibus degunt, minime eos ad vindicandum hoc privilegium adiuvantibus.

D. k. April. Constantinopoli Decio vc. cons.

XXXVI Adversus Creditorem

[1] *Imp. Gordianus A. Veneriae.* Diuturnum silentium longi temporis praescriptione corroboratum creditoribus pignus persequentibus inefficacem actionem constituit, praeterquam si debitores vel qui in iura eorum successerunt obligatae rei possessioni incumbant. ubi autem creditori a possessore longi temporis praescriptio obicitur, personalis actio adversus debitorem salva ei competit.

[2] *Imp. Diocletianus et Maximianus AA. et CC. Marcellae.* Si debitori heres non extitisti, sed iusta viginti annorum possessione collata in te donatio roborata est, neque personali actione, quia debitori non successisti, conveniri te iuris ratio permittit nec data pignori praedia post intervallum longi temporis tibi auferenda sunt, quando etiam praesentibus creditoribus decem annorum praescriptionem opponi posse tam rescriptis nostris quam priorum principum statutis probatum sit.

XXXVII De Quadriennii Praescriptione

[1] *Imp. Constantinus A. ad Orfitum.* Notum est a fisco quaestionem post quadriennium continuum super bonis vacantibus inchoandam non esse. additum etiam est et eos, qui nostra largitate nituntur, nulla inquietudine lacessendos nec his a fisco nostro controversiam commovendam, qui quoquo modo aut titulo easdem res possederint.

[2] *Imp. Zeno A. Aeneae comiti rerum privatarum. pr.* Omnes, qui quas-cumque res mobiles vel immobiles seu se moventes vel in actionibus aut quocumque iure constitutas a sacratissimo aerario comparaverint,

places or in their own houses, without being constrained by an expedition, will not avail them in claiming that privilege.

Given April 1, at Constantinople, in the consulship of Decius (529).

Thirty-Sixth Title (Prescription) Against a Creditor

[1] *Emperor GORDIAN Augustus to Veneria.* Extended silence, fortified by long-time prescription, renders an action by creditors suing for a pledge inefficacious, except when possession of the pledged property inheres in the debtors themselves or their heirs. But when the defense of long-time prescription is set up against the creditor by (an outside) possessor, a personal action against the debtor (on the debt) remains available.

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Marcella.* If you were not the debtor's heir, but a gift (of the property) to you is fortified by lawful possession of twenty years, neither does the rule of law permit suit against you in a personal action, since you did not succeed to the debtor as heir, nor are properties that were offered as a pledge to be taken from you after the lapse of this long time period, for it has been demonstrated both in Our rescripts and the statutes of former emperors that prescription of just ten years may be set up against creditors who are present in the province.¹⁰⁶

Thirty-Seventh Title Prescription of Four Years

[1] *Emperor CONSTANTINE Augustus to Orfitus.* It is known that no inquest can be initiated by Our Treasury concerning ownerless property (*bona vacantia*) after a continuous period of (possession of) four years.¹⁰⁷ It may also be added that those who base their case on a gift from Us must not be disturbed, nor must a dispute be raised by Our Treasury against those who hold such property in any manner or by any title.

[2] *Emperor ZENO Augustus to Aeneas, Count of the Privy Purse. pr.* All who acquired from the imperial treasury any movable, immovable, or self-moving

¹⁰⁶ Blume: "The statement in the two preceding laws that a hypothecary action, that is to say, an action by a pledgee or mortgagee of property to recover the pledged or mortgaged property in the hands of a third person may be barred in ten or twenty years, is confirmed by other laws in the Code, as C. 7.39.8 pr; C. 4.10.7; C. 8.13.7; C. 8.40.25; C. 8.44.19."

¹⁰⁷ Inst. 2.6.14 claims that Marcus set the period of prescription at five years and that Zeno (in the constitution that follows) set it at four. It is likely, then, that this constitution originally read "five" years, but was altered to "four" by the Justinianic editors. Seeck dates the constitution to March 28, 355.

eos quin etiam, quibus quaecumque res mobiles seu immobiles seu se moventes aut in actionibus vel quocumque iure constitutae munificentiae principalis nomine datae fuerint, omnibus pariter privilegiis, quae ex divinis sanctionibus inclitae recordationis Leonis et nostrae pietatis super certis patrimoniis antea emptores consecuti sunt, perpotiri et ita cunctos huiusmodi beneficiis seu privilegiis perfrui, tamquam si super singulis substantiis seu patrimoniis etiam nunc vel postea data fuisset huiusmodi dispositio: nec posse contra emptores praedictarum rerum factos iam vel futuros, vel contra eos, quibus super huiusmodi rebus largitas nostra delata est vel fuerit, aliquas actiones in rem domini vel hypothecae gratia vel in personam, civiles seu praetorias, vel ex legibus aut sacratissimis constitutionibus descendentes vel quaslibet alias, licet nominatim praesenti sanctione non sint comprehensae, moveri: data volentibus licentia intra quadriennium contra sacratissimum aerarium, si quas sibi competere actiones existimant, exercere, ita tamen, ut post elapsum quadriennium nec sacratissimum fiscum licere sibimet quibuslibet actionibus pulsare cognoscant.

1. Ad haec fiscalium rerum emptoribus cum ratione iustitiae consulentes iubemus, quotiens competens scrinium gestis intervenientibus distractarum rerum pretia sese deposuerit suscepisse, minime post huiusmodi solutae pecuniae depositionem emptores quasi non numeratis pecuniis molestari vel necessitatem isdem emptoribus imponi, licet non sollemnem consecuti fuerint securitatem, soluta fuisse pretia probare. sed cum sit in arbitrio pretia suscipientis minime deponere sese quod non accepit suscepisse, ita convenit nec emptores plenissimam ex huiusmodi depositione super pretii solutione securitatem consecutos ullum (sicut dictum est) ulterius probatione gravamen penitus formidare.

[3] *Imp. Iustinianus A. Floro comiti rerum privatarum et curatori dominicae domus et Petro viro illustri curatori divinae domus serenissimae Augustae et Macedonio viro illustri curatori et ipsi dominicae domus. pr.* Bene a Zenone divae memoriae fiscalibus alienationibus prospectum est, ne homines, qui ex nostro aerario donationis vel emptionis vel cuiuslibet alienationis titulo quicquam accipiunt, si quid circa contractum contrarium emergerit vel evictionis vel alterius inquietudinis gratia ad dominium vel hypothecam respiciens, aliquid sustineant

property, or property constituted in legal actions or by whatever right, as well as those who were gifted in the name of Our imperial munificence with whatever movable, immovable, or self moving property or property constituted in legal actions or by whatever right, shall hold it with all attendant privileges which buyers gained previously over certain patrimonies by the imperial sanctions of Leo of famous memory and of Our Own Piety. And all shall enjoy the benefits and privileges of that kind, the same as if such provision had been made now or in future as to individual properties or patrimonies. And no action *in rem*, claiming ownership or hypothecation, and no action *in personam*, civil or Praetorian, and no action stemming from any law or imperial constitution, and no other action, even if it might not be mentioned explicitly in this ordinance, shall be brought against any purchasers, past or future, of the aforesaid property, or against those who have benefited or shall benefit from Our largesse in respect to such properties. To those who wish, We grant permission to sue the imperial treasury within four years, if they think that they have any right of action, but they should know that they will not be permitted to sue the imperial treasury after the lapse of four years in any form of action.

1. In addition, in looking after the interests of purchasers of Treasury property by the rule of justice, We order that whenever the relevant bureau records in its paid accounts that it has received the price of the properties sold, after this manner of recording payment, the buyers are in no way to be bothered as if the money had not been paid or to be imposed with the necessity of proving that the price was paid, even if they did not obtain the customary receipt. For as it is hardly good judgment for the one who receives the price to record that he has received what he did not, so too it is proper that the buyers should fear no further burden of proof, as We said, when they obtained the fullest guarantee of having paid the price from the record itself.¹⁰⁸

[3] *Emperor JUSTINIAN Augustus to Florus, Count of the Privy Purse and Curator of the Imperial Patrimony, and to the vir illustris Petrus, Curator of the Patrimony of the Most Serene Augusta, and to the vir illustris Macedontus, also Curator of the Imperial Patrimony.* pr. Alienations by the Treasury (*fiscales alienationes*) were well protected by Zeno of sacred memory, so that men who received any property from Our Treasury by gift, purchase, or other conveyance should not sustain any loss if any adverse claims should be made against such contracts, looking either toward the eviction of such men or otherwise disturbing them under a claim of ownership or hypothecation: no actions should be brought against the parties who purchased,

¹⁰⁸ Lounghis *et al.* date to between 474 and 491.

detrimentum: sed adversus emptores quidem vel donationem accipientes vel per alios titulos alienationis quicquam detinentes minime quaecumque actiones moveantur, sed tantummodo contra aerarium usque ad quadriennium tantum, quo translapso neque adversus fiscum remaneat aliqua actio.

1. Sed scimus hoc quidem in fiscalibus alienationibus naviter observari, sed non simili modo rem fuisse observatam circa eas res, quae a sacratissimis imperatoribus non a fiscalibus rebus, sed ex privata eorum substantia procedunt. 1a. Quod satis inrationabile est. quae enim differentia introducit, cum omnia principis esse intellegantur, sive a sua substantia sive ex fiscali fuerit aliquid alienatum? eodemque modo et si a serenissima Augusta aliquid alienetur, quare non eadem utatur prerogativa? sed curatores nostri, per quos solemus substantiam nostram gubernare, necesse habeant in venditionibus rerum et evictionem et alia quae sunt privatae utilitatis pacta emptionalibus instrumentis addere vel quasdam tales obligationes in alienationum instrumentis agnoscere vel in permutationibus vel in transactionibus, si et hoc fuerit celebratum? 1b. Hoc enim est eorum, qui nec maiestatem imperialem agnoscunt et quantum inter privatam fortunam et regale culmen medium est, et nostros curatores, per quos res divinarum domuum aguntur, aliquibus iniuriis vel damnis adficere conantur.

1c. Quae omnia resecantes per hanc generalem et in perpetuum valituram legem sancimus omnes alienationes de aula procedentes, sive a nostra clementia sive a serenissima Augusta coniuge nostra sive ab his, qui postea digni fuerint nomine imperiali, sive iam alienatum quid est sive postea fuerit, sine omni inquietudine permanere, sive res eis per nosmet ipsos sive procuratores, ex epistalmate tamen nostro, fuerint adsignatae. 1d. Et nemo audeat eos, qui res accipiunt per quemcumque titulum alienationis sive mobiles sive immobiles seu se moventes vel iura incorporalia vel panes civiles, iudiciis adficere vel sperare aliquam contra eos esse sibi viam apertam, sed omnis aditus excludatur, omnis motus et spes huiusmodi petulantiae.

2. Sed adversus domos nostras habeant, intra quadriennium tamen, secundum imitationem fisci, quas existimant posse sibi competere actiones in rem vel hypothecariam, ut ex nostra iussione causa moveatur et competentem mereatur effectum. quod si quadriennium fuerit emensum, nec adversus nostram domum habeat quis quamcumque actionem.

received as a gift, or held such property under any other title of alienation, but (such actions might be brought) only against the Treasury, and only during a period of four years, beyond which no action remains even against the Treasury.

1. We know that this is zealously observed in alienations by the Treasury, but it has not been observed in like fashion in connection with property that originates with the most Sacred Emperors coming from their own private patrimony rather than Treasury property. 1a. That is surely irrational. For since all of it is understood to belong to the Emperor, what is the difference whether the property alienated is part of his private patrimony or belongs to the Treasury? Similarly, if something is alienated by the Most Serene Augusta, why should it not enjoy the same prerogative? And why should it be necessary for Our curators, through whom We are accustomed to manage Our property, in cases of property sales to add warranties against eviction and other agreements useful in connection with private contracts, or to acknowledge such obligations in documents of alienations, exchange or compromise, should such transactions occur? 1b. This is the mark of those who do not acknowledge the Imperial Majesty or the contrast between private fortune and Imperial Greatness, and who attempt to inflict injury and damage upon Our curators by whom the property of the imperial patrimony is managed.

1c. Correcting all these things, We ordain by this general and perpetually valid law, that all alienations coming from the imperial court – either from Our Clemency, or from the Most Serene Augusta, Our Consort, or from those who hereafter shall be worthy of the imperial name – shall remain valid and free of any disturbance regardless of whether the alienation has already been made or shall be made in future and of whether it was made by ourselves or by Our procurators, provided it is pursuant to an imperial commission. 1d. And no one shall dare to sue those who receive movable, immovable, or self-moving property, or any incorporeal rights, or civil bread rights (*panes civiles*) pursuant to any title of alienation, or to hope that any method to defeat them is open to them. Rather, may every approach be barred, as also every motion and expectation of such petulance.

2. But against Our Patrimony (*domos nostras*) let them have actions *in rem* or hypothecary actions, whichever they think pertinent to their cases, but only for up to four years, in keeping with the rules of the Treasury, in order that the case may be initiated according to Our command and may obtain an appropriate outcome. But if four years are permitted to pass, no one shall have any right of action against Our Patrimony.

3. Quia igitur multa scimus tam nosmet ipsos quam serenissimam Augustam coniugem nostram variis personis iam donasse et vendidisse et per alios titulos adsignasse, et maxime sacrosanctis ecclesiis et xenonibus et ptochotrophis et episcopis et monachis et aliis innumerabilibus personis, et eandem liberalitatem ex nostra substantia sive serenissimae coniugis nostrae esse confectam, sancimus etiam eos firmo iure habere quod consecuti sunt, ita ut contra illos quidem nulla moveatur actio, intra quadriennium autem ex praesenti die numerandum pateat omnibus aditus contra nostras divinas domos suas actiones super isdem rebus movere, scituris, quod praefato quadriennio finito neque adversus nostras domos aliquis eis reservetur regressus. 4. Cum enim multa privilegia Augusta fortuna meruit et in donationibus sine insinuatione gestorum omnem firmitatem habentibus et super rebus, quas pro tempore serenissimus princeps divinae Augustae constante matrimonio donaverit vel ipse a serenissima Augusta per donationis titulum consequatur, ut maneat ilico donatio plena, nullo alio adfirmationis tempore expectando, ita et hoc videatur imperiale esse privilegium. qui enim suis consiliis suisque laboribus pro toto orbe terrarum die noctuque laborant, quare non habeant dignam sua praerogativam fortuna?

5. Quae igitur pro Augusto honore et cautela res accipientium nostra statuit aeternitas, haec tam sublimitas tua quam ceteri omnes iudices nostri observare festinent, ex eo tempore valitura, ex quo nutu divino imperiales suscepimus infulas.

D. v k. Dec. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

XXXVIII Ne Rei Dominicae vel Templorum Vindicatio Temporis Exceptione Submoveatur

[1] *Impp. Valentinianus et Valens AA. ad Probum pp. Galliarum.* Saepenumero praeceptum est, ut servi atque liberti, colonique praeterea rei nostrae nec non etiam eorum suboles ac nepotes, quicumque de nostris possessionibus recessissent ac se ad diversa militiae genera contulissent, cingulo, in quo obrepserant fraudulenter, exuti, si ad aliquas fortasse transcenderint dignitates, omni temporis definitione submota nostro patrimonio redderentur.

D. xi k. Dec. Valentiniano et Valenta AA. cons.

3. And because We know that We ourselves and the Most Serene Augusta, Our Consort, have already given, sold or transferred by some other title much property, especially to the holy churches, guest-houses (*xenones*), almshouses (*ptochotrophia*), bishops, monks and innumerable other persons, and that such bounty came from Our Own Patrimony or that of Our Serene Consort, We ordain that such parties shall firmly hold what they obtained in such a way that no action may be brought against them. But within a four-year period to be reckoned from the present day, all shall have the opportunity to bring their actions against Our Imperial Patrimony, but should know that, once this four-year period has ended, no one has the right to recourse (even) against Our Patrimony. 4. For as the Imperial Fortune enjoys many privileges, both in regard to gifts which are valid without record of the transaction and in regard to property which the then Serene Emperor (*princeps*) gave during marriage to the deified Augusta, or which he himself received as a gift from the Most Serene Augusta, such gift being immediately valid without waiting to receive confirmation through any further lapse of time,¹⁰⁹ this too is part of the imperial privilege. For why should they who by their counsel and work labor day and night for the people of the whole earth not have a prerogative worthy of their fortune?

5. Your Sublimity, therefore, and all other judges shall hasten to observe what Our Eternity has decided for the Imperial Dignity and for the protection of the recipients of property, which shall be valid from the time that We, with God's approval, took the imperial crown.

Given November 27, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Thirty-Eighth Title Suits of Ownership for Imperial or Temple Property May Not be Barred through a Defense of Prescription¹¹⁰

[1] Emperors VALENTINIAN and VALENS, Augusti, to Probus, Praetorian Prefect of the Gauls. It has been often ordered that slaves and freedmen and bound tenants (*coloni*) belonging to imperial property, and their offspring and grandchildren, who have left Our possessions and have entered different kinds of public service shall be deprived of the rank (*cingulum*) into which they fraudulently crept, should they happen to have obtained any offices, and be returned to Our property, with any claims to prescription of time debarred.

Given November 21, in the consulship of Valentinian and Valens Augusti (365).¹¹¹

¹⁰⁹ See C. 5.16.26 (529 CE).

¹¹⁰ Blume: "The property of the temples referred to in the title was probably the property formerly belonging to the heathen temples, and confiscated for the benefit of the crown domain. See Gothofredus ad C.Th. 10.1.15."

¹¹¹ Seeck dates to October 13, 367.

[2] *Imppp. Valentinianus Theodosius et Arcadius AAA. Dextro comiti rerum privatarum.* Universas terras, quae a colonis dominicis iuris rei publicae vel iuris templorum in qualibet provincia venditae vel ullo alio pacto alienatae sunt, ab his, qui perperam atque contra leges eas detinent, nulla longi temporis praescriptione officiente iubemus restitui, ita ut nec pretium quidem iniquis comparatoribus reposcere liceat.

D. v non. Iul. Constantinopoli Valentiniano A. III et Eutropio cons.

[3] *Impp. Arcadius et Honorius AA. ad Paulum comitem domorum. pr.* Si qua usquam loca ad sacrum dominium pertinentia cuiuslibet temeritas occupavit, secundum veteris census fidem in sua iura retrahentur. 1. Rescripta igitur obreptionibus impetrata cum praescriptione longi temporis et novi census praeiudicio submovebit auctoritas tua, atque ita omnia suo corpori quae sunt avulsa restituet. neque enim incubatio diuturna aut novella professio proprietatis nostrae privilegium abolere poterit.

D. v k. April. Constantinopoli Arcadio IIII et Honorio III AA. cons.

XXXVIII De Praescriptione XXX vel XL Annorum

[1] *Impp. Diocletianus et Maximianus AA. Arrianae. pr.* Cum adseveras te absente eos, qui oculos praediis tuis imposuerant, operam dedisse, ut annonariae collationis praetextu vili pretio ab officio praesidali praedia tua distraherentur, si legitimi temporis spatium ex venditionis die fluxit, qui provinciam regit inter vos cognoscet et, quod publico iure praescriptum est, statuet. 1. Si autem nondum ex die publicae venditionis legitimum tempus transmissum sit, iudex examinatis adlegationibus tuis quod rei qualitas dictaverit sequetur, non ignarus, si iniustam esse emptionem perspexerit, pretium, quod pro vitioso contractu datum est, secundum principalium statutorum tenorem mala fide emptoribus restitui non oportere.

[2] *Impp. Valentinianus et Valens AA. ad Volusianum pu. pr.* Male agitur cum dominis praediorum, si tanta precario possidentibus praerogativa

[2] *Emperors VALENTINIAN, THEODOSIUS, and ARCADIUS Augusti to Dexter, Count of the Privy Purse.* We order that all municipal or temple lands in any province which have been sold or in any manner alienated by bound tenants (*coloni*) of the Emperor shall be restored by those who detain them wrongfully and contrary to law, without bar of long-time prescription, and fraudulent purchasers shall not even have the right to demand back the price.

Given July 3, at Constantinople, in the consulship of Valentinian Augustus, for the third time, and Eutropius (387).

[3]¹¹² *Emperors ARCADIUS and HONORIUS Augusti to Paulus, Count of the Private Estate.* *pr.* If anyone has rashly occupied any places belonging to the Sacred Imperial Property (*sacrum dominium*), they will be drawn back to their proper status in accord with reliance on the former census. 1. Your Authority, therefore, will declare void any rescripts fraudulently obtained, disregard long time prescription and any new inscription on the census roll, and restore all parts which have been severed to the body to which they belong. For neither squatting over the long term nor a new census declaration (*professio*) could destroy the privilege of Our ownership.

Given March 28, at Constantinople, in the consulship of Arcadius, for the fourth time, and Honorius, for the third time, Augusti (396).

Thirty-Ninth Title Prescription of Thirty or Forty Years¹¹³

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Arriana.* *pr.* Since you allege that those who had their eye on your land had brought it to pass in your absence that your lands were sold (to them) for a very small price by the governor's office under the pretext of the grain tax (due from you), if the legal time since the day of the sale has lapsed, the provincial governor will examine the matter between you and will decide what is prescribed in the public law. 1. If, however, the legal time since the day of the sale has not yet lapsed, the judge will examine your allegations and will do what the situation demands, knowing that, if he finds that the purchase was illegal, the price paid under a void contract should not be returned to bad faith purchasers, in keeping with the tenor of imperial statutes.

[2] *Emperors VALENTINIAN and VALENS, Augusti, to Volusianus, City Prefect.* *pr.* It would be bad for owners of lands if the privileges of those who hold land

¹¹² = C. 11.67.2 (where Theodosius is added as originator); C.Th. 10.1.15.

¹¹³ This title deals with two long-term bars on bringing legal actions; both are of late imperial origin.

defertur, ut eos post quadraginta annorum spatia qualibet ratione decursa inquietare non liceat, cum lex Constantiniana iubeat ab his possessionis initium non requiri, qui sibi potius quam alteri possederunt, eos autem possessores non convenit appellari, qui ita tenent, ut ob hoc ipsum solitam debeant praestare mercedem. 1. Nemo igitur, qui ad possessionem conductor accedit, diu alienas res tenendo ius sibi proprietatis usurpet, ne cogantur domini aut amittere quod locaverunt aut conductores utiles sibi fortassis excludere aut annis omnibus super dominio suo publice protestari.

D. VIII k. Aug. Valentiniano et Valente AA. cons.

[3] *Impp. Honorius et Theodosius AA. Asclepiodoto pp. pr.* Sicut in rem speciales, ita de universitate ac personales actiones ultra triginta annorum spatium minime protendantur. sed si qua res vel ius aliquod postuletur vel persona qualicumque actione vel persecutione pulse-tur, nihilo minus erit agenti triginta annorum praescriptio metuenda: eodem etiam in eius valente persona, qui pignus vel hypothecam non a suo debitore, sed ab alio per longum tempus possidente nititur vindicare. 1. Quae ergo ante non motae sunt actiones, triginta annorum iugi silentio, ex quo competere iure coeperunt, vivendi ulterius non habeant facultatem.

nec sufficiat precibus oblatis speciale quoddam, licet per adnotationem, promeruisse responsum, vel etiam iudiciis adlegasse, nisi adlegato sacro rescripto aut in iudicio postulatione deposita fuerit subsecuta per exsecutorem conventio. 1a. Non sexus fragilitate, non absentia, non militia contra hanc legem defendenda, sed pupillari aetate dumtaxat, quamvis sub tutoris defensione consistit, huic eximenda sanctioni. nam cum ad eos annos pervenerit, qui ad sollicitudinem pertinent curatoris, necessario eis similiter ut aliis annorum triginta intervalla servanda sunt.

2. Hae autem actiones annis triginta continuis extinguantur, quae perpetuae videbantur, non illae, quae antiquitus temporibus limitantur. 3. Post hanc vero temporis definitionem nulli movendi ulterius facultatem patere censemus, etiamsi se legis ignorantia excusare temptaverit.

D. XVIII k. Dec. Constantinopoli Victore cons.

on sufferance (*precario possidentes*) were extended to the point that they could not be disturbed (in their possession) after forty years had lapsed, regardless of the terms (of the grant). The Constantinian law¹¹⁴ orders that the beginning of possession shall not be questioned in the case of those who are in possession for themselves and not for another, but it is not proper to call those people possessors who hold anything upon the condition that they pay the customary rent. 1. No one, therefore, who receives possession as tenant (*conductor*) may usurp the right of ownership by holding another's property over a long time. Otherwise owners will be compelled either to lose what they had leased, or perhaps to evict tenants who are useful to them, or to publicly proclaim their ownership every year.

Given July 24, in the consulship of Valentinian and Valens Augusti (365).

[3]¹¹⁵ *Emperors HONORIUS and THEODOSIUS Augusti to Asclepiodotus, Praetorian Prefect. pr.* As with individual (*speciales*) actions *in rem*, so also with corporate (*de universitate*) and personal actions, these may not be extended beyond thirty years. But if some thing or some right is sought or if a person is sued through any action or prosecution, the plaintiff must nevertheless beware the thirty-year prescription. The same is true as to a plaintiff who attempts to recover a pledge or hypothec not from his debtor, but from another who has had long-term possession. 1. Therefore any actions not commenced earlier shall have no further life after a continuous silence of thirty years from the time when they accrued.

Nor shall it suffice that, after making a petition, someone has obtained a special rescript, even one with an imperial dispensation (*per adnotationem*), not even if it has been adduced in court, unless, once the imperial rescript was adduced or the initial pleading has been filed in court, a summons has followed through a court clerk. 1a. Weakness of sex, absence, or public office (*militia*) shall be no defense against this law; only minors under the age of puberty – although protected by a guardian – are excepted from these provisions. And once minors have arrived at the age when they come under the care of a *curator*, the prescriptive period of thirty years applies to them the same as to others.

2. The bar of thirty years' prescription is applicable, however, to those actions that have been considered perpetual, not to those which were since ancient times limited in time. 3. After the time mentioned, no further right to commence an action exists, even if a claimant attempts to excuse himself by ignorance of the law.

Given November 14, at Constantinople, in the consulship of Victor (424).

¹¹⁴ C. 3.1.8 and 7.22.3 may be fragments of this law, which is no longer extant.

¹¹⁵ = C.Th. 4.14.1; combine with C.Th. 2.12.7.

[4] *Imp. Anastasius A. Matroniano pp. pr.* Omnes nocendi quibuslibet modis artes omnibus amputantes cunctas quidem temporales exceptiones, quae ex vetere iure vel principalibus decretis descendunt, tamquam si per hanc legem specialiter ac nominatim fuissent enumeratae, cum suo robore durare et suum cunctis, quibus competunt vel in posterum competere valuerint, pro suo videlicet tenore praesidium in perpetuum deferre decernimus.

1. Quidquid autem praeteritarum praescriptionum vel verbis vel sensibus minus continetur, implentes per hanc in perpetuum valituram legem sancimus, ut, si quis contractus, si qua actio, quae, cum non esset expressim saepe dictis temporalibus praescriptionibus concepta, quorundam tamen vel fortuita vel excogitata interpretatione saepe dictarum exceptionum laqueos evadere posse videatur, huic saluberrimae nostrae sanctioni succumbat et quadraginta curriculis annorum procul dubio sopiatur, nullumque ius privatum vel publicum in quacumque causa in quacumque persona, quod praedictorum quadraginta annorum extinctum est fugi silentio, moveatur. 2. Sed quicumque super quolibet iure, quod per memoratum tempus inconcussum et sine ulla re ipsa illata iudiciaria conventionem possedit, superque sua condicione, qua per idem tempus absque ulla iudiciali sententia simili munitione potitus est, sit liber et praesentis saluberrimae legis plenissima munitione securus.

D. IIII k. Aug. Constantinopoli Olybrio cons.

[5] *Idem A. ad Thomam pp. per Illyricum.* Praescriptionem quadraginta annorum ab his, qui ad curialem condicionem vocantur, opponi non patimur, sed genitalem statum semper eos agnoscere compelli sancimus. sacra etenim nostrae pietatis lex de aliis loquitur condicionibus nec anterioribus constitutionibus per eandem novellam legem derogatur, quae manifestissime curiales et liberos eorum explosis temporalibus praescriptionibus patriis suis reddi praecipunt.

[6] *Idem A. Leontio pp. pr.* Comperit nostra serenitas quosdam sacratissimam nostrae pietatis constitutionem, quae de annorum quadraginta loquitur praescriptione, ad praeiudicium etiam publicarum functionum solutionis trahere conari et, si quid per tanti vel amplioris temporis lapsus minime vel minus quam oportuerat tributorum nomine

[4] *Emperor ANASTASIUS Augustus to Matronianus, Praetorian Prefect.*¹¹⁶ *pr.* Intent on curtailing every method of doing harm for everyone, We decree that all defenses limiting the time for bringing actions that derive from ancient law or imperial decrees shall remain in full force, as if specially enumerated by name in this law, and shall be a perpetual protection to all to whom they are or shall be available in accordance with the tenor of each.

1. In order to supply whatever is not clearly contained within the words or meaning of previous enactments providing for limitation of actions, We ordain by this perpetually valid law that any contract or action, even if not expressly contained within the regularly cited defenses as to limitation of action, shall be subject to this most salutary enactment of Ours, although it may seem possible for it to escape the bonds of the regularly cited defenses either through accidental or deliberate interpretation. It shall be void and barred after a period of forty years, and no right, private or public, which has become extinct by the silence of these forty years, shall be deployed in any cause or in relation to any person. 2. But with regard to any right that someone has possessed undisturbed for the cited time period without any judicial summons being brought as to the main subject matter, and with regard to a person's status (*sua condicione*) that he has maintained during the same time without any contrary judgment,¹¹⁷ he shall be free and fully protected by the full force of the present, most salutary law.

Given July 29, at Constantinople, in the consulship of Olybrius (491).

[5]¹¹⁸ *The same Augustus to Thomas, Praetorian Prefect for Illyricum.* We do not permit the period of limitation of forty years to be used as a defense by those called to curial status (*curialem condicionem*), but We ordain that they must acknowledge their birth status forever. For the law of Our Piety¹¹⁹ speaks of other statuses (*de aliis condicionibus*), nor does the same new law detract from former constitutions which plainly direct that curials and their children be returned to their native cities without reference to any prescriptive period.

[6] *The same Augustus to Leontius, Praetorian Prefect. pr.* Our Serenity has learned that some parties attempt to apply the imperial constitution of Our Piety which speaks of forty years prescription to avoid the fulfillment of public obligations (*publicae functiones*). These contend that if tribute or a portion

¹¹⁶ Combine with C. 10.27.1, 11.62.1.4. Lounghis *et al.* date to July 30, 491.

¹¹⁷ Blume: "By C. 7.22.2, a man in good faith in possession of liberty for twenty years was protected. The difference, evidently is, that no possession in good faith was necessary in the limitation of forty years. Under this law, every sort of action is barred in forty years."

¹¹⁸ Combine with C. 2.4.43, 2.7.21. Lounghis *et al.* give November 17, 500.

¹¹⁹ C. 7.39.4.2.

solutum est, non posse requiri seu profligari contendere, cum huiusmodi conamen manifestissime sensui propositoque nostrae legis obviare noscatur. 1. Ideoque iubemus eos, qui rem aliquam per continuum annorum quadraginta curriculum sine quadam legitima interpellatione possederunt, de possessione quidem rei seu dominio nequaquam removeri, functiones autem seu civilem canonem vel aliam quandam publicam collationem impositam ei dependere compelli nec huic parti cuiuscumque temporis praescriptionem oppositam admitti.

[7] *Imp. Iustinus A. Archelao pp. pr.* Cum notissimi iuris sit actionem hypothecariam in extraneos quidem suppositae rei detentores annorum triginta finiri spatiis, si non interruptum erit silentium, ut lege cautum est, id est etiam per solam conventionem, aut si aetas impubes excipienda monstretur, in ipsos vero debitores aut heredes eorum primos vel ulteriores nullis expirare lustrorum cursibus: nostrae provisionis esse perspeximus hoc quoque emendare, ne possessores eiusmodi prope immortali timore teneantur.

1. Quamobrem iubemus hypothecarum persecutionem, quae rerum movetur gratia vel apud debitores consistentium vel apud debitorum heredes, non ultra quadraginta annos, ex quo competere coepit, prorogari, nisi conventio aut aetas, sicut dictum est, intercesserit, ut diversitas utriusque rerum persecutionis, quae in debitorem aut heredes eius quaeque movetur in extraneos, in solo sit annorum numero, verum in aliis omnibus ambo similes sint: in actione scilicet personali his custodiendis, quae prisca constitutionum sanxit iustitia.

2. Sed cum illud etiam in forensibus controversiis ventilabatur, an creditor anteriora iura praetendens potest posteriorem creditorem hypothecam tenentem et ultra triginta annos inquietare utpote imaginem debitoris obtinentem eique possidentem, necessarium duximus et hoc dirimere. 2a. Et sancimus, donec communis debitor vivit, non posse creditori anteriori triginta annorum exceptionem opponi, sed locum esse quadraginta annorum praescriptioni, quia, dum ille vivit, merito anterior creditor confidit, utpote apud debitorem eius possessione per posteriorem creditorem constituta.

2b. Ex quo autem in fata sua debitor decesserit, ex eo quasi suo nomine possidentem posteriorem creditorem merito posse triginta annorum opponere praescriptionem. et secundum hanc distinctionem computationem temporum adhibendam, ut ex persona quidem sua

thereof is not paid and the time mentioned or a greater time has elapsed, the arrears cannot be demanded or collected. Yet it is known that such attempts are clearly contrary to the intent and purpose of Our law. 1. Therefore We order that those who are in possession of any property through a continuous period of forty years without legal interruption cannot be deprived of the possession or ownership of that property, but with regard to public obligations, whether municipal dues (*civilis canon*) or any other public contribution imposed on someone, these must be paid and no limitation of any time period can be set up as a defense to them.¹²⁰

[7] *Emperor JUSTIN Augustus to Archelaus, Praetorian Prefect. pr.* It is well-known law that an action on a hypothec against third parties who hold the hypothecated property as occupants (*detentores*) is barred by the lapse of thirty years, provided the time is not interrupted as provided by law, including interruption by summons alone, or if the age of a prepubescent minor (*impubes*) is shown to require an exception. But claims against debtors themselves or their heirs, whether of the first degree or of further degrees, are not barred by the lapse of years. We have deemed it to be part of Our watchfulness to correct that situation also, lest possessors of that kind be held in almost endless fear.

1. We order, accordingly, that actions on hypothecs brought to recover property which is in the hands either of debtors or their heirs shall not be extended beyond forty years from the time that the right accrued, unless, as mentioned, a lawsuit or age intervenes, so that the only difference as to the right to recover the property from the debtor and his heirs or from third parties shall be in the number of years. In all other respects they shall be alike. That is to say, in a personal action the rights which the justice of older constitutions safeguarded ought to be preserved.

2. And since it has also been disputed in the courts whether, even after thirty years, a creditor having superior rights can disturb a creditor with inferior right who holds a hypothec, as though he took the place of the debtor and was in possession for him, We have thought it necessary to clarify that point too. 2a. And We ordain that, while the common debtor lives, the prescriptive period of thirty years cannot be set up against the creditor with superior right, but the prescriptive period of forty years applies because, while the former lives, the creditor with superior right justly has confidence knowing that his debtor's possession is confirmed through the creditor with inferior right.

2b. But from the time that the debtor dies, the creditor with inferior right may, as possessor in his own right, set up the prescription of thirty years, and time shall be computed according to the following distinction: the creditor

¹²⁰ Lounghis *et al.* date to between late 500 and 518.

posterior creditor triginta annos, quos ipse post mortem debitoris possedit, opponat: sin autem coniungere voluerit suae possessioni quam post mortem debitoris habuit, etiam tempus, quo vivente debitore vel ipse creditor vel communis debitor detinuit, tunc quadraginta annorum exceptionis iura tractari et, quantum deest ad quadraginta annorum possessionem, per quam et ipse debitor creditorem repellere potuerat, hoc se possedissee ostendat. 3. Eodem iure pro temporum computatione observando et si posterior creditor anteriori creditori offerre debitum paratus est et is creditor longaevam possessionis praescriptionem ei opponere conatur.

4. Illud autem plus quam manifestum est, quod in omnibus contractibus, in quibus sub aliqua condicione vel sub die certa vel incerta stipulationes et promissiones vel pacta ponuntur, post condicionis exitum vel post institutae diei certae vel incertae lapsum praescriptiones triginta aut quadraginta annorum, quae personalibus vel hypothecariis actionibus opponuntur, initium accipiunt. 4a. Unde evenit, ut in matrimoniis, in quibus redhibitio dotis vel ante nuptias donationis in diem incertam mortis vel repudii differri adsolet, post coniugii dissolutionem earundem curricula praescriptionum personalibus itidem actionibus vel hypothecariis opponendarum incipiant.

5. Immo et illud procul dubio est, quod, si quis eorum, quibus aliquid debetur, res sibi suppositas sine violentia tenuerit, per hanc detentionem interruptio fit praeteriti temporis, si minus effluxit triginta vel quadraginta annis, et multo magis, quam si esset interruptio per conventionem introducta, cum litis contestationem imitatur ea detentio. 5a. Sed et si quis debitorum ad agnoscendum suum debitum secundam cautionem in creditorem exposuerit, tempora memoratarum praescriptionum interrupta esse videbuntur, quantum ad priorem cautionem pertinet, quae scilicet innovata permansit, tam in personalibus quam in hypothecariis actionibus. namque improbum est debitorem contradicere, qui, ne sub accusatione creditoris fiat, secundam in eum super eo debito cautionem exposuit.

6. In his etiam promissionibus vel legatis vel aliis obligationibus, quae dationem per singulos annos vel menses aut aliquod singulare tempus continent, tempora memoratarum praescriptionum non ab exordio talis obligationis, sed ab initio cuiusque anni vel mensis vel alterius singularis temporis computari manifestum est.

7. Nulla scilicet danda licentia vel ei, qui iure emphyteutico rem aliquam per quadraginta vel quoscumque alios annos detinuerit, dicendi ex transacto tempore dominium sibi in isdem rebus quaesitum esse,

with inferior right acting on his own behalf may oppose the limitation of thirty years during which he was in possession after the debtor's death; but if he also wants to tack that time when he himself as creditor or as joint debtor was in possession during the original debtor's lifetime onto his own possession which followed the death of the debtor, then the rights of the forty years defense obtain, and he must show that he has been in possession for however much time was remaining for the fulfillment of forty years' possession by which even the original debtor would have been able to defend against the creditor. 3. The same rule about the computation of time shall be followed even if the creditor of inferior right is ready to offer the debt due to the earlier creditor, and the latter attempts to set up against him long time prescription.

4. But it is more than evident that in all contracts in which stipulations, promises, or pacts are imposed in connection with some condition or some certain or uncertain date (*sub die certa vel incerta*), the prescriptive period of thirty or forty years operative against personal or hypothecary actions begins to run after the condition occurs or after the date arrives. 4a. Whence it occurs that in the case of marriages, where the repayment of a dowry or prenuptial gift is usually put off to the uncertain date of a death or divorce, the prescriptive period to be set up against personal actions or actions on a hypothec likewise commences to run after the dissolution of the marriage.

5. And it is also unquestioned that if a man to whom a debt is due peaceably holds the property pledged to him, the prescriptive period is interrupted by this occupation (*detentionem*), if less than thirty or forty years respectively have run. In fact this is all the more true than if the period had been interrupted by summons, since such occupation is likened to joinder of issue. 5a. And if a debtor gives a creditor a new promise (*cautio*) for the purpose of acknowledging the debt, the prescriptive period as it relates to the first promise – which of course is renewed but continues in force – will seem to have been interrupted, both in personal and hypothecary actions. For it is dishonest for a debtor to object who gives a second promise for that debt in order to avoid a suit by the creditor.

6. So also, where promises, legacies or other obligations require the giving of something each year, month or other particular time, it is clear that the prescriptive period mentioned is not computed from the beginning of such obligation, but from the beginning of each year, month or other particular time (in which something is due).

7. Absolutely no permission must be given to the person who holds property under *emphyteusis* and has detained it for forty years or any other period of years to claim that he has acquired ownership in such property by reason of the

cum in eodem statu semper manere datas iure emphyteutico res oporteat, vel conductori seu procuratori rerum alienarum dicendi ex quocumque temporum curriculo non debere se domino volenti post completa conductionis tempora possessionem recipere eam reddere.

D. k. Dec. Constantinopoli Philoxeno et Probo cons.

[8] *Imp. Iustinianus A. Menae pp. II. pr.* Si quis emptionis vel donationis vel alterius cuiuscumque contractus titulo rem aliquam bona fide per decem vel viginti annos possederit et longi temporis exceptionem contra dominos eius vel creditores hypothecam eius praetendentes sibi adquisierit posteaque fortuito casu possessionem eius rei perdiderit, posse eum etiam actionem ad vindicandam eandem rem habere sancimus. hoc enim et veteres leges, si quis eas recte inspexerit, sanciebant.

1. Quod si quis eam rem desierit possidere, cuius dominus vel is qui suppositam eam habebat exceptione triginta vel quadraginta annorum expulsus est, praedictum auxilium non indiscrete, sed cum moderata divisione ei praestare censemus, ut, si quidem bona fide ab initio eam rem tenuit, simili possit uti praesidio, sin vero mala fide eam adeptus est, indignus eo videatur, ita tamen, ut novus possessor, si quidem ipse rei dominus ab initio fuit vel suppositam eam habebat et memoratae exceptionis necessitate expulsus est, commodum detentionis sibi adquirat. 1a. Sin vero nullum ius in eadem re quocumque tempore habuit, tunc licentia sit priori domino vel creditori, qui nomine hypothecae rem obligatam habuit, et heredibus eorum ab iniusto detentore eam vindicare, non obsistente ei, quod prior possessor triginta vel quadraginta annorum exceptione eum removerat, nisi ipse iniustus possessor triginta vel quadraginta annorum ex eo tempore computandorum, ex quo prior possessor, qui et vicit, ea possessione cecidit, exceptione munitus sit.

2. Sed haec super illis detentoribus censemus, qui sine violentia eandem rem nacti sunt. nam si quis violenter eam abstulit, omnimodo licebit priori possessori sine ulla distinctione eam vindicare. 3. Sed et si quis non per vim, sed sententia iudicis eam detinuit, ea tamen occasione, quod absens prior possessor et ad litem vocatus minime respondit, licebit ei ad similitudinem ceterorum, qui rei dominium habent, intra annum se offerenti cautionemque suscipiendae litis danti eandem rem

lapse of time, since property held by right of *emphyteusis* should always remain in the same state. Nor must opportunity be given to a lessee (*conductor*) or procurator of another's property to say, by reason of the lapse of any period of time whatever, that he ought not to restore it to the owner who wants to retake possession after the time of the lease has expired.

Given December 1, at Constantinople, in the consulship of Philoxenus and Probus (525).

[8] Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect for the second time. *pr.* If a man has been in good faith possession of any property for ten or twenty years by title of purchase, gift or any other contract and has acquired the right to the defense of long-time prescription against the owners or against creditors claiming a hypothec over it, and afterwards he loses possession of the property by a fortuitous circumstance, We ordain that he is able to have a suit on ownership to recover the property. The ancient laws, if correctly considered, also made provision for that.

1. But if a person ceases to possess that property, whose owner or whose mortgagee has lost it through the defense of thirty or forty years, We decree that the aforementioned remedy should not be applied indiscriminately but should follow a moderate distinction: if the person held the property in good faith from the beginning, he shall enjoy that right, but if he acquired it in bad faith, he seems unworthy of it; thus if the new possessor was the original owner or mortgagee of the property and lost it by reason of the aforesaid defense (of prescription), he acquires the benefit of the occupation. 1a. But if (the new possessor) had no right to the property at any time, then the former owner or the creditor to whom the property was bound under a hypothec, as well as to their heirs, are given the right to reclaim it from the unlawful occupant. And it shall be no defense that a prior possessor had blocked (the original owner) by the defense of the prescriptive period of thirty or forty years, unless the unlawful possessor himself was fortified by the defense of thirty or forty years computed from the time when the prior possessor, who had also evicted (the original owner), fell out of possession.

2. These provisions apply, however, only to occupants (*detentores*) who acquired the property without violence. For if a person takes possession violently, the prior possessor is permitted to recover it in all cases. 3. And if a person detains it not by violence but pursuant to a judicial verdict rendered when the prior possessor was absent and did not respond to a summons to court, the latter may, as other owners of property, appear within a year, give a guarantee (*cautio*) to defend the suit, and receive the property back subject to

recipere superque ea cognitionalia subire certamina. 4. Exceptionem etiam triginta vel quadraginta annorum in illis contractibus, in quibus usurae promissae sunt, ex illo tempore initium capere sancimus, ex quo debitor usuras minime persolvit.

D. III id. Dec. Constantinopoli dn. Iustiniano A. II cons.

[9] *Idem A. Demostheni pp. pr.* Saepe quidam suos obnoxios in iudicium vocantes et iudiciariis certaminibus ventilatis non ad certum finem lites producebant, sed taciturnitate in medio tempore adhibita, propter potentiam forte fugientium vel suam imbecillitatem vel alios quoscumque casus (cum sortis humanae multa sunt, quae nec dici nec enumerari possint), deinde iure suo lapsi esse videbantur eo, quod post cognitionem novissimam triginta annorum spatium effluerit, et huiusmodi exceptione opposita suas fortunas ad alios translatas videntes merito quidem, sine remedio autem lugebant.

1. Quod nos corrigentes eandem exceptionem, quae ex triginta annis oritur, in huiusmodi casu opponi minime patimur, sed licet personalis actio ab initio fuerit instituta, tamen eam in quadragesimum annum extendimus, cum non sit similis, qui penitus ab initio tacuit, ei, qui et postulationem deposuit et in iudicium venit et subiit certamina, litem autem implere per quosdam casus praepeditus est. 2. Sed licet ipse actor defecerit, suae posteritati huiusmodi causae cursum eum relinquere posse definimus, ut eius heredibus vel successoribus liceat eam adimplere, nullo modo triginta annorum exceptione sublatam. 3. Quod tempus, id est quadraginta annorum spatium, ex eo numerari decernimus, ex quo novissima processit cognitio, post quam utraque pars cessavit.

XXXX De Annali Exceptione Italici Contractus Tollenda et de Diversis Temporibus et Exceptionibus et Praescriptionibus et Interruptionibus Earum

[1] *Imp. Iustinianus A. Iuliano pp. pr.* Super annali exceptione, quae ex Italiciis contractibus oritur, tantae moles altercationum in omnibus iudiciis exortae sunt, quantas et enumerari difficile et explanari impossibile est. 1. Primum etenim naturae eius observatio cum omni scrupulositate et difficultate composita est, cum multa concurrere debent, ut ea nascatur. 1a. Deinde illud spatium annale alii quidem ita effuse

the result of the suit. 4. In case of contracts which draw interest, the defense of the prescriptive period of thirty or forty years shall accrue from the time that the debtor fails to pay the interest.

Given December 11, at Constantinople, in the consulship of Our Lord Justinian Augustus, for the second time (528).

[9] *The same Augustus to Demosthenes, Praetorian Prefect. pr.* Plaintiffs who have cited into court defendants liable to them and have put the suit in motion have frequently failed to end it definitely, but thereafter remained inactive on account of the influence of the defendants or on account of their own weakness or for other causes – since people's fates are too many to describe or enumerate. Afterwards they seem to have lost their right since a span of thirty years had passed after they last brought suit, and that defense was set up so that they have grieved, justly but without remedy, as they watched their fortunes transferred to others.

1. Correcting this, We do not permit the defense arising from the passage of thirty years to be set up in a case of this kind, but extend the period to forty years, even if the action was instituted from the beginning as a personal action, since a case where a party remains entirely silent from the beginning is not like one where he offers a summons, comes into court, and commences litigation, but is prevented from finishing the suit through some chance. 2. And though the plaintiff himself dies, We determine that he may transmit his right to his posterity, and his heirs and successors may assert it, for it cannot be defeated by the defense of the lapse of thirty years. 3. The period of forty years shall be computed from the time the most recent suit was brought after which both parties became inactive.

<Without subscription (529).>¹²¹

Fortieth Title Repeal of the One-Year Prescription of an Italic Contract, Various Grace Periods, Exceptions, Prescriptions, and their Interruption¹²²

[1]¹²³ *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect. pr.* Such great mountains of disputes over the one-year prescription arising from Italic contracts have arisen that it is difficult to enumerate them and impossible to explain them. 1. In the first place the observance of the nature of the rule is wrapped in much technicality and difficulty, since many things must concur in order that it may apply. 1a. Next, some have interpreted that period of a year so broadly that it may be extended to ten years; others think that it should not

¹²¹ Lounghis *et al.* date to September or October 529.

¹²² See D. 44.3.

¹²³ Combine with C. 1.2.23.

interpretabantur, ut possit usque ad decennium extendi, alii iudicantes usque ad quinquennium standum esse putaverunt. et in nostris temporibus saepius super huiusmodi calculo a iudicibus variatum est, unde nec facile suum effectum in litigiis ostendere huiusmodi exceptio valuit.

1b. Cum itaque nobis aliae temporales exceptiones vel praescriptiones sufficiant, huiusmodi difficultatibus illigari nostro subiectos imperio minime patimur. ideoque memorata annali exceptione penitus quiescente aliae omnes legitimae exceptiones vel praescriptiones in iudiciis suum vigorem ostendant, sive quae super decennio vel viginti vel triginta vel quadraginta annis introductae sunt, sive quae minoribus spatiis concluduntur. 1c. Ad haec cum nihil prohibet etiam ea, quae aliquam dubitationem acceperunt, clarioribus et compendiosis sanctionibus renovare, iubemus omnes personales actiones, quas verbosa quorundam interpretatio iactare extra metas triginta annorum conabatur, triginta annorum spatiis concludi, nisi legitimus modus, qui et veteribus et nostris legibus enumeratus est, interruptionem temporis introduxerit: sola hypothecaria actione quadraginta annorum utente curriculum. 1d. Nemo itaque audeat neque actionis familiae erciscundae neque communi dividundo neque finium regundorum neque pro socio neque furti neque vi bonorum raptorum neque alterius cuiuscumque personalis actionis vitam longiorem esse triginta annis interpretari: sed ex quo ab initio competit et semel nata est et non iteratis fabulis saepe recreata, quemadmodum in furti dicebatur, post memoratum tempus finire. 1e. Exceptis omnibus actionibus, licet personales sint, quae in iudicium deductae sunt et cognitionalia acceperunt certamina et postea silentio traditae sunt, in quibus non triginta, sed quadraginta annos esse expectandos, ex quo novissimum litigatores tacuerunt, nostra lex antea promulgavit.

2. Ne autem imperfecta sanctio videatur, cum in maternis quidem rebus filiis familias tempore exceptionum currere dispositum erat, ex quo sacris paternis absoluti sunt, in aliis autem, quae minime adquiri possunt, hoc non fuerat specialiter constitutum, apertissima definitione sancimus filiis familias omnibus in his casibus, in quibus habent res minime patribus suis adquisitas, nullam temporalem exceptionem opponi, nisi ex quo actionem movere poterint, id est postquam manu paterna vel eius in cuius potestate erant constituti fuerint liberati. quis enim incusare eos poterit, si hoc non fecerint, quod et si maluerint, minime adimplere lege obviante valebant?

D. xv k. April. Constantinopoli Lampadio et Oreste vv. cc. cons.

exceed five years. Even in Our own times judges have often varied over this calculation, on account of which this type of defense has scarcely been able to be effective in litigation.

1b. So, since We find other defenses as to limitation of actions or prescription sufficient, We cannot permit Our subjects to be enmeshed in these sorts of difficulties. Therefore, the defense of one year's prescription shall no longer be in force, but all other legal defenses or prescriptions shall remain in effect for lawsuits, namely, those limiting them to ten, twenty, thirty or forty years, or those that conclude in briefer periods. 1c. Furthermore, since nothing prevents the revision of laws which are ambiguous by clearer and succinct provisions, We order that all personal actions, which the verbose interpretation of some has attempted to extend beyond the bounds of thirty years, must be concluded within a span of thirty years, unless that period is interrupted by one of the legal methods set forth in ancient laws and in statutes enacted by Us. The limitation of forty years shall apply only to hypothecary actions. 1d. So no one must dare to argue that an action has validity for more than thirty years, whether it is an action to divide an inheritance, to partition common property, to fix boundaries, an action on partnership, theft, robbery, or any other personal action; but from the period when it first comes into existence it is born once and for all and ends after the stated time period, without having been recreated again and again through repeated stories, as is said of actions on theft. 1e. An exception is made where actions, even when personal, are brought and proceedings in court have been commenced and the parties become inactive thereafter. In such cases one must wait not thirty but forty years from the last time when the litigants became inactive, as provided in Our recently promulgated law.¹²⁴

2. It had been provided by former laws that prescription against unemancipated sons (*filiifamilias*) as regards maternal property runs only from the time that they were released from paternal power, but this provision was not specially made as to other property, which they cannot acquire. So, in order that this law may not seem incomplete, We ordain by this plain provision that no prescription shall run against unemancipated sons in any case when they have property not acquired by them for the benefit of their father, except from the time that they could bring an action, that is to say, after they have been liberated from their father's power or that of some other person in whose power they were. In fact, who could accuse them of not having done what they would have chosen to do had they not been unable because the law prevented them.

Given March 18, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

¹²⁴ C. 7.39.9.

[2] *Idem A. Iohanni pp. pr.* Ut perfectius omnibus consulamus et nemini absentia vel potentia vel infantia penitus adversarii sui noceat, sed sit aliqua inter desides et vigilantes differentia, sancimus: si quando afuerit is, qui res alienas vel creditori obnoxias detinet, et desiderat dominus rei vel creditor suam intentionem proponere et non ei licentia sit, absente suo adversario qui rem detinet, vel infantia vel furore laborante et neminem tutorem vel curatorem habente, vel in magna potestate constituto, licentia ei detur adire praesidem vel libellum ei porrigere et hoc in querimoniam deducere intra constituta tempora et interruptionem temporis facere: et sufficere hoc ad plenissimam interruptionem. 1. Sin autem nullo poterit modo praesidem adire, saltem ad episcopum locorum eat vel defensorem civitatis et suam manifestare voluntatem in scriptis deproperet. sin autem afuerit vel praeses vel episcopus vel defensor, liceat ei et proponere publice, ubi domicilium habet possessor, seu cum tabulariorum subscriptione vel, si civitas tabularios non habeat, cum trium testium subscriptione: et hoc sufficere ad omnem temporalem interruptionem sive triennii sive longi temporis sive triginta vel quadraginta annorum sit. 2. Omnibus aliis, quae de longi temporis praescriptione vel triginta vel quadraginta annorum curriculum constituta sunt sive ab antiquis legum conditoribus sive a nostra maiestate, in suo robore duraturis.

D. xv k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[3] *Idem A. Iohanni pp. pr.* Si ex multis causis quendam obnoxium habens, et maxime ex similibus quantitibus, in unius quidem causae summam libellum conventionis composuerit, causam tamen non expresserit, apud veteres agitabatur, an videatur omnes causas in iudicium deduxisse aut vetustissimam earum aut nihil fecisse, cum eius sensus incertus esse apparebat. 1. Sed et in iudiciis in multis casibus tales altercationes ventilatas invenimus, et maxime propter longi temporis interruptionem. si enim personalis forte fuerat mota actio, hypothecariae autem actionis nulla mentio procedebat, quidam putabant personalem quidem esse temporis interruptione perpetuatam, hypothecariam autem evanescere taciturnitate sopitam. 2. Et si quis generaliter dixerat obnoxium sibi aliquem constitutum, aliae dubitationes emergebant, si omnes ei competentes actiones huiusmodi narratione contineri credantur, an vero quasi silentio circa eas habito tempore expirare, nullo ex incerta libelli confectione adminiculo eis adquisito.

[2] *The same Augustus to John, Praetorian Prefect. pr.* In order that We may more perfectly look after the interests of all, and that the absence, power, or infancy of an adversary may harm no one, and yet that there may remain a distinction between those who are negligent and those who are vigilant, We²²⁵ ordain that if he who detains property owned by another or under obligation to a creditor should be absent, and the owner or creditor wishes to bring suit but is not permitted because his opponent, who detains the property, is absent or is impeded by inability to speak (*infantia*) or insanity and has no *tutor* or *curator*, or is in a position of great power, permission shall be given to the owner or creditor to go before the governor or to present him with a petition and make this a matter of complaint within the allotted period, and thus interrupt the time. 1. But if he cannot in any way go before the governor, he shall go at least before the bishop of the place or the Defender of the City, and hasten to make known his desire in writing. If the governor or bishop or Defender are absent, he may make a public statement where the possessor has his domicile, in writing, witnessed by secretaries (*tabularii*), or by three other witnesses if the city has no secretaries; and this shall suffice for interrupting any prescriptive period, either of three years, of a long time (ten or twenty years), or of thirty or forty years. 2. All other provisions made concerning long-time prescription and prescription of thirty and forty years shall remain in force, whether made by the ancient founders of the laws or by Our Majesty.

Given October 18, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[3] *The same Augustus to John, Praetorian Prefect. pr.* If a plaintiff to whom a defendant was liable on many causes of action, and particularly for similar sums, claimed in the summons the sum involved in one of these causes of action without expressing the cause, it was debated among the ancients whether he should be considered to have brought action on all of the causes, or the oldest one, or on none, since the premise of his claim appeared uncertain. 1. And We find that such dispute frequently arose in trials, especially in connection with the interruption of long-time prescription. If, for instance, a personal action was commenced and no mention was made of a hypothecary action, some thought that the personal action was extended by the interruption but that the hypothecary action was extinguished by silence. 2. And if someone stated generally that the defendant was liable to him, other doubts arose as to whether all actions available to him should be considered as embraced in the statement, or whether all should be held to expire during the prescriptive time, as though he had been silent as to all of them, the uncertain statement in his petition being of no benefit to him.

²²⁵ The text is repeated from this point down to "make his desire known in writing" at C. 1.4.31 (incorrectly dated to October 1).

3. Sancimus itaque nullam in iudiciis in posterum locum habere talem confusionem, sed qui obnoxium suum in iudicium clamaverit et libellum conventionis ei transmiserit, licet generaliter nullius causae mentionem habentem vel unius quidem specialiter, tantummodo autem personales actiones vel hypothecarias continentem, nihilo minus videri ius suum omne eum in iudicium deduxisse et esse interrupta temporum curricula, cum contra desides homines et sui iuris contemptores odiosae exceptiones oppositae sunt.

D. xv k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

XXXXI De Adluvionibus et Paludibus et de Pascuis ad Alium Statum Translatis

[1] *Imp. Gordianus A. Marco.* Quamvis fluminis naturalem cursum opere manu facto alio non liceat avertere, tamen ripam suam adversus rapidi amnis impetum munire prohibitum non est. et cum fluvius priore alveo derelicto alium sibi facit, ager quem circumivit, prioris domini manet. quod si paulatim ita auferat alique parti applicet, id adluvionis iure ei quaeritur, cuius fundus crescit.

PP. III k. Dec. Gordiano A. et Aviola cons.

[2] *Imppp. Arcadius Honorius et Theodosius AAA. Caesario pp.* Hi, quos inundatio Nili fluminis reddidit ditiores, pro terris quas possident tributorum praestationem agnoscant. et qui suum deplorant patrimonium imminutum, alieno saltem functionis onere liberentur et nostrae serenitatis largitate defensi, locorum etiam possessione contenti, pro agitando census examine respondeant devotioni.

D. III id. Iun. Theodosio A. et Rumorido cons.

[3] *Impp. Theodosius et Valentinianus AA. Cyro pp. pr.* Ea, quae per adluvionem sive in Aegypto per Nilum sive in aliis provinciis per diversa flumina possessoribus adquiruntur, neque ab aerario vendi neque a quolibet peti nec separatim censi vel functiones exigi hac

3. Therefore, We ordain that such confusion shall no longer have any place in the courts, but whoever cites into court anyone liable to him and sends him a petition of summons, whether he has not mentioned a general cause of action, or has stated only a specific one, or has brought only a personal or a hypothecary action, he shall nevertheless be considered to have commenced an action as to every right which he has and to have interrupted the prescriptive period. Indeed, odious defenses should be set up only against men who are negligent and contemptuous of their rights.

Given October 18, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Forty-First Title Alluvium and Swamps and Pastures Transferred to Another Status

[1] *Emperor GORDIAN Augustus to Marcus.* Although it is not permitted to divert the natural course of a river through any man-made work, nevertheless it is not forbidden to strengthen its banks against the assault of a rapid stream. And when a river abandons its former channel and makes another for itself, the field round which it flows remains the property of the former owner. But if it carries the soil off gradually, adding it to another field, such added soil is acquired by the man whose farm is increased through the right of alluvium (*alluvio*).

Posted November 29, in the consulship of Gordian Augustus and Aviola (239).

[2] *Emperors ARCADIUS, HONORIUS, and THEODOSIUS Augusti to Caesarius, Praetorian Prefect.* Persons whom the inundation of the river Nile makes richer must pay tribute for the land which they possess. But those who lament the diminution of their property should at least be relieved from the burden of an obligation owed by another, and, protected by the bounty of Our Serenity and content with the land they possess, they should devotedly pay their tribute according to the adjustment made.¹²⁶

Given June 11, in the consulship of Theodosius Augustus and Rumoridus (403).

[3]¹²⁷ *Emperors THEODOSIUS and VALENTINIAN Augusti to Cyrus, Praetorian Prefect. pr.* We ordain by this perpetually valid law that property which is acquired by possessors through alluvium, whether in Egypt because of the Nile

¹²⁶ The last sentence is awkward. This translation reflects its sense more than its exact wording. Seeck dates this constitution to June 11, 397.

¹²⁷ = Nov. Theod. 20.

perpetuo lege valitura sancimus, ne vel adluvionum ignorare vitia vel rem noxiam possessoribus videamur indicere. 1. Similiter ne ea quidem, quae paludibus antea vel pascuis videbantur adscripta, si sumptibus possessorum nunc ad frugum fertilitatem translata sunt, vel vendi vel peti vel quasi fertilia separatim censi vel functiones exigi concedimus, ne doleant diligentes operam suam agri dedisse culturae nec diligentiam suam sibi damnosam intellegant. 2. Cuius legis temeratores quinquaginta librarum auri condemnatione coerceri decernimus: inter quos habendum est officium quoque tuae sedis excelsae, si aliquid eiusmodi suggererit disponendum vel si preces instruxerit petitoris.

D. XI k. Oct. Constantinopoli Valentiniano A. v et Anatolio cons.

XXXXII De Sententiis Praefectorum Praetorio

[1] *Imp. Theodosius et Valentinianus AA. Thalassio pp. Illyrici.* Litigantibus in amplissimo praetorianae praefecturae iudicio, si contra ius se laesos adfirment, non provocandi, sed supplicandi licentiam ministramus, licet pro curia vel qualibet publica utilitate seu alia causa dicatur prolata sententia (nec enim publice prodest singulis legum adminicula denegari): ita videlicet, ut intra biennium tantum nostro numini contra cognitionales sedis praetorianae praefecturae sententias, post successionem iudicis numerandum, supplicandi eis tribuatur facultas.

D. III id. Aug. Constantinopoli Theodosio A. XVII et Festo cons.

XXXXIII Quomodo et Quando Iudex Sententiam Proferre Debet Praesentibus Partibus vel Una Absente

[1] *Imp. Titus Aelius Antoninus Publicio.* Non semper compelleris, ut adversus absentem pronunties, propter subscriptionem patris mei, qua significavit etiam contra absentes sententiam dari solere. id enim eo pertinet, ut absentem damnare possis, non ut omnimodo necesse habeas.

Sine die et cons.

or in other provinces because of various rivers, shall not be sold by the Treasury (*aerarium*) nor claimed by anyone, nor shall it be separately assessed or compelled to obligations. In this way We will not seem to overlook the defects of alluvial lands or to impose something injurious on possessors. 1. Similarly, We do not permit even those lands formerly assigned to swamp or pasture but which have been made agriculturally productive through the outlays¹²⁸ of possessors to be sold or claimed or separately assessed or compelled to obligations as fertile lands, lest the diligent lament the efforts they expended in cultivating them and witness their diligence turned into loss. 2. We decree that violators of this law shall be punished by a fine of 50 pounds of gold. Among them are to be considered the members of your official staff if they suggest any such disposition or prepare a petition of a claimant.

Given on September 21, at Constantinople, in the consulship of Valentinian Augustus, for the fifth time, and Anatolius (440).

Forty-Second Title The Verdicts of Praetorian Prefects

[1]¹²⁹ *Emperors THEODOSIUS and VALENTINIAN Augusti to Thalassius, Praetorian Prefect of Illyricum.* If litigants in the most high court of the Praetorian Prefecture allege that they have been injured contrary to law, We offer them the right not of appeal but of supplication, even if a decision was given in favor of a (municipal) council, or for the public interest, or for the benefit of any other matter. For it is not in the interest of the public to deny the aid of the law to individuals. Nevertheless, this right of supplicating Our Majesty against the judicial decisions of the court of the Praetorian Prefecture exists only for two years beginning from the time when the judge is succeeded.

Given August 11, at Constantinople, in the consulship of Theodosius Augustus, for the seventeenth time, and Festus (439).

Forty-Third Title How and When a Judge Should Give His Verdict When Both Parties Are Present or One Is Absent¹³⁰

[1] *Emperor TITUS ABLIUS ANTONINUS to Publicius.* You are not always compelled to give judgment against an absent party on account of the signed rescript (*scriptio*) of my father in which he stated that decisions are regularly given even against parties that are absent. For that means that you may condemn a party that is absent, not that you are always required to do so.

Without date or consul.

¹²⁸ Nov. Theod. 20 adds "and labors" (*ac laboribus*).

¹²⁹ = Nov. Theod. 13, with minor variations.

¹³⁰ See Paul, *Sent.* 5.5a.

[2] *Imp. Gordianus A. Severo.* Cessante quoque causa peremptorii edicti adversus eos, qui admoniti iudicio adesse noluerunt, sententiam ab iudice posse ferri certum est.

S. IIII k. Aug. Pio et Pontiano cons.

[3] *Idem A. Antistio.* Ab eo iudicato recedi non potest, quod vobis absentibus et ignorantibus atque indefensis dicitis esse prolatum, si, ubi primum cognovistis, non ilico de statutis querellam detulistis. ita enim firmitatem sententia, quae ita prolata est, non habebit, si ei non sit commodatus adsensus.

PP. IIII id. Iun. Gordiano A. et Aviola cons.

[4] *Imp. Philippus A. Domitio.* Si, ut proponis, pars diversa die feriato absente et ignorante te ab iudice dato sententiam pro partibus suis, quasi contumaciter deesses, impetravit, non immerito praeses denuo negotium alterius iudicis notioni terminandum commisit.

PP. v id. Oct. Peregrino et Aemiliano cons.

[5] *Idem A. et Philippus C. Longino.* Si, ut proponis, praeses provinciae, cum certum locum causae cognoscendae dedisset, alibi per obreptionem aditus sententiam adversus te absentem protulit, quod ita gestum est, ad effectum iuris spectare minime oportet.

[6] *Imp. Valerianus et Gallienus AA. Domitio.* Si praeses quasi desertam ab adultis tuis causam appellationis, quae ab adiutore suo facta fuerat, circumduxit eo tempore, quo adulti curatores non habebant, repetitus notionem suam exhibebit. neque enim debet adultis nocere, quidquid eo tempore statutum est, quo defensione iusta et curatoris auxilio fuerant destituti.

[7] *Imp. Diocletianus et Maximianus AA. Marino.* Ea, quae statuuntur adversus absentes non per contumaciam, scilicet denuntiationibus nequaquam ex more conventos, iudicatae rei firmitatem non obtinere certum est.

PP. III k. April. ipsis IIII et III AA. cons.

[8] *Idem AA. Claudiae.* Consentaneum iuri fuit temporibus ad praesentiam partis adversae praescriptis praesidem provinciae impleta iuris sollemnitate et adversario tuo trinis litteris vel uno pro omnibus peremptorio edicto, ut praesentiam sui faceret, commonefacto, si in eadem

[2] *Emperor GORDIAN Augustus to Severus.* It is certain that a decision may be given by a judge against those who were cited but refused to appear, even if the grounds for the issuance of a peremptory edict fail.

Written July 29, in the consulship of Pius and Pontianus (239).

[3] *The same Augustus to Antistius.* A judgment which you say was pronounced in your absence, without your knowledge, and while undefended, cannot be vacated if you did not petition against the decision immediately after learning of it. For a decision thus given is only invalid if it is not acquiesced in.

Posted June 10, in the consulship of Gordian Augustus and Aviola (239).

[4] *Emperor PHILIP Augustus to Domitius.* If, as you state, your opponent obtained a decision in his favor from the judge appointed for the case, but it was on a holiday, in your absence, and without your knowledge, as though your absence was contumacious, the governor was right to refer the matter to another judge for investigation and determination.

Posted October 11, in the consulship of Peregrinus and Aemilianus (244).

[5] *The same Augustus and Caesar PHILIP to Longinus.* Although the provincial governor had appointed a certain place for the trial of a case, if, as you state, he was approached clandestinely and gave judgment elsewhere against you while you were absent, such action should have no legal effect.

[6] *Emperors VALERIAN and GALLIENUS, Augusti, to Domitius.* If the governor treated an appeal that his assistant had prepared as abandoned by your pubescent minors (*adulti*) in a period when the minors had no *curator*, he will take up the matter again if you go before him. For the minors cannot be prejudiced by a decision made when they were without proper defense and the assistance of a *curator*.

[7] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Marinus.* It is certain that a decision given against parties who are absent without contumacy, not having been summoned by the usual notices (*denuntiationes*), is invalid.

Posted March 30, in the consulship of the same Augusti, for the fourth and third time (290).

[8] *The same Augusti to Claudia.* When the time for the appearance of your opponent had been fixed, and the usual formality of law had been observed, and your opponent had been admonished to appear by three written notices (*litterae*) or by one peremptory edict serving in place of all, if he persevered in

contumacia perseveravit, praesentis adlegationes audire. quod vel successor eius facere curabit. a quo ter citatus si contumaciter praesentiam sui facere neglexerit, non abs re erit vel ad cogendum eum, ut se repraesentaret, possessionem bonorum cui incumbit ad te transferre et adversarium petitozem constituere, vel auditis defensionibus tuis id quod iuris ratio exegerit iudicare.

PP. III k. Oct. ipsis IIII et III AA. cons.

[9] *Idem AA. Leontio.* Tres denuntiationes ad peremptorii edicti vicem adversus contumaces convalescere salubriter statutum est.

PP. XI k. Nov. ipsis IIII et III AA. cons.

[10] *Idem AA. Blaesio.* Cum non voluntatis tuae arbitrio, sed necessitate profectus sis, quidquid contra absentem statutum fuerit, quando absentiae necessaria causa sit, officere tibi iuris ratio non permittit.

PP. III id. Mai. Tiberiano et Dione cons.

[11] *Idem AA. et CC. Valerio.* Cum praesentibus partibus litem inchoatam proponas, si, posteaquam contra te licet absentem pronuntiatum est, intra praefinitum diem non appellasti, latam sententiam rescindi postulanti multae sacrae constitutiones refragantur.

XXXXIIII De Sententiis ex Periculo Recitandis

[1] *Impp. Valerianus et Gallienus AA. Quinto.* Arbitri nulla sententia est, quam scriptam edidit litigatoribus, non ipse recitavit. si igitur nihil fallis, omitta provocationis mora ex integro iudicari impetrabis a rectore provinciae.

[2] *Imppp. Valentinianus Valens et Gratianus AAA. ad Probum pp. pr.* Hac lege perpetua credimus ordinandum, ut iudices, quos cognoscendi et pronuntiandi necessitas teneret, non subitas, sed deliberatione habita post negotium sententias ponderatas sibi ante formarent et emendatas statim in libellum secuta fidelitate conferrent scriptasque ex libello

the same contumacy, it was in harmony with the law for the provincial governor to hear the allegations of the party present. Now his successor will see to the matter. If your opponent has been cited by him three times but contumaciously refuses to appear, it will be proper either to compel him to defend himself by transferring to you possession of the property over which he disposes and thus putting him in the position of claimant, or simply to hear your claims and give judgment according to the law.

Posted September 29, in the consulship of the same Augusti, for the fourth and third time (290).

[9] *The same Augusti to Leontius.* It is a salutary provision that three notices (*denuntiationes*) to contumacious parties are sufficient to take the place of a peremptory edict.

Posted October 22, in the consulship of the same Augusti, for the fourth and third time (290).

[10] *The same Augusti to Blaesus.* Since you did not leave (the jurisdiction) voluntarily but through necessity, the rule of law does not permit the decision rendered against you while absent to prejudice you, for your absence was necessary.

Posted May 13, in the consulship of Tiberianus and Dio (291).

[11] *The same Augusti and the Caesars to Valerius.* Since, as you state, the dispute was commenced while the parties were all present, and judgment was later given against you while absent, if you did not appeal within the date fixed, many imperial constitutions oppose your demand to have the decision vacated.

Forty-Fourth Title Reading Draft Trial Verdicts

[1] *Emperors VALERIAN and GALLIENUS Augusti to Quintus.* The verdict of the judge arbitrator given to the litigants in writing but not read by him is void. Therefore, if you have stated the truth, the governor (*rector*) of the province will grant you a new trial, without the delay of an appeal.

[2] *Emperors VALENTINIAN, VALENS, and GRATIAN Augusti to Probus, Praetorian Prefect. pr.* We believe it best to provide by this perpetually valid law that judges, whose duty it is to try to decide cases, must first formulate verdicts that are not hasty but well considered in deliberations held after the trial

partibus legerent, sed ne sit eis posthac copia corrigendi vel mutandi.
 1. Exceptis tam viris eminentissimis praefectis praetorio quam aliis illustrem administrationem gerentibus ceterisque illustribus iudicibus, quibus licentia conceditur etiam per officium suum et eos, qui ministerium suum eis accommodant, sententias definitivas recitare.

D. XII k. Febr. Gratiano A. II et Probo cons.

[3] *Idem AAA. ad Probum pp. pr.* Statutis generalibus iussimus, ut universi iudices, quibus reddendi iuris in provinciis permisimus facultatem, cognitis causis ultimas definitiones de scripti recitatione proferant. 1. Huic adicimus sanctioni, ut sententia, quae dicta fuerit, cum scripta non esset, nec nomen quidem sententiae habere mereatur nec ad rescissionem perperam decretorum appellationis sollemnitas requiratur.

D. III non. Dec. Triveris Gratiano A. III et Equitio cons.

XXXXV · De Sententiis et Interlocutionibus Omnium Iudicum

[1] *Imp. Severus et Antoninus AA. Quintiliano.* Non videtur nobis rationem habere sententia decessoris tui, qui cum cognovisset inter petitem et procuratorem, non procuratorem, sed ipsam dominam litis condemnavit, cuius persona in iudicio non fuit. potes igitur ut re integra de causa cognoscere.

D. IIII k. Iun. Antonino A. III et Geta cons.

[2] *Imp. Antoninus A. Sextilio.* Si arbiter datus a magistratibus, cum sententiam dixit, in libertate morabatur, quamvis postea in servitutem depulsus sit, sententia ab eo dicta habet rei iudicatae auctoritatem.

[3] *Imp. Alexander A. Vettio.* Praeses provinciae non ignorat definitivam sententiam, quae condemnationem vel absolutionem non continet, pro iusta non haberi.

PP. k. Oct. Maximo II et Aeliano cons.

and, once these have been corrected, they must transfer them to the protocol (*in libellum*) immediately and accurately, and, once they have been written, the judges must read them from the protocol to the parties, and they are to have no opportunity to correct or change them afterward. 1. Excepted from this rule are the most eminent Praetorian Prefects, and others who occupy illustrious offices, and all other judges of illustrious rank. They are permitted to have their final decisions read by members of their official staff or other persons who serve in their office.

Given January 21, in the consulship of Gratian Augustus, for the second time, and Probus (371).

[3]¹³¹ *The same Augusti to Probus, Praetorian Prefect. pr.* We have ordered by general provisions that all judges to whom We give power to render justice in the provinces shall, after cases have been tried, give final judgment by reading their written decisions. 1. And We add to this provision that a verdict that is spoken but not written does not deserve to have even the name of a verdict, nor is the customary appeal required to rescind such faulty decisions.

Given December 3, at Trier, in the consulship of Gratian Augustus, for the third time, and Equitius (374).

Forty-Fifth Title Verdicts and Interim Orders of All Judges

[1] *Emperors SEVERUS and ANTONINUS Augusti to Quintilianus.* We do not see the reason behind the verdict of your predecessor, who tried a case between a claimant and a (female owner's) procurator and rendered judgment against the female owner even though she was not legally involved. You can, therefore, retry the case anew.

Given May 29, in the consulship of Antoninus Augustus, for the third time, and Geta (208).

[2] *Emperor ANTONINUS Augustus to Sextilius.* If a judge arbitrator appointed by magistrates was living as a free man when he rendered his decision, it has the force of a judgment, even if he was later forced into servitude.

[3] *Emperor ALEXANDER Augustus to Vettius.* The provincial governor is aware that a final verdict which does not contain a condemnation or absolution is not considered legal.

Posted October 1, in the consulship of Maximus, for the second time, and Aelianus (223).

¹³¹ = C.Th. 4.17.1.

[4] *Idem A. Severae.* Prolatam a praeside sententiam contra solitum iudiciorum ordinem auctoritatem rei iudicatae non obtinere certum est.

PP. xv k. Ian. Alexandro A. III et Dione cons.

[5] *Imp. Philippus A. et Philippus C. Montano.* Cum eorum, qui principaliter fisco tenebantur, bona ea lege fideiussoribus procurator tradi iusserit, ut ipsi indemnitate fisco praestarent, nec a sententia eius intercesserit provocatio, consequens est datae formae obtemperari.

[6] *Impp. Carus Carinus et Numerianus AAA. Zoilo.* Cum sententiam praesidis irritam esse dicis, quod non publice, sed in secreto loco officio eius non praesente sententiam suam dixit, nullum tibi ex his quae ab eo decreta sunt praeiudicium generandum esse constat.

PP. v k. Dec. Caro et Carino cons.

[7] *Impp. Diocletianus et Maximianus AA. et CC. Isidorae. pr.* Ex stipulatione parta actione pacisci proximis personis suadendo praeses provinciae verborum obligationem, quam certo iure tolli tantum licet, extinguere non potest, nec vox omnis iudicis iudicati continet auctoritatem, cum potestatem sententiae certis finibus concludi saepe sit constitutum. 1. Quapropter si nihil causa cognita secundum iuris rationem pronuntiatum est, vox pacisci suadentis praesidis actionem tuam perimere, si quam habuisti, minime potuit.

[8] *Idem AA. et CC. Licinio. pr.* Libera quidem Theodota, quam ex emptionis causa vel in solutum creditori traditam proponis, pronuntiata citra provocationis auxilium sententia rescindi non potest. 1. Verum si mota quaestione, praemissa denuntiatione ei, qui auctor huius mulieris fuit, iudicatum processit, quanti tua interest, empti, si emisti, vel ob debitum reddendum, si in solutum data est, repetere non prohiberis.

[9] *Idem AA. et CC. Domno.* Post sententiam, quae finibus certis concluditur, ab eo qui pronuntiaverat vel eius successore de quaestione, quae iam decisa est, statuta rei iudicatae non obtinent auctoritatem:

[4]³³ *The same Augustus to Severa.* It is certain that a verdict rendered by the governor in violation of the usual rules in administering justice does not have the force of a judgment.

Posted December 18, in the consulship of Alexander Augustus, for the third time, and Dio (229).

[5] *Emperors PHILIP Augustus and Caesar PHILIP to Montanus.* Since the Procurator ordered that the property of those who are liable to the Treasury as principals should be turned over to sureties upon the condition that these indemnify the Treasury, and an appeal on his verdict has not been lodged, it follows that this order should be obeyed.

[6] *Emperors CARUS, CARINUS, and NUMERIAN Augusti to Zoilus.* Since you state that the verdict of the governor is void because he did not pronounce his verdict publicly but in a secret place without the presence of his official staff, it is clear that his decisions create no prejudice for you.

Posted November 27, in the consulship of Carus and Carinus (283).

[7]³³ *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Isidora. pr.* If a right of action was acquired by a stipulation, the provincial governor could not extinguish such a verbal obligation by persuading persons who were close relations to settle, for it can only be eliminated in a set legal manner. Nor does every pronouncement of a judge have the force of an adjudication, since it has often been held that the force of a verdict is limited within definite bounds. 1. Hence, if no pronouncement is made after the trial of a case according to the principle of law, the pronouncement of the governor persuading a settlement could in no way destroy your cause of action, if you had any.

[8] *The same Augusti and Caesars to Licinius. pr.* If Theodota, who you say was delivered to you pursuant to a purchase or in payment of a debt, was judicially pronounced to be a free woman, the verdict cannot be vacated without appealing. 1. But if the suit was started and notice was given to the one who sold this woman and he proceeded to trial, you are not forbidden to recover your interest in an action on purchase, if you bought her, or an action on recovery of debt, if she was given to you in payment of debt.

[9] *The same Augusti and Caesars to Domnus.* After a verdict, which is confined by definite limits, is rendered, a subsequent decision of the same question, made either by the judge who gave the first one or by his successor, does not have the force of an adjudication. But a judgment as to possession does not

³³ Combine with C. 6.34.1.

³⁴ See C. 8.37.5, dated November 27, 293.

nam nec de possessione pronuntiata proprietati ullum praeiudicium adferunt nec interlocutiones ullam causam plerumque perimunt.

S. III non. April. CC. cons.

[10] *Idem AA. et CC. Menodoro.* Nulli, qui statuendi non habet facultatem, interdicere patriae cuiquam permittitur.

[11] *Idem AA. et CC. Titiano.* Cum iudex in definitiva sententia iusiurandum solummodo praestari praecipiat, non tamen addat, quid ex recusatione vel praestatione sacramenti fieri oportet, huiusmodi sententiam nullam vim obtinere palam est.

[12] *Imp. Arcadius et Honorius AA. Iuliano proconsuli Africae.* Iudices tam Latina quam Graeca lingua sententias proferre possunt.

D. v id. Ian. Mediolani Caesario et Attico cons.

[13] *Imp. Iustinianus A. Demostheni pp.* Nemo iudex vel arbiter existimet neque consultationes, quas non rite iudicatas esse putaverit, sequendum, et multo magis sententias eminentissimorum praefectorum vel aliorum procerum (non enim, si quid non bene dirimatur, hoc et in aliorum iudicum vitium extendi oportet, cum non exemplis, sed legibus iudicandum est), nec si cognitionales sint amplissimae praefecturae vel alicuius maximi magistratus prolatae sententiae: sed omnes iudices nostros veritatem et legum et iustitiae sequi vestigia sancimus.

D. III k. Nov.^{vi}

[14] *Idem A. Demostheni pp.* Cum Papinianus summi ingenii vir in quaestionibus suis rite disposuit non solum iudicem de absolutione rei iudicare, sed ipsum actorem, si e contrario obnoxius fuerit inventus, condemnare, huiusmodi sententiam non solum roborandam, sed etiam augendam esse sancimus, ut liceat iudici vel contra actorem ferre sententiam et aliquid eum daturum vel facturum pronuntiare, nulla ei opponenda exceptione, quod non competens iudex agentis esse cognoscitur. cuius enim in agendo observavit arbitrium, eum habere et contra se iudicem in eodem negotio non dedignetur.

^{vi} <Recitata septimo miliario in novo consistorio palatii Iustiniani> d. III k. Nov. <Decio vc. cons.> (Corcoran).

prejudice the question of ownership, nor do interim orders (*interlocutiones*) generally destroy a cause of action.

Written April 3, in the consulship of the Caesars (294).

[10] *The same Augusti and Caesars to Menodorus.* No one who lacks the power of rendering judgment can banish anyone from his native land.

[11] *The same Augusti and Caesars to Titianus.* When a judge merely directs in his final verdict that an oath shall be taken, but does not add what the consequences of either refusing the oath or taking it should be, it is clear that his verdict has no validity.

[12] *Emperors ARCADIVS and HONORIUS Augusti to Julian, Proconsul of Africa.* Judges may give verdicts in the Latin as well as the Greek language.

Given January 9, at Milan, in the consulship of Caesarius and Atticus (397).

[13]¹³⁴ *Emperor JUSTINIAN Augustus to Demosthenes, Praetorian Prefect.* No judge or judge arbitrator needs to follow answers to a consultation (*consultatio*) which he does not believe to be correct, much less the opinions of the most eminent Prefects or other high officials, nor even the judicial decisions of the most high Prefecture or of any other of the highest officials. For if a case has been improperly resolved, it should not be extended so as to vitiate other judges, since judgments should be made based on laws not examples. We ordain that all Our judges must follow the truth and the path of both law and justice.

Read at the seventh milestone in the New Consistory of Justinian's Palace. Given October 30, in the consulship of the vir clarissimus Declus (529).

[14]¹³⁵ *The same Augustus to Demosthenes, Praetorian Prefect.* Since Papinian, a man of great genius, rightly held in his *Questions* that a judge may not only decide to absolve a defendant, but may also condemn the plaintiff if he should be found to be liable, We ordain that this opinion should not only be confirmed but also extended. Therefore let it be permitted for a judge to give judgment against the plaintiff and order him to give or do something, and there can be no objection that the judge was not competent to give judgment against the plaintiff. For if a person, while acting as plaintiff, respected this man's judgment, he may not deem him unworthy to serve as judge against himself in the same matter.¹³⁶

¹³⁴ Possibly to combine with 14.

¹³⁵ Possibly to combine with 13.

¹³⁶ MS P reports the subscription: "Given November 17 in the consulship of Lampadius and (H) Orestes (530)." This cannot be reconciled with the known dates for Demosthenes' (second) Praetorian Prefecture, which ended after October 30, 529; see *PLRE II* FL Theodorus Petrus Demosthenes 4. The subscription is thus to be transferred to §16.

[15] [Ὁ αὐτὸς βασιλεὺς Ἰουλιανῷ ἐπάρχῳ πραιτωρίων.] Ἡ διάταξις κελεύει πολλῶν ὄντων ἐν τῇ δίκῃ κεφαλαίων δύνασθαι τὸν δικαστὴν ἐπὶ τισιν αὐτῶν ἐξαγαγεῖν ἀπόφασιν τελείαν καὶ τότε πάλιν ζητῆσαι περὶ τῶν ἄλλων καὶ πάλιν ἐξενεγκεῖν τὴν δοκοῦσαν αὐτῷ ἀπόφασιν καὶ μὴ ἀναγκάζεσθαι μίαν ἀπόφασιν περὶ πάντων ὅμα λέγειν τῶν κεφαλαίων.

[16] *Idem A. Iuliano pp.* Cum solitum est in sententiis iudicum sic interlocutionem proferri, ut non liceat partibus ante definitivam sententiam ad appellationis vel recusationis venire auxilium, quidam putabant non licere ante litem contestatam nec iudicem recusare, quemadmodum nec ab eo appellare. cum enim simul utrumque vocabulum ponitur tam appellationis quam recusationis, provocatio autem ante litem contestatam non potest porrigi, putabant, quod nec recusare quidem iudicem cuidam conceditur ante litem contestatam. quod minime vetitum est. caveant itaque iudices huiusmodi sermonem simul et sine certa distinctione proferre.

D. xv k. Dec. Lampadio et Oresta vv. cc. cons.

XXXXVI De Sententia, Quae sine Certa Quantitate Prolata Est

[1] *Imp. Severus et Antoninus AA. Aeliana.* Cum iudicem, quoad pecunia condemnationis soluta fuisset, pendendis usuris legem dixisse profiteris, non contra iuris formam sententiam datam palam est.

[2] *Imp. Alexander A. Marcellino.* Quamquam pecuniae quantitas sententia curatoris rei publicae non continetur, sententia tamen eius rata est, quoniam indemnitatem rei publicae praestari iussit.

[3] *Imp. Gordianus A. Aemilio.* Haec sententia: 'omnem debiti quantitatem cum usuris competentibus solve' iudicati actionem parere non potest, cum apud iudices ita demum sine certa quantitate facta condemnatio auctoritate rei iudicatae censeatur, si parte aliqua actorum certa sit quantitas comprehensa.

[15]¹³⁷ [*The same Emperor to Julian, Praetorian Prefect.*] The constitution orders that if many points are involved in a suit, the judge may give a final decision on some of them and then proceed to investigate others and again give a decision on them, and he shall not be compelled to pronounce his decision on all the points at once.

[16] *The same Augustus to Julian, Praetorian Prefect.* As it has been customary in judicial sentences to frame an interim order (*interlocutio*) in such a way that the parties could not have recourse to an appeal or an objection to the judge (*recusatio*) before the final decision, some have thought that the parties could not object to the judge (*recusare*) before joinder of issue just as they could not appeal from him. For as both expressions, "appeal" and "objection to the judge," are used together, and as no appeal can be made before joinder of issue, they thought that the judge could not be objected to before joinder of issue. But that is not forbidden. Judges, therefore, must be careful not to use these expressions at the same time and without definite distinction.

Given November 17, in the consulship of the viri clarissimi Lampadius and Orestes (530).

Forty-Sixth Title A Verdict Rendered Without Naming a Definite Sum

[1] *Emperors SEVERUS and ANTONINUS Augusti to Aeliana.* Since you state that the judge fixed the conditions for paying interest until the monetary amount of the judgment could be satisfied, it is clear that the verdict was not given contrary to the legal norm.

[2] *Emperor ALEXANDER Augustus to Marcellinus.* Although no sum of money is mentioned in the verdict of the curator of the municipality, his verdict is nevertheless valid since he ordered indemnity to be furnished to the municipality.

[3] *Emperor GORDIAN Augustus to Aemilius.* The verdict: "Pay the whole sum of the debt with corresponding interest," cannot give rise to an action on the judgment (*actio iudicati*), since a condemnation made at the trial stage without fixing an amount is in fact considered an adjudicated matter (only) if a definite sum is named somewhere in the record (*acta*).

¹³⁷ Possibly to combine with C. 3.2.5, whence the inscription is restored; it also has the subscription: "Given June 24, at Chalcedon, in the consulship of Lampadius and Orestes (530)." Lounghis *et al.* accept this date. The preserved text is a Greek synopsis of the original constitution found at Basilika 9.1.81.

[4] *Idem A. Saturninae.* Haec sententia: 'quae bona fide accepisti, solve,' cum incertum esset quid accepisset quantumque ab eo peteretur, praesertim cum ipse qui extra ordinem iudicabat interlocutus sit dotem datam quae repeteretur non liquidam esse, iudicati auctoritate non nititur. cum igitur is qui postea iudicabat contra te certam sententiam protulit neque ab statutis provocaveris, ipsa tuo facto confirmasti iudicatum.

XXXXVII De Sententiis, Quae pro Eo Quod Interest Proferuntur

[1] *Imp. Iustinianus A. Johanni pp. pr.* Cum pro eo quod interest dubitationes antiquae in infinitum productae sunt, melius nobis visum est huiusmodi prolixitatem prout possibile est in angustum coartare. 1. Sancimus itaque in omnibus casibus, qui certam habent quantitatem vel naturam, veluti in venditionibus et locationibus et omnibus contractibus, hoc quod interest dupli quantitatem minime excedere: in aliis autem casibus, qui incerti esse videntur, iudices, qui causas dirimendas suscipiunt, per suam subtilitatem requirere, ut, quod re vera inducitur damnum, hoc reddatur et non ex quibusdam machinationibus et immodicis perversionibus in circuitus inextricabiles redigatur, ne, dum in infinitum computatio reducitur, pro sua impossibilitate cadat, cum scimus esse naturae congruum eas tantummodo poenas exigi, quae cum competenti moderatione proferuntur vel a legibus certo fine conclusae statuuntur. 2. Et hoc non solum in damno, sed etiam in lucro nostra amplectitur constitutio, quia et ex eo veteres quod interest statuerunt: et sit omnibus, secundum quod dictum est, finis antiquae prolixitatis huius constitutionis recitatio.

D. k. Sept. Constantinopoli post consulatum Lampadii et Orestae vv. cc.

XXXXVIII Si Non a Competenti Iudice Iudicatum Esse Dicatur

[1] *Imp. Alexander A. Sabiniano.* Iudex ad certam rem datus, si de aliis pronuntiavit, quam quod ad eam speciem pertinet, nihil egit.

III non. Ian. Maximo II et Aeliano cons.

[4] *The same Augustus to Saturnina.* The verdict: "Pay what you received in good faith," does not have the authority of an adjudication since it was uncertain what he had received and how much was claimed from him. This is especially true because the judge himself who tried the case, under the extraordinary procedure, stated in an interim order that the amount of the dowry which was claimed was not clear. Since, therefore, the judge who later gave judgment against you reported a definite amount and you did not appeal from his decision, you ratified the judgment by your own act.

Forty-Seventh Title Verdicts Given for Indemnification of One's Interest

[1] *Emperor JUSTINIAN Augustus to John, Praetorian Prefect, pr.* Since the ancient ambiguities as to indemnification of one's interest (*id quod interest*) are innumerable, We thought it best to confine such immoderation as narrowly as possible. 1. Therefore, We ordain that in all cases which involve a definite sum or which are definite in their nature, like sales, leases and all contracts, no one's interest shall exceed double the amount stated. But in other cases, where the amount is uncertain, the judges who try the cases must deploy their attentiveness to detail in order that the actual damage might be recompensed and that it not be pulled into inextricable complications through certain machinations and immoderate perversions, lest the computation be extended endlessly and thus fail because of its own impossibility. Indeed, We know it to be consonant with the law of nature that only those penalties can be extracted which are doled out with appropriate moderation and regulated so as to be bounded by a definite end. 2. This is applicable not only to damage proper but also to loss of profits, since the ancients also considered that in fixing the amount of indemnification. May the recitation of this constitution set an end to the ancient immoderation for all, according to what has been said.

Given September 1, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Forty-Eighth Title When Judgment Is Said to Have Been Given by One Who Is Not the Appropriate Judge

[1] *Emperor ALEXANDER Augustus to Sabinianus.* If a judge appointed for a definite matter gives judgment on some other matter, he acted without effect.

January 3, in the consulship of Maximus, for the second time, and Aelianus (223).

[2] *Imp. Gordianus A. Licinae*. Si militaris iudex super ea causa, de qua civilibus actionibus disceptandum fuit, non datus, a quo dari poterat, cognovit, etiam remota appellatione id quod ab eo statutum est firmitatem non habet iudicati.

[3] *Impp. Diocletianus et Maximianus AA. et CC. Philetae*. Si de proprietate datus iudex adversus te nihil super hac statuit, rector aditus provinciae causam hanc cognoscere suaque decidere sententia curabit, cum et si quid de possessione pronuntiatum probetur, hoc causae proprietatis minime noceat.

S. non. Nov. Heracleae CC. cons.

[4] *Imppp. Gratianus Valentinianus et Theodosius AAA. ad Potitum vicarium*. Et in privatorum causis huiusmodi forma servetur, ne quemquam litigatorum sententia non a suo iudice dicta constringat.

D. x k. Oct. Romae Ausonio et Olybrio cons.

XXXXVIII De Poena Iudicis, Qui Male Iudicavit, vel Eius, Qui Iudicem vel Adversarium Corruptere Curavit

[1] *Imp. Antoninus A. ad Gaudium*. Constitit in quacumque causa sive privata sive publica sive fiscali, ut, cuicumque data fuerit pecunia, vel iudici vel adversario, amittat actionem is, qui diffidentia iustae sententiae in pecuniae corruptela spem negotii reposuerit.

D. XIII k. Ian. duobus Aspris cons.

[2] *Imp. Constantinus A. ad Felicem praesidem Corsicae*. De eo, qui pretio depravatus aut gratia perperam iudicaverit, ei vindicta quem laeserit non solum existimationis dispendiis, sed etiam litis discrimine praebeatur.

D. VIII k. Nov. Sirmi Constantino A. v et Licinio C. cons.

[2] *Emperor GORDIAN Augustus to Licinia*. If a military judge tries a case which should be tried in civil court without having been appointed by someone with the authority to appoint him, his decision does not have the force of a judgment and even the possibility of appeal is removed (as superfluous).

[3] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Philetas*. If a judge appointed to try a question of ownership decided nothing against you on that point, the provincial governor (*rector*) will, when you go before him, try to decide that question himself, since even if a judgment is proven to have been rendered concerning possession, this in no way harms your case for ownership.

Written November 5, at Heraclea, in the consulship of the Caesars (294).

[4]¹³⁸ *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS Augusti to Politus, Vicar*. This rule is observed in cases between private individuals as well, lest a verdict given by an inappropriate judge bind any of the litigants.

Given¹³⁹ September 22, at Rome, in the consulship of Ausonius and Olybrius (379).

Forty-Ninth Title Punishment of a Judge Who Adjudicated Corruptly or of Someone Who Caused a Judge or Opponent to be Corrupted

[1]¹⁴⁰ *Emperor ANTONINUS Augustus to Gaudius*. It is well known that if any money should be given in any case, whether private, public, or Treasury-related, regardless of whether the money is given to a judge or an opponent, anyone who, from lack of confidence in a just decision, placed his hope in the corruption of money should lose his right of action.

Given December 19, in the consulship of the two Aspri (212).

[2]¹⁴¹ *Emperor CONSTANTINE Augustus to Felix, Governor of Corsica*. A judge who gives a wrong decision distorted by bribery or favoritism shall be punished not only by the loss of his good name, but he will also be liable to the party whom he injured for the value of the suit.

Given October 25, at Sirmium, in the consulship of Constantine Augustus, for the fifth time, and Licinius Caesar (319).

¹³⁸ = C.Th. 4.16.2.

¹³⁹ Gothofredus emended to "posted" since no emperor is known to have been at Rome to have issued this constitution in September 379.

¹⁴⁰ See D. 3.6.1.3.

¹⁴¹ = C.Th. 1.16.3; combine with C.Th. 2.6.2, C. epitomates C.Th. Seeck dates to October 24, 318.

L Sententiam Rescindi Non Posse

[1] *Imp. Gordianus A. Secundo.* Neque suam neque decessoris sui sententiam quemquam posse revocare in dubium non venit: nec necesse esse ab eiusmodi decreto interponere provocationem explorati iuris est.
PP. k. Mart.

[2] *Impp. Diocletianus et Maximianus AA. et CC. Alexandrae. pr.* Peremptorias exceptiones omissas initio, antequam sententia feratur, opponi posse perpetuum edictum manifeste declarat. 1. Quod si aliter actum fuerit, in integrum restitutio permittitur. nam iudicatum contra maiores annis viginti quinque non oppositae praescriptionis velamento citra remedium appellationis rescindi non potest.
vii k. Ian. Nicomediae CC. cons.

[3] *Imp. Constantinus A. ad Proculum.* Impetrata rescripta non placet admitti, si decisa semel causae fuerint iudiciali sententia, quam provocatio nulla suspendit: sed eos, qui tale rescriptum meruerint, etiam limine iudiciorum expelli.

D. vii k. Ian. Constantino A. v et Licinio cons.

LI De Fructibus et Litis Expensis

[1] *Impp. Diocletianus et Maximianus AA. et CC. Actae.* Hoc fructuum nomine continetur, quod iustis sumptibus deductis superest.
iii non. April. CC. cons.

[2] *Impp. Valentinianus et Valens AA. Olybrio pu.* Litigator victus, qui post conventionem rei incubarit alienae, non in sola rei redhibitione teneatur nec tantum fructuum praestationem aut eorum quos ipse percepit agnoscat, sed eos, quos percipi oportuisse, non quos eum redegissee constabit, exsolvat ex eo, ex quo re in iudicium deducta scientiam malae

Fiftieth Title A Verdict May Not be Rescinded

[1] *Emperor GORDIAN Augustus to Secundus.* It is beyond doubt that no one (acting as a judge) may revoke his own decision or that of his predecessor in office. It is also settled law that it is unnecessary to appeal from a (substitute) decision of this sort.

Posted March 1.

[2] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Alexandra. pr.* The Perpetual Edict clearly declares that when peremptory defenses are omitted in the beginning, they may be set up (at any time) before the decision is given.¹⁴² 1. But if that is not done, restoration of rights is permitted (to minors under 25 years). For without the remedy of appeal, a judgment against a man who is more than 25 years old cannot be rescinded under the pretense that such a defense was not set up.

December 26, at Nicomedia, in the consulship of the Caesars (294).

[3] *Emperor CONSTANTINE Augustus to Proculus.*¹⁴³ It is not permitted to admit rescripts obtained once cases have been disposed of through a judicial verdict that has not been suspended by an appeal. But those who have obtained such a rescript shall be expelled from the very threshold of the courts.

Given December 26, in the consulship of Constantine Augustus, for the fifth time, and Licinius (319).

Fifty-First Title Fruits and the Expenses of Litigation

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Acta.* The term “fruits” means: what remains after just expenses have been deducted.

April 3, in the consulship of the Caesars (294).

[2]¹⁴⁴ *Emperors VALENTINIAN and VALENS Augusti to Olybrius, City Prefect.* A litigant who was defeated and who after summons remained in possession of another’s property is bound to restore not only the property, nor just the fruits which he acknowledges he collected, but he must pay the fruits which he ought to have collected and not those which he is acknowledged to have received, beginning from the period when he came to know that he was in wrongful

¹⁴² *Exceptiones peremptoriae* are defenses that can be interposed at any point in the trial and, if proved, render the plaintiff’s claim void. Most common defenses are peremptory.

¹⁴³ = C.Th. 4.16.1, which reports “petitions (*preces*) and rescripts.”

¹⁴⁴ = C.Th. 4.18.1, with considerable changes affecting the substance. Seeck dates to April 25, 369.

possessionis accepit. heredis quoque succedentis in vitium par habenda fortuna est.

D. VII k. Mart. Treviris Valentiniano np. et Victore cons.

[3] *Imp. Honorius et Theodosius AA. Asclepiodoto pp.* Terminato trans-actoque negotio posthac nulli actio neque ex rescripto super sumptuum repetitione praestetur, nisi iudex, qui de principali negotio sententiam promulgavit, cominus partibus constitutis iuridica pronuntiatione signaverit victori causae restitui debere expensas aut super his querellam iure competere. post absolutum enim dimissumque iudicium nefas est litem alteram consurgere ex litis primae materia.

D. III k. April. Constantinopoli Asclepiodoto et Mariniano cons.

[4] *Imp. Valentiniani et Marciani AA. edictum ad populum.* Non ignoret is, cuius ex interpellatione aliquis secundum datam formam in longinqua fuerit protractus examina, quod, si culpa sui fuerit dilata cognitio vel minime actioni suae adfuerit vel delata probaverit, pro calumnia quidem poenam luat legibus constitutam, pro vero pecuniaria causa post dispendia, post sumptus considerata quantitate postulatorum vel medii itineris intervallo condemnationem pro aestimatione iudicis sustinebit.

D. v id. Oct. Constantinopoli Valentiniano A. VII et Avieno cons.

[5] [Ἀυτοκράτωρ Ζήνων Α.] *pr.* Ἡ διάταξις κελεύει, ὥστε πάντα δικαστὴν ἐν τῇ ἀποφάσει αὐτοῦ κελεύειν τὸν ἡττηθέντα διδόναι τὰ δαπανήματα πάντα τὰ ἐν τῷ δικαστηρίῳ γενόμενα. ἔχοντος ἐξουσίαν αὐτοῦ τοῦ δικαστοῦ καὶ ὑπερβαίνειν τὴν δαπάνην ἕως τῆς δεκάτης μοίρας τῶν δαπανηθέντων, ἐὰν αὐτὸν ἡ ἀναίσχυντία τοῦ ἡττηθέντος μέρους πρὸς τοῦτο παρακινήσῃ, ὥστε τὸ ὑπὲρ τὰ δαπανήματα τῷ δημοσίῳ λόγῳ διαφέρειν, εἰ μὴ τι ἄρα ὁ δικαστὴς τὴν τριβὴν τοῦ νενικηκότος μέρους βουλευθεὶς θεραπεῦσαι μέρος τί ποτε ἐκ τούτων αὐτῷ ἀφορίσει. 1. Καταδικαζομένου μὴ μόνον τοῦ ἐνάγοντος καὶ τοῦ ἐναγομένου, ὅτε πρόσφορος ἑκατέρῳ ἐστὶν ὁ δικαστὴς, ἀλλὰ καὶ τοῦ ἐνάγοντος ἀπρόσφορός ἐστιν, ἡττηθῇ δὲ ἐξ ἀντεναγωγῆς, μὴ δυνάμενος ἐκεῖνον τὸν δικαστὴν παραιτήσασθαι, εἴτε ἄρχοντες εἴησαν δικασταὶ εἴτε θεῖοι διαιτηταί· ἔχουσι γὰρ καὶ οὗτοι ἐκβιβαστὰς καὶ

possession due to the lawsuit being brought. An heir who succeeds to a bad title is subject to the same fate.

Given February 23, at Trier, in the consulship of Valentinian, Most Noble Boy, and Victor (369).

[3]¹⁴⁵ *Emperors HONORIUS and THEODOSIUS Augusti to Asclepiodotus, Praetorian Prefect.* Once a suit has been terminated and completed, no action shall lie to recover expenses even pursuant to an imperial rescript, unless the judge who rendered the verdict in the main suit has declared, by judicial pronouncement while the parties were still present, that the expenses should be repaid to the winner of the case or that a complaint to recover them has legal force. For it is wrong that after a judgment is resolved and dismissed, a second suit should arise out of the substance of the first.

Given March 30, at Constantinople, in the consulship of Asclepiodotus and Marinianus (423).

[4]¹⁴⁶ *An Edict of Emperors VALENTINIAN and MARCIAN Augusti to the People.* Anyone at whose instigation another is dragged to a distant court pursuant to law should not forget that, if the case is protracted through his fault, or if he fails to be present or fails to prove his allegations, he must pay a penalty fixed by law for vexatious litigation (*calumnia*); he will, in a civil case, aside from costs and expenses incur a penalty fixed at the discretion of the judge taking into consideration the sum demanded by his adversary or the distance of the average journey.

Given October 11, at Constantinople, in the consulship of Valentinian Augustus, for the third time, and Avienus (450).

[5]¹⁴⁷ [*The Emperor ZENO Augustus... pr.* The constitution orders that every judge shall in his verdict order the loser to pay all expenses of litigation. The judge has the authority to exceed the expenses up to one-tenth of the value of what was spent if the insolence of the losing party moves him to this, in such a way that the excess over the expenses shall accrue to the Treasury, unless the judge wishes to make good the losses of the winning party and sets aside some part of the sum for him. 1. Not only may the plaintiff and defendant be condemned thus when the judge has authority to give judgment against either party, but also when he has no such power over the plaintiff, but the latter is defeated by a counter claim, since he cannot refuse that judge, whether the

¹⁴⁵ = C.Th. 4.18.2; combine with C. 7.62.31; C.Th. 11.31.9.

¹⁴⁶ = Nov. Marc. 1.1.7.

¹⁴⁷ Possibly to combine with C. 1.51.13 (dated June 26, 487), 2.7.18–19 (dated December 27, 487), 3.3.6, 3.10.1. The preserved text is a Greek synopsis of the original constitution found at Bas. 9.3.69.

ἐπαίκτας. 2. Εἰ δὲ μὴ τοῦτο ποιήσει ὁ δικαστής, αὐτὸς τὴν ζημίαν ταύτην ἀναγκάζεται θεραπεῦσαι τῷ νενικηκότι μέρει. 3. Ἐάν τις ἐναγόμενος εὐγνωμόνως ἀποδώσει ἢ ἐνάγων ἀποστῇ τῆς δίκης ἢ καὶ ὁ δικαστής εὖρῃ αὐτὸν τῇ ἀληθείᾳ οὐχὶ συκοφάντην, ἀλλὰ ἐπὶ ἀμφιβόλῳ πράγματι δικαζόμενον, ὁ τοιοῦτος ἐκφεύγει τὴν τῶν δαπανημάτων καταδίκην. 4. Δῆλον δέ, ὅτι ἐπὶ τῶν χαμαιδικαστῶν ὁ ἄρχων ἐστὶν ὁ ὀφείλων αὐτοῖς ἀφορίσαι ταξεώτην τὸν ταῦτα μεθοδεύοντα.

D. VII k. April. post consulatum Longini.

[6] *Imp. Anastasius A. Stephano magistro militum.* Cum quidam per leges sacrasque constitutiones, alii per speciales largitates sibi praestituta privilegia praetendunt tam super sportulis pro conventionibus usque ad certam quantitatem praebendis quam super expensis litium vel minuendis vel penitus non agnoscendis, per hanc legem decernimus, ut, quicumque huiusmodi privilegio munitus est vel postea talem praerogativam quolibet modo meruerit, sciat, et si quos ipse utpote obnoxius sibi pro quacumque criminali vel civili causa constitutos in accusationem deduxerit, hos nihilo minus isdem privilegiis potituros, quoniam non est ferendum eos, qui praefatas praerogativas, ut ante latum est, praetendunt, aliquid plus ab adversariis suis quaerere concedi, quam ipsi ab aliis pulsati facere patiantur: ita scilicet, ut haec forma modis omnibus observetur super privilegiis per liberalitates vel generaliter quibusdam officiis aut scholis seu dignitatibus vel specialiter certis personis praestitis vel postea praebendis, sive hoc ipsum expressim principalibus dispositionibus vel adfatibus insertum sive praetermissum sit vel fuerit.

LII De Re Iudicata

[1] *Imp. Antoninus A. Stellatori.* Rebus quidem iudicatis standum est. sed si probare poteris eum cui condemnatus es id quod furto amisisse videbatur recepisce, adversus iudicati agentem doli exceptione opposita tueri te poteris.

xii k. Mart. Antonino A. IIII et Balbino cons.

[2] *Idem A. Pacatiano.* Res iudicatae si sub praetextu computationis instaurentur, nullus erit litium finis.

PP. prid. non. ... Romae Laeto et Cereale cons.

judges are magistrates or imperial arbitrators; for these also have subordinates and court clerks (*apparitores executoresque*, ἐκβιβασταὶ καὶ ἐπείκταις). 2. If the judge fails to do so, he must himself make good the damage to the winning party. 3. But if a defendant shows his good faith by paying, or if the plaintiff abandons the suit, or the judge truly finds that he is not a malicious litigant but that the case was over a contentious matter, he will escape condemnation to pay the costs. 4. It is proper in the instance of petty judges for the magistrate to be the one who assigns a subordinate that can manage these affairs.

Given March 26, in the post-consulate of Longinus (487).

[6] *Emperor ANASTASIUS Augustus to Stephanus, Master of the Soldiers.* Some persons claim that, under laws and imperial constitutions or through special munificence, they have obtained privileges of having to pay only a certain amount as fees before a summons, and less than the usual amount of the expenses of suit or none at all. Therefore We decree by this law that, whoever has now obtained or hereafter obtains such privilege in any manner, should know that, if he himself sues anyone as liable to him in a criminal or civil case, the defendant shall have the same privileges. For it is not to be tolerated that those who, as stated before, claim the aforesaid prerogatives should be permitted to seek from their opponents anything more than they would pay if sued by others. And this rule shall be followed in every respect in connection with privileges already given or hereafter to be given by special munificence, or generally to any officials, departments (*scholis*), ranks, or to individuals by special grant, whether this is expressly stated in imperial orders or rescripts or it happens to have been omitted.¹⁴⁸

Fifty-Second Title An Adjudicated Matter¹⁴⁹

[1] *Emperor ANTONINUS Augustus to Stellator.* Once matters have been adjudicated, they must remain so. But if you can prove that the man who obtained judgment against you received back (from some other source) what he seemed to have lost by theft, you can protect yourself using the defense of fraud (*exceptio doli*) against him when he sues you on adjudicated matters.

February 18, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2] *The same Augustus to Pacatianus.* If an adjudicated matter were reopened under the pretext of (an error in) computation, there could be no end to law-suits.

Posted on the day before the nones of ..., at Rome, in the consulship of Laetus and Cerealis (215).

¹⁴⁸ Lounghis *et al.* date to between 491 and 518.

¹⁴⁹ See D. 42.1.

[3] *Idem A. Demetrio.* Si pecuniam, quam mala ratione interceptisse vos apparuit, iussi sitis inferre cum poena et comperto praecepto praesidis non provocaveritis, universam quantitatem debetis inferre.

[4] *Imp. Gordianus A. Antonino.* Sub specie novorum instrumentorum postea repertorum res iudicatas restaurari exemplo grave est.
D. VII id. Mart.

[5] *Impp. Diocletianus et Maximianus AA. et CC. Valentino.* Ad solutionem dilationem petentem adquevisse sententiae manifeste probatur, sicut eum, qui quolibet modo sententiae adqueverit. nec enim instaurari finita rerum iudicarum patitur auctoritas.
S. prid. id. Febr. Sirni CC. cons.

[6] *Impp. Honorius et Theodosius AA. Iuliano proconsuli Africae.* Gesta, quae sunt translata in publica monumenta, habere volumus perpetuam firmitatem. neque enim morte cognitoris perire debet publica fides.
D. III k. Sept. Romae Constantio et Constante cons.

LIII De Exsecutione Rei Iudicatae

[1] *Impp. Severus et Antoninus AA. Iustino.* Nimis propere iudex pignora Marcellae capi ac distrahi iussit ante rem iudicatam. prius est ergo, ut servato ordine actionem adversus eam dirigas et causa cognita sententiam accipias.
PP. III k. Febr. Albino et Aemiliano cons.

[2] *Imp. Antoninus A. Maximo.* Si causam iudicati non novasti, rem iudicatam praeses provinciae etiam pignoribus captis ac distractis ad emolumentum perducere iubebit. quod si novata causa est, ex stipulatu tibi actio competit et iudice accepto secundum iuris formam experire.

[3] *The same Augustus to Demetrius.* If you were ordered to pay the money which you were shown to have embezzled by false accounting, together with a penalty, and you did not appeal when you learned of the governor's order, you must pay the full amount.

[4] *Emperor GORDIAN Augustus to Antoninus.* It sets an unseemly example to reopen an adjudicated matter on the pretense of the subsequent discovery of new documents.

Given March 9.

[5] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Valentinus.* A man who asks time for payment is clearly proven to have acquiesced in the verdict, just like one who acquiesces in a verdict in any other manner. And the law of adjudicated matters does not permit completed cases to be reopened.

Written February 12, at Sirmium, in the consulship of the Caesars (294).

[6]¹⁵⁰ *Emperors HONORIUS and THEODOSIUS Augusti to Julian, Proconsul of Africa.* We want transactions that are transferred into public records to have perpetual force. Public trust should not perish with the death of the trial judge.

Given August 30, at Rome, in the consulship of Constantius and Constans (414).

Fifty-Third Title Execution of a Judgment¹⁵¹

[1] *Emperors SEVERUS and ANTONINUS Augusti to Justinus.* The (trial) judge was too hasty in ordering the pledges of Marcella to be seized and sold before the matter was adjudicated. You should, accordingly, first, by observing the regular order, commence an action (for execution) against her, and obtain judgment after the trial of the case.

Posted January 30, in the consulship of Albinus and Aemilianus (206).

[2] *Emperor ANTONINUS Augustus to Maximus.* If you did not seek novation of the judgment, the provincial governor will order the adjudicated matter to be satisfied by the seizure and sale of pledges. But if there was a novation of the case (through stipulation), you have an action on stipulation, and once a judge is appointed, you should try the case according to law.

¹⁵⁰ = C.Th. 16.5.55. C. epitomizes C.Th., which applied quite specifically to trials against Donatists.

¹⁵¹ See D. 42.1.

[3] *Idem A. Agrippae.* Ordo rei gestae et mora solutionis, quae intercessit, constantius desiderat remedium, si itaque praesidem provinciae, qui rem iudicatam exsequi debet, adieris et adlegaveris res soli, quae pignori datae sunt, diu subhastatas ex compacto sive ambitione diversae partis emptorem non invenire, in possessionem earum te mittet, ut vel hoc remedio res tam diu tracta ad effectum perducatur.

D. XI k. Iul. Messala et Sabino cons.

[4] *Idem A. Marcello militi.* Stipendia retineri propterea, quod condemnatus es, non patietur praeses provinciae, cum rem iudicatam possit aliis rationibus exsequi.

PP. III non. Iun. Sabino II et Anullino cons.

[5] *Imp. Gordianus A. Amando.* Etiam nomen debitoris in causa iudicati capi posse ignotum non est.

PP. III id. Oct. Attico et Praetextato cons.

[6] *Imp. Philippus A. et Philippus C. Titiano.* Si, ut proponis, rerum iudicarum exsecutor datus partes sibi iudicis vindicavit et contra ea, quae pridem pro partibus tuis fuerunt statuta, aliquid pronuntiandum putavit, sententia ab eo dicta vim rei iudicatae obtinere nequaquam potest.

[7] *Impp. Diocletianus et Maximianus AA. Theodoro.* Si longis apertisque frustrationibus partis adversae restitutio remorata est, etiam servis rebus humanis exemptis a frustratore aestimatio eorum restituenda est. animalia quoque cum fetibus tibi intercessu praesidis repraesentabuntur.

[8] *Idem AA. et CC.* Exsecutorem eum solum esse manifestum sit, qui post sententiam, inter partes audita omni et discussa lite, prolatam iudicatae rei vigorem ad effectum videtur adducere.

Sine die et consule.

[3] *The same Augustus to Agrippa.* The order in which things were done and the delay in payment which intervened call for a more steadfast remedy. If, accordingly, you go before the provincial governor who ought to be executing the judgment and show that the land (*res soli*) that was given in pledge has long been up for auction but has not found a buyer, whether through an agreement or through the corrupt solicitation of the opposite party, he will put you in possession of it, so that a matter that has been dragged out for so long may be brought to a close through this remedy.

Given June 21, in the consulship of Messala and Sabinus (214).

[4] *The same Augustus to Marcellus, a soldier.* The provincial governor will not allow your salary (*stipendia*) to be distrained to satisfy a judgment against you, since he is able to compel the adjudicated matter to be satisfied by other methods.

Posted June 3, in the consulship of Sabinus, for the second time, and Anullinus (216).

[5] *Emperor GORDIAN Augustus to Amandus.* It is not unknown that a claim due from a debtor may be taken to satisfy a judgment.

Posted October 13, in the consulship of Atticus and Praetextatus (242).

[6] *Emperors PHILIP Augustus and Caesar PHILIP to Titianus.* If, as you state, the court officer (*exsecutor*) appointed to enforce the adjudicated matter arrogated to himself the office of judge and undertook to render a decision contrary to what was previously decided in your favor, the verdict which he pronounced cannot obtain the force of an adjudicated matter.

[7] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Theodorus.* If restitution was delayed by the long and open evasion of your opponent, even if the slaves have died in the meantime, an estimate of their value must be restored by the evader. So, too, any animals along with their offspring are to be given back to you by the intercession of the governor.

[8]¹⁵² *The same Augusti and the Caesars.* Let it be clear that he alone is an enforcement officer (*exsecutor*) who, after a verdict and after the entire suit between the parties has been heard and discussed, brings the adjudicated matter into effect.

Without date or consul

¹⁵² Possibly to combine with C. 3.3.2 and 3.11.1 (implying a date of March or July 18); 7.62.6, which add *dicunt* to the inscription.

[9] *Idem AA. et CC. Glyconi.* Eos, quos debitores tuos esse contendis, apud rectorem conveni provinciae, qui sive confessi debitum sive negantes et convicti fuerint condemnati nec intra statutum spatium solutioni satisfecerint, cum latae sententiae pignoribus etiam captis ac distractis secundum ea quae saepe constituta sunt meruerunt executionem, iuris formam tibi custodiet.

S. non. Nov. CC. cons.

LIII De Usuris Rei Iudicatae

[1] *Imp. Antoninus A. procuratoribus hereditatium.* Fiscus, qui bona secundum se dicta sententia persequitur, eas quoque rationes habiturus est, ut, qui post legitimum tempus placitis non obtemperavit, usuram centesimam temporis quod postea fluxerit solvat.

[2] *Imp. Iustinianus A. Menae pp.* Eos, qui condemnati solutionem pecuniarum, quas dependere iussi sunt, ultra quattuor menses a die condemnationis vel, si provocatio fuerit oblata, a die confirmationis sententiae connumerandos distulerint, centesimas usuras exigi praecipimus: nec priscis legibus, quae duas centesimas eis inferebant, nec nostra sanctione, quae dimidiam centesimae statuit, locum in eorum personam habentibus.

D. VII id. April. Constantinopoli Decio cons.

[3] *Idem A. Iohanni pp. pr.* Sancimus, ut si quis condemnatus fuerit, post datas a nobis quadrimenstres indutias centesimas quidem usuras secundum naturam iudicati eum compelli solvere, sed tantummodo sortis et non usurarum, quae ex pristino contractu in condemnationem deductae sunt. cum enim iam constituimus usurarum usuras penitus esse delendas, nullum casum relinquimus, ex quo huiusmodi machinatio possit induci. 1. Si enim sine emendatione relinquatur, aliquid absurdum atque inelegans necesse est evenire, cum utiliter ex contractibus descendentes plerumque minores centesimae ex nostra lege factae sunt et necesse est minoribus usuris graviores supponi. si enim ex iudicati actione centesimae omnimodo currunt usurae, ex contractibus autem hoc raro contingit in capitulis lege nostra tantummodo exceptis, huiusmodi iniquitatem ipsa necessitas rerum introducebat.

[9] *The same Augusti and the Caesars to Glyco.* Sue the men who you contend are your debtors before the provincial governor. He will safeguard the substance of the law on your behalf, whether they confess the debt or, having denied it, are defeated and condemned but fail to make payment within the time fixed. Once verdicts were rendered and pledges seized and sold according to oft-repeated provisions, they deserved enforcement.

Written November 5, in the consulship of the Caesars (294).

Fifty-Fourth Title Interest on an Adjudicated Matter

[1] *Emperor ANTONINUS Augustus to the Procurators of Inheritances.* The Treasury, which pursues property adjudicated to it, will also take into account that anyone who failed to comply with the order of the court must pay interest at 1 percent per month for the period that runs after the legal time fixed for such compliance.

[2] *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect.* We order those condemned to pay a money judgment to pay interest at a rate of 1 percent per month on the judgment beginning after four months from the day on which they were condemned or, if an appeal was made, four months beyond the date of confirmation of the verdict. Neither the old laws, which imposed interest at 2 percent per month, nor Our own sanction,¹⁵³ which established a 0.5 percent per month, are to apply to such persons.

Given April 7, at Constantinople, in the consulship of Decius (529).¹⁵⁴

[3] *The same Augustus to John, Praetorian Prefect. pr.* We ordain that a judgment debtor must, after a period of four months' grace, pay interest at the rate of 1 percent per month, according to the nature of the matter adjudged, but only on the principal and not on interest, which, arising out of a prior contract, was included in the judgment. Since We have already established¹⁵⁵ that interest payments on interest are to be eliminated, We leave no chance for this sort of contrivance to be introduced. 1. If left without correction, an absurd and inconsistent situation would necessarily arise. For inasmuch as interest on contracts is, under Our law,¹⁵⁶ generally less than 1 percent per month, it is necessary to replace a heavier interest with a lesser one. Indeed, if interest rates of 1 percent per month always result from an action on judgment, but arise only rarely from contracts, with the lone exception of chapters from Our law, this sort of inequality was perforce naturally introduced.

¹⁵³ C. 4.32.26.2.

¹⁵⁴ Lounghis *et al.* date to April 6, 529.

¹⁵⁵ C. 4.32.28.

¹⁵⁶ C. 4.32.26.2.

2. Et ideo pio remedio causam corrigentes sancimus sortis tantummodo usuras usque ad centesimam currentes ex iudicati actione profligari, non autem usurarum quantascumque usuras. si enim novatur iudicati actione prior contractus, necesse est usurarum quidem, quae anterioris contractus sunt, cursum post sententias inhiberi, alias autem usuras ex iudicati actione tantummodo sortis procedere, et non ideo, quod forsitan consummata est quantitas sortis et usurarum, totius summae usuras postea colligi, sed sortis tantummodo. 3. Et cum antiquitas pessimo exemplo reis quidem condemnatis laxamentum duorum mensum praestabat, fideiussores autem eorum eodem uti beneficio non concedebat, ut liceret victoribus relictis propter legem condemnatis personis a fideiussoribus eorum vel mandatoribus statim pecunias vel res in condemnatione positas exigere, huiusmodi acerbitatem resecentes sancimus quadrimenstres indutias, quas dedimus condemnatis, etiam ad fideiussores eorum et mandatores extendi, ne legi fiat derogatum. cum enim interventor solvere compellatur et ipse reum coerceat ad invitam solutionem, nullum condemnatus habebat nostrae sensum humanitatis, quia per medium fideiussorem statim pecunias persolvere compellebatur.

D. v k. Dec. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

LV Si Plures Una Sententia Condemnati Sunt

[1] *Imp. Alexander A. Victori.* Si non singuli in solidum, sed generaliter tu et collega tuus una et certa quantitate condemnati estis nec additum, ut, quod ab altero servari non possit, alter suppleret, effectus sententiae virilibus portionibus discretus est. ideoque parens pro tua portione sententiae ob cessationem alterius ex causa iudicati conveniri non potes.

PP. k. Iul. Alexandro A. III et Dione cons.

[2] *Imp. Gordianus A. Anniano.* Quotiens a tutoribus singulis procuratoribus datis insequitur in omnium persona condemnatio, periculum sententiae videri esse divisum. ideoque quod ab uno servari non potuerit, a ceteris exigi non posse explorati iuris est.

PP. xv k. April. Attico et Praetextato cons.

2. Correcting the matter, therefore, by this pious remedy, We ordain that interest on the principal shall be demanded only up to 1 percent per month under an action on judgment, but no interest whatever on interest. For if a novation of the prior contract occurs through the action on judgment, the accrual of interest on the previous contract must necessarily cease after the verdict, but any other interest arising from the action on judgment must necessarily arise from the principal only. Therefore, because the amount of the principal and of the interest may have been added together, interest on the entire sum must not then be collected, but only interest on the principal. 3. And since antiquity set a bad example by giving convicted defendants two months' grace without permitting their sureties to enjoy the same benefit, plaintiffs who won their suit could ignore the principal defendant, who had been convicted at law, and immediately demand the money or property mentioned in the judgment from their sureties or mandators (*mandatores*). Correcting such harshness, We ordain that the four-month grace We have given to defendants condemned in judgment shall be extended to their sureties and mandators lest anything be detracted from the law. Since the surety-guarantor (*intensor*) is compelled to pay and he in turn coerces the principal defendant to involuntary payment, the condemned defendant did not use to receive the benefit of Our kindness, because through the surety or guarantor he was compelled to pay immediately.

Given November 27, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

Fifty-Fifth Title If Several Persons are Condemned by One Verdict

[1] *Emperor ALEXANDER Augustus to Victor.* If you and your associate together were, in general terms, condemned to pay a single and certain sum of money, and each was not condemned to pay the whole, and it was not added that the amount not collected from one should be paid by the other, each will be compelled to pay only his portion of the judgment. If, accordingly, you complied with the verdict as to your portion, you cannot be sued on the judgment on account of the default of the other party.

Posted July 1, in the consulship of Alexander Augustus, for the third time, and Dio (229).

[2] *Emperor GORDIAN Augustus to Annianus.* Whenever a group of procurators severally appointed by *tutores* is condemned on a person-by-person basis, the risk of the verdict is divided. Accordingly, it is settled law that the amount that cannot be collected from one cannot be extracted from the others.

Posted March 18, in the consulship of Atticus and Praetextatus (242).

LVI Quibus Res Iudicata Non Nocet

[1] *Imp. Alexander A. Masculino.* Si neque mandasti fratri tuo defensionem rei tuae neque quod gestum est ratum habuisti, praescriptio rei iudicatae tibi non oberit, et ideo non prohiberis causam tuam agere sine praeiudicio rerum iudicatarum.

PP. non. Mai. Alexandro A. cons.

[2] *Imp. Gordianus A. Athenio.* Res inter alios iudicatae neque emolumentum adferre his, qui iudicio non interfuerunt, neque praeiudicium solent inrogare, ideoque nepti tuae praeiudicare non potest, quod adversus coheredem eius iudicatum est, si nihil adversus ipsam statutum est.

PP. v id. Iul. Gordiano A. et Aviola cons.

[3] *Imp. Diocletianus et Maximianus AA. Honorato.* Iuris manifestissimi est et in accusationibus his, qui congressi iudicio non sunt, officere non posse, si quid forte praeiudicii videatur oblatum.

PP. XIII k. Sept. Basso et Quintiano cons.

[4] *Idem AA. et CC. Soteriano.* Nec in simili negotio res inter alios actas absenti praeiudicare saepe constitutum est.

S. III k. Dec. CC. cons.

LVII Comminationes Epistulas Programmata Subscriptiones
Auctoritatem Rei Iudicatae Non Habere

[1] *Imp. Antoninus A. Rogatiano.* Nec vim stipulationis obtinere potest comminatio iudicis, qui certas usuras praestatueros eos dixit, qui intra certum diem debitum non exsolvissent.

PP. prid. id. Ian. Antonino A. IIII et Balbino cons.

[2] *Imp. Alexander A. Maximiano.* Rei iudicatae effectum non habet, quod per epistulam rector provinciae solvere vos pecuniam rei publicae iussit.

Fifty-Sixth Title Those Not Harmed by an Adjudicated Matter

[1] *Emperor ALEXANDER Augustus to Masculinus.* If you gave no mandate to your brother to defend your property and did not ratify what was done, a defense that the matter has been adjudicated does not stand in your way. Accordingly, you are permitted to prosecute your cause without prejudice from the claim that the matter was adjudicated.

Posted May 7, in the consulship of Alexander Augustus (222).

[2] *Emperor GORDIAN Augustus to Athenius.* The fact that matters were adjudicated between others gives no benefit to parties not involved in the case, nor can it ordinarily harm their case. Accordingly, it cannot prejudice your granddaughter that a judgment was rendered against her co-heir if there was no decision against herself.

Posted July 11, in the consulship of Gordian Augustus and Aviola (239).

[3]³⁷ *Emperors DIOCLETIAN and MAXIMIAN Augusti to Honoratus.* The law is very clear that even in criminal actions, nothing can injure parties who are not in court, even though something is brought forth that seems prejudicial to them.

Posted August 19, in the consulship of Bassus and Quintianus (289).

[4] *The same Augusti and the Caesars to Soterianus.* It has often been established that litigation among third parties cannot prejudice an absent person even in a similar affair.

Written November 29, in the consulship of the Caesars (294).

Fifty-Seventh Title Warnings, Letters, Proclamations, and Signed Responses Do Not Have the Force of an Adjudicated Matter

[1] *Emperor ANTONINUS Augustus to Rogatianus.* A judge's warning (*comminatio*) that those who fail to pay a debt within a certain date should pay a certain interest does not have the force of a stipulation.

Posted January 12, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2] *Emperor ALEXANDER Augustus to Maximianus.* A letter of the provincial governor ordering you to pay money to a municipality does not have the force of an adjudicated matter.

³⁷ Combine with C. 9.2.9.

PP. IIII id. Mart. Maximo II et Aeliano cons.

[3] *Idem A. Zotico.* Ea, quae causa cognita statuuntur, subscriptionibus revocari non posse saepe rescriptum est.

PP. VI id. Sept. Albino et Maximo cons.

[4] *Imp. Gordianus A. Asclepiadi.* Interlocutio praesidis apud acta signata: 'nisi solutioni debiti is qui convenitur obsequium praestitisset, duplum seu quadruplum inferat' voluntas potius comminantis quam sententia iudicantis est, cum placitum eiusmodi ne rei iudicatae auctoritatem obtineat, iuris ratio declaret.

PP. III id. Dec. Gordiano A. et Aviola cons.

[5] *Idem A. Iucundo.* Iudex, qui disceptationi locum dederat, partium adlegationes audire et examinare debuit. nam subscriptionem ad libellum datam talem, quae diversam partem in possessionem fundi mitteret, vicem rei iudicatae non obtinere non ambigitur.

PP. XII k. Febr. Gordiano A. II et Pompeiano cons.

[6] *Imp. Philippus A. et Philippus C. Cassiano.* Programma, si quod a praeside propositum est, vim rei iudicatae nequaquam potest obtinere. nec comminationem vim rei iudicatae continere manifestum est.

PP. x k. April. ... cons.

[7] *Imp. Constantinus A. ad Bassum pp.* Quod magno conflictu sententia decerni solet, id paucis litteris temere adscriptis definiri fas non est.

D. xv k. April. Constantino A. VI et Constantino C. cons.

Posted March 12, in the consulship of Maximus, for the second time, and Aelianus (223).

[3] *The same Augustus to Zoticus.* It has often been stated by rescript that decisions made after a hearing cannot be reopened because of signed responses (*subscriptiones*).

Posted September 8, in the consulship of Albinus and Maximus (223).

[4] *Emperor GORDIAN Augustus to Asclepiades.* An interim order (*interlocutio*) of the governor from the signed records (*acta signata*), "unless the party that is being sued has obeyed the order to pay the debt, he must pay twofold or fourfold," is more the expression of a wish by someone giving a warning than the verdict of someone offering a judgment. Indeed, the law declares that an order of that sort does not have the force of an adjudicated matter.

Posted December 11, in the consulship of Gordian Augustus and Aviola (239).

[5] *The same Augustus to Jucundus.* The judge, who had provided the forum for a legal dispute, should have heard and examined the allegations of the parties. For there is no doubt that a notation made on a petition designed to put the opposing party in possession of a farm does not obtain the force of an adjudicated matter.

Posted January 21, in the consulship of Gordian Augustus, for the second time, and Pompeianus (241).

[6] *Emperor PHILIP Augustus and Caesar PHILIP to Cassianus.* A petition (*programma*), if such was posted by the governor, is in no way able to obtain the force of an adjudicated matter. Nor, it is clear, does a warning have the force of an adjudicated matter.

*Posted March 23, in the consulship of ...*⁵⁸

[7] *Emperor CONSTANTINE Augustus to Bassus, Praetorian Prefect.* It is not right that a decision in a great conflict, usually rendered through a verdict, be issued with a bit of hastily added writing.⁵⁹

Given March 18, in the consulship of Constantine Augustus, for the sixth time, and Constantine Caesar (320).

⁵⁸ The names of the Consuls have fallen out. Krüger suggests emending to "in the consulship of Praesens and Albinus" (246) based on MS V, which appears to read: "ap. ... a ... et dione cons.",

⁵⁹ Blume; "Reference is not made to the shortness of a decision, but to the manner in which the words thereof are written. The decision, in other words, should not be by signs or a few abbreviated words." Junius Bassus was Praetorian Prefect (pp) 318-321. Following an alternate manuscript tradition, Seeck dated this constitution to March 18, 318, when Septimius Bassus was City Prefect (pu) in Rome.

LVIII Si ex Falsis Instrumentis vel Testimoniis Iudicatum Erit

[1] *Imp. Severus et Antoninus AA. Vipsaniae.* Si tabulas testamenti, quas secutus proconsul vir clarissimus sententiam dixit, falsas dicere vis, praebebit notionem suam non obstante praescriptione rei iudicatae, quia nondum de falso quaesitum est.

PP. v ... cons.

[2] *Imp. Alexander A. Optato.* Et qui non provocaverunt, si instrumentis falsis se victos esse probare possunt, cum de crimine docuerint, ex integro de causa audiuntur.

PP. xvi k. Oct. Iuliano et Crispino cons.

[3] *Idem A. Clementi.* Falsam quidem testationem, qua diversa pars in iudicio adversus te usa est, ut proponis, solito more arguere non prohiberis. sed causa iudicati in irritum non devocatur, nisi si probare poteris eum qui iudicaverat secutum eius instrumenti fidem, quod falsum esse constiterit, adversus te pronuntiasse.

PP. vii k. Sept.

[4] *Imp. Gordianus A. Herennio.* Iudicati exsecutio solet suspendi et soluti dari repetitio, si falsis instrumentis circumventam esse religionem iudicantis crimine postea falsi illato manifestis probationibus fuerit ostensum.

PP. v id. Sept.

LVIII De Confessis

[1] *Imp. Antoninus A. Iuliano.* Confessos in iure pro iudicatis haberi placet. quare sine causa desideras recedi a confessione tua, cum et solvere cogaris.

Accepta prid. k. Oct. Gentiano et Basso cons.

Fifty-Eighth Title If a Decision was Given as a Result of False Documents or Testimony

[1] *Emperors SEVERUS and ANTONINUS Augusti to Vipsania.* If you want to raise the claim that the testament which the Proconsul, a *vir clarissimus*, followed in rendering his decision is in fact forged, he will give you a hearing without reference to any defense that the matter has been adjudicated, for the question of forgery has not yet been tried.

Posted on the 5th ..., in the consulship of ...

[2] *Emperor ALEXANDER Augustus to Optatus.* Even if they never made an appeal, their case will be heard again from the beginning if they are able to prove that they were defeated by forged documents, for they will have made demonstration of a crime.

Posted September 16, in the consulship of Julian and Crispinus (224).

[3] *The same Augustus to Clemens.* You are not forbidden to argue, in the usual manner, that, as you allege, the evidence which your opponent used against you in the trial was false. But the judgment does not become void unless you can prove that the person who gave judgment had decided against you while relying on the validity of the document that is shown to be forged.

Posted August 26.

[4] *Emperor GORDIAN Augustus to Herennius.* Execution of the judgment is usually suspended, and a right granted to recover money already paid, if it should be shown by clear proofs that the scrupulousness of the judge was misled by forged documents, and a charge of forgery is later brought.

Posted September 9.

Fifty-Ninth Title Those who Confess¹⁶⁰

[1] *Emperor ANTONINUS Augustus to Julian.* It is agreed that those who confess their liability in court are considered the same as adjudged debtors. Hence it is pointless for you to ask to rescind your confession, since even so you will be compelled to pay.

Received September 30, in the consulship of Gentianus and Bassus (211).

¹⁶⁰ See D. 42.2.

LX Inter Alios Acta vel Iudicata Aliis Non Nocere

[1] *Impp. Diocletianus et Maximianus AA. et CC. Epagatho.* Inter alios res gestas aliis non posse facere praeiudicium saepe constitutum est. unde licet quosdam de heredibus eius, quem debitorem tuum fuisse significas, solvisse commemores, tamen ceteri non alias ad solutionem urgentur, nisi debitum fuerit probatum.

v k. April. Byzantio AA. cons.

[2] *Idem AA. et CC. Severae.* Inter alios factam transactionem absentis non posse facere praeiudicium notissimi iuris est. quapropter adito praeside provinciae aviam tuam mancipium tibi donasse proba ac, si hoc iure ad te pertinere perspexerit, restitui tibi providebit. neque enim, si te absente divisionem eius fecerint, aliquid iuri tuo derogari poterit.

S. id. April. Byzantio AA. cons.

[3] *Idem AA. et CC. Fortunatae.* Si cum fratre tuo matri successisti, frater pro portione tua cum debitoribus hereditariis paciscendo vel agendo, non ex tua voluntate, pro hereditaria parte tibi quaesitam obligationem extinguere non potuit.

v id. Oct. Retiariae CC. cons.

LXI De Relationibus

[1] *Imp. Constantinus A. Profuturo praefecto annonae. pr.* Si quis iudicium duxerit esse referendum, nihil inter partes pronuntiet, sed magis super quo haesitandum putaverit, nostram consulat scientiam aut, si tulerit sententiam, minime postea, ne a se provocetur, relatione promissa terreat litigantes, sciens, quod, si hoc fecerit, nihilo minus iure appellationum res agitabitur. 1. Sed nec ad nos mittatur aliquid, quod plena instructionem indigeat. 2. Quotiens autem ad nostram scientiam

Sixtieth Title Transactions and Adjudications between Third Parties Do Not Harm Anyone Else

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Epagathus.* It has often been established that transactions between third parties cannot injure others. Hence, although you say that some of the heirs of the decedent, who you state to have been your debtor, have paid (the decedent's alleged debt), the others will not be forced to pay unless the debt is proven.

March 28, at Byzantium, in the consulship of the Augusti (293).¹⁶¹

[2] *The same Augusti and Caesars to Severa.* It is well known law that a settlement (*transactio*) made between third parties cannot prejudice an absent party. Go, therefore, before the provincial governor and prove that your grandmother gave you the slave, and if he finds that such slave legally belongs to you, he will see to it that he is restored to you. For even if, in your absence, they made an agreement dividing the interest in the slave among themselves, that could not detract from your rights.

Written April 13, at Byzantium, in the consulship of the Augusti (293).

[3] *The same Augusti and Caesars to Fortunata.* If you and your brother succeeded your mother as heirs, your brother could not without your consent deprive you of your proportionate right in an obligation due to the decedent by making an agreement with or bringing suit against the debtors to the estate.

October 11, at Retiaria, in the consulship of the Caesars (294).¹⁶²

Sixty-First Title Legal Referrals (to the Emperor)¹⁶³

[1]¹⁶⁴ *Emperor CONSTANTINE Augustus to Profuturus, Prefect of the Food Supply. pr.* If any judge believes that a matter ought to be referred to the Emperor, he must render no decision between the parties, but should consult Our wisdom as to the point that he believes to be questionable. Or, if he has given a decision, he must not afterwards deter litigants from making an appeal by promising to refer the matter to us,¹⁶⁵ knowing that, even if he does so, the matter will nevertheless be handled according to the right of appeal. 1. Nothing must be sent to Us which lacks a complete case report. 2. Whenever the judge promises to refer a matter to us, he must order that a copy of the consultation

¹⁶¹ Mommsen dates to April 9, 293.

¹⁶² Mommsen dates to October 10, 294.

¹⁶³ See D. 49.1. A *relatio* or *consultatio* is the referral of a legal question by a lower-level judge to a higher one or to the Emperor.

¹⁶⁴ = C.Th. 11.29.2, C.Th. 11.30.1. §1 = C.Th. 2.18.1 (ending).

¹⁶⁵ C.Th. 11.29.2 breaks off here. The Justinianic compilers added down to "complete case report" beyond which C. follows C.Th. 11.30.1, in epitomated form.

iudex se polliceatur relaturum, consultationis exemplum litigatoribus ilico edi apud acta iubeat, ut, si cui forte relatio minus plena vel contraria videatur, is refutatorias preces similiter apud acta sine aliqua frustratoria dilatione offerat.

D. IIII id. Febr. Sirmio Constantino A. v et Licinio C. cons.

[2] *Imp. Valentinianus et Valens AA. ad Viventium pp.* Super delictis provincialium numquam rectores provinciarum ad scientiam principum putent esse referendum, nisi ediderint prius consultationis exemplum. quippe tunc demum relationibus plena maturitas est, cum vel adlegationibus refelluntur vel probantur adsensu.

D. III k. Ian. Treviris Valentiniano et Valente AA. cons.

[3] *Idem AA. ad Apodemium.* Si quando ratio aut necessitas est in negotiis nostra iudicia requirendi expectandique responsa, omnem omnino causam relationis series comprehendat, ut recitata consultatione, quae ita est dirigenda, propemodum actorum recensione non opus sit: actis etiam necessario sociandis.

D. VI id. Mai. Treviris Valentiniano np. et Victore cons.

LXII De Appellationibus et Consultationibus

[1] *Sententia divi Severi data in persona Marci Prisci idibus Ian. Pompeiano et Avito cons.* Severus A. dixit: Prius de possessione pronuntiare et ita crimen violentiae excutere praeses provinciae debuit. quod cum non fecerit, iuste provocatum est.

[2] *Imp. Alexander A. Plariano.* Novum quod postulas non est, quod, etsi rescripti mei auctoritas intercesserit, provocandi tamen facultas tibi non denegetur.

[3] *Imp. Gordianus A. Victori.* Appellatione interposita, licet ab iudice repudiata sit, in praeiudicium deliberationis nihil fieri debere et in eo

(*consultatio*) be immediately furnished of record to the litigants, so that if the report appears to anyone not to be complete or to be wrong, that person may, without evasive delay, offer refutatory statements of record.¹⁶⁶

Given February 10, at Sirmium, in the consulship of Constantine Augustus, for the fifth time, and Licinius Caesar (319).

[2]¹⁶⁷ *Emperors VALENTINIAN and VALENS Augusti to Viventius, Praetorian Prefect.* Provincial governors should never think that they can refer cases involving the delicts of provincials to the wisdom of the Emperors unless they first issue a copy of the consultation. For referrals (*relationes*) are only made complete when they are either refuted by allegations or proven by consent.

Given December 30, at Trier, in the consulship of Valentinian and Valens Augusti (368).

[3]¹⁶⁸ *The same Augusti to Apodemius.* If it should appear reasonable or necessary in suits that Our advice be sought and Our response awaited, the report of reference must include the entire dossier of the case, so that, after reading the consultation, which needs to be sent thus, a reexamination of the records is almost unnecessary. It is also necessary to attach the records.

Given May 10, at Trier, in the consulship of Valentinian, Most Noble Boy, and Victor (369).

Sixty-Second Title Appeals and Consultations¹⁶⁹

[1] *Verdict of the deified SEVERUS, given through Marcus Priscus, January 13, in the consulship of Pompeianus and Avitus. Severus Augustus said:* The provincial governor ought to have pronounced on the question of possession first, and thus to have disposed of the charge of violence (against a possessor). Because he failed to do so, it was right to appeal.

(209).

[2] *Emperor ALEXANDER Augustus to Plarianus.* What you demand is nothing strange, for even if the authority of my rescript was interposed, nevertheless you are not denied the opportunity to appeal.

[3] *Emperor GORDIAN Augustus to Victor.* Quite often it has been established that, when an appeal is demanded, although the judge may refuse it, nothing

¹⁶⁶ Blume: "According to C.Th. 11.30.1, the copy of the inquiry was to be given and placed of record within ten days; anyone dissatisfied might furnish for the record refutatory statements within five days thereafter." Seeck dates this constitution to February 7, 318.

¹⁶⁷ = C.Th. 11.29.3. Seeck dates to December 30, 368 or 370.

¹⁶⁸ = C.Th. 11.29.4, including also Gratian among the authors.

¹⁶⁹ See D. 49.1.

statu omnia esse, quo tempore pronuntiationis fuerint, saepissime constitutum est.

PP. IIII ...

[4] *Imp. Philippus A. et Philippus C. Probo.* Si ad scribatum nominatus non provocasti, convelli statuta non possunt.

[5] *Impp. Diocletianus et Maximianus AA. Valerio.* Praeses provinciae, ad quem appellasti, si non vitio negligentiae vestrae tempus, quod ad reddendos apostolos praescriptum est, exemptum esse animadvertit, sed ex fatalis casus necessitate, diem functo eo qui eos perferebat, id accidisse cognoverit, iuxta perpetui iuris formam desiderio vestro medebitur.

[6] *Idem AA. et CC. dicunt: pr.* Eos, qui de appellationibus cognoscent ac iudicabunt, ita iudicium suum praebere conveniet, ut intellegant, quod, cum appellatio post decisam per sententiam litem interposita fuerit, non ex occasione aliqua remittere negotium ad iudicem suum fas sit, sed omnem causam propria sententia determinare conveniat, cum salubritas legis constitutae ad id spectare videatur, ut post sententiam ab eo qui de appellatione cognoscit recursus fieri non possit ad iudicem, a quo fuerit provocatum. quapropter remittendi litigatores ad provincias remotam occasionem atque exclusam penitus intellegant, cum super omni causa interpositam provocationem vel iniustam tantum liceat pronuntiare vel iustam.

1. Si quid autem in agendo negotio minus se adlegasse litigator crediderit, quod in iudicio acto fuerit omissum, apud eum qui de appellatione cognoscit persequatur, cum votum gerentibus nobis aliud nihil in iudiciis quam iustitiam locum habere debere necessaria res forte transmissa non excludenda videatur. 2. Si quis autem post interpositam appellationem necessarias sibi putaverit poscendas esse personas, quo apud iudicem qui super appellatione cognoscet veritatem possit ostendere, quam existimabit occultam, hocque iudex fieri prospexerit, sumptus isdem ad faciendi itineris expeditionem praebere debebit, cum id iustitia ipsa persuadeat ab eo haec recognosci, qui evocandi personas sua interesse crediderit.

3. Super his vero, qui in capitalibus causis constituti appellaverint (quos tamen et ipsos vel qui pro his provocabunt non nisi audita omni causa atque discussa post sententiam dictam appellare conveniet), id observandum esse sancimus, ut inopia idonei fideiussoris retentis in

must be done to prejudice the deliberation, and everything must remain in the situation in which it was at the time of the decision.

*Posted on the 4th.*¹⁷⁰

[4] *Emperor PHILIP Augustus and Caesar PHILIP to Probus.* If you were appointed to the post of secretary (*ad scribatum*) and you did not appeal, the appointment cannot be annulled.¹⁷¹

[5] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Valerius.* If the provincial governor to whom you appealed noted that the time fixed for filing the report on appeal (*apostoli*) expired not through any fault of your negligence, but he learned that this occurred because of the accidental fact that the man who was carrying it had died, he will grant your request in accordance with the usual rule.

[6]¹⁷² *The same Augusti and the Caesars say: pr.* Those who will hear and decide appeals ought to formulate their own judgment in such a way as to reflect their understanding that, when an appeal is interposed after a suit has been decided through a verdict, the matter may under no circumstances be sent back to its original judge, but it is proper that they decide the whole case with their own verdict. For the benefit of established law seems to require that, after a verdict from the appellate judge, there can be no recourse to the judge from whom the case was appealed. Because of this, litigants should know that any occasion for sending it back to the provinces is removed and entirely excluded, since in every case it should be permissible only to decide whether the appeal that was interposed is unjust or just.

1. If a litigant thinks that he omitted an allegation in the process of trial, whatever he omitted in the previous trial must be investigated before the judge who hears the appeal. For We wish nothing else than that justice find its place in courtrooms and thus think that a related matter which might have been reported should not be excluded. 2. But if someone thinks after making an appeal that essential witnesses should be produced on his behalf in order that he could demonstrate to the appellate judge a truth that he thinks has been hidden, and the judge thinks this advisable, he should pay the traveling expenses, since justice requires that they be paid by the party who thinks that summoning such persons will be in his interest.

3. As to those who appeal in capital cases – which may not be done by themselves or others for them until the whole case has been heard and tried and a verdict rendered – We ordain the following: appellants are detained in custody in the absence of a proper surety (*idoneus fideiussor*); judges shall issue to the

¹⁷⁰ Subscript partially preserved as *PR. XII K.* in *Fragmenta Londiniensia Antejustiniana (FLA)*, see Corcoran and Salway.

¹⁷¹ Consular date restored from *FLA* to 245.

¹⁷² Possibly combine with *C. 3.3.2, 3.11.1, 7.53.8.*

custodia reis opiniones suas iudices exemplo appellatoribus edito ac refutatorios eorum ad scrinia quorum interest transmittant, quibus gestarum rerum fides manifesta relatione pandatur, ut meritis eorum consideratis pro fortuna singulorum sententia proferatur. 4. Ne temere autem ac passim provocandi omnibus facultas praeberetur, arbitramur eum, qui malam litem fuerit persecutus, mediocriter poenam a competenti iudice sustinere. 5. Sin autem in iudicio propriam causam quis fuerit persecutus atque superatus voluerit provocare, eodem die vel altero libellos appellatorios offerre debet. is vero, qui negotium tuetur alienum, supra dicta condicione etiam tertio die provocabit.

6. Apostolos post interpositam provocationem etiam non petente appellatore sine aliqua dilatione iudicem dare oportet, cautione videlicet de exercenda provocatione in posterum minime praebenda.

Sine die et consule.

[7] *Idem AA. et CC. Neoni.* Qui ad civilia munera vel decurionatum vel honores devocantur, licet vacationem a principibus acceperint, si appellationis auxilio non utantur, consensu suo nominationem confirmant, cum igitur ad munus vocatus appellaveris a praeside provinciae, iuste te appellasse ostende.

[8] *Idem AA. et CC. Oppiano.* Si contra maiorem quinque et viginti annis sententia lata provocationis secutae tempore praefinito causas non esse repraesentatas nec appellatione pendente transactione finitum negotium rector animadverterit, res iudicatas exsequi curabit.

[9] *Idem AA. et CC. have Heraclida carissime nobis.* Dominus litis causam appellationis, quam procurator suus litigando interposuit, etiam absente procuratore exsequi potest.

[10] *Idem AA. et CC. Titiano. pr.* Si actor a curatore ordinatus deteriorem calculum reportaverit, tam ipse quam curator ad provocationis auxilium possunt pervenire, curator vero solus provocationis litem exercebit. 1. Sin autem interim adulescens veniam aetatis impetraverit vel ad legitimam aetatem pervenerit, potest suo nomine appellationem exercere.

S. prid. k. Oct. Viminacti CC. cons.

appellants a copy of their decisions and send these and any refutatory statements to the relevant bureau. Through these an accurate representation of the matters transacted should be laid out in a clear report so that, after considering their merits, a verdict may be rendered according to the circumstances of each individual. 4. In order that appeals may not be made inconsiderately and indiscriminately, We judge that anyone who pursues an appeal without merit shall suffer a moderate penalty at the hands of the appropriate judge. 5. But if someone prosecutes his own case in court and loses, and he wishes to appeal, he should offer his petition for appeal on the same day or the day following. But whoever oversees another's affair shall appeal by the third day also following the condition stated above.

6. After an appeal is made, the judge must offer reports on appeal (*apostoli*) even if the appellant does not ask for them and without any delay, and no bond shall hereafter be required to lodge the appeal.

*Without date or consul.*²⁷³

[7] *The same Augusti and Caesars to Neo.* Persons appointed to public services (*civilia munera*) or the decurionate or magistracies (*honores*), if they do not make use of an appeal, ratify the appointment by acquiescence even though they have been granted exemption by the Emperors. Therefore, since you were called to a public service by the provincial governor but appealed, show that your appeal is just.

[8] *The same Augusti and Caesars to Opplanus.* If a decision was given against a man over 25 years old, and the governor learns that the grounds of the appeal subsequently taken were not presented within the fixed time, and that the affair was not concluded by a settlement while an appeal was pending, he will see to it that the judgment is executed.

[9] *The same Augusti and Caesars: Hail, Heraclides, very dear to us.* The principal of a suit, even in the absence of his procurator, may prosecute an appeal which his procurator made in the litigation.

[10] *The same Augusti and Caesars to Titianus. pr.* If an agent (*actor*) appointed by a *curator* lost his case, both he and the *curator* can have recourse to the aid of an appeal, but only the *curator* can conduct the suit on appeal. 1. But if the minor has in the meantime received the rights of majority (*venia aetatis*) or has arrived at legal age, he may prosecute the appeal in his own name.

Written September 30, at Viminacium, in the consulship of the Caesars (294).

²⁷³ This constitution may be dated March 18, 294, based on the subscription of C. 3.11.1 and 7.53.8, or July 18, 294, based on the subscription of C. 3.3.2.

[11] *Idem AA. et CC. Aurelio.* Cives et incolae, manifestas etiam excusationes habentes, si sub iusta nominatione non appellaverint, ad probationem earum non admittuntur.

xvii k. Ian.

[12] *Imp. Constantinus A. ad Catullinum.* Minime fas est, ut in civili negotio libellis appellatoriis oblati aut carceris cruciatus aut cuiuslibet iniuriae genus seu tormenta vel etiam contumelias perferat appellator, absque his criminalibus causis, in quibus, etiamsi possunt provocare, eum tamen statum debent obtinere, ut post provocationem in custodia, si fideiussoris idonei copiam non habeant, perseverent.

D. III non. Nov. Treviris. acc. xv k. Mai. Hadrumeto Volusiano et Anniano cons.

[13] *Idem A. Petronio Probiano suo salutem.* Ex illo tempore, quo in civilibus causis, quae inter privatos moventur, consultaturum vel relaturum te esse promiseris vel appellationis a te interpositae sollemnia completa fuerint, nihil posthac tibi quodlibet speciale ac requisitum vel quibuscumque modis favoris gratiam praeferens audiendum est, sed observandum, ut iuxta priora statuta sollemnitis more expleto gesta ad comitatum omnia dirigantur.

D. id. Aug. Arelato. pp. id. Oct. Theveste Sabino et Rufino cons.

[14] *Idem A. ad Bassum pu.* Litigatoribus copia est etiam non conscriptis libellis ilico appellare voce, cum res poposcerit iudicata, tam in civilibus quam in criminalibus causis.

D. VIII id. Iun. Sirmio Gallicano et Basso cons.

[15] *Idem A. ad Severum vicarium.* Ne causas, quae in nostram venerint scientiam, rursus transferri ad iudicia necesse sit, instructiones necessarias plene actis inseri praecipimus. nam cogimur a proferenda sententia temperare, quoniam verendum est, ne lis incognito negotio dirimatur, adempta copia conquerendi. quare perennibus inuretur

[11]¹⁷⁴ *The same Augusti and Caesars to Aurelius.* Citizens and inhabitants who do not appeal when lawfully appointed to a civic position will not, even though they have clear excuses (to avoid service), be permitted to prove them.

December 16 (294?).

[12]¹⁷⁵ *Emperor CONSTANTINE Augustus to Catullinus.* It is not right that, if petitions for appeal in a civil affair have been filed, an appellant should have to endure the hardships of imprisonment or any sort of outrage or tortures or even insults, with the exception of those criminal cases in which, even if they are able to appeal, they would nevertheless remain in a state requiring them to abide in prison following the appeal should a suitable surety (*fideiussor*) be lacking.

Given November 3, at Trier, received April 17, at Hadrumetum, in the consulship of Volusianus and Annianus (314).

[13]¹⁷⁶ *The same Augustus to his friend Petronius Probianus, greetings:* From the time when you have promised that you would consult Us or report to Us on civil cases litigated between private persons, or when the formalities for an appeal interposed from your decision have been completed, you should no longer hear any special request or offer the benefit of your favor in any other way. Rather you must observe that all matters be directed to Our court in the customary fashion according to previous statutes.¹⁷⁷

Given August 13, at Arles, posted October 15, at Theveste, in the consulship of Sabinus and Rufinus (316).

[14]¹⁷⁸ *The same Augustus to Bassus, City Prefect.* Litigants in civil as well as criminal cases may, when the adjudicated matter demands it, immediately appeal orally even without any written petition.

Given June 6, at Sirmium, in the consulship of Gallicanus and Bassus (317).

[15]¹⁷⁹ *The same Augustus to Severus, Vicar.* In order that it may not be necessary to refer cases that have come into Our knowledge back for trial, We direct that the necessary documents shall be attached fully to the records. For We shall feel compelled to abstain from rendering a verdict,¹⁸⁰ since there is cause to fear that a suit might be decided without complete knowledge and the

¹⁷⁴ Possibly to combine with C. 10.40.7.

¹⁷⁵ = C.Th. 11.30.2. C. epitomizes C.Th. Combine with C. 9.47.16; C.Th. 11.36.1. Seeck dates this constitution to November 3, 313.

¹⁷⁶ = C.Th. 11.30.5. Combine with C. 1.21.2.

¹⁷⁷ Apparently C.Th. 11.30.1.

¹⁷⁸ = C.Th. 11.30.7.

¹⁷⁹ = C.Th. 11.30.9. Seeck dates to June 22, 318.

¹⁸⁰ C.Th. adds here: "We who have sanctioned that the rescripts We have granted to the opinions or even reports of judges ought not to be revised."

iudex notis, si cuncta, quae litigatores instructionis probationisque causa recitaverint, indita actis vel subiecta non potuerint inveniri.

D. x k. Iul. Aquileiae Constantino A. v et Licinio C. cons.

[16] *Idem A. ad Maximum.* Etiam eos, qui imaginem principalis disputationis accipiunt, appellationum adminicula necesse est accipere.

D. prid. id. Ian. Sirmio Crispo II et Constantino II CC. cons.

[17] *Idem A. ad Iulianum pu.* Si apud utrumque praetorem, dum quaestio ventilatur, ab aliqua parte auxilium provocationis fuerit obiectum, praefecturae urbis iudicium sacrum appellator observet.

[18] *Idem A. Victori rationali urbis Romae.* Quoniam nonnulli fisci debitores, cum iussi fuerint debitam summam exsolvere, interposito provocationis auxilio vim executionis eludunt nec iam opinionis exemplum nec refutatorias preces curant petere vel offerre, placuit, ut, si intra dies sollemnitatibus praestitutos ad facienda haec appellatoris cura defuerit, deserta ab eo provocatio aestimetur moxque debitum exigatur.

D. prid. k. Aug. Constantino et Maximo cons.

[19] *Idem A. ad universos provinciales. pr.* A proconsulibus et comitibus et his qui vice praefectorum cognoscunt, sive ex appellatione sive ex delegato sive ex ordine iudicaverint, provocari permittimus, ita ut appellanti iudex praebeat opinionis exemplum et acta cum refutatoriis partium suisque litteris ad nos dirigat, a praefectis autem praetorio provocare non sinimus. 1. Quod si victus oblatam nec receptam ab iudice appellationem adfirmet, praefectos adeat, ut apud eos de integro litiget tamquam appellatione suscepta. superatus enim si iniuste

opportunity of protest removed. Hence a judge will be branded with eternal infamy, if everything which the litigants cited for elucidation and as proof cannot be found embodied in or attached to the records.

Given June 22, at Aquileia, in the consulship of Constantine Augustus, for the fifth time, and Licinius Caesar (319).

[16]¹⁸¹ *The same Augustus to Maximus.* Even judges who represent the Emperor in trial must permit the right of appeal.

Given January 12, at Sirmium, in the consulship of Crispus, for the second time, and Constantine, for the second time, Caesars (321).

[17]¹⁸² *The same Augustus to Julian, City Prefect.* If, while a case is being aired before the two Praetors,¹⁸³ the aid of an appeal is interposed by either party, the appellant must observe the imperial judgment of the City Prefecture.

[18]¹⁸⁴ *The same Augustus to Victor, Comptroller of the City of Rome.* Since some debtors of the Treasury, when they have been ordered to pay a sum due, elude the execution of the judgment by making an appeal and do not bother to seek or offer a copy of the report or any refutatory statements, We have decided that, if the appellant fails to see that the formalities attendant upon an appeal are complied with in the time fixed for that purpose, the appeal shall be considered to have been abandoned and thereafter the debt shall be collected.

Given July 31, in the consulship of Constantius and Maximus (327).

[19]¹⁸⁵ *The same Augustus to all provincials. pr.* We permit an appeal to be made from Proconsuls, Counts, and Vicars, whether they offer judgment on appeal or by assignment or in their ordinary jurisdiction (*ex ordine*), in such a way that the judge must furnish a copy of the report to the appellant and must send Us the records together with refutatory statements of the parties as well as his own report. But We do not permit an appeal from the Praetorian Prefects. 1. And if the defeated party alleges that an appeal was made but not accepted

¹⁸¹ = C.Th. 11.30.11. Combine with C. 3.1.9. C. epitomates C.Th. and alters the wording dramatically. Seeck dates to June 12, 321.

¹⁸² = C.Th. 3.32.2. Combine with C. 5.71.18. C. epitomates C.Th. and alters the wording dramatically. The constitution is dated by Krüger to 322, but Seeck is surely right to argue for December 31, 326.

¹⁸³ Clearly the Praetors of the newly founded city of Constantinople, one called the "Constantinian" and the other either the "Flavialis" or "Triumphalis," see C.Th. 3.32.2, 6.4.5; and Joh. Lyd. *Mag.* 2.30.2.

¹⁸⁴ = C.Th. 11.30.14.

¹⁸⁵ = C.Th. 11.30.16. Combine with C. 1.21.3.

appellare videbitur, lite perdita notatus abscedet: aut si vicerit, contra eum iudicem, qui appellationem non receperit, ad nos referre necesse est, ut digno supplicio puniatur.

D. k. Aug. pp. k. Sept. Constantinopoli Basso et Ablabio cons.

[20] *Imp. Constantius A. Albino.* Et in maioribus et in minoribus negotiis appellandi facultas est. nec enim iudicem oportet iniuriam sibi fieri existimare eo, quod litigator ad provocationis auxilium convolvit.

D. vii id. April. Marcellino et Probrino cons.

[21] *Idem A. ad Lollianum pp.* Quoniam iudices ordinarii provocationes aestimant respuendas, placet, ut, si quis appellationem suscipere recusaverit, quae non contra executionem, sed adversus sententiam iurgium terminantem fuerit interposita, triginta auri pondo cogatur largitionibus nostris inferre: triginta alia officio eius itidem soluturo, nisi ei pertinaciter restiterit atque actis contradixerit et, quid iure sit constitutum, ostenderit.

D. viii k. Aug. Messadensi. PP. Capuae Arbitione et Lolliano cons.

[22] *Idem A. ad Volusianum pp.* Lata sententia, quae pertinet ad bona vacantia et ad ea, quae indignis legibus cogentibus auferuntur, si quis putaverit provocandum, vox eius debet admitti.

D. iiii k. Aug. Arbitione et Lolliano cons.

[23] *Idem A. ad senatum.* Cum appellatio interposita fuerit per Bithyniam Paphlagoniam Lydiam Hellespontum, insulas etiam ac Phrygiam salutarem, Europam ac Rhodopam et Haemimontum, praefecturae urbis iudicium sacrum appellator observet.

D. v non. Mai. Tauro et Florentio cons.

by the judge, he may go before the Prefects in order to litigate the matter anew before them as though the appeal had been accepted. If he is defeated and appears to have appealed unjustifiably, he will lose his suit and be branded with infamy as he departs. But if he prevails, it is necessary to report to Us the case against the judge who refused to receive the appeal, so that he may be visited with proper punishment.

Given August 1, and posted September 1, at Constantinople in the consulship of Bassus and Ablabius (331).

[20]¹⁸⁶ *Emperor CONSTANTIUS Augustus to Albinus.* The opportunity for appeal exists in large and small cases. For a judge should not think that he is insulted because a litigant resorts to the aid of an appeal.

Given April 7, in the consulship of Marcellinus and Probinus (341).

[21]¹⁸⁷ *The same Augustus to Lollianus, Praetorian Prefect.* Since ordinary judges suppose that appeals are to be rejected, We have decided that if any judge refuses to take up an appeal which is not interposed against the execution of a judgment but from a verdict that terminates a dispute, he must pay 30 pounds of gold into Our treasury; and his official staff must pay another 30 pounds if it does not strenuously resist and oppose him on the records and show him what is established in the law.

Given July 25, at Messadensis, posted at Capua in the consulship of Arbitio and Lollianus (355).

[22]¹⁸⁸ *The same Augustus to Volusianus, Praetorian Prefect.* When a decision is given which relates to ownerless property (*bona vacantia*) and to property which is taken from unworthy heirs under legal compulsion, if anyone thinks he should appeal, his plea must be admitted.

Given July 30, in the consulship of Arbitio and Lollianus (355).

[23]¹⁸⁹ *The same Augustus to the Senate.* When an appeal is interposed from Bithynia, Paphlagonia, Lydia, Hellespontus, the Islands, and Phrygia Salutaris, Europa, and Rhodope, and Haeminontus, the appellant should look to the imperial court of the City Prefect (at Constantinople).

Given May 3, in the consulship of Taurus and Florentius (361).

¹⁸⁶ Combine with C.Th. 11.36.5. The inscription of C.Th. reports "the same Augusti," i.e., Constantius II and Constans.

¹⁸⁷ = C.Th. 11.30.25. Combine with C.Th. 11.36.11. The final phrase, beginning "if it does not ..." is borrowed from C.Th. 11.30.58. Seeck dates to July 25, 356.

¹⁸⁸ = C.Th. 11.30.26. Combine with C.Th. 11.36.12. Seeck dates to July 29, 355.

¹⁸⁹ = C.Th. 1.6.1. Combine with C. 12.1.7; C.Th. 6.4.12 and 13, 7.8.1, 11.1.7, 11.15.1, 11.23.1, 12.1.48, 13.1.3. These laws indicate that the constitution was given at "Gyfyra," i.e., Gephyra in Syria.

[24] *Impp. Valentinianus et Valens AA. salutem dicunt ordini civitatis Carthagenensium.* Iudicibus non solum appellationis suscipiendae necessitas videtur imposita, verum etiam triginta dierum spatia ex die sententiae definita sunt, intra quae gesta una cum relatione litigatoribus convenit praestari: iudice et officio eius, si statuta fuerint aliqua parte mutilata, multae subiacentibus.

D. prid. non. Febr. Mediolani divo Ioviano et Varroniano cons.

[25] *Imppp. Gratianus Valentinianus et Theodosius AAA. ad Syagrium pp.* Et in multis ab iudicibus inferendis appellationes iubemus admitti.

D. XIII k. Iul. Gratiano V et Theodosio AA. cons.

[26] *Idem AAA. et Arcadius A. ad Pelagium comitem rerum privatarum.* Cum post sententiam discussoris vel rationalis fuerit provocatum, ad sinceritatem tuam negotium transferatur, ut, si mediocritas negotii aut longinquitas regionis ad iudicium tuum litigatores venire non patitur, iudicio rectoris provinciae, quem ipse probaveris, negotium deleges.

D. xv k. Mart. Mediolano Arcadio A. et Bautone cons.

[27] *Impp. Arcadius et Honorius AA. Ennodio proconsuli Africae.* Nominationes libellis vel edictis factae citra consilium publicum non valent: de quibus nec appellare necesse est, si sollemnitas deest.

D. xvii k. Iun. Mediolani Olybrio et Probino cons.

[28] *Idem AA. Nebridio proconsuli Asiae.* Si quis libellos appellatorios ingesserit, sciat se habere licentiam arbitrium commutandi et suos libellos recuperandi, ne iustae paenitudinis humanitas amputetur.

D. xi k. Aug. Constantinopoli Arcadio IIII et Honorio III AA. cons.

[24]¹⁹⁰ *Emperors VALENTINIAN and VALENS, Augusti, greet the Senate of the City of Carthage.* Not only does the necessity of accepting an appeal seem to be imposed on judges, but a period of thirty days from the date of the decision is also fixed within which the records together with the report should be furnished to the litigants. The judge and his official staff will be subject to a fine if the requirements are violated in any respect.

Given February 4, at Milan, in the consulship of the deified Jovian and Varronian (364).

[25]¹⁹¹ *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS Augusti to Syagrius, Praetorian Prefect.* We order that appeals shall also be permitted from fines imposed by judges.

Given June 18, in the consulship of Gratian and Theodosius Augusti (380).

[26]¹⁹² *The same Augusti and ARCADIVS Augustus to Pelagius, Count of the Privy Purse.* Since an appeal was lodged after the verdict of an Auditor (*discussor*) or Comptroller (*rationalis*), the affair should be referred to Your Uprightness, so that if the unimportance of the affair or the remoteness of the region does not permit the litigants to come to your court, you may delegate the affair to the judgment of the provincial governor whom you yourself approve.

Given February 15, at Milan, in the consulship of Arcadius Augustus and Bauto (385).

[27]¹⁹³ *Emperors ARCADIVS and HONORIUS Augusti to Ennodius, Proconsul of Africa.* Appointments (of councilors) made by petitions or edicts outside a public meeting are not valid. Nor is it necessary to appeal them if the customary formality is lacking.

Given May 16, at Milan, in the consulship of Olybrius and Probinus (395).

[28]¹⁹⁴ *The same Augusti to NEBRIDIUS, Proconsul of Asia.* If anyone has filed a petition of appeal, he should know that he has the right to change his mind and withdraw the petition, lest the benefit of a just repentance be curtailed.

Given July 22, at Constantinople, in the consulship of Arcadius, for the fourth time, and Honorius, for the third time (396).

¹⁹⁰ = C.Th. 11.30.32, with some additional provisions. Combine with C.Th. 11.36.15. Seeck gives February 4, 365.

¹⁹¹ = C.Th. 11.30.38.

¹⁹² = C.Th. 11.30.45. Combine with C. 7.65.7. The Justinianic compilers have omitted the final sentence of the C.Th. text, which continues "but overseas appeals should be tried in your court within the space of a year; appeals from provinces that are contiguous or not far removed should be completed within the legally constituted time period."

¹⁹³ = C.Th. 11.30.53. Combine with C.10.32.45; C.Th. 12.1.1.41–5.

¹⁹⁴ = C.Th. 11.30.56. C. epitomates C.Th. and alters the wording dramatically.

[29] *Idem AA. ad Eutychianum pp. pr.* Addictos supplicio et pro criminum immanitate damnatos nulli clericorum vel monachorum, eorum etiam quos synoditas vocant, per vim atque usurpationem vindicare liceat ac tenere. 1. Quibus in causa criminali humanitatis consideratione, si tempora suffragantur, interponendae provocationis copiam non negamus, ut ibi diligentius examinetur, ubi contra hominis salutem per errorem vel gratia cognitoris oppressa putatur esse iustitia: ea conditione, ut, si proconsules vel comes Orientis, Augustalis, vicarii fuerint cognitores, non tam ad clementiam nostram quam ad amplissimas potestates sciant esse referendum. eorum enim de his plenum volumus esse iudicium, qui, si ita res est et crimen exegerit, rectius possint punire damnatos.

D. vi k. Aug. Mnizo Honorio A. iiii et Eutychiano cons.

[30] *Idem AA. Theodoro pp.* Si quis provocatione interposita suspecti iudicis velit prolatam evitare sententiam, in hac voce liberam habeat potestatem nec timeat contumeliam iudiciorum, cum et ab ipsa iniuria possit facile provocare, maxime cum a solo tantum praefecto praetorio non sine dispendio causae provocare permissum sit. sciant igitur cuncti sibi ab iniuriis et suspectis iudicibus et in capitali supplicio ac fortunarum dispendio provocationem esse concessam.

D. vii id. Iun. Mediolani Theodoro cons.

[31] *Impp. Honorius et Theodosius AA. Asclepiodoto pp. pr.* Si appellationem oblatam, in qua vel tuae amplitudinis vel urbanae praefecturae sacrum auditorium postulatur, iudex non susceperit vel suscepta appellatione apostolorum copiam denegaverit, ad deponendam super hac iniquitate querimoniam nec non etiam conveniendum adversarium ex sententia prolata iuxta antiquum ius anni metas habeat litigator: vel si huiusmodi appellatio suscepta non fuerit, in qua inferiorum iudicum sacra desideratur auditio, ad haec eadem facienda sex menses habeat litigator. 1. Si vero arbiter appellationem suscipere aut relationem dare contempserit, quattuor mensum tempora observentur: ut his quae

[29]¹⁹⁵ *The same Augusti to Eutychianus, Praetorian Prefect. pr.* No clergymen or monks, or yet those called "fellow travelers,"¹⁹⁶ may by force or unlawful seizure protect and detain men sentenced to punishment and condemned for the enormity of their crimes. 1. We do not deny them the opportunity to interpose an appeal out of humanitarian consideration if time permits, in order that a more careful investigation can be made in those instances where justice is thought to have been suppressed contrary to human welfare either through error or the partiality of the judge. But this condition must be observed, that if Proconsuls, the Count of the East, the Augustal Prefect, or Vicars were the judges, the case must be referred not to Our Clemency, but to the Most High Office (of the Praetorian Prefect). We wish their jurisdiction to be plenary in order that, if the matter is such that the crime demands it, they can better punish the condemned.

Given July 27, at Mnizus, in the consulship of Honorius Augustus, for the fourth time, and Eutychianus (398).

[30]¹⁹⁷ *The same Augusti to Theodorus Praetorian Prefect.* If anyone, by interposing an appeal, wants to avoid a verdict rendered by a judge suspected (of bias?), he shall have full freedom to do so in his plea, nor need he fear contumely from the court since it is easy to appeal even from an outrage, and especially since it is permitted to appeal without the penalty of losing one's case, with the lone exception of cases from the Praetorian Prefect. Therefore, let all know that they are permitted to appeal from outrages, and suspected judges, and in capital cases as well as those involving the loss of their property.

Given January 7, at Milan, in the consulship of Theodorus (399).

[31]¹⁹⁸ *Emperors HONORIUS and THEODOSIUS Augusti to Asclepiodotus, Praetorian Prefect. pr.* If an appeal is offered requiring an imperial hearing either by Your Amplitude or by the City Prefect but the judge below should not accept it, or if after accepting it he should refuse to make available the reports on an appeal (*apostoli*), the litigant may according to ancient law have one year after the verdict is rendered in which to make complaint of this iniquity and notify the opponent. Or if an appeal of this nature should not be accepted in cases in which an imperial hearing by lower judges is sought, the litigant shall have six months in which to do these things. 1. But if a judge arbitrator refuses to accept an appeal or make his report, the period granted is four months.

¹⁹⁵ = C.Th. 11.30.57, which is an abbreviated *lex geminata* of C.Th. 9.40.16. The beginning of §29 is repeated at C. 1.4.6. Combine with 1.3.11 and 12, 1.4.7; C.Th. 16.2.32.

¹⁹⁶ The text uses the Greek term *synoditae*, an alternative designation for cenobitic monks in the fourth and fifth century CE.

¹⁹⁷ = C.Th. 11.30.58.

¹⁹⁸ = C.Th. 11.30.67. Combine with C. 7.51.3; C.Th. 11.31.9.

statuimus actitatis pareat appellator temporibus, quae de appellationibus definita noscuntur.

D. III k. April. Constantinopoli Asclepiodoto et Mariniano cons.

[32] *Impp. Theodosius et Valentinianus AA. Cyro pp. pr.* Praecipimus ex appellationibus spectabilium iudicum, quae per consultationes nostri numinis discepcionem implorant, non nostram ulterius audientiam expectari, ne nostris occupationibus, quibus pro utilitate mundi a singulorum nonnumquam negotiis avocamur, aliena fraudari commoda videantur.

1. Sed si a proconsulibus vel Augustali vel comite Orientis vel vicariis fuerit appellatum, virum illustrem praefectum praetorio, qui in nostro est comitatu, virum etiam illustrem quaestorem nostri palatii sacris iudiciis praesidentes discepcionem iubemus adripere eo ordine, ea observatione, isdem temporibus, quibus ceterae quoque lites fatali die post appellationem in sacris auditoriis terminantur. et hoc, licet quidam praedictorum spectabilium iudicum iure concesso ut sacri iudices appellationes acceperint. 1a. Quod si a duce fuerit appellatum, si idem et praeses sit, praefectura necessario tantum iure ordinario in sacro auditorio iudicabit.

2. In his autem omnibus iudiciis, quae consultationum introduximus loco, vel apostolos vel ea quae apud eum gesta sunt, contra cuius sententiam dicitur appellatum, suscipere ab appellatoribus et cognitiones inducere apud viros illustres praedictos iudices et ea quae geruntur excipere scribere scriptaque litigatoribus edere nostros epistolares praecipimus: officiis videlicet eorum, cum quibus vir illustris quaestor iudicat, exsequentibus iudicata.

3. Haec, si appellatio fuerit oblata iudici, qui non ex delegatione cognoscit. eorum enim sententiis appellatione suspensis, qui ex delegatione cognoscunt, necesse est eos aestimare, iuste nec ne fuerit appellatum, qui causas delegaverint iudicandas.

4. Huic saluberrimae legi illud etiam consultissime credidimus inserendum, ut, si privato, non illustri, uni pluribusve, ut adsolet, nostra serenitas adita delegaverit causam et eius eorumve definitio fuerit appellatione suspensa, vir quidem magnificus praefectus praetorio, qui in nostro est comitatu, cum viro illustri quaestore temporali iudicet

As you have been acting according to the measures We have established, the appellant must abide by the times that are recognized as applying to appeals.

Given March 30, at Constantinople, in the consulship of Asclepiodotus and Marinianus (423).

[32]¹⁹⁹ *Emperors THEODOSIUS and VALENTINIAN Augusti to Cyrus, Praetorian Prefect, pr.* We direct that appeals from judges of *spectabilis* rank which seek a decision of Our Divine Majesty by the method of consultation must no longer expect Our hearing, in order that the benefit of others may not seem to suffer because of the preoccupations to which We are often summoned for the good of the world through the affairs of individuals.

1. Nevertheless, if an appeal is lodged from Proconsuls, or the Augustal Prefect, or the Count of the East, or Vicars, We order that the *vir illustris* Praetorian Prefect, who is in Our court, and the *vir illustris* Quaestor of Our Palace, both of whom preside over imperial courts, shall assume jurisdiction in the dispute in the same order, in the same form, and at the same times as other disputes are terminated within the normal time limit in imperial hearings on appeal. And this shall apply although the right has been granted to some of the aforesaid judges of *spectabilis* rank to accept appeals as imperial judges. 2a. But if an appeal is made from a Duke who is also a Provincial governor, the Prefect alone will of necessity give judgment in an imperial audience in the ordinary way.

2. Nevertheless, in all these appeals introduced in place of consultations, We order Our clerks of the correspondence bureau (*epistulares*) to accept from the appellants either the reports on appeal (*apostoli*) or the record of the proceedings held before the judge from whom the appeal is made, and to lay the case before the aforesaid judges of illustrious rank, and to take down, write out, and issue to the litigants their transcripts. Then the official staff of those with whom the *vir illustris* Quaestor adjudicates are to execute the judgment.

3. These provisions apply when an appeal is taken from a judge who did not try the case pursuant to special assignment. For if decisions of judges who tried a case pursuant to special assignment are suspended by appeal, the judges who assigned the cases to be tried must decide upon review, whether the appeal is justly or unjustly interposed.

4. We have deemed it expedient to add also to this salutary law, that if Our Serenity has been approached and has assigned a case for trial to a private, and not an *illustris* person, or to more than one, as is usual, and his or their finding is suspended by appeal, the *vir magnificus* Praetorian Prefect, who is in Our court, together with the *vir illustris* Quaestor, shall give judgment within the date for

¹⁹⁹ Combine with C. 3.4.1, 7.63.2, reporting a date of May 20 or 21, 440. Seeck gives May 20, 440.

die. 4a. Nostri vero libellenses quae apud arbitros gesta sunt suscipiant, cognitiones inducant et ea quae geruntur excipiant scribant scriptaque litigatoribus edant: qui etiam apud arbitros, licet illustres sint, ex delegatione nostra cognoscentes excipiunt, si in sacratissimo nostri numinis comitatu causae dicantur.

5. Sane si illustrium ac magnificorum iudicum sententiae fuerint appellatione suspensae, eorum videlicet, quorum sententias licet appellatione suspendi, per consultationem nostram volumus audientiam expectari, licet antea privato homini, id est non illustri, lite a nobis delegata is postea tempore definitionis illustri decoratus dignitate reperiat: eodem observando et si alter ei coniunctus sit arbiter, qui non illustrem meruit dignitatem. 6. Quidquid autem hac lege specialiter non videtur expressum, id veterum legum constitutionumque regulis omnes relictum intellegant.

[33] *Idem AA. Cyro pp.* Eo casu, quo apparitor magisteriae potestatis a curia vel officio cohortali de statu in provincia patiatur controversiam vel ut tributa vel functiones debens in provincia detinetur, si sententia rectoris provinciae fuerit appellatione suspensa, cum tua sublimitate viro quoque magnifico magistro militum cognoscente causae iubemus merita ponderari, licet magister militum rectori provinciae causam delegaverit perorandam.

D. prid. non. Mart. Constantinopoli Cyro vc. cons.

[34] *Imp. Iustinus A. Demostheni pp. pr.* Iubemus, si qua suggestio maioris vel minoris iudicis ad nostram referatur clementiam de negotio, quod iudicandum ei tradidimus vel de quo pro sua iurisdictione iudicaverit, petentis a nostro numine finem eidem imponi negotio, quod ab eo disceptatum est, sive additum sit eidem suggestioni, quid referenti placeat (dum id partibus per sententiae recitationem manifestum non fecit) sive nihil huiusmodi adiectum sit, sed simpliciter nostri numinis responsum expectat, non prius eam discerni, quam per sacram pragmaticam nostri numinis iussionem duo magnifici viri vel patricii vel consulares vel praefectorii, quos pro tempore nos elegerimus, iubeantur adiungi viro illustri pro tempore quaestori nostri palatii et una cum eo in scriptis relationem discernere (sive praesentibus partibus, si hoc

appeal (*temporali die*). 4a. But Our clerks of the petition bureau (*libellenses*) shall receive the record of the proceedings before judge arbitrators, lay out the case, take down and write out the proceedings, and issue their transcripts to the litigants. They shall also take down the proceedings before judge arbitrators, though of *illustris* rank, who try a case upon special assignment by us, if the cases are heard in the court of Our Divine Majesty.

5. Of course, if verdicts by judges of *illustris* or *magnificus* rank shall have been suspended by appeal, that is to say the decisions of those whose sentences are allowed to be suspended by appeal, We wish to hear the case ourselves by consultation, although the case was originally assigned to a private and not to an *illustris* person, who, however, later had the *illustris* rank conferred upon him by the time of his decision. The same rule is to be applied if some other man who has not attained the *illustris* dignity, is associated with him in the trial of the case. 6. Anything that does not appear to be specifically mentioned in this law must be understood as still governed by the regulations of former laws and constitutions.

[33]²⁰⁰ *The same Augusti to Cyrus, Praetorian Prefect.* In case a subordinate official (*apparitor*) of the Master of the Soldiers (*magisteriae potestates*) endures a suit concerning his status in a province brought by a curia or the office staff of the governor (*officium cohortale*) or is detained in a province because he owes tribute or obligations, if the decision of the provincial governor is suspended by appeal, We order that the merits of the case must be reviewed by Your Sublimity together with the *vir magnificus* Master of the Soldiers, even if the Master of the Soldiers assigned the case to be heard by the provincial governor.

Given March 6, at Constantinople, in the consulship of the *vir clarissimus* Cyrus (441).

[34] *Emperor JUSTIN Augustus to Demosthenes, Praetorian Prefect.* pr. If a query (*suggestio*) from a higher or inferior judge is referred to Our Clemency concerning a matter which We assigned to him for trial or which he tried pursuant to his inherent jurisdiction, and he is asking that a conclusion be imposed by Our Divine Majesty on that same matter that he tried, whether the judge referring the matter adds his decision to the query – if he did not make it known to the parties by reading it out – or adds nothing of the sort but simply awaits a response from Our Divine Majesty, We order that the query shall not be decided until, through a pragmatic order of Our Divine Majesty, We have elected for the occasion two men of magnificent rank –

²⁰⁰ = Nov. Theod. 7.4.8 (giving Arcobindus, Master of the Soldiers, as the recipient). Combine with C. 12.54.3. C. alters the Theodosian original significantly.

prospexerint, sive absentibus) et responsum relationi dandum sua sententia manifestare: ut tamen dispositio huiusmodi excellentissimorum iudicum omnimodo rata sit, nulli danda licentia provocationem contra eorum offerre sententiam vel aliam quamcumque dubitationem introducere. 1. Quam observationem non solum, si unus iudex suggestionem vel relatione usus fuerit, tenere censemus, sed etiam si duobus vel amplioribus datis iudicibus in unam sententiam minime omnes convenierint, sed diversas suas sententias unusquisque nostrae mansuetudini rettulerit vel omnes nos consuluerint, quid decernendum sit.

[35] Ἡδὴ τῆς τριακοστῆς διατάξεως εἰπούσης ἐπὶ πάντων τῶν ἀρχόντων τῶν Ἰλλουστρίων, ἀφ' ὧν ἐστὶν ἐκκλητος, τὸν βασιλέα τῆς ἐκκλητίου ἀκροᾶσθαι, ἢ παροῦσα διάταξις εὐροῦσα νόμιμον ἐγνωσμένον, ὅτι κατὰ τῆς ἀποφάσεως τῶν ἐπάρχων ἐκκλητος μὲν οὐκ ἐστὶν, ἀναψηλάφησις δὲ ἐστὶ, καὶ εἰ μὲν ἕτερός ἐστιν ἐπαρχος, πιθανόν ἐστὶν, ὅτι ἀνατρέπει τὰ παρ' ἑτέρῳ κριθέντα, ἐάν δὲ ὁ αὐτός γένηται ἐπαρχος πάλιν ὁ ἥδη ψηφισάμενος, οὗτινος κατὰ τῆς ψήφου καὶ αἱ δεήσεις προστηνέχθησαν, ἐπειδὴ προεἰληπται ὑπὲρ τῆς παλαιᾶς αὐτοῦ ἀποφάσεως λέγειν, κελεύει ἢ διάταξις, ὥστε τὸν κοιαιστωρα συνακροᾶσθαι αὐτῷ δεύτερον ἢ τρίτον γενομένῳ ἐπάρχῳ καὶ ἐξετάζοντι τὰς ἐπὶ τῆς προτέρας αὐτοῦ ἀρχῆς γενομένας ἀποφάσεις, θεσπίζουσα, ὥστε μηδεμίαν εἶναι κατὰ τῶν τοιούτων ἀποφάσεων ἀναψηλάφησιν.

[36] Χρὴ μετὰ πᾶσαν τὴν δίκην τότε τὴν ἐκκλητίαν ἐπιδοθῆναι (οὐδὲ γὰρ βλάπτεται τις, ἐάν ἐν τῷ μεταξύ ἐγένετο διαλαλία ἀπαρνούμενη αὐτῷ δίκαιον ἀρμόζον αὐτῷ, τουτέστιν ἢ μαρτύρων παραγωγὴν ἢ ἀνάγνωσιν συμβολαίου. δύναται γὰρ ἐν τῇ ἐκκλητίᾳ πάντα γυμνάσαι), ἵνα μὴ κατὰ τῆς μέσης διαλαλίας ἐπιδεδομένης ἐκκλητίου μῆκος διδῶται ταῖς ὑπερθέσεσι, πολλάκις ἐν τῇ αὐτῇ ὑποθέσει ἐπιδεδομένης ἐκκλητίου καὶ ἐξεταζομένης, πάλιν ἄλλου κεφαλαίου γυμναζομένου καὶ πάλιν καὶ κατ'

patricians, consulars, or ex-prefects. And We order that these be joined to the *vir illustris* Quaestor of Our Palace at the time, and that together with him they examine the written report – either in the presence of the parties, if they think fit, or in their absence – and offer the response which in their judgment should be given to the report (*relatio*). Nevertheless, the disposition of the case made by these most excellent judges shall be final, and no one shall have the right to offer an appeal against their verdict or to raise any other doubts.

1. We determine that this rule shall be observed not only if one judge refers a matter to Us by query or report (*suggestio vel relatio*), but also when two or more judges specially appointed for a case cannot agree on a verdict, and each has referred his own different verdict to Our Mildness, or when all have asked Us what the decision should be.

<Without subscription (a. 520–524).>²⁰¹

[35]²⁰² The thirtieth²⁰³ constitution already provides that appeals from all magistrates of *illustris* rank from whom an appeal is permitted will be heard by the Emperor. The present constitution finds it to be established law that no appeal can be made from the verdict of Prefects, but a retrial is possible. And if there is a new Prefect, it is plausible that he might overturn the judgment of his predecessor. But if the prefect is again the same as the one who gave judgment already and against whose verdict the appeals have been lodged, since it is assumed he will pronounce in favor of his earlier judgment, the constitution orders that the Quaestor hear the case together with the one who is Prefect for the second or third time and who is reviewing the judgments rendered under his earlier term of office. It ordains that there can be no retrial against such verdicts.

[36]²⁰⁴ It is necessary for an appeal to be lodged only after the entire case has been finished – for no one is harmed if in the middle of his case an interim order is given that denies him his due rights, like the summoning of witnesses or the recitation of a document, for it is possible to treat everything in the appeal – in order that the length of the proceedings may not be extended through postponements if appeals are interposed against interim reports,

²⁰¹ Lounghis *et al.* date to between June 521 and July 522.

²⁰² The preserved text is a Greek synopsis of the original constitution found at Bas. 9.1.125. Lounghis *et al.* date to between 522 and 527.

²⁰³ Read "thirty-second."

²⁰⁴ The preserved text is a Greek synopsis of the original constitution found at Bas. 9.1.126. Possibly to combine with C. 3.1.12; see 3.1.16. At C. 3.1.15 Justinian claims the provisions of this constitution as his own. Because, however, the inscription of the following constitution (37) does not identify Justinian as "the same," Krüger believes the instant constitution was issued under the joint rule of Justin and Justinian in 527. Lounghis *et al.* date to between April 4 and August 1, 527.

αὐτοῦ παρεχομένης ἐκκλήτου. Ἐάν δὲ διατητῆς ἔστιν ὁ ἐν μέσῃ διαλαλῶν δίκαιόν τι αὐτοῖς ἀρνησάμενος, κελεύει ἐγγράφως τούτῳ ἐπισκῆπτειν, ὥστε ἐν τῇ ἐκκλήτῳ φυλάττεσθαι αὐτοῖς τὴν περὶ τούτου δικαιολογίαν ἀπρόκριτον. εἰ δὲ παρὰ ταῦτα γένηται, μὴτε δεχέσθω τὴν ἐκκλήτον ὁ δικάστης καὶ αὐτὸς ὁ ἐκκαλεσάμενος ὑπὲρ παραβάσεως πεντήκοντα λίτρας ἀργύρου παρεχέτω.

[37] *Imp. Iustinianus A. Menae pp. pr.* In offerendis provocationibus, ex quibus consultationum more negotium in nostrum sacrum palatium introduci solebat, hoc addendum esse censemus, ut, si quidem non excedat litis aestimatio decem librarum auri quantitatem, ex ipsa scilicet sententia iudicis discernenda, non duobus, sicut antea, magnificis iudicibus, sed uni tantummodo disceptatio negotii deputetur. 1. Sin vero memoratam excedens quantitatem viginti libris auri terminetur, duobus tradatur magnificis iudicibus, viris scilicet devotis epistularibus cognitionalia certamina excipientibus, ita tamen ut, si dissentirent, virum illustrem pro tempore quaestorem adhibeant, ut eo dubietatem dirimente finiatur negotium: 2. His videlicet litibus, quarum aestimatio viginti librarum auri quantitatem excedit, in commune auditorium florentissimorum sacri nostri palatii procerum introducendis: 3. Ut tamen secundum iam statuta liceat quidem non solum victo, sed etiam victori consultationem ad unum vel duos iudices mittendam intra biennii tempus ei vel eis intimare: post excessum enim memorati temporis huiusmodi licentiam amputamus. 4. Quae vero fuerint ab eo vel eis decreta, nulla provocatione suspendantur. 5. Novas etiam adsertiones a partibus apud eundem vel eosdem iudices addi ad exemplum consultationis ad sacrum nostrum palatium introducendae permittimus.

D. VIII id. April. Constantinopoli Decio cons.

[38] *Idem A. Demostheni pp.* Si quando duciano iudicio appellatio fuerit oblata, sive ab ipsa qualitate iudicis sive ex divina delegatione viro spectabili duci destinata, sive inter spectabiles idem dux connummeretur sive illustri dignitate decoratur sive etiam maiore, cum etiam magisteriae potestatis homines nec non consulares saepe utilitate publica poscente ad huiusmodi curam perveniunt, nullo discrimine habito non dignitatem, sed ducatus magistratum spectari et appellationem ex quocumque duce venientem non ut antea erat dispositum, sed apud

since often in the same case an appeal is interposed and investigated, but then, when a new heading is treated, another appeal is offered in turn against it. If it is a judge arbitrator who denies someone his right in an interim report, it orders him to object to this in writing so that he safeguards his defense against this in his appeal. If the contrary occurs, the judge must not accept the appeal and the appellant himself must pay 50 pounds of silver because of his transgression.

<Without subscription (527?).>

[37]²⁰⁵ *Emperor JUSTINIAN to Menas, Praetorian Prefect. pr.* In offering appeals, through which an affair was customarily introduced into Our Imperial Palace in the manner of a consultation, We think the following additional provision should be made. If the estimated amount of the suit, to be determined by the decision of the judge, does not exceed 10 pounds of gold, the adjudication of the affair shall not be referred, as it used to be, to two judges of *magnificus* rank but only to one. 1. If, however, the amount involved exceeds that sum but not 20 pounds of gold, the matter shall be referred to two judges of *magnificus* rank, and Our devoted clerks of the correspondence bureau (*epistulares*) will take down the court proceedings. If, however, the two judges cannot agree, they shall summon the current *vir illustris* Quaestor, so that he may settle any doubt and bring the affair to a close. 2. Suits in which the estimated amount involved exceeds 20 pounds of gold shall be heard in the collective court of most flourishing highest officials of Our imperial palace. 3. Nevertheless, in accord with previous statutes, with respect to a consultation that would need to be sent to one or two judges, not only the loser but also the winner is permitted to present it to him or them within two years' time. But We curtail this right after that time has lapsed. 4. The decision rendered by any such judge or judges shall not be suspended by any appeal. We also permit new allegations to be added by the parties before the judge or judges, after the example of a consultation introduced to Our imperial palace.

Given April 6, at Constantinople, in the consulship of Decius (529).

[38] *The same Augustus to Demosthenes, Praetorian Prefect.* If an appeal is at any time made from the decision of a Duke, whether it was rendered by him in his role as judge or from imperial assignment to a Duke of *spectabilis* rank, and with no distinction made as to whether the same Duke numbered among the *spectabiles* or was honored with the *illustris* rank or even higher – for even men of the rank of a magistrate and even consulars attain responsibilities of this sort when public utility demands – you must look not to his rank but to the magistracy of Dukedom and to the name itself no matter what level of Duke it

²⁰⁵ Combine with C. 7.64.10.

virum sublimissimum magistrum officiorum nec non virum excellentissimum nostri palatii quaestorem communi audientia praeposita in sacro auditorio more consultationum, viris devotis epistularibus excipientibus ventilari: nulla veteris legis in hac causa observatione custodienda, sed apud eosdem tantummodo excellentissimos iudices causa trutinanda.

[39] *Idem A. Iuliano pp. pr.* Ampliorem providentiam subiectis conferentes, quam forsitan ipsi vigilantes non inveniunt, antiquam observationem emendamus, cum in appellationum auditoriis is solus post sententiam iudicis emendationem meruerat, qui ad provocationis convolasset auxilium, altera parte, quae hoc non fecisset, sententiam sequi, qualiscumque fuisset, compellenda.

1. Sancimus itaque, si appellator semel in iudicium venerit et causas appellationis suae proposuerit, habere licentiam et adversarium eius, si quid iudicatis opponere maluerit, si praesto fuerit, hoc facere et iudiciale mereri praesidium: sin autem absens fuerit, nihilo minus iudicem per suum vigorem eius partes adimplere. 1a. In refutatoriis autem libellis, qui solent maxime in sacro auditorio prudentissimorum nostrorum procerum recitari, caveant tam litigatores quam libellorum dictatores verbosis uti adsertionibus et ea quae iam perorata sunt iterum resuscitare, sed haec sola eis inscribere, quae compendiosa narratione causas provocationis possunt explanare vel aliquid novi continent vel addere quod derelictum est: scituri, quod si hoc fuerit praetermissum, non deerit adversus libellorum conditores amplissimi iudicii competentis indignatio, quod sufficiant gestorum volumina introducta et viro- rum spectabilium magistrorum scriniorum breves omnia apertissime ostendere.

2. Sed cum scimus legem nostram esse promulgatam, per quam more consultationum in causis quidem, quae usque ad decem libras auri extenduntur, unum iudicem sanximus superponi, viginti autem duos sublimissimos iudices, sed cum prima quidem facie lis videbatur non tantam summam excedere, in definitiva autem sententia apparebat iudici vel iudicibus etiam maiorem quantitatem debere imponere, non erat eis possibile formam qua erant conclusi excedere. 2a. Sed nos definimus et omnem eis damus facultatem, si hoc ita fuerit subsecutum, licere eis et ampliorem summam praefata quantitate in qua dati sunt iudices

comes from, and you must air the case not as had been previously required, but before the most sublime Master of the Offices and the most excellent Quaestor of Our Palace in a collective hearing held in the imperial chamber after the fashion of consultations, with the devoted clerks of the correspondence bureau taking down the proceedings. In this case no observation of the old law is to be preserved, but the case must be weighed only before these same most excellent judges.

[39] *The same Augustus to Julian, Praetorian Prefect.* pr. Bestowing a fuller providence on Our subjects than perhaps even they themselves, if vigilant, will discover, We correct an ancient rule, since in the hearing of appeals only the one who sought the aid of the appeal had merited reparation following the verdict of a judge, while the party who did not appeal was compelled to abide by the decision, whatever it was.

1. We therefore ordain that when the appellant has come into court and has stated his reasons for the appeal, his opponent, if he wishes to object to any part of the decision, may do so if present, and shall receive legal recourse. But if he is absent, the judge shall, nevertheless, on his own motion, defend his side of the case. 1a. In connection with refutatory petitions which are customarily read chiefly in the imperial court of Our most prudent highest officials, both the litigants and those who draft such statements must be careful not to make use of verbose allegations or repeat what has already been stated. But they should take care to write in them only those things which can explain the reasons for the appeal in a succinct narrative or which contain something new or add something that was left out. They should know that, if they neglect to do this, the corresponding indignation of the most high court against the composers of such documents will not be lacking, because the books containing the record of the proceedings and the short abstract made by the *virī spectabiles* Masters of the Bureaus ought to be sufficient to show everything clearly.

2. Further, We know that We promulgated a law²⁰⁶ in which We ordained that cases appealed in the manner of consultations which involve an amount up to 10 pounds of gold should be heard by one judge, and cases involving as high as 20 pounds by two most sublime judges. But if *prima facie* the suit did not seem to exceed the respective amounts mentioned, but the judge or judges in reaching a final verdict came to the conclusion that a judgment for a greater amount should be rendered, it was impossible for them to go outside of the format by which they were bound. 2a. But We direct and give them full power, if this should occur, to exceed the sum with one even greater than the amount they were originally assigned to judge, and to give a verdict not within the

²⁰⁶ C. 7.62.37.

excedere, et non ad modum suae rationis, sed ad veritatis indaginem ferre sententiam, ne tanti iudices quasi vinculis praepediti non possint legum veritati et iudiciali vigori per omnia satisfacere.

D. VI k. April. Constantinopoli Lampadio et Oreste vv. cc. cons.

LXIII De Temporibus et Reparationibus Appellationum seu Consultationum

[1] *Imp. Constantinus A. ad Crispinum.* Si quis per absentiam nominatus vel ad duumviratus aliorumque honorum infulas vel munus aliquod evocatus ad provocationis auxilium cucurrerit, ex eo die interponendae appellationis duorum mensum tempora ei computanda sunt, ex quo contra se celebratam nominationem didicisse monstraverit. nam praesenti, qui factam nominationem cognovit et appellare voluerit, statim debet duorum mensum spatium computari.

D. VIII id. Iul. Constantino A. VI et Constantio C. cons.

[2] *Impp. Theodosius et Valentinianus AA. Cyro pp. pr.* Tempora fatalium dierum pro saeculi nostri beatitudine credidimus emendanda ubique dilationum materias amputantes. et primi quidem fatalis diei tempora post appellationem, sive a viro clarissimo rectore provinciae sive a spectabili iudice fuerit appellatum, sex mensuum esse iubemus. 1. Quod si primo fatali die lapsus est appellator, tricesimum primum diem alterum volumus esse fatalem. quod si eo quoque appellator exciderit, tertium similiter totidem diebus intermissis fatalem observari decernimus. quod si tertius quoque lapsus fuerit temporalis, quartum etiam fatalem post tricesimum primum diem similiter observari decernimus.

2. Quod si ita contigerit, ut quattuor fatalibus diebus qui appellavit exciderit, tunc intra trium alium mensum spatium a nostro numine reparationem peti praecipimus: qua petita nec adversarium decernimus admoneri nec temporalem diem a petitione reparationis numerari, sed trium mensum spatio ex quarto fatali numerando causam induci praecipimus, licet ante unum diem reparatio fuerit impetrata,

measure of their remit, but as the facts truly require, lest judges of this magnitude be fettered, as it were, by chains, and not be able to satisfy the truth of the law and judicial power in all respects.

Given March 27, at Constantinople, in the consulship of the viri clarissimi Lampadius and Orestes (530).

Sixty-Third Title Time Periods and Their Reinstatements for Appeals and Consultations²⁰⁷

[1]²⁰⁸ *Emperor CONSTANTINE Augustus to Crispinus.* If anyone is appointed in his absence either to the duumvirate or to the badges of some other honor or called to some public service, and he has recourse to the aid of an appeal, the period of two months for interposing an appeal must be computed from the day on which he shows that he learned his appointment was announced. For if he was present and knew of his appointment and wanted to appeal, the period of two months ought to be computed beginning immediately.

Given July 8, in the consulship of Constantine Augustus, for the sixth time, and Constantius Caesar (320).

[2]²⁰⁹ *Emperors THEODOSIUS and VALENTINIAN Augusti to Cyrus, Praetorian Prefect. pr.* In keeping with the happiness of Our times, We believed that the deadlines for appeal (*tempora fatalium dierum*) should be corrected so as to curtail opportunities for delay. And We order that the first deadline after the appeal is taken shall be six months, whether the appeal is made from a *vir clarissimus* provincial governor or from a judge of *spectabilis* rank. 1. But if the appellant lets the first deadline lapse, then We want the thirty-first day thereafter to be the second deadline. But if the appellant also exceeds that, We decree that the third deadline shall be after the same number of days has passed. But if the third period has also lapsed, We decree that the fourth deadline shall likewise fall on the thirty-first day.

2. But if it happens that the appellant has exceeded four deadlines, We direct that he seek reinstatement (*reparatio*) of his right of appeal from Our Divine Majesty within the period of three additional months. We decree that the opponent need not be notified when a reinstatement is sought, nor need the deadline be computed from the date of the petition for reinstatement, but We instruct that the case be introduced within a space of three months to be calculated from the fourth deadline, even if the reinstatement was obtained one day

²⁰⁷ See D. 49.4.

²⁰⁸ = C.Th. 11.30.10. Seeck dates to July 8, 353.

²⁰⁹ Combine with C. 3.4.1, 7.62.32.

licet adlegata in iudicio virorum illustrium praefectorum non fuerit. 3. Nec hoc parti nocebit adversae, cum non dubius, sed notus omnibus dies fatalis appareat. haec, si adversus viri clarissimi rectoris provinciae vel spectabilium iudicum sententias fuerit appellatum.

4. Quod si arbitro in provincia ex delegatione sacra disceptante appellatio subsequatur, post priorem fatalem lapsum tres alii tantum fatales dies similiter ut supra dictum est servabuntur, nulla reparatione a nostro numine postulanda, ita ut nonaginta tribus diebus elapsis iudicata congruae executioni mandentur. 5. Sin autem ex sententia praetorianae praefecturae vel magistri officiorum vel alio illustri dignitate decorato arbiter in hac sacratissima civitate fuerit delegatus et appellatio contra definitionem vel sententiam eius subsecuta fuerit, primus quidem fatalis dies duorum mensum, alii vero tres ad similitudinem supra dictorum fatalium numerentur. 6. Qui vero delegatum vel a spectabili iudice seu praeside provinciae arbitrum appellaverit, primum quidem fatalem diem duorum mensum, tres vero alios ad similitudinem praedictorum fatalium dierum habeat.

7. Illud etiam circa observationem fatalium dierum custodiri decernimus, ut, si forte temporales in feriatos quoquo modo inciderint, praecedentes eos dies ut temporales a litigantibus observentur. quod si quis secus, ac iura praecipunt, lapsus die fuerit temporali et hoc primo loco vel a praesente adversario vel etiam a iudice, si solus litigat, appellatori fuerit oppositum probatumque, pro eo habebitur appellator, ac si sententiam quoquo modo non coactus susceperit.

D. XII k. Iun. Valentiniano A. v et Anatolio cons.

[3] *Imp. Iustinus A. Apioni pp.* Nemo arbitretur in posterum licentiam futuram consultationibus ultra statuti temporis vivendi spatia neque per oblationem precum neque per sacrum rescriptum super reparatione temporum indulgendum neque sub praetextu quodam altero: sed omnibus incumbendum esse vigilantia diligentia, quo provocationes eorum intra statutum tempus introducantur, ita ut etiam gesta in iudicio, contra quod provocatum est, non prope finem temporis tradantur scrinio sacrarum epistularum, ne praepediatur per astutias fatalis rei terminus, sed aut statim, postquam appellatum sit, aut non minus

earlier and even if it was not adduced in the court of the *viri illustres* Prefects. 3. Nor will this harm the adverse party, since the deadline is not in doubt but is known to all. These provisions apply in case of an appeal made from the verdicts of a *vir clarissimus* provincial governor or judges of *spectabilis* rank.

4. But if an appeal arises from a judge arbitrator who gave judgment in a province pursuant to an imperial assignment, only three additional deadlines shall be kept in the same manner as mentioned above, and no reinstatement can be demanded from Our Divine Majesty. In this way once ninety-three days have passed, the judgment should be ordered to be properly executed. 5. Nevertheless, if a judge arbitrator was appointed in this imperial city by orders of the Praetorian Prefect or of the Master of the Offices or of any other person of illustrious rank, and an appeal followed against his decision or verdict, the first deadline shall consist of two months, but the other three should be counted the same as the deadlines mentioned above. 6. And whoever appeals from a judge arbitrator appointed by a judge of *spectabilis* rank or by a provincial governor should have a first deadline of two months and three others the same as mentioned above.

7. We decree that this too must be complied with in connection with deadlines, that if the trial day falls on a holiday, the days immediately preceding shall be considered the trial days by the litigants. But if, contrary to what the laws direct, someone misses the trial day, and this is set up against the appellant in the first instance and proven, whether by the adversary, if present, or by the judge, if the person is litigating alone, the appellant shall be considered as having accepted the verdict without having been coerced in any way.

Given May 21, in the consulship of Valentinian Augustus, for the fifth time, and Anatolius (440).²²⁰

[3] *Emperor JUSTIN Augustus to Apion, Praetorian Prefect.* No one need think that in future there will be a right to appeals by consultation beyond the period of time currently established, whether through the offering of petitions or through an imperial rescript granting indulgence for the reinstatement of periods of appeal or upon any other pretext. But it is incumbent on everyone to be vigilant that their appeals are introduced within the established time. And they should do it in such a way that the proceedings in the case from which an appeal is made should not be delivered to the imperial bureau for correspondence toward the end of the time fixed, which might cause the final deadline to lapse through trickery, but should deliver them immediately after an appeal is taken, or not later than when half of the period has expired, so that a tardy

²²⁰ Seeck dates this constitution to May 20, 440.

quam ante dimidiam partem temporis praebeantur scrinio, ne, quod per angustias contingit temporum, tardus appellationis fautor suo dispendio refutetur.

D. k. Dec. Constantinopoli Magno cons.

[4] *Idem A. Tatiano magistro officiorum. pr.* Per hanc divinam sanctionem decernimus, ut licentia quidem pateat in exercendis consultationibus tam appellatori quam adversae parti novis etiam adsertionibus utendi vel exceptionibus, quae non ad novum capitulum pertinent, sed ex illis oriuntur et illis coniunctae sunt, quae apud anteriorem iudicem noscuntur propositae. **1.** Sed et si qua dicta quidem adlegatio monstrabitur vel instrumentum prolatum aliquod, probationes tamen illo quidem defuerunt tempore, verum apud sacros cognitores sine procrastinatione praeberi poterunt, id quoque eos admittere, quo exercitatis iam negotiis pleniore subveniat veritatis lumine.

D. v k. Iun. Constantinopoli Rusticio cons.

[5] *Imp. Iustinianus A. Triboniano quaestori sacri palatii. pr.* Cum anterioribus legibus ex omni provincia ad hunc nostrum sacratissimum comitatum similis cursus ad appellationes exercendas impertitus est, necessarium nobis visum est huiusmodi spatiis iustum imponere libramentum.

1. Sancimus itaque, si quidem ab Aegyptiaco vel Libyco limite vel Orientali tractu usque ad utrasque Cilicias numerando vel Armeniis et gentibus et omni Illyrico causa fuerit more appellationum transmissa, primum semestre spatium in antiqua definitione permanere et nihil penitus neque deminui neque ad crescere. **1a.** Sin autem ex aliis nostri imperii partibus sive Asianae sive Ponticae sive Thraciae dioeceseos lis provocatione suspensa in hanc regiam urbem perveniat, pro semestri spatio trium tantummodo mensum spatium eis indulgeri: aliis trium mensum spatiis, id est nonaginta tribus diebus simili modo sequentibus sive semestre tempus sive tres priores menses secundum locorum definitionem, quam designavimus. **1b.** Sed et aliis tribus mensibus, qui ex reparatione ab aula concedi solent, in suo robore duraturis et prioribus accedentibus, ut partim annale numeretur, partim novem mensum spatium consequatur.

1c. Et cum antea in fine cuiusque temporis unus fatalis dies ex antiquis legibus constitutus est et saepe eveniebat (cum multae sunt occasiones mortales appellationum) vel aegritudine vel spatii prolixitate vel per alias causas, quas nec dici nec enumerari facile sit, eundem diem

appellant will not be refuted at his own loss because of what happens when time runs short.

Given December 1, at Constantinople, in the consulship of Magnus (518).

[4] *The same Augustus to Tatianus, Master of the Offices.* We decree by this imperial sanction, that in appeals by consultation, both appellants and their opponents have the right to set up new claims or defenses which do not pertain to a new heading but arise out of or are connected to matters known to have been brought before the previous judge. 1. But even if some assertion is shown to have been made or a document to have been offered, yet proof for it was previously lacking, and if it can be furnished to the imperial judges without delay, they shall also admit this so that fuller light may be shed on affairs previously investigated.

Given May 28, at Constantinople, in the consulship of Rusticius (520).

[5] *Emperor JUSTINIAN Augustus to Tribonianus, Quaestor of the Imperial Palace. pr.* Since in previous laws a similar course was allotted for making appeals from all the provinces to this Our Imperial Court, it seemed necessary to Us to give proper measure to the time periods necessary for this.

1. We therefore ordain that, if a case should be sent on appeal from the Egyptian or Libyan frontier or the eastern reaches up to both Cilicias or from the Armenians and the Nations (*gentes*) and all of Illyricum, the first period of six months shall remain as in the old regulation²¹¹ and shall in no way be increased or diminished. 1a. But if a suit suspended by appeal should reach this imperial city from other parts of Our empire, whether from the dioceses of Asiana, Pontica, or Thracia, instead of a six-month period, only a three-month span will be permitted for it. The other periods of three months, that is to say the ninety-three days, shall follow in similar fashion the six-month or three-month period according to the distinction We have assigned to the various places. 1b. The other period of three months, which is usually granted by the Emperor for reinstatement of the right of appeal shall, continue in force and be added to the prior ones. And so a one-year period is calculated in some places and a nine-month period occurs in others.

1c. And formerly a single deadline was established at the end of each time period following ancient laws, and it used to happen often – since men have many occasions for appeal – that, either through sickness or through great distance or for other reasons difficult to relate or recount, that same deadline was not observed, and suits expired, and people's property was endangered

²¹¹ C. 7.63.2. As to "the Nations," see C. 1.29.5.

fatalem non observari et lites expirare et huiusmodi luctuosis infelicitatibus patrimonia hominum titubare: propter hoc fortunae relevantes insidias sancimus non in unum diem fatalem standum esse in posterum, sed sive ante quartum diem fatalis luminis et ipsum fatalem sive post quinque dies, ex quo ortus fatalis effluxerit, appellator venerit et litem instituendam curaverit et eam in competens iudicium deduxerit, legi videri satisfactum, ne ingemiscat mortuae causae dispendium, sed nostro gaudeat beneficio, cum nobis cognitum sit etiam ex errore calculi dierum quem officium habuit saepe esse causas periclitatas: quod in posterum non fieri ex remedio legis praesentis sperandum est. 1d. Eodem beneficio et in aliis omnibus fatalibus qui vel a pedaneis iudicibus vel ab aliis, quos leges suis sanctionibus enumeraverunt, custodiendo seu observando, ut decem fatales pro uno ubique instituantur.

2. In his autem casibus, in quibus biennium constitutum est, quatenus more consultationum in regia urbe sub communi audientia florentissimorum nostri palatii procerum ventilentur, biennii metas unius anni terminis coartamus, ut intra eum et gesta colligere et ea viris devotis epistularibus tradere et refutatorios libellos, si voluerint, offerre et litem in sacrum nostrum consistorium introducere cogantur: nulli licentia deneganda victrici parti, si voluerit, secundum quod iam constitutum est, et praemature causam inducere neque annali spatio expectato. 3. Si tamen in sacro nostro consistorio lis exordium ceperit, etsi non fuerit in eodem die completa, tamen perpetuari eam concedimus, cum iniquum sit propter occupationes florentissimi ordinis, quas circa nostrae pietatis ministeria habere noscitur, causas hominum deperire.

4. Illud etiam merito addendum huic legi censemus, ut si qui fatali die apud appellationis iudicem introductus, sive ex una parte sive cognitionaliter causae appellationis imponat exordium, deinde relicta ea discedat et in desidia reliquum tempus permaneat et annale tempus post inchoatam litem praeterierit, victore neque sententiam ad effectum perducere valente propter litem iam inchoatam neque iam terminum accipere inveniente, cum appellatoris absentia eam finiri non facile concedit, huiusmodi iniquitatem amputantes (cum adversarius potest et minime praesente appellatore litem exercere, quia hoc speciale privilegium eius est, qui appellationi examinandae praesidet, posse ex una parte causam dirimere) iubemus eundem appellatorem, nisi observaverit iudicium et causam usque ad finem peregerit, sed per eum steterit, quominus omnia litis certamina impleantur, appellatione defraudari et sententiam contra

by grievous misfortunes of this sort. For this reason We relieve the snares of fortune and ordain that in future there is no need to abide by a single deadline, but the law will be satisfied if the appellant approaches, sees to the establishment of his suit, and brings it before the appropriate court either up to four days before the deadline day, or on that day itself, or for the five days following sunset on the deadline. Thus he will not groan at the loss of an expired case, but will rejoice in Our beneficence, for it has come to Our attention that cases have often been threatened even by calculation errors committed by the official staff. It is hoped this will not happen in future because of the remedy of the present law. *id.* This benefit should also be kept and observed in all other deadlines both by delegated judges and others whom the laws enumerate in their sanctions, so that ten-day deadlines shall be established everywhere instead of one-day.

2. But in cases in which a period of two years is now established for airing an appeal by consultation in the Imperial City before a collective hearing of the most flourishing highest officials of Our palace, We restrict the boundary from two years to one year, so that appellants are compelled within this span to collect the proceedings and deliver these to the devoted clerks of the correspondence bureau, and to offer refutatory petitions, if they wish, and to introduce their suit into Our Imperial Court. Nor must the right be denied to the winning party, if he so desires, to introduce his case very early without waiting a year's time, in accordance with what has long been established.²²² 3. Nevertheless, if a suit is begun before Our Imperial Council, even if it should not be finished on the same day, We permit it to be continued, since it would be unjust if people's cases failed because of the preoccupations of the Most Flourishing Order while it is engaged in the service of Our Piety.

4. We think that the following should also be added to this law: if an appellant is brought before an appeals judge on the deadline day, whether he began the case for appeal as a single party or in the manner of an inquest, and if he then abandons it and departs and remains inactive for the time to come, and a year's time passes after the suit was begun, the winner will not be able to bring the verdict into effect on account of the suit having been begun but not yet finished, since the absence of the appellant hardly permits it to be concluded; curtailing such injustice We command that, if the appellant is not observant of the court and does not pursue his case to its end, and if because of him every dispute is not concluded in the suit, that same appellant will be deprived of his appeal and the verdict rendered against him will remain in force and be brought into effect as if he had never appealed in the first place; for his adversary is able to conduct his suit even if the appellant is not present, since it is the

²²² See C. 7.62.37.2, 7.64.10.1.

eum latam in suo robore durare et ad effectum perducere, tamquam si ab initio minime fuerit provocatum: nisi ipse appellator evidentissime probationibus possit ostendere se quidem summa ope nisum voluisse litem exercere, per iudicem autem stetisse vel aliam inexorabilem causam subsecutam, propter quam hoc facere minime valuit. tunc etenim aliud ei annale tempus indulgemus, quo effluente et lite minime finem accipiente cadere eum de appellatorio iuvamine disponimus, cum sit ei apertissima facultas et nostram adire maiestatem et tarditatem iudicis in querellam deducere et nostro beneficio perpotiri.

5. Cui consentaneum est, ut et in sententiis omnium amplissimorum praefectorum praetorio ex divino oraculo retractandis eadem observatio, quae supra dicta est, post ingressum unius vel utriusque partis tam propter absentiam personarum quam propter statuta tempora teneat. 6. Sin autem partes inter se scriptura interveniente paciscendum esse crediderint nemini parti licere ad provocationis auxilium pervenire vel ullum fatalem observare, eorum pactionem firmam esse censemus. legum etenim austeritatem in hoc casu volumus pactis litigantium mitigari.

D. xv k. Dec. Chalcedone Decio vc. cons.

LXIII Quando Provocare Necesse Non Est

[1] *Imp. Alexander A. Apollinario et aliis.* Datam sententiam dicitis, quam ideo vires non habere contenditis, quod contra res prius iudicatas, a quibus provocatum non est, lata sit. cuius rei probationem si promptam habetis, et citra provocationis adminiculum quod ita pronuntiatum est sententiae auctoritatem non obtinebit.

PP. viii k. April. Alexandro A. cons.

[2] *Idem A. Capitoni. pr.* Si, cum inter te et aviam defuncti quaestio de successione esset, iudex datus a praeside provinciae pronuntiavit potuisse defunctum et minorem quattuordecim annis testamentum facere ac per hoc aviam potiore esse, sententiam eius contra tam manifesti iuris formam datam nullas habere vires palam est et ideo in hac specie nec provocationis auxilium necessarium fuit. 1. Quod si, cum de aetate quaereretur, implese defunctum quartum decimum annum ac per hoc iure factum testamentum pronuntiavit, nec provocasti aut post appellationem impletam causa destitisti, rem iudicatam retractare non debes.

<PP. xvi k. Apr. Alexandro A. II et Marcello? cons.>

special privilege of the person who presides over appeals courts to be able to adjudicate cases with only one party present; unless the appellant can clearly show that he wanted to use every effort to carry on the suit but was halted because of the judge or some other unavoidable cause through which he was unable to do so; for in that case We grant him one more year's time; but if that, too, passes and the suit is not terminated, We order that he should lose any relief from an appeal, since he has the fullest opportunity to come before Our Majesty, complain of the tardiness of the judge, and obtain Our beneficence.

5. It is proper that the above-stated rule should also be applied by all of Our Most High Praetorian Prefects when reviewing cases by imperial order after the appearance of one or both of the parties, both with regard to the absence of persons as well as to the times established. 6. If the parties deem it best, however, to make a pact in writing that neither party shall resort to the help of an appeal or pay attention to any deadline, We determine that their pact shall be valid. For We want the severity of the law to be mitigated in this case by the pacts of the litigants.

Given November 17, at Chalcedon, in the consulship of the vir clarissimus Decius (529).

Sixty-Fourth Title When It Is Not Necessary to Appeal²¹³

[1] *Emperor ALEXANDER Augustus to Apollinarius and others.* You say that a decision was rendered which you contend to be without force because it was rendered contrary to matters previously adjudicated from which no appeal was taken. If you have the proof of that at hand, the pronouncement made in this way will not obtain the force of a verdict, even leaving aside the support of an appeal.

Posted March 25, in the consulship of Alexander Augustus (222).

[2] *The same Augustus to Capito. pr.* If, in a suit between you and the grandmother of the deceased about an inheritance, the judge appointed for the case by the provincial governor held that the decedent, though less than 14 years old, was capable of making a testament, and because of this the grandmother prevailed, his verdict was so clearly rendered contrary to the existing law that it obviously has no force and no appeal was necessary in such case. 1. But if, when the question of age was raised, he held that the deceased had passed his fourteenth year and that the testament was therefore valid, and you did not appeal or you abandoned the case after the appeal had been made, you must not reopen the matter once adjudicated.

Posted March 17, in the consulship of Alexander Augustus, for the second time <and Marcellus> (226).²¹⁴

²¹³ See D. 49.8.

²¹⁴ The subscripts of this and the two following constitutions have been restored from the Vallicelliana fragments. See Corcoran, "New Subscripts."

[3] *Imp. Gordianus A. Ingenuo.* Si, ut proponis, suspensa apud amplissimos iudices cognitione provocationis, quam te ob id interposuisse dicis, quod decurio nominatus esses, ad duumviratum vocatus es, manifestum est praeiudicium futurae notioni memoratorum iudicum fieri non potuisse.

<PP. k. Mar. Sabino et Venusto? cons.>

[4] *Impp. Valerianus et Gallienus AA. et Valerianus nob. C. Iuliano.* Cum magistratus datos iudices et unum ex his pronuntiasse proponas, non videtur appellandi necessitas fuisse, cum sententia iure non teneat.

<PP. k. Iul. Aemiliano et Basso cons.>

[5] *Imppp. Carus Carinus et Numerianus AAA. Domitiano.* Certa ratione et fine multare praesides possunt, quod si aliter et contra legis statutum modum provinciae praeses multam vobis interrogaverit, dubium non est id, quod contra ius gestum videtur, firmitatem non tenere et sine appellatione posse rescindi.

PP. id. Ian. Caro et Carino cons.

[6] *Idem AAA. Germano.* Cum non eo die, quo praeses provinciae praecepit, iudex ab eodem datus pronuntiaverit, sed ductis diebus alieniore tempore sententiam dedisse proponatur, ne ambages frustra interpositae provocationis ulterius negotium protrahant, praeses provinciae superstitiosa appellatione submota ex integro inter vos cognoscet.

<PP. k. Dec. Carino et Numeriano cons.>

[7] *Impp. Diocletianus et Maximianus AA. Nicagorae.* Venales sententias, quae in mercedem a corruptis iudicibus proferuntur, et citra interpositae provocationis auxilium iam pridem a divis principibus infirmas esse decretum est.

[3] *Emperor GORDIAN Augustus to Ingenuus.* If, as you state, the inquest into an appeal that you had interposed because you had been nominated as a decurion was pending before the most high judges, and you were then called to serve as duumvir, it is clear that this could not have prejudiced the upcoming trial by the above-mentioned judges.

Posted March 1, in the consulship of Sabinus <and Venustus> (240?).

[4] *Emperors VALERIAN and GALLIENUS Augusti and Valerian the Most Noble Caesar to Julian.* Since you state that the magistrates were appointed as judges and from these just one gave judgment, no appeal appears to have been necessary, since the verdict does not legally hold.

Posted July 1, in the consulship of Aemilianus and Bassus (259).

[5] *Emperors CARUS, CARINUS, and NUMERIAN Augusti to Domitianus.* Governors may impose fines under certain circumstances and within definite limits. But if the provincial governor has imposed a fine on you under other circumstances and beyond the limit fixed by law, there is no doubt that an act which appears to have been done contrary to law has no validity and can be annulled without appeal.

Posted January 13, in the consulship of Carus and Carinus (283).

[6] *The same Augusti²³⁵ to Germanus.* Since the judge appointed by the provincial governor did not give his decision on the day when the governor ordered, but is said to have rendered his verdict after that date had been postponed and at a quite inappropriate time, the provincial governor should try the case between you anew, having set aside any superfluous appeal, lest the delays of an appeal interposed in vain should draw out the affair any further.

Posted December 1, in the consulship of Carinus and Numerian (284).

[7]²³⁶ *Emperors DIOCLETIAN and MAXIMIAN Augusti to Nicogoras.* Purchased verdicts given by corrupt judges for a price have long ago been declared by the deified emperors to be invalid, even without the assistance of an interposed appeal.

²³⁵ The subscript of this constitution, which has been restored from the Vallicelliana fragments, dates it after the accession of Diocletian on November 20, 284. The heading is thus inaccurate, and this becomes the earliest known rescript of Diocletian.

²³⁶ Possibly to combine with C. 6.34.2, with Corcoran, "New Subscripts" p. 417 on the date.

PP. v k. Ian. Diocletiano A. et Aristobulo cons.

[8] *Idem AA. Constantio.* Si pater tuus, cum decurio creareris, non consensit et quindecim annos aetatis agis, aditus praeses provinciae, si inhabilem te ad obeundum decurionatus honorem esse perspexerit, quando huiusmodi aetati etiam praetermissa appellatione subveniat, iniquam nominationem removebit.

<PP. III k. Oct. ipsis III et III AA. cons.>

[9] *Idem AA. et CC. Rufino.* Veteranis, qui in legione vel vexillatione militantes post vicesima stipendia honestam vel causariam missionem consecuti sunt, onerum^{vii} et munerum personalium vacationem concessimus. huius autem indulgentiae nostrae tenore remunerantes fidam devotionem militum nostrorum etiam provocandi necessitatem remisimus.

[10] *Imp. Iustinianus A. Menae pp. pr.* Omnem honorem salvum iudicibus reservantes, si quando una pars quasi laesa per definitivam eorum sententiam provocatione usa fuerit, interdicens alteri parti quae vicit pro hoc tantummodo, quod nihil capere pro sumptibus litis et detrimentis vel minus quam oportuerat iussa est, provocationem offerre, cum ipsam decisionem litis recte factam esse confiteatur: iudicibus scilicet sive florentissimis proceribus sacri nostri palatii sive his, quibus pro minore litium aestimatione consultationes delegantur, si perspexerint adiuvandum esse victorem sumptuum perceptione, etiam sine provocatione eius hoc statuentibus et iustam eorundem sumptuum quantitatem definientibus. 1. Sed nec occasione consultationis introducendae victori provocare concedimus, cum et priscis legibus liceat ei et sine provocationis auxilio eandem consultationem differente suo adversario introducere et nos ei nihilo minus hoc permittimus, iniuriam ex super-
vacua provocatione iudicibus fieri prohibentes.

D. VIII id. April. Constantinopoli Decio vc. cons.

^{vii} honorum, Vall.

*Posted December 28, in the consulship of Diocletian Augustus and Aristobulus (285).*²¹⁷

[8] *The same Augusti to Constantius.* If your father did not give his consent when you were appointed as decurion and you are 15 years of age, and if, when you go before the provincial governor, he finds that you are incapable of assuming the office of the decurionate, he will annul the unfair appointment since persons of that age obtain relief even in the absence of an appeal.

Posted September 28, in the consulship of the same Augusti, for the fourth and third time (290).

[9] *The same Augusti and the Caesars to Rufinus.* We have granted veterans, if they have served in a legion or a cavalry squadron (*vexillatio*) and have obtained an honorable discharge or discharge for disability after twenty years of service, exemption from offices and personal services. But by this ruling of this Our Indulgence and in reward for the faithful devotion of Our soldiers We have also released them from the necessity of an appeal.

[10]²¹⁸ *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect. pr.* Preserving every honor due to judges, if one of the parties to a suit, feeling himself aggrieved by a final decision, resorted to an appeal, We forbid the other party, who was victorious, to make an appeal merely on the ground that he was ordered to receive nothing for the costs and damages of his suit or less than he ought to have, even though he acknowledges that the judgment of the suit is correct. In fact, the judges, whether they are the most flourishing highest officials of Our Imperial Palace or the sort to whom consultations are delegated for judgment of lesser suits, can establish this without an appeal and can delimit a fair amount for these same expenses if they foresee that the winner should be aided through the collection of his expenses. 1. Nor, however, do We permit the winner to appeal on the pretext of introducing a consultation, since it is permitted even in the previous laws to introduce a consultation without the aid of an appeal when his opponent is delaying, and We do permit him the same right, even as We forbid that any outrage be done to judges through a superfluous appeal.

Given April 6, at Constantinople, in the consulship of the vir clarissimus Decius (529).

²¹⁷ This subscript, as well as that for the next constitution, has been restored from the Vallicelliana fragments.

²¹⁸ Combine with C. 7.62.37.

LXV Quorum Appellationes Non Recipiantur

[1] *Imp. Antoninus A. Sabino.* Eius, qui per contumaciam absens, cum ad agendam causam vocatus esset, condemnatus est negotio prius summatim perscrutato, appellatio recipi non potest.

PP. non. Iul. Antonino A. IIII et Balbino cons.

[2] *Imp. Constantius A. ad Hieroclem. pr.* Observare curabis, ne quis homicidarum veneficorum maleficorum adulterorum itemque eorum, qui manifestam violentiam commiserunt, argumentis convictus, testibus superatus, voce etiam propria vitium scelusque confessus audiat appellans. 1. Sicut enim haec ita observari disposuimus, ita aequum est testibus productis, instrumentis prolatis aliisque argumentis praestitis si sententia contra eum lata sit et ipse, qui condemnatus est aut minime voce sua confessus sit aut formidine tormentorum tentus contra se aliquid dixerit, provocandi licentiam ei non denegari.

D. v id. Dec. Leontio et Sallustio cons.

[3] *Impp. Valentinianus et Valens AA. ad Modestum pp.* Nulli officium a sententia proprii iudicis provocatio tribuatur nisi in eo tantum negotio, quod ratione civili, super patrimonio forte, apud proprium iudicem inchoarit, scilicet ut in eo tantum negotio a sententia eius, si paret iudici, quisquis velit officialis appellet, quod per procuratorem persequi iure tribuitur.

D. IIII id. Iun. Cyzico Valentiniano et Valente AA. cons.

[4] *Idem et Gratianus AAA. ad Olybrium pu.* Abstinendum prorsus appellatione sancimus, quotiens fiscalis calculi satisfactio postulatur a tributariae functionis sollemne munus exposcitur aut publici vel etiam privati, dummodo evidentis atque convicti redhibitio debiti flagitat ut necessario in contumacem vigor iudiciarius excitetur.

Sixty-Fifth Title Whose Appeals May Not Be Accepted²¹⁹

[1] *Emperor ANTONINUS Augustus to Sabinus.* If someone remained contumaciously absent when he was called to conduct his case and, after the affair was summarily investigated, he was condemned, his appeal cannot be accepted.

Posted July 7, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2]²²⁰ *Emperor CONSTANTIUS Augustus to Hierocles, pr.* You will take care that no murderers, poisoners (*venefici*), magicians (*malefici*), adulterers, and persons committing open violence²²¹ shall be heard as an appellant when they have been convicted by proofs, have been proven guilty by witnesses, and have by their own testimony confessed their vice and wickedness. 1. Just as We order that rule to be followed, it is also fair that the right of appeal should not be denied to someone who, even after witnesses were produced, documents proffered, other proofs brought to bear, and a verdict rendered against him so that he was condemned, yet never confessed by his own testimony nor said anything against himself even when tested with the frightfulness of tortures.

Given December 9, in the consulship of Leontius and Sallustius (344).

[3]²²² *Emperors VALENTINIAN and VALENS Augusti to Modestus, Praetorian Prefect.* No staff member has the right to appeal from the decision of his own judge, with the lone exception of a suit which he initiated before his own judge in a civil case, as for example concerning his property. That is to say, any given staff member (*officialis*) may appeal from a judge whom he serves only in a suit that can be legally prosecuted through a procurator.

Given June 10, at Cyzicus, in the consulship of Valentinian and Valens Augusti (373).

[4]²²³ *The same and GRATIAN Augusti to Olybrius, City Prefect.* We ordain that no appeal whatever shall be permitted when satisfaction of a Treasury account or of the customary obligation of a tributary service or when repayment of public or even private debt is demanded, provided it is clear and proven, in order that necessary judicial force can be brought to bear against contumacy.

²¹⁹ See D. 49.5.

²²⁰ = C.Th. 11.36.7, attributing the constitution to Constantius II and Constans; Seeck dates it to April 24, 348. C. epitomates C.Th. and alters the wording dramatically; frag. 1 is probably interpolated.

²²¹ For *qui manifestam violentiam commiserunt*, C.Th. 11.36.7 has *raptorum argumento convictus*, i.e., convicted for rape.

²²² = C.Th. 11.36.17. Seeck dates to June 10, 371; Schmidt-Hofner; posted June 10, 370 or 373.

²²³ = C.Th. 11.36.19. Combine with C. 2.6.6. Seeck dates to August 18, 370.

PP. Romae xv k. Sept. Valentiniano et Valente II AA. cons.

[4a] *Idem AAA. ad Claudium pu.* Si clericus ante definitivam sententiam frustratoriae dilationis causa ad appellationis auxilium convolverit, multam quinquaginta librarum argenti, quam contra huiusmodi appellatores sanctio generalis imponit, cogatur expendere. hoc autem non fisco nostro volumus accedere, sed pauperibus fideliter erogari.

D. VIII id. Iul. Valentiniano np. et Victore cons.

[5] *Imppp. Valens Gratianus et Valentinianus AAA. ad Thalassium proconsulem Africae. pr.* Ab exsecutione appellari non posse satis et iure et constitutionibus cautum est, nisi forte exsecutor sententiae modum iudicationis excedat. 1. A quo si fuerit appellatum, exsecutione suspensa decernendum putamus, ut, si res mobilis est, ad quam restituendam exsecutoris opera fuerit indulta, appellatione suscepta possessori res eadem detrahatur et idoneo collocetur reddenda ei parti, pro qua sacer cognitor iudicaverit. 2. Quod si de possessione vel de fundis executio concessa erit et eam suspenderit provocatio, fructus omnes, qui tempore interpositae provocationis capti vel postea nati erunt, in deposito collocentur, iure fundi penes eum qui appellaverit constituto.

3. Sciant autem se provocatores vel ab exsecutione appellantes vel ab articulo, si eos perperam intentionem cognitoris suspendisse claruerit, quinquaginta librarum argenti animadversione multandos.

D. III k. Febr. Treviris Valente VI et Valentiniano II AA. cons.

[6] *Imppp. Gratianus Valentinianus et Theodosius AAA. ad Hypatium pu.* Quisquis, ne voluntas diem functi testamento scripta reseretur, vel ne hi, quos scriptos patuerit heredes, in possessionem mittantur, ausus fuerit provocare interpositamque appellationem is cuius de ea re notio

Posted August 18, at Rome, in the consulship of Valentinian and Valens, for the second time, Augusti (368).

[4a]²²⁴ *The same Augusti to Claudius, City Prefect.* If a clergyman resorts to appeal for the purpose of delaying proceedings before a final ruling,²²⁵ he shall be compelled to pay a fine of 50 pounds of silver, which the general decree²²⁶ imposes on appellants of this kind. We desire that this sum not go to the Treasury but be faithfully spent on the poor.

Given July 8, in the consulship of Valentinian, Most Noble Boy, and Victor (369).

[5]²²⁷ *Emperors VALENS, GRATIAN, and VALENTINIAN Augusti to Thalassius, Proconsul of Africa. pr.* It is clearly enough provided by both the law and constitutions that no appeal may be taken from execution (of a judgment), unless the enforcement officer exceeds the bounds of the decision. 1. If an appeal is taken from him and the execution has been suspended, We think it right to direct that, if it is movable property that the execution officer was assigned to restore, that same property should be removed from the possessor once the appeal has been accepted and placed with a suitable person only to be restored later to that party in favor of whom the imperial judge (*cognitor*) decides. 2. But if the execution was issued against a landholding or farm and the appeal suspended it, all the fruits which have been captured at the time when the appeal was made and all that are produced subsequently should be placed in deposit, but the right to the farm should remain in the control of the appellant.

3. But appellants should know that if they appeal either from an execution or on a special point (*articulus*),²²⁸ and it is clear that they have wrongly held up the intent of the judge, they shall be punished by a fine of 50 pounds of silver.

Given January 30, at Trier, in the consulship of Valens, for the sixth time, and Valentinian, for the second time, Augusti (378).

[6]²²⁹ *Emperors GRATIAN, VALENTINIAN, and THEODOSIUS Augusti to Hypatius, City Prefect.* If anyone ventures to appeal to prevent the opening of a will written as the testament of a deceased person, or to prevent those who appear to have been appointed as heirs from being put in possession, and if any

²²⁴ = C. 1.4.2; see C.Th. 11.36.20. Restored here on the authority of the *Paratitla* to Const. 3. Claudius was actually Proconsul of Africa; see *PLRE I* Petronius Claudius 10.

²²⁵ That is, if he makes an *appellatio frustratoria* or *moratoria*.

²²⁶ C.Th. 11.36.15–16.

²²⁷ = C.Th. 11.36.25. Combine with C.Th. 11.30.37, 11.36.23, 24.

²²⁸ C. has omitted a phrase from C.Th. 11.36.25 which clarifies: "appeal either from an execution or on a special point only from those cases from which we have ordered appeals to be accepted."

²²⁹ = C.Th. 11.36.26.

erit recipiendam esse crediderit, viginti librarum argenti multa et litigatorem, qui tam importune appellaverit, et iudicem, qui tam ignave coniventiam adhibuerit, involvat.

D. non. April. Triveris Ausonio et Olybrio cons.

[7] *Idem AA. et Arcadius A. ad Pelagium comitem rerum privatarum.* Ante sententiae tempus et ordinem eventus nec a discussore nec a rationali appellare liceat.

D. xv k. Mart. Mediolani Arcadio A. et Bautone cons.

[8] *Imp. Arcadius et Honorius AA. Apollodoro comiti rerum privatarum.* Et publicarum necessitatum et privati aerarii deposcit utilitas, ne commoda, quae domui nostrae debentur, callidis debitorum artibus differantur. quamobrem eorum appellatione reiecta, qui aperte manifesteque convicti sunt, hoc observari praecepti huius auctoritate censemus, ut ei, quem constiterit esse publicum debitorem, appellationis beneficium denegetur.

D. III id. Aug. Mediolani Arcadio III et Honorio III AA. cons.

LXVI Si Pendente Appellatione Mors Intervenerit

[1] *Imp. Alexander A. Iuliano.* Etiam post mortem eius qui appellavit necesse est heredibus eius vel reddi causas provocationis vel statutis adquiescere.

PP. vi k. Nov. Alexandro A. cons.

[2] *Idem A. Marcellinae.* Eius, qui requirendus adnotatus appellaverat et ante actam causam mortuus est, bona ad successorem pertinere parentibus meis placuit.

PP. III non. Dec. Alexandro cons.

[3] *Idem A. Ulpio.* Si is, qui adeptis bonis in exilium datus appellaverit ac pendente provocatione defunctus est, quamvis crimen in persona eius evanuerit, tamen causam bonorum agi oportet. nam multum

judge has jurisdiction over the matter and believes that such an appeal, once interposed, should be accepted, a fine of 20 pounds of silver shall ensnare both the litigant, who appealed so inappropriately, and the judge, who connived so indolently.

Given April 5, at Trier, in the consulship of Ausonius and Olybrius (379).

[7]²³⁰ *The same Augusti and ARCADIVS Augustus to Pelagius, Count of the Privy Purse.* Before the time of the decision and regular order of events, it is not permitted to appeal either from an Auditor (*discussor*) or a Comptroller.

Given February 15, at Milan, in the consulship of Arcadius Augustus and Bauto (385).

[8]²³¹ *Emperors ARCADIVS and HONORIUS Augusti to Apollodorus, Count of the Privy Purse.* The utility of public needs and of Our private treasury demand that payment of debts due to Our Household should not be put off by the clever tricks of debtors. Hence, forbidding appeals on the part of those who are openly and clearly convicted, We direct by the authority of this order that the benefit of an appeal shall be denied to anyone who has clearly been established to be a public debtor.

Given August 10, at Milan, in the consulship of Arcadius, for the fourth time, and Honorius, for the third time, Augusti (396).

Sixty-Sixth Title If Death Intervenes While an Appeal is Pending²³²

[1] *Emperor ALEXANDER Augustus to Julian.* Even if an appellant has died, his heirs must either prove the grounds of appeal or acquiesce in what has been established.

Posted October 27, in the consulship of Alexander Augustus (222).

[2] *The same Augustus to Marcellina.* Our parents decided that the property of someone who had been branded as a fugitive from the court, but who had appealed and then died before the case was tried, belongs to his heir.

Posted December 3, in the consulship of Alexander (222).

[3] *The same Augustus to Ulpian.* If a person whose property was confiscated and who was sent into exile appealed and died with the appeal pending, although the charge becomes extinct insofar as it relates to his person, the case

²³⁰ = C.Th. 11.36.29. Combine with 7.62.26.

²³¹ = C.Th. 11.36.32.

²³² See D. 49.13.

interest, utrum capitalis poena inrogata bona quoque rei adimat, quo casu morte eius extincto crimine nulla quaestio superesse potest, an vero non ex damnatione capitis, sed speciali praesidis sententia bona auferantur: tunc enim subducto reo sola capitis causa perimitur bonorum remanente quaestione.

PP. v id. Mart. Modesto et Probo cons.

[4] *Imp. Gordianus A. Alexandro.* Si pater tuus ad decurionatum devocatus appellationem interposuit eaque pendente concessit in fatum, honoris eius quaestio morte finita est.

PP. prid. non. Oct. Pio et Pontiano cons.

[5] *Idem A. Felici.* Quamvis ancilla, de cuius dominio disceptabatur et a rectore provinciae contra te iudicatum fuerat, in fatum concesserit, tamen cum appellationem super ea interpositam fuisse et in numero cognitionum pendere proponas, ea provocatio suo ordine propter peculium ancillae audiri debet.

PP. vii k. Dec. Pio et Pontiano cons.

[6] *Imp. Constantinus A. ad Bassum pu.* Si unus ex litigatoribus adhuc pendente appellatione defunctus sit, non residuum tantum temporis heredes eius habent, sed etiam alios quattuor menses. sin autem ad deliberationem hereditatis certum tempus indulgetur, post elapsum eius idem tempus quattuor mensum numerabitur, ne ignorantes negotium vel etiam super adeunda hereditate dubitantes, priusquam aliquod commodum sentiant, damnis adfici compellantur.

D. xiii k. Iun. Sirmi Crispo II et Constantino II CC. cons.

LXVII De His Qui per Metum Iudicis Non Appellaverunt

[1] *Impp. Diocletianus et Maximianus AA. et CC. Diophani.* Si contra te iure pronuntiatum est nec appellationis imploratum auxilium, legis adquiescere te statutis oportere. in sacro enim comitatu nostro timere nihil potuisti.

over his property ought still to be tried. For there is a great difference whether the capital penalty that was imposed also causes confiscation of the property of the accused – in which case, since the accusation becomes extinct by death, no further question remains – or whether the property is confiscated not as the result of the capital condemnation but by the special verdict of the governor. In the latter instance, only the capital case is extinguished with the death of the accused, while the question about his property remains.

Posted March 11, in the consulship of Modestus and Probus (228).

[4] *Emperor GORDIAN Augustus to Alexander.* If your father interposed an appeal after having been appointed to the decurionate and then died while it was pending, the question of his office is ended.

Posted October 6, in the consulship of Pius and Pontianus (238).

[5] *The same Augustus to Felix.* Although a female slave died, whose ownership was disputed in litigation in which the provincial governor gave judgment against you, still, since you state that an appeal concerning her was interposed and was pending on the court calendar, the appeal should be heard in proper order because of the *peculium* of the female slave.

Posted November 25, in the consulship of Pius and Pontianus (238).

[6]²³³ *Emperor CONSTANTINE Augustus to Bassus, City Prefect.* If one of the litigants dies with an appeal still pending, his heirs have not only the remainder of the legal time (for completing the appeal), but also four additional months. But if a certain time is granted for deliberation as to whether to accept an inheritance, the same period of four months shall be added after the time previously fixed has lapsed, lest they (the heirs) be compelled to suffer losses through ignorance of the affair or even hesitation about whether to enter on the inheritance before they know whether it will be of benefit.

Given May 20, at Sirmium, in the consulship of Crispus, for the second time, and Constantine, for the second time, Caesars (321).

Sixty-Seventh Title Those Who Did Not Appeal through Fear of the Judge

[1] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Diophanes.* If a legal decision was given against you and you did not appeal, you understand that you must acquiesce in the decision. For you could not have feared anything in Our imperial court.

²³³ = C.Th. 11.35.1. Combine with C.Th. 2.6.3. C. has entirely rewritten the Theodosian original. Seeck dates to May 19, 318.

S. xv k. Iul. Philippopoli AA. cons.

[2] *Impp. Iulianus A. Germaniano pp. pr.* His, qui tempore competenti non appellant, redintegrandae audientiae facultas denegetur. omnes igitur, qui contra praefectos urbi, magistros officiorum, magistros militum seu proconsules seu comites Orientis seu vicarios seu praefectos Augustales vel alium iudicem sub specie formidinis provocationem non arbitrantur interponendam, a revocanda lite pellantur. 1. Qui vero vim sustinuerunt contestatione publice proposita, intra dies videlicet legitimos, quibus appellare licet, causas appellationis evidenti adfirmatione distinguant, ut hoc facto tamquam interposita appellatione isdem aequitatis adminicula tribuantur.

Emissa xv k. Iul. Mamertino et Nevitta cons.

LXVIII Si Unus ex Pluribus Appellaverit

[1] *Imp. Alexander A. Licinio.* Si iudici probatum fuerit unam eandemque condemnationem eorum quoque, quorum appellatio iusta pronuntiata est, fuisse nec diversitate factorum separationem accipere, emolumentum victoriae secundum ea quae constituta sunt ad te quoque pertinere non ignorabit.

PP. xiii k. Sept. Maximo II et Aeliano cons.

[2] *Idem A. Sereno.* Si in una eademque causa unus appellaverit eiusque iusta appellatio pronuntiata est, ei quoque prodest qui non appellaverit. quod si aetatis auxilio unus contra sententiam restitutionem impetravit, maiori, qui suo iure non appellaverit, hoc rescriptum non prodest.

S. III id. Sept. Iuliano et Crispino cons.

LXVIII Si de Momentaria Possessione Fuerit Appellatum

[1] *Imppp. Valentinianus Theodosius et Arcadius AAA. ad Eusignium pp.* Cum de possessione et eius momento causa dicatur, etsi appellatio

Written June 17, at Philippopolis, in the consulship of the Augusti (293).

[2]²³⁴ *Emperor JULIAN Augustus to Germanianus, Praetorian Prefect.* **pr.** Persons who do not appeal within the appropriate time will be denied the opportunity of renewing a hearing. Therefore, all who under the pretense of fear do not think they should interpose an appeal against the Prefects of the City, Masters of the Offices, Masters of the Soldiers, or Proconsuls, Counts of the East, Vicars, Augustal Prefects, or any other judge will be refused renewal of the suit. 1. Those who in truth suffered force may post an attestation (*contestatio*) publicly, within the time fixed for taking an appeal of course, and set forth the grounds for appeal with clear proof, so that, by having done so, they may gain the benefits of equity as if an appeal had been interposed.

Issued (emissa) June 17, in the consulship of Mamertinus and Nevitta (362).

Sixty-Eighth Title If One Out of Many (Co-Litigants) Appeals

[1] *Emperor ALEXANDER Augustus to Licinius.* If it is proven to the judge that those whose appeal was pronounced just had (with you) one and the same judgment which did not undergo separation through any diversity of the facts, he will not ignore the fact that the benefit of victory applies to you as well according to previously established precedent.

Posted August 20, in the consulship of Maximus, for the second time, and Aelianus (223).

[2] *The same Augustus to Serenus.* If, in one and the same case, only one has appealed, and his appeal was pronounced just, it will also benefit the party who did not appeal. But if one person obtained a restoration of rights contrary to the verdict by reason of his age, this rescript will not benefit a person of legal age who did not appeal in his own right.

Written September 11, in the consulship of Julian and Crispinus (224).

Sixty-Ninth Title If Appeal Is Made from Provisional Possession

[1]²³⁵ *Emperors VALENTINIAN, THEODOSIUS, and ARCADIUS Augusti to Eusegnius, Praetorian Prefect.* When a case involving possession and its

²³⁴ = C.Th. 11.30.30, but C. extends the list of magistrates.

²³⁵ = C.Th. 11.37.1.

interposita fuerit, tamen lata sententia sortiatur effectum. ita tamen possessionis reformationem fieri oportet, ut integra omnis proprietatis causa servetur.

D. XIII k. Dec. Mediolano Honorio np. et Euodio cons.

**LXX Ne Liceat in Una Eademque Causa Tertio Provocare vel
Post Duas Sententias Iudicum, Quas Definitio Praefectorum
Roboraverit, Eas Retractare**

[1] *Imp. Iustinianus A. Menae pp.* Si quis in quacumque lite iterum provocaverit, non licebit ei tertio in eadem lite super isdem capitulis provocatione uti vel sententias excellentissimorum praefectorum praetorio retractare: licentia danda litigatoribus arbitro dato ipsius audientiam qui eum dedit ante litis contestationem invocare et huiusmodi petitione minime provocationis vim obtinente.

D. k. Iul. Constantinopoli dn. Iustiniano A. II cons.

LXXI Qui Bonis Cedere Possunt

[1] *Imp. Alexander A. Irenaeo.* Qui bonis cesserint, nisi solidum creditor receperit, non sint liberati. in eo enim tantum hoc beneficium eis prodest, ne iudicati detrahantur in carcerem.

PP. x k. Dec. Maximo II et Aetiano cons.

[2] *Imp. Philippus A. et Philippus C. Abascanto.* Si quantitatem, quam (licet rei publicae) condemnatus debebas, inferre paratus es, frustra vereris, ne verbum bonorum cessionis temere a te prolatum privare te necdum distractis facultatibus iuris rationibus possit.

PP. XVI k. Febr. Philippo A. et Titiano cons.

[3] *Impp. Valerianus et Gallienus AA. et Valerianus nobilissimus C. Lenillae.* Si pater tuus bonis cessit propter onera civilia, ipsius facultates

provisional grant is tried, even if an appeal should be interposed, a verdict once rendered should still be executed. But the restoration of possession ought to occur in such a way that the entire case for ownership should be kept whole.

Given November 18, at Milan, in the consulship of the Most Noble Boy Honorius and Euodius (386).

Seventieth Title It Is Not Permitted to Appeal a Third Time in One and the Same Case or to Reconsider Cases after Two Verdicts of Judges Which a Decision of the Prefects has Confirmed

[1] *Emperor JUSTINIAN Augustus to Menas, Praetorian Prefect.* If anyone has appealed a case for the second time, he shall not be permitted to appeal a third time on the same points or to reopen the verdicts of the most excellent Praetorian Prefects. But if a judge arbitrator was appointed, litigants should be given the right to seek a hearing from the judge who appointed him before joinder of issue, for in no way does a petition of this sort have the force of an appeal.

Given July 1, at Constantinople, in the consulship of Justinian Augustus, for the second time (528).

Seventy-First Title Who Can Surrender Property to Creditors²³⁶

[1] *Emperor ALEXANDER Augustus to Irenaeus.* Persons who have surrendered their property to creditors (*cessio bonorum*) are not released unless the creditor received his debt in full. Indeed, this benefits them only in as far as they are not carried to jail as judgment debtors.

Posted November 22, in the consulship of Maximus, for the second time, and Aelianus (223).

[2] *Emperor PHILIP Augustus and Caesar PHILIP to Abascantus.* If you are ready to pay the amount which you were condemned to pay and you owed – albeit to a municipality – you need not fear that the declaration you made hastily that you would surrender your property to creditors can by any rules of law deprive you of such property when it has not yet been sold.

Posted January 17, in the consulship of Philip Augustus and Titianus (245).

[3] *Emperors VALERIAN and GALLIENUS Augusti and the Most Noble Caesar Valerianus to Lenilla.* If your father surrendered his property to creditors because

²³⁶ See D. 42.3.

oportet inquiri, non patrimonium, quod tibi emancipatae quaesitum dicis, inquietari. quod ut fiat, implorare aequitatem praesidis debes.

PP. XIII k. Dec. Aemiliano et Basso cons.

[4] *Impp. Diocletianus et Maximianus AA. et CC. Chiloni. pr.* Legis Iuliae de bonis cedendis beneficium constitutionibus divorum nostrorum parentum ad provincias porrectum esse, ut cessio bonorum admittatur, notum est: non tamen creditoribus sua auctoritate dividere haec bona et iure dominii tenere, sed venditionis remedio, quatenus substantia patitur, indemnitati suae consulere permissum est. 1. Cum itaque contra iuris rationem res iure dominii teneas eius qui bonis cessit creditorem te dicens, longi temporis praescriptione petitem submoveri non posse manifestum est. quod si non bonis eum cessisse, sed res suas in solutum tibi dedisse monstretur, praeses provinciae poterit de proprietate tibi accommodare notionem.

[5] *Idem AA. et CC. Myroni.* Propter honorem municipalem vel munus bonis cedentium invidiosam admitti cessionem minime convenit, sed his obnoxios pro modo substantiae fungi.

[6] *Apud acta imp. Theodosius A. dixit:* In omni cessione bonorum ex qualibet causa facienda scrupulositate priorum legum explosa professio sola quaerenda est. *Idem dixit:* In omni cessione sufficit voluntatis sola professio.

D. k. Mai. Honorio np. et Euodio cons.

[7] *Imp. Iustinianus A. Iuliano pp.* Cum et filii familias possint habere substantias, quae patribus adquiri vetitae sunt, nec non peculium vel castrense vel quod patre volente possident, quare cessio bonorum eis deneganda sit? cum, etsi nihil in suo censu hi qui in potestate sunt parentum habeant, tamen, ne patiantur iniuriam, debet bonorum cessio

of what he owed the city, an inquest into his finances should be made, but the property which you say you acquired after emancipation must not be disturbed. To ensure that this happens, you should implore the equity of the governor.

Posted November 19, in the consulship of Aemilianus and Bassus (259).

[4] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Chilo, pr.* It is well known that the benefit of the Julian law on the surrender of property has been extended to the provinces by the constitutions of Our deified parents, so that surrender of property (to creditors) is permitted. It is not permitted, however, for creditors to divide that property on their own authority and to hold it by right of ownership, but they are permitted to indemnify themselves only through the remedy of a sale and up to the amount that the fortune permits. 1. Since, therefore, contrary to law you hold by right of ownership the property of the man who surrendered his property and whose creditor you say you are, it is clear that a claimant cannot be defeated by long-time prescription. But if it should be shown that the owner did not surrender his property to creditors but gave it to you in lieu of payment (*in solutum*), the provincial governor will be able to grant an inquest into the property for you.

[5] *The same Augusti and the Caesars to Myron.* It is right not to permit an odious surrender by those who surrender their property in order to avoid a municipal office or obligation, but rather for those subject to these (offices) to perform them in keeping with the size of their fortune.

[6]²⁷ *Emperor THEODOSIUS Augustus stated (dixit) among the records (apud acta):* The technical requirements of former laws are abolished in connection with the surrender of property to creditors, regardless of the reason it is made, and a declaration alone is necessary. *The same emperor stated:* In every surrender of property to creditors, a declaration of intention alone suffices.

Given May 1, in the consulship of the Most Noble Boy Honorius and Euodius (386).

[7] *Emperor JUSTINIAN Augustus to Julian, Praetorian Prefect.* Since unemancipated sons (*filiifamilias*) may also have wealth which is forbidden to be acquired by their fathers, and they may also have a military *peculium* or a *peculium* that they possess by consent of their father, why should the right to make a surrender of property to creditors be denied them? Even if those in the power of their parents have nothing registered to them (*nihil in suo censu habeant*), the surrender of property to creditors should still be permitted them in order

²⁷ = C.Th. 4.20.3, which omits the first clause (through "abolished").

admitti. si enim et pater familias admittendus est propter iniuriarum timorem ad cessionis flebile veniens adiutorium, quare filiis familias utriusque sexus hoc ius denegamus? cum apertissimi iuris est et inter patres familias et alieno iuri subiectos, si quid postea eis pinguius accesserit, hoc iterum usque ad modum debiti posse a creditoribus legitimo modo avelli.

D. x k. Mart. Constantinopoli post consulatum Lampadii et Orestis vv. cc.

[8] *Idem A. Iohanni pp. pr.* Cum solito more a nostra maiestate petitur, ut ad miserabilis cessionis bonorum homines veniant auxilium et electio detur creditoribus vel quinquennale spatium eis indulgere vel bonorum accipere cessionem, salva eorum videlicet existimatione et omni corporali cruciatu semoto: quotidie dubitabatur, si quidam ex creditoribus voluerint quinquennales dare indutias, alii autem iam nunc cessionem accipere velint, qui audiendi sunt.

1. In tali itaque dubitatione minime putamus esse ambiguum, quod sentimus et quod humaniorem sententiam pro duriore elegimus. et sancimus, ut vel ex cumulo debiti vel ex numero creditorum causa iudicetur. 2. Et si quidem unus creditor aliis omnibus gravior in summa debiti inveniatur, ut omnibus in unum coadunatis et debitis eorum computatis ipse alios antecellat, ipsius sententia obtineat, sive indulgere tempus sive cessionem accipere desiderat. 3. Si vero plures quidem sint creditores, ex diversis autem quantitatibus, et nunc amplior debiti cumulus minori summae praeferatur, sive par sive discrepans numerus est creditorum, cum non ex frequentissimo ordine feneratorum, sed ex quantitate debiti causa trutinatur. 4. Pari autem quantitate debiti invenienda, dispari vero creditorum numero, tunc amplior pars creditorum obtineat, ut, quod pluribus placeat, hoc statueretur. 5. Sin vero undique aequalitas emergat tam debiti quam numeri creditorum, tunc eos anteponi, qui ad humaniorem declinant sententiam non cessionem exigentes, sed indutias. 6. Nulla quidem differentia inter hypothecarios et alios creditores quantum ad hanc electionem observanda: in rebus autem officio iudicis partiendis suam vim singulis creditoribus habentibus, quam eis legum praestabit regula. 7. Nullo praeiudicio creditorum cuidam ex quinquennii dilatione circa temporalem praescriptionem generando.

that they may not suffer any outrage (*iniuria*). Indeed, if a *paterfamilias* in fear of outrages is permitted to resort to the lamentable aid of a surrender of property, why should We deny that right to unemancipated children of either sex. This is particularly true since the law is clear, both in the case of a *paterfamilias* and in that of persons subject to another's power, that if additional wealth later falls to them, this can be confiscated by the creditors in a lawful manner up to the extent of the debt.

Given February 20, at Constantinople, in the post-consulate of the viri clarissimi Lampadius and Orestes (531).

[8] *The same Augustus to John, Praetorian Prefect. pr.* Since in the usual way it is often sought from Our Majesty that people might resort to the aid of a pitiable surrender of property to creditors, and a choice is given to the creditors whether to grant a five-year respite to these or to accept the surrender of their property, while of course keeping their good name intact and preventing any corporal punishment, there used to be daily disputes about who should be given preference if some of the creditors wanted to grant the five-year respite but others wished to receive the surrender of property immediately.

1. In such a dispute there is no ambiguity in what We feel and which decision We hold to be more humane and less harsh. And We ordain that the case be decided according to the amount of the debt or the number of creditors. 2. If one creditor is found to be owed more than all others from the total of the debt, so that, once all of these are assembled together and their share in the debt calculated, he exceeds the others, let his decision prevail, whether he decides to grant the respite or to accept the surrender of property. 3. But if there are many creditors each with a different amount, here too the greater portion of the debt shall have preference over the lesser sum, whether the number of creditors is equal or unequal, since the case shall be weighed out not by the number of lenders but by the amount of debt. 4. If the amount of the debt (on each side) is found to be equal but the number of creditors unequal, then the greater number of creditors shall prevail, and whatever the majority decides shall be done. 5. If equality emerges on all sides, both in point of debts as well as in the number of creditors, the parties who are more merciful and are in favor of giving respite instead of demanding an immediate surrender of property shall prevail. 6. There shall be no difference in making the choice, between secured and other creditors. But every creditor shall have his own right to divide property through the official staff of the judge as the regulations of the law permit. 7. The five-year respite shall not prejudice any creditor in connection with the period of prescription.

(531–532).²³⁸

²³⁸ Lounghis *et al.* date to between 531 and 534.

**LXXII De Bonis Auctoritate Iudicis Possidendis seu
Venumdandis et de Separationibus**

[1] *Imp. Antoninus A. Atticae.* In bonis mortui potiore esse causam legatariorum, qui eum utpote heredem convenire potuerunt, quam eorum, quibus ipse legavit, manifestum est, cum prius legatum quasi aes alienum exigitur, legatum autem a mortuo relictum post debiti detractorem inducitur.

<PP. xv k. Iul. G(entiano?) et Basso cons.>

[2] *Imp. Gordianus A. Aristoni.* Est iurisdictionis tenor promptissimus indemnitasque remedium edicto praetoris creditoribus hereditariis demonstratum, ut quotiens separationem bonorum postulant, causa cognita impetrent. praeoptabis igitur convenientem desiderii tui fructum, si te non heredum fidem secutum, sed ex necessitate ad iudicium eos provocare demonstraveris.

<PP. III k. Feb. Gor. A. et Aviola cons.>

[3] *Idem A. Claudianae.* Ex contractu, qui cessionem rerum antecessit, debitorem contra iuris rationem conveniens, cum eum aequitas auxilio exceptionis muniat ac tunc demum iteratam possis desiderare conventionem, cum tantum postea quaesiit, quod praesidem ad eius rei licentiam debeat promovere.

<PP.? k. Mai. Gor. A. et ... cons.>

[4] *Impp. Diocletianus et Maximianus AA. et CC. Clearchianae.* Incivile est, quod postulas, ut unus ex chirographariis creditoribus debitoris bona compellatur suscipere, satis ceteris eius creditoribus facturus.

<S. id. Apr. Biza. AA. cons.>

[5] *Idem AA. et CC. Abydonio.* Si bona debitoris tui vacare constet et haec a fisco non agnoscantur, in possessionem eorum mitti te a competentis iudice recte postulabis.

xvii k. Ian. AA. cons.

**Seventy-Second Title The Possession and Sale of Property by the
Authority of a Judge and Separations of Property²³⁹**

[1] *Emperor ANTONINUS Augustus to Attica.* With the property of a decedent, it is clear that those legatees who could have sued the decedent as heir have a stronger case than those to whom he himself left a legacy. For the former of these legacies can be collected as a debt, though the legacy left by the decedent is met only after the deduction for debts.

Posted June 17, in the consulship of G(entianus?) and Bassus (211).²⁴⁰

[2] *Emperor GORDIAN Augustus to Aristo.* The promptest rendering of a decision and remedy for indemnification have been accorded to creditors of an inheritance by the Praetor's Edict, so that, whenever they demand separation of property (*separatio bonorum*), following a hearing they obtain it. Therefore you will choose an outcome suited to your wish if you should show that you did not rely on the good faith of the heirs, but of necessity summoned them to court.

Posted January 30, in the consulship of Gordian Augustus and Aviola (239).

[3] *The same Augustus to Claudiana.* You are suing the debtor contrary to the rule of law on a contract that preceded the surrender of property (*cessio rerum*), since equity protects him through the aid of a defense. But ultimately you can request that your suit be reintroduced after he has acquired so much property that the governor should be moved to grant you permission to sue.

... May 1, in the consulship of Gordian Augustus ... (239 or 241).

[4] *Emperors DIOCLETIAN and MAXIMIAN Augusti and the Caesars to Clearchiana.* What you ask is not lawful, namely that one of the promissory-note creditors (*chirographarii creditores*) should be forced to take over the property of the debtor and then pay his other creditors.

Written April 13, at Byzantium, in the consulship of the Augusti (293).

[5] *The same Augusti and the Caesars to Abydonius.²⁴¹* If it appears that the property of your debtor is ownerless and is not claimed by the treasury, you will be right to ask that you be put in possession of it by the appropriate judge.

Written December 16, in the consulship of the Augusti (294).

²³⁹ See D. 42.5–6.

²⁴⁰ This subscript and those of the three following rescripts are restored from the Valicelliana Fragments, see Corcoran, "New Subscripts."

²⁴¹ This is the likeliest reading of the recipient's name. Corcoran, 420–422.

[6] *Idem AA. et CC. Agathemero. pr.* Pro debito creditores addici sibi bona debitoris non iure postulant. unde si quidem debitoris tui ceteri creditores pignori res acceperunt, potiores eos quam te chirographarium creditorem haberi non ambigitur. 1. Quod si specialiter vel generaliter nemini probentur obligatae ac sine successore communis debitor vel heres eius decessit, non dominii rerum vindicatione, sed possessione bonorum itemque venditione aequali portione pro rata debiti quantitate omnibus creditoribus consuli potest.

[7] *Idem AA. et CC. Domno.* Si uxor tua pro triente patruo suo heres extitit nec ab eo quicquam exigere prohibita est, debitum a coheredibus pro besse petere non prohibetur, cum ultra eam portionem qua successit actio non confundatur. sin autem coheredes solvendo non sint, separatio postulata nullum ei damnum fieri patiatur.

D. k. Dec. CC. cons.

[8] *Idem AA. et CC. Aelidae.* In possessionem rei servandae uxor defuncti vel alii creditores missi dominium ex hac causa tenentes adipisci minime possunt.

Sub die vi k. Ian. Nicomediae CC. cons.

[9] *Idem AA. et CC. Aurelio Gerontio.* Cum proponas eum contra quem supplicas ex administratione tibi negotiorum obligatum, hunc secundum iuris rationem adito rectore provinciae potes convenire. nam si ad circumscriptionem tui iuris latitat nec defendatur et eum tuum esse debitorem constat, ad exemplum edicti bonorum eius possessionem poteris impetrare. tempore autem transacto etiam venditionem eorum a competenti iudice postulare non prohiberis.

D. XIII k. Sept. Diocletiano VII et Maximiano VI AA. cons.

[10] *Imp. Iustinianus A. Iohanni pp. pr.* Cum apud veteres quaestionem ortam invenimus super pecuniis debitis, pro quibus hypothecae non sunt constitutae, propter res ad debitorem pertinentes, dum is severiores

[6] *The same Augusti and Caesars to Agathemerus. pr.* Creditors cannot legally ask that the property of their debtor be adjudged to them for their debt. Hence if other creditors of your debtor had received property in pledge, there is no doubt that they have stronger claims than you, who are only an unsecured creditor. 1. But if it is shown that no property was specially or generally mortgaged to anyone and the common debtor or his heir died without a successor, the interests of all of the creditors can be equally protected in proportion to the amount of their debt, not by a suit on ownership of the property, but by an order for possession of the property (*possessio bonorum*) and its sale.

[7]²⁴² *The same Augusti and the Caesars to Domnus.* If your wife is heir to one-third of the estate of her paternal uncle, and she was not forbidden to extract payment from him (of an independent debt he owed her), she is not prohibited from seeking two-thirds of the (uncle's) debt (to her) from her co-heirs, since beyond that portion by which she succeeded her right of action is not merged. But if they are insolvent, a requested separation (of property) will not allow any loss to accrue to her.

Given December 1, in the consulship of the Caesars (294).

[8] *The same Augusti and the Caesars to Aelis.* The wife of a decedent or other creditors who are put in possession of property to preserve it cannot acquire ownership by holding it for this reason.

Under the date December 27, at Nicomedia, in the consulship of the Caesars (294).

[9]²⁴³ *The same Augusti and the Caesars to Aurelius Geronius.* Since you state that the man against whom you complain is indebted to you on account of management of affairs (*administratio negotiorum*), according to law you may go before the provincial governor and sue him. If he is hiding to defraud you of your rights, he shall not be defended and he is clearly your debtor; you may, according to the edict, obtain an order for possession of his property. And after the legal time has passed, you are not forbidden to demand from the appropriate judge an order for its sale.

Given August 19, in the consulship of Diocletian, for the seventh time, and Maximianus, for the sixth time, Augusti (299).

[10] *Emperor JUSTINIAN Augustus to John, Praetorian Prefect. pr.* We find that a dispute existed among the ancients as to debts for which no security arrangements (*hypothecae*) had been given: as regards the property belonging to the

²⁴² = C. 4.16.6, with significant difference in the hypothetical ("wife" is the recipient's ward).

²⁴³ Combine with C. 3.21.1, 4.50.7.

creditores formidans sese celaverit, et illi de rebus ad eum pertinentibus competentia ingrediantur iudicia postulentque in possessionem rerum sese transmitti, si etiam alii creditores, quibus obnoxius esse videtur, possint quandam habere communionem in rerum possessione:

huiusmodi dubitationem amputantes censemus per praesentem generalem divinam constitutionem, ut, si non omnes huiusmodi debita praetendentes, sed ex his certi ab iudiciali sententia in possessionem rerum mittantur, non solum hi, sed etiam alii omnes talia debita praetendentes eadem commoditate potiantur et possint cum prioribus rerum detentatoribus communionem habere in rebus, de quibus (sicut superius declaratur) prolata fuit sententia. quid enim iustius est, quam omnes, qui ad res debitoris mitti debent, esse participes huiusmodi commoditatis?

1. Ut autem non in perpetuum aliorum neglegentia illi, qui pro suis debitis alacriores creditoribus aliis ostenduntur fuisse, praegraventur, rectum nobis esse videtur tunc communionem habere in possessionem rerum alios creditores, qui non hoc peregissee noscuntur, cum praesentes quidem in una eademque degentes provincia, in qua et possessores rerum commorantur, intra duorum annorum spatia, absentes autem intra quadriennium creditoribus possessionem antelato modo detinentibus suum debitum certum faciant et expensas secundum quantitatem debitorum persolvant eis, qui sententias consecuti sunt, per sacramentum manifestandas eorum, qui eas adipiscendae gratia possessionis rerum sustinuerunt, quia et secundum debita satis eis fieri explorati iuris est. 1a. Post completum autem memoratum tempus nullam eis esse licentiam eos qui possessionem adepti sunt molestare vel quibusdam damnis adficere: actiones autem, quas ex legibus sibi competere putaverint, contra suos exercere debitores.

2. Sin autem hi qui detinent possessiones vel ex sententia iudicis res vendiderint vel alio quocumque legitimo modo omne ius, quod in isdem rebus habere noscuntur, in alias personas post definitum a nobis tempus transtulerint et certas pecunias acceperint, quidquid superfluum inventum fuerit vel amplius quam eis debetur, hoc modis omnibus necesse est eos praesentibus tabulariis signare et in ceme-liarchio sanctae ecclesiae illius civitatis, in qua huiusmodi contractus celebratur, deponere: attestatione videlicet prius per memoratos tabularios conscribenda, praesente etiam eo qui res vendiderit vel in alias

debtor, if he, in fear of harsh creditors, should conceal himself, and they should go before the appropriate tribunal concerning his property and ask to be put in possession of it, could the other creditors to whom the debtor was liable have any share in the possession of the property?

Curtailing any doubt on this matter, We decree by the present imperial constitution that, if all those who claim debts of this sort are not put in possession of the property by judicial verdict, but only certain ones of them, not only these latter but also all others claiming such debts shall gain the same benefit and can have a share in it with the earlier occupants of the property over which a verdict was rendered as mentioned above. For what could be more just than that all who are put into possession of the property of the debtor are sharers in this benefit?

1. Nevertheless, in order that those who are more diligent than other creditors in pursuit of debts owed to them may not in perpetuity be handicapped by the negligence of others, it seems right to Us that the other creditors who are not known to have pursued this matter can have a share in the possession of the property only when they have given notice of the debt they are owed to the creditors who are holding possession in the previously mentioned way within a period of two years – if they are present and reside in one and the same province in which the possessors of the property also reside – or within four years, if they are absent. They must also pay expenses to those who obtained verdicts according to their percentage of the debt, and these are to be made clear in an oath by those who sustained them in order to obtain possession of the property, since it is settled law that they must be satisfied according to the size of the debt. 1a. However, after the completion of the above-mentioned period, they will have no right to bother those who obtained possession or to afflict them with any damages. But actions which they think are legally valid for them must be brought against their own debtors.

2. Nevertheless, if those who occupy the possessions should either sell the property following a judicial verdict or should convey all rights they are known to have in this property to other persons in any other legal manner after the period defined by Us, and they shall have received a certain price (*certae pecuniae*), whatever is found to be residual or greater than what was owed to them, they must of utmost necessity seal up in the presence of secretaries and deposit in the treasury of the holy church of this city where this sort of contract is known to be kept. And of course a certificate must be written by the above-mentioned secretaries in the presence of the one who sold the property or conveyed it to other persons, in order that through this may be shown both the amount of money which was offered for the sale or conveyance of the property, as well as the sum of money that was found to be residual after the payment

personas transtulerit, ut per eam manifestetur tam quantitas pecuniarum, quae pro venditione rerum vel translatione praestitae sunt, quam earum, quae superfluae post dissolutum debitum inveniantur, ut, si quis postea creditor apparuerit et debiti cautionem ostenderit, possit ex his satis sibi facere, prius scilicet rectore provinciae sine aliquo damno causae faciente examinationem et non concedente nec viros reverentissimos oeconomos vel cimeliarcham sanctae ecclesiae, in qua pecuniae deponuntur, aliquod detrimentum vel dispendium sustinere, per suam autem interlocutionem creditorem praecipiente secundum modum debiti ex depositis pecuniis suum accipere debitum.

3. Ut autem non liceat creditori in venditione vel translatione rerum dolum vel aliquam machinationem vel circumscriptionem facere, iubemus attestatione super hoc celebranda apud defensorem locorum gestis intervenientibus insinuari, sive tantum ex pretio, quantum debetur, sive plus sive minus colligitur, et praesentibus non tantum, sicut dictum est, tabulariis, sed etiam viro reverentissimo cimeliarcha, apud quem, si ita contigerit, superfluae pecuniae signatae deponendae sunt, iusiurandum sacrosanctis evangelis propositis venditorem vel translatores rerum praestare, quod neque per gratiam emptoris vel eius, ad quem res iure cessionis transferuntur, nec dolo aliquo interveniente minorem iusto rerum pretio quantitatem acceperit, sed eam, quam re vera cum omni studio potuerit invenire.

D. xv k. Nov. Constantinopoli post consulatum Lampadii et Orestis vv. cc. anno secundo.

LXXIII De Privilegio Fisci

[1] *Imp. Antoninus A. Eutropiae.* Bona mariti tui si ob reliqua administrationis primipili a fisco occupata sunt, res, quas tuas esse liquido probaveris, ab aliis separatae tibi restituuntur.

[2] *Idem A. Valerianae.* Quamvis ex causa dotis vir quondam tuus tibi sit condemnatus, tamen si prius, quam res eius tibi obligarentur, cum fisco contraxit, ius fisci causam tuam praevenit. quod si post bonorum eius obligationem rationibus meis coepit esse obligatus, in eius bona cessat privilegium fisci.

PP. XIII k. Nov. Antonino A. IIII et Balbino cons.

of the debt. In this way, if some creditor later appears and shows a written promise (*cautio*) of debt, what is owed can be satisfied from this money. But first, of course, the provincial governor must conduct an examination that the case happens with no loss, and he must not allow either the most reverend stewards (*oeconomi*) or the treasurer (*cimeliarcha*) of the holy church in which the money was placed to sustain any loss or expense, but he must instruct the creditor through his interim order to accept what is owed in the manner of a debt paid from money on deposit.

3. But in order that the creditor not be allowed to perpetrate some deceit, trick, or fraud in the sale or conveyance of the property, We order that the certificate concerning this be made known before the defender of the place (*defensor*) and inserted into the public records detailing whether just as much was collected from the sale price as was owed, or whether more or less was collected. And not only should the secretaries be present, as We said, but also the most reverend treasurer before whom, if relevant, the residual money is sealed and deposited. And before these the seller or conveyor of the property must swear an oath on the Holy Gospel that neither through favoritism of the buyer or the one to whom the property was conveyed in a legal cession nor through some intervening deceit did he receive an amount less than the fair price of the property, but that it was the price that he was able to obtain with all true earnestness.

Given October 18, at Constantinople, in the second post-consulate of the viri clarissimi Lampadius and Orestes (532).

Seventy-Third Title The Privilege of the Treasury

[1] *Emperor ANTONINUS Augustus to Eutropia.* If the property of your husband was seized by the Treasury on account of arrears in his account as chief centurion (*primipilus*), whatever property you clearly prove to be yours will be separated from the rest and restored to you.

[2] *The same Augustus to Valeriana.* Although judgment was rendered in your favor against your former husband in a case for recovery of dowry, still if he made a contract with the Treasury before his property became obligated to you, the right of the Treasury is superior to yours. But if he began to be obligated to My coffers subsequent to your lien on his property, the privilege of the Treasury in his property ceases.

Posted October 19, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[3] *Idem A. Iulianae*. Si, cum pecuniam pro marito solveres, neque ius fisci in te transferri impetrasti neque pignoris causa domum vel aliud quid ab eo accepisti, habes personalem actionem nec potes praeferri fisci rationibus, a quo dicis ei vectigal denuo locatum esse, cum eo pacto universa, quae habet habuitve eo tempore, quo ad conductionem accessit, pignoris iure fisco teneantur. salva igitur indemnitate fisci debitorem tuum pro pecunia, quam pro eo fisco solvisti, more solito convenire non prohiberis.

PP. III k. Ian. Antonino A. IIII et Balbino cons.

[4] *Idem A. Quinto*. Si debitor, cuius fundum fuisse et ipse confiteris, prius eum distraxit, quam fisco aliquid debuit, inquietandum te non esse procurator meus cognoscet. nam etsi postea debitor extitit, non ideo tamen ea, quae de dominio eius excesserunt, pignoris iure fisco potuerunt obligari.

PP. III k. Iul. Laeto II et Cereale cons.

[5] *Imp. Alexander A. Magnae*. Pecunia, quam creditor a debitore suo recepit, si postea ex iusta causa fisco restituenda erit, sine usuris debetur, quia non fenus contractum, sed suum recuperatum extraordinario iure aufertur.

PP. xv k. Iun. Fusco et Dextro cons.

[6] *Imp. Gordianus A. Severianae*. Cum patrem tuum fisci debitorem fuisse demonstrates eumque nubenti tibi possessionem dedisse adleges, procuratorem ius fisci exsequentem eam iure pignoris revocare potuisse intellegis.

PP. non. Iul. Sabino et Venusto cons.

[7] *Impp. Valerianus et Gallienus AA. et Valerianus C. Diodoro*. Si in te ius fisci, cum reliqua debitoris, pro quo satisfaciebas, tibi competens iudex adscripsit et transtulit, ab his creditoribus, quibus fiscus potior habetur, res quas eo nomine tenes non possunt inquietari.

PP. xv k. Iun. Aemiliano et Basso cons.

[3] *The same Augustus to Juliana.* If you did not have the right of the Treasury transferred to you when you paid it money on behalf of your husband, and you received no lien on his house or other property, you have a personal action against him, but no preference over the accounts of the Treasury, which you say farmed the collection of customs duties (*vectigal*) out to him again, since under that contract all the property which he has or which he had at the time when he took on its lease is subject to a lien of the Treasury. But with the Treasury kept harmless from loss, you are not forbidden to sue him in the usual way as your debtor for the money which you paid for him to the Treasury.

Posted December 30, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[4] *The same Augustus to Quintus.* If the debtor whose farm it was, as even you admit, sold it (to you) before he owed anything to the Treasury, My procurator will find that you should not be disturbed. For although he became its debtor subsequently, that is no reason why things that had passed from his ownership should have been subject to a lien by the Treasury.

Posted June 29, in the consulship of Laetus, for the second time, and Cerealis (215).

[5] *Emperor ALEXANDER Augustus to Magna.* If money which a creditor received from a debtor must later be restored to the Treasury for some lawful reason, it is owing without interest, since it is not the contracted interest but the repayment of its debt which the Treasury confiscates through extraordinary law.

Posted May 18, in the consulship of Fuscus and Dexter (225).

[6] *Emperor GORDIAN Augustus to Severiana.* Since you show that your father was a debtor of the Treasury and that when you married he gave you the property, you understand that the procurator can confiscate it by a lien in pursuing the right of the Treasury.

Posted July 7, in the consulship of Sabinus and Venustus (240).

[7] *Emperors VALERIAN and GALLIENUS Augusti and Valerianus Caesar to Diodorus.* If the appropriate judge assigned and transferred to you the right of the Treasury along with the balance of the debtor whose debt you paid, the property that you hold by that title cannot be disturbed by any creditors, over whom the Treasury has a superior right.

Posted May 18, in the consulship of Aemilianus and Bassus (259).

LXXIII De Privilegio Dotis

- [1] *Impp. Severus et Antoninus AA. Firmo.* Scire debes privilegium dotis, quo mulieres utuntur in actione de dote, ad heredes non transire.
PP. k. Mai. Pompeiano et Avito cons.

LXXV De Revocandis His Quae Per Fraudem Alienata Sunt

- [1] *Imp. Antoninus A. Caesiae.* Si heres post aditam hereditatem ad eum cui cessit corpora hereditaria transtulit, creditoribus permansit obligatus. si igitur in fraudem tuam id fecit, bonis eius excussis usitatis actionibus, si tibi negotium fuerit^{viii} gestum, ea quae in fraudem alienata probabuntur revocabis.

PP. II id. Oct. Antonino A. IIII et Balbino cons.

- [2] *Imp. Alexander A. Symphorianae.* Si successione patris abstenta fuisti, ob ea quae in dotem data sunt convenire te creditores nequeunt, quibus pignerata in dotem data non docentur, nisi bonis defuncti non sufficientibus in fraudem creditorum dotem constitutam probabitur.

PP. x k. Iul. Probo et Maximo cons.

- [3] *Impp. Diocletianus et Maximianus AA. Acyndino.* Si paterna hereditate abstinuisti nec quicquam in fraudem creditorum ex bonis eius in te donationis iure transscriptum est, a privatis creditoribus praeses provinciae conveniri te non patietur.

PP. x k. Iul. ipsis IIII et III AA. cons.

- [4] *Idem AA. et CC. Epagatho.* Filios debitoris ei succedentes velut in creditorum fraudem alienatorum facultatem revocandi non habere notissimi iuris est.

Subscripta x k. Mai. AA. cons.

^{viii} offuerit (Krüger)

Seventy-Fourth Title The Privilege of Dowry

[1] *Emperors SEVERUS and ANTONINUS Augusti to Firmus.* You should know that the privilege of dowry, which wives enjoy in an action for recovery of dowry, does not pass to (a woman's) heirs.²⁴⁴

Posted May 1, in the consulship of Pompeianus and Avitus (209).

Seventy-Fifth Title The Recovery of Property Fraudulently Alienated²⁴⁵

[1] *Emperor ANTONINUS Augustus to Caesia.* If an heir, after accepting an inheritance, transferred its whole substance to a creditor to whom he surrendered his property (*cui cessit*), he remains obligated to its creditors. Therefore, if he did this to defraud you after his property had already been sued for (by the creditors) through the usual actions, (and) if (as a result) the transaction harmed you, you will recover whatever is proven to have been alienated fraudulently.

Posted October 14, in the consulship of Antoninus Augustus, for the fourth time, and Balbinus (213).

[2] *Emperor ALEXANDER Augustus to Symphoriana.* If you abstained from accepting your father's inheritance, the creditors cannot sue you because of the property given you as a dowry. They are not shown to have a lien on the property in the dowry, unless it shall be proven that the property of the deceased is insufficient to pay the debts and that the dowry was given to defraud creditors.

Posted June 22, in the consulship of Probus and Maximus (232?).

[3] *Emperors DIOCLETIAN and MAXIMIAN Augusti to Acyndinus.* If you refrained from accepting your father's inheritance, and none of his property was signed over to you as a gift to defraud creditors, the provincial governor will not permit you to be sued by his private creditors.

Posted June 22, in the consulship of the Augusti themselves, for the fourth and third time (290).

[4] *The same Augusti and the Caesars to Epagathus.* It is well known law that the sons of a debtor who succeed him have no right to reclaim property alienated to defraud creditors.

Subscribed April 22, in the consulship of the Augusti (293).

²⁴⁴ This classical privilege, available against her husband's unsecured creditors, was substantially strengthened by Justinian: C. 5.13.1, 8.17.12; Nov. 97.3.

²⁴⁵ See D. 42.8.

[5] *Idem AA. et CC. Crescentino.* Ignoti iuris non est adversus eum, qui sententia condemnatus intra statutum tempus satis non fecit nec defenditur, bonis possessis itemque distractis per actionem in factum contra emptorem, qui sciens fraudem comparavit, et eum, qui ex lucrativo titulo possidet, scientiae mentione detracta creditoribus esse consultum.

S. x k. Nov. AA. cons.

[6] *Idem AA. et CC. Menandrae.* Si actu sollemni praecedentem obligationem peremisti, perspicis adversus fraudatorem intra annum in quantum facere potest vel dolo malo fecit, quo minus possit, edicto perpetuo tantum actionem permitti.

[5] *The same Augusti and Caesars to Crescentinus.* It is not unknown law that, against someone who is condemned by a verdict but fails to pay within the legal time and has no defense, but sells the property that he possessed, the interests of his creditors are consulted through an *actio in factum* against any buyer who made the purchase knowing it was fraudulent, and (indeed) against anyone else who is in possession under a title that is profitable (*ex lucrativo titulo*), regardless of his knowledge.

Written October 23, in the consulship of the Augusti (293).

[6] *The same Augusti and Caesars to Menandra.* If you eliminated a previous obligation by using a solemn form, an action against the defrauder lies, according to the Perpetual Edict, only within a year for so much as he can pay, or used deceit (*dolo malo*) to make it so he could not pay.

