The Digest of Justinian, Volume 1

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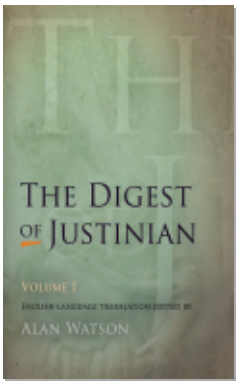

Published by University of Pennsylvania Press

OUR LORD THE MOST HOLY EMPEROR

JUSTINIAN'S

DIGESTS OR PANDECTS

OF THE LAW IN A NUTSHELL

COLLECTED OUT OF EVERY ANCIENT SOURCE

BOOK ONE

1

JUSTICE AND LAW

1 ULPIAN, *Institutes, book 1:* A law student at the outset of his studies ought first to know the derivation of the word *jus.* Its derivation is from *justitia.*[1] For, in terms of Celsus' elegant definition, the law is the art of goodness and fairness. 1. Of that art we [jurists] are deservedly called the priests. For we cultivate the virtue of justice and claim awareness of what is good and fair, discriminating between fair and unfair, distinguishing lawful from unlawful, aiming to make men good not only through fear of penalties but also indeed under allurement of rewards, and affecting a philosophy which, if I am not deceived, is genuine, not a sham. 2. There are two branches of legal study: public and private law. Public law is that which respects the establishment of the Roman commonwealth, private that which respects individuals' interests, some matters being of public and others of private interest. Public law covers religious affairs, the priesthood, and offices of state. Private law is tripartite, being derived from principles of *jus naturale, jus gentium,* or *jus civile.* 3. *Jus naturale* is that which nature has taught to all animals; for it is not a law specific to mankind but is common to all animals—land animals, sea animals, and the birds as well. Out of this comes the union of man and woman which we call marriage, and the procreation of children, and their rearing. So we can see that the other animals, wild beasts included, are rightly understood to be acquainted with this law. 4. *Jus gentium,* the law of nations, is that which all human peoples observe. That it is not co-extensive with natural law can be grasped easily, since this latter is common to all animals whereas *jus gentium* is common only to human beings among themselves.

2 POMPONIUS, *Manual, sole book:* For example, religious duties toward God, or the duty to be obedient to one's parents and fatherland.

3 FLORENTINUS, *Institutes, book 1:* Or the right to repel violent injuries. You see, it emerges from this law (*jus gentium*) that whatever a person does for his bodily security he can be held to have done rightfully; and since nature has established among

1. *Jus* cannot be exactly translated from Latin into English.

us a relationship of sorts, it follows that it is a grave wrong for one human being to encompass the life of another.

4 ULPIAN, *Institutes, book 1:* Manumissions also belong to the *jus gentium.* Manumission means sending out of one's hand, that is, granting of freedom. For whereas one who is in slavery is subjected to the hand (*manus*) and power of another, on being sent out of hand he is freed of that power. All of which originated from the *jus gentium,* since, of course, everyone would be born free by the natural law, and manumission would not be known when slavery was unknown. But after slavery came in by the *jus gentium,* there followed the boon (*beneficium*) of manumission. And thenceforth, we all being called by the one natural name "men," in the *jus gentium* there came to be three classes: free men, and set against those slaves and the third class, freedmen, that is, those who had stopped being slaves.

5 HERMOGENIAN, *Epitome of Law, book 1:* As a consequence of this *jus gentium,* wars were introduced, nations differentiated, kingdoms founded, properties individuated, estate boundaries settled, buildings put up, and commerce established, including contracts of buying and selling and letting and hiring (except for certain contractual elements established through *jus civile*).

6 ULPIAN, *Institutes, book 1:* The *jus civile* is that which neither wholly diverges from the *jus naturale* and *jus gentium* nor follows the same in every particular. And so whenever to the common law we add anything or take anything away from it, we make a law special to ourselves, that is, *jus civile,* civil law. 1. This law of ours, therefore, exists either in written or unwritten form; as the Greeks put it, "of laws some are written, others unwritten."

7 PAPINIAN, *Definitions, book 2:* Now the *jus civile* is that which comes in the form of statutes, plebiscites, *senatus consulta,* imperial decrees, or authoritative juristic statements. 1. Praetorian law (*jus praetorium*) is that which in the public interest the praetors have introduced in aid or supplementation or correction of the *jus civile.* This is also called honorary law (*jus honorarium*), being so named for the high office (*honos*) of the praetors.

8 MARCIAN, *Institutes, book 1:* For indeed the *jus honorarium* itself is the living voice of the *jus civile.*

9 GAIUS, *Institutes, book 1:* All peoples who are governed under laws and customs observe in part their own special law and in part a law common to all men. Now that law which each nation has set up as a law unto itself is special to that particular *civitas* and is called *jus civile,* civil law, as being that which is proper to the particular civil society (*civitas*). By contrast, that law which natural reason has established among all human beings is among all observed in equal measure and is called *jus gentium,* as being the law which all nations observe.

10 ULPIAN, *Rules, book 1:* Justice is a steady and enduring will to render unto everyone his right. 1. The basic principles of right are: to live honorably, not to harm any other person, to render to each his own. 2. Practical wisdom in matters of right is an awareness of God's and men's affairs, knowledge of justice and injustice.

11 PAUL, *Sabinus, book 14:* The term "law" is used in several senses: in one sense,

when law (*jus*) is used as meaning what is always fair and good, it is natural law (*jus naturale*); in the other, as meaning what is in the interest of everyone, or a majority in each *civitas*, it is civil law (*jus civile*). Nor is it the less correct that in our *civitas* the *jus honorarium* is called law. The praetor is also said to render legal right (*jus*) even when he makes a wrongful decree, the reference, of course, being in this case not to what the praetor has done, but to what it is right for a praetor to do. By a quite different usage the term "*jus*" is applied to the place where the law is administered, the reference being carried over from what is done to the place where it is done. That place we can fix as follows: wherever the praetor has determined to exercise jurisdiction, having due regard to the majesty of his own *imperium* and to the customs of our ancestors, that place is correctly called *jus*.

12 MARCIAN, *Institutes, book 1:* We sometimes use the term "*jus*" also with a reference to a bond of relationship: for example, I have a *jus cognationis* (a blood tie) or a *jus adfinitatis* (a tie by marriage) with someone or other.

2

THE ORIGIN OF THE LAW AND OF ALL THE MAGISTRACIES AND THE SUCCESSION OF THE JURISTS

1 GAIUS, *XII Tables, book 1:* Since I am aiming to give an interpretation of the ancient laws, I have concluded that I must trace the law of the Roman people from the very beginnings of their city. This is not because I like making excessively wordy commentaries, but because I can see that in every subject a perfect job is one whose parts hang together properly. And to be sure the most important part of anything is its beginning. Moreover, if it is regarded as a sin (so to speak) for people arguing cases in court to launch straight into an exposition of the case to the judge without having made any prefatory remarks, will it not be all the more unfitting for people who promise an interpretation of a subject to deal straight off with that subject matter, leaving out its beginnings, failing to trace its origin, not even, as I might say, giving their hands a preliminary wash? In fact, if I mistake not, such introductions both lead us more willingly into our reading of the proposed subject matter, and, when we have got to the point, give us a far clearer grasp of it.

2 POMPONIUS, *Manual, sole book:* Accordingly, it seems that we must account for the origin and development of law itself. 1. The fact is that at the outset of our *civitas*, the citizen body decided to conduct its affairs without fixed statute law or determinate legal rights; everything was governed by the kings under their own hand. 2. When the *civitas* subsequently grew to a reasonable size, then Romulus himself, according to the tradition, divided the citizen body into thirty parts, and called them *curiae* on the ground that he improved his curatorship of the commonwealth through the advice of these parts. And accordingly, he himself enacted for the people a number of statutes passed by advice of the *curiae* [*leges curiatae*]; his successor kings legislated likewise. All these statutes have survived written down in the book by Sextus Papirius, who was a contemporary of Superbus, son of Demeratus the Corinthian, and was one of the leading men of his time. That book, as we said, is called *The Papirian Civil Law*, not because Papirius put a word of his own in it, but because he compiled in unitary form laws passed piecemeal. 3. Then, when the kings were thrown out under a Tribuni-

cian enactment, these statutes all fell too, and for a second time, the Roman people set about working with vague ideas of right and with customs of a sort rather than with legislation, and they put up with that for nearly twenty years. 4. After that, to put an end to this state of affairs, it was decided that there be appointed, on the authority of the people, a commission of ten men by whom were to be studied the laws of the Greek city states and by whom their own city was to be endowed with laws. They wrote out the laws in full on ivory tablets and put the tablets together in front of the *rostra*, to make the laws all the more open to inspection. They were given during that year sovereign right in the *civitas*, to enable them to correct the laws, if there should be a need for that, and to interpret them without liability to any appeal such as lay from the rest of the magistracy. They themselves discovered a deficiency in that first batch of laws, and accordingly, they added two tablets to the original set. It was from this addition that the laws of the *Twelve Tables* got their name. Some writers have reported that the man behind the enactment of these laws by the Ten Men was one Hermodorus from Ephesus, who was then in exile in Italy. 5. After the enactment of these laws, there arose a necessity for forensic debate, as it is the normal and natural outcome that problems of interpretation should make it desirable to have guidance from learned persons. Forensic debate, and jurisprudence which without formal writing emerges as expounded by learned men has no special name of its own like the other subdivisions of law designated by name (there being proper names given to these other subdivisions); it is called by the common name "civil law." 6. Then about the same time actions-at-law whereby people could litigate among themselves were composed out of these statutes [the laws of the *Twelve Tables*]. To prevent the citizenry from initiating litigation any old how, the lawmakers' will was that the actions-at-law be in fixed and solemn terms. This branch of-law has the name *legis actiones*, that is, statutory actions-at-law. And so these three branches of law came into being at almost the same time: once the statute law of the *Twelve Tables* was passed, the *jus civile* started to emerge from them, and *legis actiones* were put together from the same source. In relation to all these statutes, however, knowledge of their authoritative interpretation and conduct of the actions at law belonged to the College of Priests, one of whom was appointed each year to preside over private matters. The people followed this practice for nearly a hundred years. 7. Thereafter, when Appius Claudius had written out these actions-at-law and brought them back into a common form, his clerk Gnaeus Flavius, the son of a freedman, pirated the book and passed it over to the people at large. This service so ingratiated him with the citizenry that he became a tribune of the *plebs*, a senator and a curule aedile. The book which contains the actions-at-law is called *The Flavian Civil Law* on the same basis as the above-mentioned *The Papirian Civil Law*, for neither did Gnaeus Flavius put a word of his own into the book. With the beginnings of the growth of the city, and because some types of suit were found to be lacking, Sextus Aelius not much later composed further forms of action and gave to the people the book which is called *The Law according to Aelius* (*Jus Aelianum*). 8. Then, since in the *civitas* there was the statute law of the *Twelve Tables* and on top of that the *jus civile* and on top of that the statutory *legis actiones*, it came to pass that the *plebs* fell at odds with the members of the senatorial class and seceded and set up laws for itself, which laws are called plebiscites. Soon after the *plebs* had been wheedled back, because these plebiscites were giving rise to many disputes, the decision was made in the *lex Hortensia* that they were to be deemed to have the force of statutes. And so it came about that although there was a difference as to the method of passing plebiscites and *leges* (statutes), they had the same legal force. 9. Next, because it grew hard for the *plebs* to assemble, and to be

sure much harder for the entire citizenry to assemble, being now such a vast crowd of men, the very necessity of the case imposed upon the senate trusteeship of the commonwealth. And thus did the senate come to exercise authority, and whatever it resolved upon was respected, and such a law was called a *senatus consultum* (senate resolution). 10. At the same time, the magistrates also were settling matters of legal right, and in order to let the citizens know and allow for the jurisdiction which each magistrate would be exercising over any given matter, they took to publishing edicts. These edicts, in the case of the praetors, constituted the *jus honorarium* (honorary law): "honorary" is the term used, because the law in question had come from the high honor of praetorian office. 11. Most recently, just as there was seen to have been a transition toward fewer ways of establishing law, a transition effected by stages under dictation of circumstances, it has come about that affairs of state have had to be entrusted to one man (for the senate had been unable latterly to govern all the provinces honestly). An emperor, therefore, having been appointed, to him was given the right that what he had decided be deemed law. 12. Thus, in our state either it is laid down by law, that is by statute; or there is our own *jus civile*, which is grounded without formal writing in nothing more than interpretation by learned jurists; or there are statutory actions-at-law, which govern forms of process; or there is plebiscite law, which is settled without the advice and consent of the senate; or there is a magisterial edict, whence honorary law derives; or there is a *senatus consultum* which is brought in without statutory authority solely on the decision of the senate; or there is an imperial enactment (*constitutio*), the principle being that what the emperor himself has decided is to be observed as having statutory force. 13. After this study of the origin and development of law, the next thing to consider is the names and origin of the magistracies. As we have pointed out, business is actually effected through those who preside over some jurisdiction. For how much is it worth that there be law in a *civitas* unless there be people able to administer the laws? Then after that we shall speak of the succession of juristic authorities, because the law cannot be coherent unless there is someone skilled in law by whom it may be from day to day clarified. 14. It is indubitable that from the foundation of the *civitas*, the kings had entire power in all that now pertains to magistrates. 15. In those same times, it is clear that there was also a *tribunus celerum*. It was he who commanded the cavalry and, as it were, stood in second place to the kings. Junius Brutus, who was responsible for getting the kings thrown out, once held this office. 16. Then, after the ejection of the kings, it was established that there be two consuls in whom a statute laid down that the supreme authority should be vested. They were called consuls on this ground, that they first and foremost consulted the interest of the commonwealth. But lest they should claim for themselves kingly power over all things, legislation provided that there should be an appeal from them and that they should have no power to impose the death penalty on a Roman citizen save by the order of the whole citizen body. Alone devolved to them the power of physical coercion and of ordering the imposition of public fetters. 17. Then later, when a census had been too long on the agenda, and the consuls were too few to carry out this study, censors were established. 18. Then, with a growth in population, since wars were growing frequent and some were waged with abnormal ferocity by neighboring peoples, sometimes, under pressure of events, it was decided to establish a magistrate with greater power. Accordingly, dictators were put in office from whom there was no right of appeal and to whom even the capital penalty was entrusted. It was not lawful for this magistrate to be kept in office longer than six months, since he had sovereign power. 19. And these dictators were required to have masters of the cavalry (*magistri equitum*) in just the same way as kings were required to have tribunes of the cavalry (*tribuni celerum*). This office was substantially the same as that of the present day prefects of the praetorian guard (*praefecti praetorio*), the magistrates in question being however considered statutory

officers. 20. At the same time as the secession of the *plebs* from the patricians in about the seventeenth year after the expulsion of the kings, during its stay on the Sacred Mount, the *plebs* established for itself tribunes, to be plebeian magistrates. They were called tribunes, because at one time the citizen body was divided into three parts and the tribunes were elected one from each part, or because the tribes voted them into existence. 21. Likewise, in order that there should be people in charge of the *aedes* (houses) in which the *plebs* deposited all its plebiscites, they appointed two members of the *plebs* who were called aediles. 22. Then, because the public treasury had begun to grow richer, in order that there should be officers in charge of it, quaestors were appointed to have charge of the money, so-called because inquests and savings of money were the reasons for their being brought into existence. 23. And because, as we have said, the consuls were not permitted to take jurisdiction in the capital trial of a Roman citizen save by order of the citizen body, on that account quaestors were appointed by the citizen body in order to preside over capital trials; these were called *quaestores parricidii* of whom there is also a mention in the statute of the *Twelve Tables*. 24. When it had been resolved that statutes were indeed to be passed, it was proposed to the people that all the magistrates should abdicate their offices, in order that the Ten Men might be appointed to produce statute laws in writing. The Ten Men were accordingly appointed. But when they prorogued the magistracy in their own favor and exercised unlawful power and refused in due course to give way to the magistrates, aiming to keep possession of the commonwealth in perpetuity for themselves and their faction, they brought matters to such a pass, by the excesses of their harsh masterfulness, that the army seceded from the commonwealth. One Verginius is said to have taken the initiative in the secession. He had discovered that Appius Claudius, in breach of the very law which he himself had transcribed out of the ancient customary law into the *Twelve Tables*, had refused him [Verginius] interim custody of his own daughter and had awarded interim custody to a man whom Appius had put up to claiming her as his slave, and had been so captivated by lust for the maiden as to have got good and evil quite confused. At this discovery, Verginius was outraged, because over the *persona* of his daughter there had been a lapse from one of the most ancient observances of legal right (as, for example, when Brutus, who was the first consul of Rome, had ordained interim liberation in the case of Vindex, a slave of the Vitellii who had by his evidence uncovered a traitorous conspiracy). Thinking the chastity of his daughter more to be prized than even her life, Verginius snatched a knife from a butcher's shop and slew her with it, doubtless intent upon making the maid's death ward off from her the reproach of whoredom. Fresh from the slaying and still dripping with his daughter's blood, he forthwith took refuge among his army comrades. To a man, they abandoned their former leaders and carried their standards across to the Aventine Mount from Algidum, where the legions had been based for the pursuit of war. Soon the whole body of the city's *plebs* betook itself to the same place, and by popular consent [the Ten Men] were, some of them, [driven into exile; and others were] incarcerated and put to death. 25. Then, several years after the enactment of the *Twelve Tables* legislation, when there was contention between *plebs* and patricians, the *plebs* wishing the right of electing consuls from its own body as well, the patricians rejecting the proposal, the following step was taken: Military tribunes with consular power were created partly from among the plebeians, partly from the patricians. These magistrates as established were variable in number. Sometimes there were twenty of them, sometimes more, occasionally fewer. 26. Later, when the decision had been taken that consuls also might be elected from the *plebs*, elections from both groups began to be the practice. Thereupon, in order that the patricians should have greater legal standing, it was decided that two persons be appointed from among the patricians [to superintend the games]; thus were the curule

aediles brought into being. 27. And when the consuls were being called away to the wars with neighboring peoples, and there was no one in the *civitas* empowered to attend to legal business in the city, what was done was that a praetor also was created, called the urban praetor on the ground that he exercised jurisdiction within the city. 28. Some years thereafter that single praetor became insufficient, because a great crowd of foreigners had come into the *civitas* as well, and so another praetor was established, who got the name peregrine praetor, because he mainly exercised jurisdiction as between foreigners (*peregrini*). 29. Then, since a magistrate was needed to preside over the Spear Court (*hasta*), the Ten Men for trying disputed issues were constituted. 30. At the same time were constituted the Four Men for Care of the Highways and the Three Men of the Mint (the assayers of bronze silver and gold) and the Capital Three Men, the board of guardians of the jail, were constituted so that when a mandatory punishment was to be carried out, it should be done by their agency. 31. And because it was unsuitable for magistrates to be getting into public affairs during the evening hours, there were set up the Five Men for Below the Tiber and the Five Men for Beyond the Tiber, who were empowered to exercise promagisterial authority. 32. The annexation of Sardinia and soon afterward of Sicily and in due course of Spain and finally of the province of Narbonne brought the creation of as many praetors as there were provinces that had come under Roman rule, some of these praetors presiding over affairs of the city, others over provincial affairs. Then, Cornelius Sulla set up criminal courts (*quaestiones publicae*) dealing, for example, with forgery, with parricide, and with stabbings, and he added four further praetors. Next Gaius Julius Caesar set up two praetors and two aediles to oversee the corn supply, and from the name of the Goddess Ceres [these were called] the cereal praetors and aediles. Thus, twelve praetorships and six aedileships were created. Subsequently, the deified Augustus established sixteen praetors, and then later on the deified Claudius added two praetors to exercise fideicommissary jurisdiction. One of those posts has since been suppressed by the deified Titus, and reestablished by the deified Nerva to exercise jurisdiction between the imperial treasury and private citizens. Thus, there are eighteen praetors exercising jurisdiction in the *civitas*. 33. All these points are observed, so long as the magistrates are within the state. But whenever they cross the boundary, one man is left behind to exercise jurisdiction. He is called the prefect of the city (*praefectus urbi*). Formerly, he used to be appointed when the magistrates were away; latterly, he has been installed regularly for the sake of the Latin festivals, and he is appointed every year. The prefect of the corn supply (*praefectus annonae*) and the prefect of the city guard (*praefectus vigilum*) are not magistrates, but hold extraordinary appointments in the public interest. On the other hand, those "Cistiberians" [the Five Men for Below the Tiber] of whom we have spoken, were afterward created aediles by *senatus consultum*. 34. Therefore, in total: ten tribunes of the plebs, two consuls, eighteen praetors, and six aediles administer justice in the *civitas*.

35. Very many very great men have professed knowledge of civil law. But the ones who have been held in highest honor by the Roman people are the ones of whom an account must be given in the present work, to let it be clear by whom—by what quality of men—legal principles have been developed and passed down. As to that, tradition has it that of all those who mastered this knowledge, none earlier than Tiberius Coruncanius made a public profession of it. The others up to his time either thought it right to keep the civil law unknown or made it their practice only to give private consultations rather than offering themselves to people wishing to learn. 36. Yet a man in the first rank for skill was Publius Papirius, who compiled the laws of the kings (*leges regiae*) in a unitary form. Hereafter came Appius Claudius, one of the Ten Men, and the man whose counsel was of the greatest weight in the writing of the *Twelve Tables*. After him Appius Claudius, a member of the same family, had the

greatest knowledge. This man was called Hundred-Handed. He laid down the Appian Way; he built the Claudian Aqueduct; he carried the resolution for not letting Pyrrhus into the city; there is even a tradition that he was the man who first wrote the form of action for cases of interruption of possession, but this book has not survived. The same Appius Claudius invented the letter "R," and from this it seems to have followed that there were Valerii in place of Valesii and Furii in place of Fusii. 37. After their time, the man of greatest knowledge was Sempronius, whom the Roman people called *Sophos* (The Wise), a by-name given to no one else before or since. [Next came] Gaius Scipio Nasica, who was given the title *Optimus* (The Best) by the senate, and to whom was also given by act of state a house on the Via Sacra, so that he could be consulted the more easily. Then, there was Quintus Mucius, who, when he was sent as an ambassador to the Carthaginians and when two dice were offered to him, one for peace and the other for war, for him to choose between them which he wished to take back to Rome, picked them both up and said that the Carthaginians ought to ask him for the one they would prefer to receive. 38. After their time was Tiberius Coruncanius who, as I have stated, was the first to give public discourses. Nothing of his survives in writing, however, though his opinions (*responsa*) were numerous and long remembered. Next Sextus Aelius and his brother Publius Aelius and also Publius Atilius evinced the greatest depth of knowledge in their public teaching. As a result, the two Aelii even became consuls, while Atilius was the first person to whom the people gave the name *Sapiens* (The Wise). Indeed, Ennius wrote in praise of Sextus Aelius, a book of whose survives bearing the title *Tripertita*. This book contains as it were the cradle of the law. It is called the *Tripertita*, since the first part is the *Law of the Twelve Tables*, to which is annexed an interpretation of the law, and then the text is rounded off with a description of the *legis actiones*. There are three other books which reports ascribe to Aelius, but some people deny that ascription, Cato following this latter opinion. Next in line was Marcus Cato, the head of the Porcian family, of whom also some books have survived. But his son wrote more, and from his works subsequent writings descend. 39. After these men came Publius Mucius and Brutus and Manilius, who laid the foundations of the *jus civile*. Of this group, Publius Mucius left as many as ten short books, Brutus seven and Manilius three. There even survive *volumina* (books in the form of rolls) of Manilius. The two former held consular rank, Brutus having served as praetor, Publius Mucius however having actually been *pontifex maximus* (chief priest). 40. These men's pupils included Publius Rutilius Rufus, who was a consul in Rome and a proconsul in Asia Minor, Paulus Verginius, and Quintus Tubero, the well-known stoic who studied under Pansa and who was himself a consul. Sextus Pompeius, too, the paternal uncle of Gnaeus Pompeius, flourished at the same time, as did Coelius Antipater, who wrote histories, but who put more effort into literary style than into legal science, and also Lucius Crassus, brother of Publius Mucius, who has the by-name Munianus. Cicero said that he was the best speaker of all the

jurisconsults. 41. After that group, Quintus Mucius, son of Publius and a *pontifex maximus*, became the first man to produce a general compendium of the civil law by arranging it into eighteen books. Mucius had several pupils, but those who achieved the highest standing were Aquilius Gallus, Balbus Lucilius, Sextus Papirius, and Gaius Juventius. Of them, Gallus had the highest popular standing, according to Servius. All, however, are mentioned by name in works of Servius Sulpicius; apart from that, writings of theirs which survive are not in themselves of such quality that everyone is always searching them out; indeed, their pages are hardly ever turned over by human hand. But Servius relied on them in writing his own books, and our remembering them in fact depends on his writings. 43. According to the traditional story, however, when Servius Sulpicius held the first place as a pleader of cases or to be sure the first place after Marcus Tullius [Cicero], he once sought out Quintus Mucius to consult him about the business of a client of his. When Servius failed to understand Quintus's opinion on the law, he questioned Quintus again; again an opinion was given, and again not understood; then he was severely reproached by Quintus. For, indeed, he told him that it was disgraceful for a patrician of noble family who regularly appeared as advocate in courts to be ignorant of the law on which his cases turned. Stung by this near insult, Servius applied himself to learning the civil law, and he especially studied under the men of whom we have spoken. He had lessons from Balbus Lucilius, but most of all he was taught by Gallus Aquilius, who was living at Cercina. That is why several of his surviving books were composed at Cercina. When Servius died during a period of acting as an ambassador, the people of Rome put up a statue of him in front of the *rostra*, and that statue still stands before the *rostra* of Augustus. Several volumes of his survive, but he left almost one hundred eighty books. 44. Many men got their learning under him, of whom the following wrote books: Alfenus Varus Gaius, Aulus Ofilius, Titus Caesius, Aufidius Tucca, Aufidius Namusa, Flavius Priscus, Gaius Ateius, Pacuvius Labeo Antistius, the father of Labeo Antistius, Cinna, and Publicius Gellius. Of these ten, eight composed books, and Aufidius Namusa edited all their complete books into a set of one hundred forty books. Alfenus Varus and Aulus Ofilius enjoyed the highest authority of Servius's pupils. Varus indeed became a consul, while Ofilius always kept his equestrian rank. He was on the friendliest of terms with Caesar, and he left behind very many civil law books such as would give the basis for every branch of study. He was the first person to write up the statutes on the five percent tax; he also was the first to give a careful account of the praetor's edict with regard to jurisdictional questions, although Servius had before him left two books dedicated to Brutus, exceedingly brief ones, entitled *On the Edict*. 45. At the same time too lived Trebatius, the one who was a pupil of Cornelius Maximus; also Aulus Cascellius, pupil of

Quintus Mucius Volusius, whose grandson Publius Mucius he actually made his testamentary heir as a mark of honor to Quintus Mucius. Aulus Cascellius was of quaestorian rank, and he refused to go higher even though Augustus offered him the consulship. Of those two, Trebatius is said to have been the more skillful lawyer, but Cascellius to have been the more eloquent pleader; but Ofilius was more learned than either of them. Cascellius's writings have not survived, except for one book of *bons mots*; quite a few of Trebatius's books survive, but nowadays they are little consulted. 46. Quintus Tubero was later than these men. He studied under Ofilius. He was a patrician, and he transferred his attention from pleading cases as advocate to consulting on the civil law, in particular after he had prosecuted Quintus Ligarius but failed to get a conviction before Gaius Caesar. Quintus Ligarius was the man who, as commander on the African coast, withheld permission for Tubero to land when he was ill or to swallow water. That was the ground on which Tubero prosecuted him and Cicero defended him. Cicero's speech survives—certainly a very stylish one. It bears the title *Pro Quinto Ligario*. Tubero was considered most learned both in public and in private law, and he left several books in both fields of study. But he had an affection of writing in an antique style of speech, and so his books are not considered very agreeable reading. 47. After him, the leading authorities were Ateius Capito, who was of Ofilius's school, and Antistius Labeo, who went to lectures of all the above, but who was a pupil of Trebatius. Of these two Ateius was consul. Labeo declined to accept office when Augustus made him an offer of the consulship whereby he would have become *consul suffectus* (interim consul). Instead, he applied himself with the greatest firmness to his studies, and he used to divide up whole years on the principle that he spent six months at Rome with his students, and for six months he retired from the city and concentrated on writing books. As a result, he left four hundred manuscript rolls (*volumina*) most of which are still regularly thumbed through. These two men set up for the first time rival sects, so to say. For Ateius Capito persevered with the line which had been handed down to him, whereas Labeo set out to make a great many innovations on account of the quality of his genius and the trust he had in his own learning which had drawn heavily on other branches of knowledge. 48. And so when Ateius Capito was succeeded by Massarius Sabinus and Labeo by Nerva, these two increased the above-mentioned range of disagreements. Nerva was also on the most intimate terms with Caesar. Massurius Sabinus was of equestrian rank, and was the first person to give state-certificated opinions (*publice respondere*). For after this privilege (*beneficium*) came to be granted, it was conceded to him by Tiberius Caesar. 49. To clarify the point in passing: before the time of Augustus the right of stating opinions at large was not granted by emperors, but the practice was that opinions were given by people who had confidence in their own studies. Nor did they always issue opinions under seal, but most commonly wrote themselves to the judges, or gave the testimony of a direct answer to those who consulted them. It was the deified Augustus who, in order to enhance the authority of the law, first established that opinions might be given under his authority. And from that time this began to be sought as a favor. As a consequence of this, our most excellent emperor Hadrian issued a rescript on an occasion when some men of praetorian rank were petitioning him for permission to grant opinions; he said that this was by custom not merely begged for but earned and that he [the emperor] would accordingly be delighted if whoever had faith in himself would prepare himself for giving opinions to the people at large. 50. Anyway, to Sabinus the concession was granted by Tiberius Caesar that he might give opinions to the people at large. He was admitted to the equestrian rank when already of mature years

and almost fifty. He never had substantial means, but for the most part was supported by his pupils. 51. His successor was Gaius Cassius Longinus, the son of a daughter of Tubero's who was herself a granddaughter of Servius Sulpicius; this is why he speaks of Servius Sulpicius as his great grandfather. He was consul along with Quartinus in Tiberius's time, but his was the greatest authority in the state right up to the time when Caesar banished him. 52. Banished by Tiberius to Sardinia, he lived to be recalled by Vespasian. Nerva's successor was Proculus. There lived at the same time also Nerva the younger and another Longinus, a member of the equestrian rank who however subsequently attained the praetorship. But Proculus's authority was superior to the others, for he was a man of the greatest ability. So [lawyers of] the one party were called Cassians and [those] of the other were called Proculians, a division which in origin began with Capito and Labeo. 53. Caelius Sabinus succeeded Cassius, and he exercised the greatest influence in Vespasian's times. Proculus's successor was Pegasus, who was prefect of the city in Vespasian's times. Caelius Sabinus was succeeded by Priscus Iavolenus; Pegasus by Celsus, and Celsus the Elder by Celsus the Younger and Priscus Neratius, both of whom were consuls, Celsus indeed serving a second term. Javolenus Priscus was succeeded by Aburnus Valens and Tuscianus, also by Salvius Julianus.

3

STATUTES, *SENATUS CONSULTA*, AND LONG-ESTABLISHED CUSTOM

1 PAPINIAN, *Definitions, book 1:* A statute is a communal directive, a resolution of wise men, a forcible reaction to offenses committed either voluntarily or in ignorance, a communal covenant of the state.

2 MARCIAN, *Institutes, book 1:* For Demosthenes the orator also defines it thus: "Law is that which all men ought to obey for many reasons, and chiefly because all law is a discovery and gift of God, and yet at the same time is a resolution of wise men, a correction of misdeeds both voluntary and involuntary, and the common agreement of the *polis* according to whose terms all who live in the *polis* ought to live." Chrysippus too, a philosopher of supreme stoic wisdom, begins his book *On Law* in the following terms: "Law is sovereign over all divine and human affairs. It ought to be the controller, ruler, and guide of good and bad men alike, and in this way to be a standard of justice and injustice and, for beings political, by nature a prescription of what ought to be done and a proscription of what ought not to be done."

3 POMPONIUS, *Sabinus, book 25:* Rules of law should be established, as Theophrastus said, in the matters which happen by way of general occurrence, not for those which happen against the normal run of things.

4 CELSUS, *Digest, book 5:* Out of those matters whose occurrence in one kind of case is a bare possibility, rules of law do not develop.

5 CELSUS, *Digest, book 17:* For the law ought rather to be adapted to the kinds of things which happen frequently and easily, than to those which happen very seldom.

6 PAUL, *Plautius, book 17:* For, as Theophrastus says, a thing that happens once or twice is passed over by the lawgivers.

7 MODESTINUS, *Rules, book 1:* The force of a law is this: to command, to prohibit, to permit, or to punish.

8 ULPIAN, *Sabinus, book 3:* Rules of law are set up not as against single individuals, but in generic terms.

9 ULPIAN, *Edict, book 16:* There is no doubt that the senate has law-making power.

10 JULIAN, *Digest, book 58:* Neither statutes nor *senatus consulta* can be written in such a way that all cases which might at any time occur are covered; it is however sufficient that the things which very often happen are embraced.

11 JULIAN, *Digest, book 90:* And, therefore, as to matters on which decisions of first impression have been made, more exact provision must be made either by [juristic] interpretation or by a legislative act of our most excellent emperor.

12 JULIAN, *Digest, book 15:* It is not possible for every point to be specifically dealt with either in statutes or in *senatus consulta;* but whenever in any case their sense is clear, the president of the tribunal ought to proceed by analogical reasoning and declare the law accordingly.

13 ULPIAN, *Curule Aediles' Edict, book 1:* For, as Pedius says, whenever some particular thing or another has been brought within statute law, there is good ground for other things which further the same interest to be added in supplementation, whether this be done by [juristic] interpretation or *a fortiori* by judicial decision.

14 PAUL, *Edict, book 54:* Yet a ruling adopted against the *ratio juris* (the underlying rationale of the law) ought not to be carried to its logical conclusion.

15 JULIAN, *Digest, book 27:* We cannot follow a rule of law in instances where there has been a decision against the *ratio juris.*

16 PAUL, *De Jure Singulari, sole book: Jus singulare* (particular law) is law brought in by authority of a decision maker against the general tenor of legal reason on account of a specific policy goal.

17 CELSUS, *Digest, book 26:* Knowing laws is not a matter of sticking to their words, but a matter of grasping their force and tendency.

18 CELSUS, *Digest, book 29:* Statutes ought to be given the more favorable interpretation, whereby their intendment is saved.

19 CELSUS, *Digest, book 33:* When there is an ambiguity in a statute, that sense is to be preferred which avoids an absurdity, especially when by this method the intendment of the act is also secured.

20 JULIAN, *Digest, book 55:* It is not possible to find an underlying reason for everything which was settled by our forebears.

21 NERATIUS, *Parchments, book 6:* Accordingly, it is not right to go ferreting after the motives behind the things which are settled as law. To do otherwise is to subvert many present certainties.

22 ULPIAN, *Edict, book 35:* When a law pardons something as to the past, it impliedly forbids it for the future.

23 PAUL, *Plautius, book 4:* We should certainly not change points which have always had a single definite interpretation.

24 CELSUS, *Digest, book 8:* It is not lawyer-like practice to give judgment or to state an opinion on the basis of one particular part of a statute without regard to the whole.

25 MODESTINUS, *Replies, book 8:* It is not allowable under any principle of law or generous maxim of equity that measures introduced favorably to men's interests should be extended by us through a sterner mode of interpretation on the side of severity and against those very interests.

26 PAUL, *Questions, book 4:* It is not an innovation to reconcile earlier laws with later ones.

27 TERTULLIAN, *Questions, book 1:* Accordingly, because the practice is to read earlier laws in the light of later ones, we ought always to deem it already inherent in statutes that they refer also to those persons and those things which may at any time turn out analogous [with persons and things expressly referred to].

28 PAUL, *Lex Julia et Papia, book 5:* But later laws also refer to earlier ones, unless they contradict them; there are many proofs of this.

29 PAUL, *Lex Cincia, sole book:* It is a contravention of the law if someone does what the law forbids, but fraudulently, in that he sticks to the words of the law but evades its sense.

30 ULPIAN, *Edict, book 4:* Fraud on the statute is practiced when one does what the statute does not wish anyone to do yet which it has failed expressly to prohibit. And what separates "words from meaning" separates cheating from what is done contrary to law.

31 ULPIAN, *Lex Julia et Papia, book 13:* The emperor is not bound by statutes. And though the empress is bound by them, nevertheless, emperors give the empress the same privileges as they have themselves.

32 JULIAN, *Digest, book 84:* What ought to be held to in those cases where we have no applicable written law is the practice established by customs and usage. And if this is in some way deficient, we should hold to what is most nearly analogical to and entailed by such a practice. If even this is obscure, then we ought to apply law as it is in use in the City of Rome. 1. Age-encrusted custom is not undeservedly cherished as having almost statutory force, and this is the kind of law which is said to be established by use and wont. For given that statutes themselves are binding upon us for no other reason than that they have been accepted by the judgment of the populace, certainly it is fitting that what the populace has approved without any writing shall be binding upon everyone. What does it matter whether the people declares its will by voting or by the very substance of its actions? Accordingly, it is absolutely right to accept the point that statutes may be repealed not only by vote of the legislature but also by the silent agreement of everyone expressed through desuetude.

33 ULPIAN, *Office of Proconsul, book 1:* Everyday usage ought to be observed in place of legal right and statute law in relation to those matters which do not come under the written law.

34 ULPIAN, *Duties of Proconsul, book 4:* When it appears that somebody is relying upon a custom either of a *civitas* or of a province, the very first issue which ought to be explored, according to my opinion, is whether the custom has ever been upheld in contentious proceedings.

35 HERMOGENIAN, *Epitome of Law, book 1:* But we also keep to those rules which have been sanctioned by long custom and observed over very many years; we keep to them as being a tacit agreement of the citizen, no less than we keep to written rules of law.

36 PAUL, *Sabinus, book 7:* This kind of law is held to be of particularly great authority, because approval of it has been so great that it has never been necessary to reduce it to writing.

37 PAUL, *Questions, book 1:* If a question should arise about the interpretation of a statute, what ought to be looked into first is the law that the *civitas* had previously applied in cases of the same kind. For custom is the best interpreter of statutes.

38 CALLISTRATUS, *Questions, book 1:* In fact, our reigning Emperor Severus has issued a rescript to the effect that in cases of ambiguity arising from statute law, statutory force ought to be ascribed to custom or to the authority of an unbroken line of similar judicial decisions.

39 CELSUS, *Digest, book 23:* A proposition does not hold good in analogical cases if it was not originally brought in on a rational ground, but adhered to in the first place in error and thereafter by custom.

40 MODESTINUS, *Rules, book 1:* Accordingly, every rule of *jus* is either made by agreement or established by necessity or built up by custom.

41 ULPIAN, *Institutes, book 2:* A complete *jus* (right) is either of acquiring or of keeping or of reducing; for the question is either how something may come to be somebody's or how a person may keep a thing or keep his *ius* or how he may alienate or lose it.

4

ENACTMENTS BY EMPERORS

1 ULPIAN, *Institutes, book 1:* A decision given by the emperor has the force of a statute. This is because the populace commits to him and into him its own entire authority and power, doing this by the *lex regia* which is passed anent his authority. 1. Therefore, whatever the emperor has determined by a letter over his signature or has decreed on judicial investigation or has pronounced in an interlocutory matter or has prescribed by an edict is undoubtedly a law. These are what we commonly call *constitutiones* (enactments). 2. Plainly, some of these are purely *ad hominem* and are not followed as setting precedents. For only the specific individual is covered by an indulgence granted by the emperor to someone according to his deserts or by a penalty specially imposed or by a benefit granted in an unprecedented way.

2 ULPIAN, *Fideicommissa, book 4:* In determining matters anew, there ought to be some clear advantage in view, so as to justify departing from a rule of law which has seemed fair since time immemorial.

3 JAVOLENUS, *Letters, book 13:* A benefit from the emperor, since it proceeds from his undoubtedly divine generosity, ought to be interpreted as amply as possible.

4 MODESTINUS, *Excuses, book 2:* Later enactments are more forceful than earlier ones.

5

HUMAN STATUS

1 GAIUS, *Institutes, book 1:* All our law concerns [either] persons or things or actions.

2 HERMOGENIAN, *Epitome of Law, book 1:* Therefore, since all law is established for men's sake, we shall speak first of the status of persons and afterward about the rest [of the law], following the order of the *edictum perpetuum* and applying titles as nearly as possible compatible with these as the nature of the case admits.

3 GAIUS, *Institutes, book 1:* Certainly, the great divide in the law of persons is this: all men are either free men or slaves.

4 FLORENTINUS, *Institutes, book 9:* Freedom is one's natural power of doing what one pleases, save insofar as it is ruled out either by coercion or by law. 1. Slavery is an institution of the *jus gentium*, whereby someone is against nature made subject to the ownership of another. 2. Slaves (*servi*) are so-called, because generals have a custom of selling their prisoners and thereby *preserving* rather than killing them: and indeed they are said to be *mancipia*, because they are *captives* in the hand (*manus*) of their enemies.

5. MARCIAN, *Institutes, book 1:* Of slaves, to be sure, there is but a single condition; of free men, on the other hand, some are freeborn (*ingenui*) and some are freedmen. 1. People are brought under our power as slaves either by the civil law or by the *jus gentium*. This happens by civil law if someone over twenty years of age allows himself to be sold with a view to sharing in the price. By the *jus gentium*, people become slaves on being captured by enemies or by birth to a female slave. 2. The freeborn are those who are born of a free woman; it suffices that she was free at the time of birth, even though she was a slave at the time of conception. And in the converse case, if a woman conceives as a free person then gives birth as a slave, it has been decided that her child is born free (and it does not matter whether she conceived in lawful wedlock or in simple cohabitation), because the mother's calamity should not redound to the harm of the child within her. 3. Further to this, the following question has been raised: suppose a pregnant slave is manumitted, then later becomes a slave or is expelled from her *civitas* before she gives birth, is her offspring free or slave? The better view, however, is that he or she is born free, and that it is enough for the child in the womb to have had a free mother albeit only for some of the time between conception and birth.

6 GAIUS, *Institutes, book 1:* Freedmen are those who have been manumitted from lawful slavery.

7 PAUL, *Shares Which Are Allowed to the Children of Condemned Prisoners, sole book:* The fetus in the womb is deemed to be fully a human being, whenever the question concerns advantages accruing to him when born, even though before birth his existence is never assumed in favor of anyone else.

8 PAPINIAN, *Questions, book 3:* The Emperor Titus Antoninus rules in a rescript that the status of free people is not adversely affected by the bearing of a badly drafted instrument.

9 PAPINIAN, *Questions, book 31:* There are many points in our law in which the condition of females is inferior to that of males.

10 ULPIAN, *Sabinus, book 1:* Question: with whom is a hermaphrodite comparable? I rather think each one should be ascribed to that sex which is prevalent in his or her make-up.

11 PAUL, *Replies, book 18:* Paul gave the opinion that a person is not deemed the lawful son of the man who begot him in the following case: he was conceived during the lifetime of his mother's father, the father being ignorant of his daughter's copulation; it was irrelevant that the birth occurred after the grandfather's death.

12 PAUL, *Replies, book 19:* That a child can be born fully formed in the seventh month is now a received view due to the authority of that most learned man Hippocrates. Accordingly, it is credible that a child born in the seventh month of a lawful marriage is a lawful son of the marriage.

13 HERMOGENIAN, *Epitome of Law, book 1:* Suppose that a slave is committed by his master to trial on a capital charge. Even if he is acquitted, he does not become a free man.

14 PAUL, *Views, book 4:* Not included in the class of children are those abnormally procreated in a shape totally different from human form, for example, if a woman brings forth some kind of monster or prodigy. But any offspring which has more than the natural number of limbs used by man may in a sense be said to be fully formed, and will therefore be counted among children.

15 TRYPHONINUS, *Disputations, book 10:* There was a testamentary instruction that if Arescusa should bear three children she should be free. She bore one child at the first birth, but triplets at the second. The question is whether any and if so which of the triplets is free. The condition set upon her freedom must be fulfilled by the woman. There should, however, be no doubt but that the last triplet is born free. Nor indeed has nature allowed that two babies can get out of their mother's womb at the same time with one push, so that from the uncertain order of their being born, there is no way of telling which is born in slavery and which in freedom. Therefore, from the onset of labor, the postulated condition has the effect that the one born last comes forth out of a free woman, just as if any other condition whatever had been set for her freedom and had come to pass while she was giving birth. For example, she is manumitted subject to this condition, that she give ten thousand to the heir or to Titius, and at the very moment of her labor, she fulfills the condition by the hand of another. In that case, it must be supposed that she gave birth as a free woman.

16 ULPIAN, *Disputations, book 6:* The answer would be the same, if Arescusa first bore two children and then had twins. For the point is that it cannot be said that both twins are born as free born; only the second born is. So the question is one of fact rather than of law.

17 ULPIAN, *Edict, book 22:* Everyone in the Roman world has been made a Roman citizen as a consequence of the enactment of the Emperor Antoninus.

18 ULPIAN, *Sabinus, book 27:* The Emperor Hadrian in a rescript to Publicius Marcellus gave the ruling that the child of a free woman, who has been condemned to death while pregnant, is born free, and that the practice is to keep her alive until she has given birth. But it is also the case that if a woman upon whom the interdict by fire and water has been imposed gives birth to a child conceived in lawful wedlock, the child is a Roman citizen and is in the *potestas* of its father.

19 CELSUS, *Digest, book 29:* When nuptials have been carried out in the statutory form, the children follow their father; one begotten at large follows the mother.

20 ULPIAN, *Sabinus, book 38:* A person who has become insane is held to retain his previous status and dignity, and also his position as a magistrate and his power, just as he retains ownership of his own property.

21 MODESTINUS, *Rules, book 7:* A freeman who sells himself and is later manumitted does not then revert to the status which by his own act he quit; he acquires the condition of a freedman.

22 MODESTINUS, *Replies, book 12:* Herennius Modestinus gave the opinion that the child born of a slave-woman is free born if her labor occurred at a time when, according to a condition of a gift, she ought to have been manumitted, since by rights she should then have been free.

23 MODESTINUS, *Encyclopaedia, book 1:* People who cannot identify their father are said to have been conceived at large, as are indeed those who can identify their father but have one whom they could not lawfully have. They are also called bastards, *spurii*, from the Greek word *spora*, being bastards by conception.

24 ULPIAN, *Sabinus, book 27:* This is a law of nature: that a child born without lawful wedlock belongs to his mother unless a special statute provides otherwise.

25 ULPIAN, *Lex Julia et Papia, book 1:* We must accept that someone is free born if there is a judicial decision to that effect, even though he is actually a freedman. For the judgment of a court (*res judicata*) is deemed true.

26 JULIAN, *Digest, book 69:* For almost all purposes of civil law, children *in utero* are considered as existent beings. Even *hereditates legitimae* revert to them; and if a pregnant woman is taken prisoner by enemies, the child to be born has the right of *postliminium*, and accordingly follows the rank of his father or (as the case may be) his mother. Moreover, if a pregnant slave-woman is stolen, then although it is a purchaser in good faith who has possession of her when she gives birth, the child to be born is deemed stolen property and not subject to *usucapio*. By analogy to all this, it is also the case that a freedman, so long as a son of his patron might possibly be born, is subject to the régime which applies to those who have patrons.

27 ULPIAN, *Opinions, book 5:* A patron could not even by adoption make a freeborn individual of a person who confesses himself to be a freedman.

6

THOSE WHO ARE *SUI JURIS* AND THOSE WHO ARE *ALIENI JURIS*

1 GAIUS, *Institutes, book 1:* There follows another division within the law of persons: some persons are *sui juris*, others are within the jurisdiction of someone else. Let us, therefore, see who are subject to another's jurisdiction (*alieni juris*). If we ascertain

who these persons are, then at the same time we know who are *sui juris*. So let us take a view of those who are in another person's *potestas*. 1. Slaves, then, are in the *potestas* of their master, this form of *potestas* being power in virtue of the *jus gentium*. For we can observe that equally among all nations masters have had the power of life or death over their slaves. And whatever acquisitions are made through a slave are acquisitions of the master's. 2. But at the present time no men who are subject to Roman rule are permitted to treat their slaves with a severity which is excessive and without statutory cause shown. For under an enactment of the deified Antoninus it is obligatory that he who has killed his own slave without due cause be punished not less severely than one who has killed another's slave. But even too great cruelty of masters is restrained by an enactment of the same emperor.

2 ULPIAN, *Duties of Proconsul, book 8:* If a master savages his slave or forces him into committing some indecency and foul malpractice, the functions of the governor are declared in the rescript addressed by the deified Pius to Aelius Marcianus, proconsul of Baetica. Here are the terms of the rescript: "The power of masters over their slaves certainly ought not to be infringed and there must be no derogation from any man's legal rights. But it is in the interest of masters that those who make just complaint be not denied relief against brutality or starvation or intolerable wrongdoing. Therefore, judicially examine those who have fled the household of Julius Sabinus to take refuge at the statue and if you find it proven that they have been treated more harshly than is fair or have been subjected to infamous wrongdoing, then issue an order for their sale subject to the condition that they shall not come back under the power of their present master. And if he should practice fraudulent evasion of my determination [on this point], let him understand that I shall bring more severe retribution on the deed."

The deified Hadrian also once ordered the relegation of one Umbricia, a lady of family, for the five-year census period on the ground that she had for the most trifling reasons subjected her serving women to appalling treatment.

3 GAIUS, *Institutes, book 1:* Also in our *potestas* are our children whom we have begotten in lawful wedlock. This right over our children is peculiar to Roman citizens.

4 ULPIAN, *Institutes, book 1:* For of Roman citizens some are heads of households (*patres familiarum*), some are sons-in-power (*filii familiarum*), some are female heads of households (*matres familiarum*), and some are daughters-in-power (*filiae familiarum*). Heads of households are those who are in their own power (*potestas*), whether they are over or under the age of puberty; female heads of households are in like case; sons-in-power and daughters are persons who are in someone else's power. For whoever is born of me and my wife is in my power: likewise, whoever is born of my son and his wife, that is, my grandson or granddaughter, is by the same token in my power, and my great-grandson and great-granddaughter, and so on down the generations.

5 ULPIAN, *Sabinus, book 36:* When a grandfather dies, his grandchildren through his son normally fall within the power of that son, that is, of their own father; in the same way also, great grandchildren and so on either come into the power of that son, if he is alive and has remained within the family, or they come into the power of that ancestor who is above them within the *potestas*. This rule applies not only in the case of natural children but also in the case of adoptive ones.

6 ULPIAN, *Sabinus, book 9:* Our definition of son is he who is born of a man and his wife. But if we suppose that a husband has been away for a spell, let us say, ten years, and has on his return found a year old boy in his house, we agree with Julian's opinion that this child is not the son of the husband. Julian, on the other hand, says that we should not listen to someone who has stayed constantly with his wife but who refuses to recognize her child as his own. But on this my opinion, which Scaevola also holds, is that a child born in a man's house even with full knowledge of the neighbors is not that man's son if it is proved that the husband for some time has not slept with his wife because of the onset of an infirmity or for any other reason or if the state of health of the head of the household (*pater familias*) was such that he had become impotent.

7 ULPIAN, *Sabinus, book 25:* If some penalty has been inflicted on a father [who is a son-in-power] whereby he loses his citizenship or is penally enslaved, there is no doubt that the grandson succeeds to the position of that son.

8 ULPIAN, *Sabinus, book 26:* Though a man be insane, his children are nevertheless in his power. The same, indeed, goes for all parents who have children in power. For since the right of power over one's family has been established by received custom and since nobody can resign his power, save if children have left the family in those cases determined by usage, it is utterly indubitable that the people we were speaking about remain in power. Accordingly, he will not only have in his power those children whom he begot before his madness but also any who were conceived before, but born during, his period of madness. But what if while he is mad his wife conceives by his agency? The question is whether in this case the son is born into his power. Well, although a madman is not able to take a woman as his wife, yet he is able to retain his married status. And since this is the case, he shall have that son in his power. Further, if the wife becomes mad, the child conceived by her before her insanity is born in power. But also the child conceived during her insanity, her husband being not mad, is undoubtedly born in power, because the marriage remains in force. But even if both man and wife were to be insane at the time of intercourse and she were then to conceive, the offspring would be born in the father's power as if the last traces of free will remained alive in them when insane. For since the marriage stands when one or other is mad, it stands when both are. 1. The father who is mad does indeed so fully retain his legal power that there still accrues to him the beneficial interest in whatever his son has acquired.

9 POMPONIUS, *Quintus Mucius, book 16:* The son-of-a-family (*filius familias*) is deemed to be a head of household (*pater familias*) for purposes of state, for example, in order that he may act as a magistrate or may be appointed a tutor.

10 ULPIAN, *Lex Julia et Papia, book 4:* If a judge has ordained that nurture or aliment ought to be forthcoming, it must be said that it remains an open question as to the truth of the matter whether this be this man's lawful son or not. For, indeed, an action of alimentation raises no presumption as to the truth of that.

11 MODESTINUS, *Encyclopaedia, book 1:* Illegitimate or emancipated sons cannot be brought back into paternal power against their will.

7

ADOPTIONS AND EMANCIPATIONS AND THE OTHER FORMS OF RELEASE FROM POWER

1 MODESTINUS, *Rules, book 2:* Sons-in-power can be made such not only by nature but also by forms of adoption. The term "adoption" denotes a genus, which is divided into two species, of which one is called by the same word "adoption," the other *adrogatio.* Sons-in-power are subject to adoption; people who are *sui juris*, to *adrogatio.*

2 GAIUS, *Institutes, book 1:* Adoption in the generic sense occurs in two ways: either

by the emperor's authority or by command of a magistrate. It is by the emperor's authority that we adopt people who are *sui juris*. This species of adoption is called *adrogatio* because, on the one hand, the adopter is rogated, that is, asked, if he wishes the person he is about to adopt to be his own lawful son, and, on the other, the adoptee is rogated if he will allow that to happen. It is by command of a magistrate that we adopt people who are in the power of their own parent, whether being children of the first degree, as are son and daughter, or being of some lower degree, as grandson, granddaughter, or great-grandson, great-granddaughter. 1. The thing which both modes of adoption have in common is that even those who cannot have children of their own, for example, eunuchs, can adopt. The thing which is peculiar to the adoption of the kind which is effected through the emperor is that if a person who has children in his power gives himself to be adrogated, not only is he himself subjected to the power of the adrogator but so also are his children brought into the *potestas* of the same man as though they were his grandchildren.

3 PAUL, *Sabinus, book 4:* If a consul or a colonial governor is a son-in-power, it is established that he can be either emancipated or given in adoption in his own court.

4 MODESTINUS, *Rules, book 2:* It is Neratius's opinion that a magistrate before whom a statutory action-at-law (*legis actio*) is competent has power both to emancipate his own sons and to give them in adoption in his own court.

5 CELSUS, *Digest, book 28:* In adoptions, inquiry is made as to their wishes only of those who are *sui juris*. But if people are being given by their father into adoption, in relation to them the choice of both parties must be considered through their consenting or their failing to make objection.

6 PAUL, *Edict, book 35:* Whenever a grandson is adopted on the fiction that he is born of one's son, the son's consent is needed. Julian also writes in the same sense.

7 CELSUS, *Digest, book 39:* In a case of adoption, it is not necessary to secure authority for it from those among whom agnatic ties consequently come into being.

8 MODESTINUS, *Rules, book 2:* The rule previously in force that a curator's authorization should not be interposed in an *adrogatio* was rightly changed in the reign of the deified Claudius.

9 ULPIAN, *Sabinus, book 1:* Even a blind man can adopt or be adopted.

10 PAUL, *Sabinus, book 2:* If someone adopts a grandson on the fiction that he is born of a son whom he has in power, the son consenting to the adoption, he is not deemed to be born to the grandfather as *suus heres*, in as much as, on the death of the grandfather, he falls into the power of his own father.

11 PAUL, *Sabinus, book 4:* In the following case, an adoptive grandson does not come into the *potestas* of the deceased's son on the death of the grandfather: a person who had a son had afterward adopted a grandson as if he were that son's son, but the son's authorization was not secured.

12 ULPIAN, *Sabinus, book 14:* Someone who has been set free from his father's power cannot afterward honorably return into his power except by adoption.

13 PAPINIAN, *Questions, book 36:* In relation to practically every right, on the termination of the power of an adoptive father no trace of the past is left. Hence, paternal rank acquired by adoption is given up on the cessation of the adoptive relationship.

14 POMPONIUS, *Sabinus, book 5:* But even a grandson conceived and born of a son in the house of his adoptive father loses all rights through emancipation.

15 ULPIAN, *Sabinus, book 26:* If a head of household (*pater familias*) should be adopted, everything which belonged to him and which can be claimed by him is by tacit operation of law transferred to his adopter. Stating this more fully: his children who are in his power go with him. But also those of his children who by right of *postliminium* return [to full citizenship from being enslaved by an enemy] or who were *in utero* at the time of *adrogatio* are likewise brought into the power of the adrogator. 1. If a man who has two sons and has a grandson by each of them wishes to adopt one of the grandsons on the fiction that he is the son of the other son, he can do this by emancipating the grandson and then adopting him on the fiction that he is the son of the other son. For he does this as anyone at all, not as grandfather, and since the *rationale* is that he can adopt the child as though he were born of anyone at all, so also he can adopt the child as if born of the other son. 2. In cases of *adrogatio*, the scrutiny of the court is directed to the question whether perhaps the adrogator is less than sixty years old, because then he should rather be attending to begetting his own children—unless it should so happen that sickness or health is an issue in the case or there is some other just ground for *adrogatio*, such as his being related to the person he wishes to adopt. 3. Likewise, one ought not to adrogate several people unless on some just ground. And *adrogatio* of someone else's freedman or of an older person by a younger is out of the question.

16 JAVOLENUS, *From Cassius, book 6:* For adoption may take place as between those persons for whom the natural relationship could in principle hold good.

17 ULPIAN, *Sabinus, book 26:* Nor is it permissible for anyone to adrogate one whose affairs he has administered as tutor or curator, if the person to be adrogated is less than twenty-five years old. This is to obviate the risk of someone adrogating in order to avoid the duty of rendering accounts. Likewise, there must always be inquiry to forestall the risk of there being some immoral reason for adrogation. 1. Adrogation of *pupilli* is permissible only by those whom a natural blood tie or the most pure-minded affection has induced to think of adoption. In all other cases, it is banned, lest it lie in the power of tutors both to bring their tutorship to an end and to terminate a testamentary substitution made by a parent. 2. So in the very first place, there must be investigation as to the means of the *pupillus* and of the person who would like to adopt him, in order to found on a comparison of these a judgment whether the proposed adoption can be supposed beneficial to the *pupillus*. Second, it must be ascertained what way of life the person has who wants to bring a *pupillus* into his family. Third, what is the age of the would-be adopter? This should be discovered in order to assess whether he would do better to think of begetting children of his own rather than to be bringing somebody from a stranger's family into his parental power. 3. Furthermore, it has to be considered whether someone with one or more children of his own ought to be refused permission to adopt another, lest it should turn out either that those children whom he begot in lawful wedlock suffer a diminution in expectations of the kind which every child may build up by *obsequium* (dutiful conduct) or that the person adopted obtains less than it will be proper for him to get. 4. On occasion, a poorer person may be permitted to adopt a richer, if the sobriety of his way of life is clearly established and his affection honorable and clearly recognized. 5. But in these cases, the practice is for security to be given.

18 MARCELLUS, *Digest, book 26:* For there is a necessary precondition for acceding to a person's wish to adrogate a pupil-child, even when he has established a good case in other respects, namely this: he must give security to the government slave that he will make over any of the child's property which comes into his hands to those who would have had the right thereto had the child remained in his original status.

19 ULPIAN, *Sabinus, book 26:* No one doubts that these words in the standard form of security which must be given by an adrogator "who have the right to that thing" refer also to grants of liberty made in the secondary testament and *a fortiori* to such a

grant made to a slave who is substitutional heir. Legatees are also covered. 1. If the adrogator should have failed to give security, an *actio utilis* lies against him.

20 MARCELLUS, *Digest, book 26:* The security comes into effect if the *impubes* (child under the age of puberty) in question dies. And although one here speaks of the *pupillus* as a male, the same practice has to be observed in the case of a female.

21 GAIUS, *Rules, sole book:* For females also can be adrogated under imperial rescript.

22 ULPIAN, *Sabinus, book 26:* If the adrogator dies leaving an adoptive son under the age of puberty and if he, in turn, dies soon thereafter still under that age, are the heirs of the adrogator then liable as above? The answer has to be that the heirs also have to make restitution of the property of the child and the quarter in addition. 1. But I am asked if an adrogator can appoint a substitute heir to the child; I think such substitution is not allowed, except perhaps in relation exclusively to the quarter of his goods which the child gets, and only on condition that the substitution take effect earlier than the age of puberty. But if he leaves the property to the child on a *fideicommissum*, on trust to hand over the property at some future date, such a *fideicommissum* ought not to be upheld, because this property has not come to the child by the decision of the deceased, but by the providence of the emperor. 2. All these propositions hold good whether the *adrogatio* of the *pupillus* was as a son or as a grandson.

23 PAUL, *Edict, book 35:* A person given in adoption becomes cognate to everyone to whom he becomes agnate, and not to those to whom he does not become agnate. For adoption confers an agnatic tie, not a blood tie. So if I adopt a boy, my wife is not in the place of mother to him; for he does not become agnatically related to her, and accordingly, she does not become cognate with him either. Likewise, my mother does not have the place of grandmother in relation to him, since he does not become agnate to those who are outside my family. But he whom I adopt does become brother to my daughter, since my daughter is in my family. And, of course, they are also within the prohibited degrees of marriage.

24 ULPIAN, *Disputations, book 1:* A person can be adrogated neither in his absence nor without his consent.

25 ULPIAN, *Opinions, book 5:* After the death of a daughter who had been living as a *mater familias* as if lawfully emancipated and who had appointed testamentary heirs before her death, her father is estopped from initiating proceedings which would give the lie to his own act by raising the allegation that he did not carry out a lawful emancipation or did not do so in the presence of witnesses. 1. No one can either adopt or adrogate in his absence nor accomplish any solemn act of that sort through an agent.

26 JULIAN, *Digest, book 70:* The adoptive son of my emancipated son will not be my grandson.

27 JULIAN, *Digest, book 85:* The offspring of an adoptive son acquires the same position in civil law as if he were himself adopted.

28 GAIUS, *Institutes, book 1:* A man who has in his *potestas* a son and through him a grandson has a free choice as to releasing the son from his power while retaining the grandson or *vice versa* as to keeping the son in power while manumitting the grandson or as to making them both *sui juris*. The same propositions we may take as read in relation to the great-grandson.

29 CALLISTRATUS, *Institutes, book 2:* If a natural father were unable to speak but could by some other means than speech make clear his wish to give his son in adoption, the adoption is thereby validated as if it had been carried out in strict legal form.

30 PAUL, *Rules, book 1:* Even bachelors can adopt sons.

31 MARCIAN, *Rules, book 5:* A son who is in his father's power is unable by any means to compel his father to emancipate him, whether he be a natural or an adoptive son.

32 PAPINIAN, *Questions, book 31:* On occasion, however, a [boy adopted under the age of puberty] is entitled to a hearing if after the age of puberty he should wish to be emancipated; and the matter falls to be determined by a judge after a full examination of the case. 1. The Emperor Titus Antoninus laid down in a rescript that a tutor should be permitted to adopt his own stepson, being tutor to him.

33 MARCIAN, *Rules, book 5:* [The rescript continues:] If he [the stepson] on attaining puberty proves that it is not in his interest to be subjected to the power of the other, fairness demands that he be emancipated and thus recover his former legal position.

34 PAUL, *Questions, book 11:* It has been asked if there is any actionable right in a case where I gave a son to you in adoption subject to the condition that you should give him back to me in adoption after, say, three years. Labeo holds that there is nothing actionable here, since it is not at all agreeable to our customs that someone have a temporary son.

35 PAUL, *Replies, book 1:* A person's rank is not lowered by adoption, but it is raised. Thus, even on adoption by a plebeian a senator remains a senator; and the same goes for the son of a senator.

36 PAUL, *Views, book 18:* It is settled law that a son can be emancipated by his father anywhere at all with valid effect that he leaves his father's power. 1. It has been decided that the act of manumitting a son or of giving one in adoption can be validly executed before a proconsul even in a province not allotted to him.

37 PAUL, *Views, book 2:* One can adopt somebody as a grandson even though one has no son. 1. One cannot adopt for a second time somebody one has previously adopted but subsequently emancipated or given in adoption.

38 MARCELLUS, *Digest, book 26:* A legal defect in an adoption can be cured by imperial confirmation of the adoption.

39 ULPIAN, *Duties of Consul, book 3:* For the deified Marcus issued to Eutychian a rescript in these terms: "Whether you ought to gain what you seek will be determined by the judges after examination of those who contest the matter, that is, those who would be harmed by confirmation of the adoption."

40 MODESTINUS, *Distinctions, book 1:* On the adrogation of a head of household (*pater familias*), those children who were in his power become grandchildren to the adrogator and come into his power at the same moment as does their father. But the same proposition does not apply in a case of adoption; for then the grandchildren are retained in the natural grandfather's power. 1. Not only when someone is adopting but also when he is adrogating, he must be older than the person he is making his son by *adrogatio* or by adoption. What is more, he must be of complete puberty, that is, he must be eighteen years older than the person in question. A eunuch can by *adrogatio* obtain for himself a *suus heres*; his bodily defect is no hindrance to him.

41 MODESTINUS, *Rules, book 2:* If a father emancipates a son through whom he has a grandson-in-power, then afterward adopts that son, the grandson does not revert to his own father's power on the death of the grandfather. Nor does a grandson revert to his own father's power if the grandfather had given the father in adoption while retaining the grandson and subsequently readopted the father.

42 MODESTINUS, *Encyclopaedia, book 1:* We can give in adoption even an infant.

43 POMPONIUS, *Quintus Mucius, book 20:* Adoptions can take place not only of sons

but also of those who take a grandson's place, in the sense that someone is to be deemed our grandson as if he were born to a son, even an indeterminate one.

44 PROCULUS, *Letters, book 8:* Suppose that someone who has a grandson through a son has adopted someone as an adoptive grandson; in that case, I am not of the opinion that there will be legal consanguinity as between the grandsons on the death of the grandfather. But if the adoption took place on the terms that he should be grandson by statutory right, being deemed to have been born of his son Lucius and of the mother of Lucius's family, I hold the opposite opinion.

45 PAUL, *Lex Julia et Papia, book 3:* There are transferred to an adoptive father any legal burdens incumbent on the person given in adoption.

46 ULPIAN, *Lex Julia et Papia, book 4:* A son begotten by me while I was in slavery can be brought into my power by the emperor's grant of a benefit. That he remains of freedman status is however not open to doubt.

8

"THINGS" SUBDIVIDED AND QUALITATIVELY ANALYZED

1 GAIUS, *Institutes, book 2:* The main division of things distinguishes them under two heads: some things are subject to divine right, others to human. Those subject to divine right are, for example, sacred things and religious things. Sanctified things (*res sanctae*) also, such as city walls and portals, are in a certain degree subject to divine right. For what is subject to divine right is not anyone's property. But something which is subject to human right does in most cases belong within someone's property, though it can happen that it is not so. For things comprising a deceased person's estate are not in anyone's ownership until someone becomes heir. Those things which are subject to human right are either public or private. Public things are considered to be nobody's property for they belong corporately to the whole community. Private things are things which belong to individuals. 1. Further, some things are corporeal, others incorporeal. Corporeal things are those which can be touched, such as land, a slave, a garment, gold, silver, and in short innumerable other things. Incorporeal things are things which cannot be touched, being of the sort which exist only in contemplation of law, such as the estate of a deceased person, a usufruct, and obligations however taken on. Nor is it relevant that in an estate are contained corporeal things. For the fruits which are gathered from a piece of land are also corporeal, and what we are owed under some obligation or other is most commonly corporeal, for example, land, a slave, money. The fact is that the right of succession itself, the right to use and to fruits itself, and the right itself correlative to the obligation is in each case incorporeal. Among this number also are the rights attaching to landholdings both urban and rural which bear the name also of servitudes.

2 MARCIAN, *Institutes, book 3:* Some things belong in common to all men by *jus naturale*, some to a community corporately, some to no one, but most belong to individuals severally, being ascribed to someone on one of various grounds. 1. And indeed by natural law the following belong in common to all men: air, flowing water, and the sea, and therewith the shores of the sea.

3 FLORENTINUS, *Institutes, book 6:* Likewise, pebbles, gems, and so on which we find on the shore forthwith become ours by natural law.

4 MARCIAN, *Institutes, book 3:* No one, therefore, is prohibited from going on to the

seashore to fish, provided he keeps clear of houses, buildings, or monuments, since these are not, as the sea certainly is, subject to the *jus gentium.* So it was laid down by the deified Pius in a rescript to the fishermen of Formiae and Capena. But almost all rivers and harbors are public property.

5 GAIUS, *Everyday Matters or Golden Words, book 2:* The right to use river banks is public by *jus gentium* just as is the use of the river itself. And everyone is at liberty to run boats aground on them, to tie ropes on to trees rooted there, to dry nets and haul them up from the sea, and to place any cargo on them, just as to sail up or down the river itself. But ownership of the banks is in those to whose estates they connect. Accordingly, trees growing in them belong to those same proprietors. 1. Those who fish in the sea are at liberty to erect a hut on the shore in which to take shelter.

6 MARCIAN, *Institutes, book 3:* This principle is taken as far as to the conclusion that people who build there are constituted owners of the ground, but only as long as the building remains there. Conversely, when the building collapses then, as if by right of *postliminium,* the place reverts to its former condition, and if someone builds in that same place, it becomes his. 1. Things in *civitates* such as theaters and stadiums and such like, and anything else which belongs communally to the *civitates* are property of the community corporately not of separate individuals. Thus, even the communal slave of the *civitas* is considered to belong not to individuals in undivided shares but to the community corporately, and accordingly, the deified brothers ruled in a rescript that a slave belonging to the *civitas* can be put to the torture as readily to inculpate as to exculpate a citizen. So too does a freedman of the *civitas* not have to seek special relaxation of the edict, if he should summon one of the citizens before the praetor (*in jus vocatio*). 2. Things sacred or religious or sanctified are no one's property. 3. Things sacred are then those which have been consecrated by an act of the whole people, not by anyone in his private capacity. Therefore, if someone makes a thing sacred for himself, acting in a private capacity, the thing is not sacred but profane. When a temple has once been consecrated, then even on destruction of the building the site remains sacred. 4. Being religious is, however, a quality which every single person can impose on a site of his own free will by burying a corpse in a place which one owns. When a sepulcher is held in common ownership, one co-owner may bury a corpse even against the will of the others. It is lawful to inter a body in someone else's land with the owner's permission, and even though he give approval after the interment of the corpse, the place becomes religious. The better view is that a Cenotaph also is a religious place, Virgil being a witness to this point.

7 ULPIAN, *Edict, book 25:* But the deified brothers issued a rescript to the contrary on this point.

8 MARCIAN, *Rules, book 4:* Whatever has been defended and secured against human mischief is sanctified (*sanctum*). 1. This term (*sanctum*) derives from the word *sagmina. Sagmina* are certain herbs which legates of the people of Rome customarily carry to ward off outrages, just as ambassadors of the Greeks carry the things which are called *cerycia.* 2. Cassius reports that Sabinus gave the correct opinion that in the case of municipalities also [as well as the city of Rome] the walls are sanctified and that there ought to be a prohibition on building onto them.

9 ULPIAN, *Edict, book 68:* Sacred places are those which are dedicated publicly

whether within the *civitas* or in the countryside. 1. It must be understood that a public place only becomes a sacred one when the emperor has dedicated it or has granted a power of dedicating it. 2. A noteworthy point is that a sacred place is one thing, but a *sacrarium* is quite another. A sacred place is one which has been consecrated; a *sacrarium* is a place in which sacred things are laid up, as can be the case even in a private building, and those who wish to free such a place from its religious tie do so customarily by evocation of the sacred things therefrom. 3. Properly speaking, we use the term "sanctified" (*sancta*) of objects which are neither sacred nor profane but which are confirmed by some kind of sanction. Thus, laws are sanctified; for they are supported by a kind of sanction. Anything which is supported by some kind of sanction is sanctified, even though it be not consecrated to a god. Sometimes in sanctifying provisions it is added that anyone who commits some offense in the sanctified place shall be liable to capital punishment. 4. It is unlawful to rebuild the walls of municipalities without authorization by the emperor or the governor, nor to build anything onto or on top of them. 5. A sacred thing is not subject to pecuniary valuation.

10 POMPONIUS, *From Plautius, book 6:* Aristo says that just as a building erected in the sea becomes private property, so too one which has been overrun by the sea becomes public.

11 POMPONIUS, *Readings, book 2:* It is an offense punishable with capital punishment to violate city walls, for example, by moving up ladders and climbing over or by any other means. It is unlawful for Roman citizens to use any other egress than the portals; for to do so is a hostile act and an abomination. Indeed, the tradition is that Romulus's brother Remus was slain on the very ground that he tried to climb out over the city wall.

9

SENATORS

1 ULPIAN, *Edict, book 62:* That a man of consular rank always takes precedence over a lady of consular rank is a point no one doubts. But whether a man of prefectorial rank takes precedence over a lady of consular rank remains to be seen. I should think he does, because greater dignity inheres in the male sex. 1. "Consular," of course, is a term we apply to ladies married to men who have been consuls. Saturninus adds also their mothers, but no case of this is reported from anywhere, nor has this ever been the received practice.

2 MARCELLUS, *Digest, book 3:* Cassius Longinus is not of opinion that it is permissible for someone who has been removed from and not yet restored to the senate on account of grave misconduct to act as judge or to bear witness, this being forbidden by the Julian enactment on extortion (the *lex Julia repetundarum*).

3 MODESTINUS, *Rules, book 6:* The deified Severus and Antoninus gave permission whereby a senator who had been removed from the senate need not suffer *capitis deminutio* but might stay in Rome.

4 POMPONIUS, *Readings, book 12:* He who is unworthy of an inferior rank is all the more unworthy of a superior one.

5 ULPIAN, *Lex Julia et Papia, book 1:* We must understand as being "a senator's son" not only one who is naturally so but also an adoptive son. Neither will it make any difference from whom or by which process he was adopted nor does it make any difference whether the senator adopted him when already confirmed in senatorial rank or did so before attaining it.

6 PAUL, *Lex Julia et Papia, book 2:* "Senator's son" includes someone whom the senator has taken in adoption, so long as he remains within his family. But on being emancipated he thereby forfeits the description son. 1. When a son is given in adoption by a senator to a person who is of inferior rank, the son is regarded as being the son of a

senator, because senatorial rank is not lost by adoption into an inferior rank—no more than one would cease to be of consular standing in such a case.

7 ULPIAN, *Lex Julia et Papia, book 1:* It is settled that a son emancipated by his father, a senator, is treated as if he were a senator's son. 1. Likewise, Labeo writes that the posthumous son whose father was a senator is deemed a senator's son. But if someone is conceived and born after his father has been demoted from the senate, Proculus and Pegasus opine that he is not to be deemed a senator's son, and their opinion is correct. For indeed you cannot properly call someone a senator's son when his father was demoted from the senate before he was born. Yet if someone were conceived before his father's demotion from the senate and were born after his father's loss of rank, there is more of a ground for his being deemed a senator's son. For there are many decisions to the effect that the time of conception is what ought to be kept in view. 2. If a man has a senator both as father and as grandfather, he is considered as being both a senator's son and a senator's grandson. But if his father lost that rank before his conception, it may be asked whether, although not deemed a senator's son, he ought nevertheless to be considered the grandson of a senator. The better view is that he ought to be, so that his grandfather's dignity may advance him rather than his father's fall from grace be an obstacle to him.

8 ULPIAN, *Fideicommissa, book 6:* The description "most honorable persons" includes women married to persons who are most honorable. But the term "most honorable women" does not cover the daughters of senators except if they have come by husbands who are most honorable. Husbands confer on their wives the dignity of being most honorable, but parents do so only until such time as they have formed a marital union with a plebeian. Thus, a woman will be a most honorable so long as she is married to a senator or a most honorable or is separated from him but has not married anyone else of inferior rank.

9 PAPINIAN, *Replies, book 4:* The fall of a father does not make a senator's daughter who has gone through a marriage ceremony with a freedman his wife. The rank attained by children is not taken away by their father's fall when he is demoted from the senate.

10 ULPIAN, *Edict, book 34:* We must understand as being senators' children not only sons of senators but all such as are said to be offspring of them or of their children, whether those who are considered their parents are natural or adoptive children of senators. But if someone was born of a senator's daughter, we have to look into his father's standing.

11 PAUL, *Edict, book 41:* Although senators are deemed to have their domicile in the city, nevertheless, they are also considered as having a domicile in the place from which they originated. For their rank is seen to have given them rather than additional domicile than a change of domicile.

12 ULPIAN, *Census, book 2:* Women who previously have been married to a man of consular rank generally try to prevail on the emperor to let them, albeit very exceptionally, keep their consular rank despite a subsequent marriage to a man of lower rank. One case of which I know: the Emperor Antoninus gave this indulgence to his cousin Julia Mamaea. 1. By senators we should understand people whose descent from patricians and consuls stretches back to illustrious men, because these and only these men are entitled to deliver speeches in the senate.

10

DUTIES OF CONSUL

1 ULPIAN, *Duties of Consul, book 2:* It is a duty of the consul to offer counsel to those who wish to execute a manumission. 1. Consuls acting by themselves singly also carry out manumissions, but one cannot have names listed before one consul and

then execute the manumission before the other. For manumissions are separate acts in law. Certainly, if in any case one consul cannot carry out a manumission, being prevented by infirmity or some other legitimate ground, then according to a ruling of the senate his colleague can give clearance to the manumission. 2. There is absolutely no doubt that consuls can manumit their own slaves in their own courts. But if a consul happens to be less than twenty years of age, he cannot manumit in his own court, since he is himself the person who under the *senatus consultum* carries out the examination with a view to counseling [on the manumission]. He can however manumit in his colleagues' court if he proves the case [for manumission].

11

DUTIES OF PREFECT OF THE PRAETORIAN GUARD

1 AURELIUS ARCADIUS CHARISIUS, *Master of the Rolls, Duties of Praetorian Prefect, sole book:* It is necessary to give a brief reminder of the process whereby it originally emerged that the office of praetorian prefect was set up. According to tradition, attested by certain writers, the prefects of the praetorian guard were anciently appointed in place of masters of the horse (*magistri equitum*). For whereas in the times of our ancestors supreme power was temporarily entrusted to dictators, and they chose masters of the horse who wielded power in the second degree after the dictator as associates sharing in their burdens for military purposes; so too when governance of the commonwealth was transferred to permanent emperors, they chose prefects of the praetorian guard, on the analogy of the masters of the horse. A fuller range of authority was given to them with a view to procuring improvement in public discipline. 1. The powers of the prefects, which started from these swaddling clothes, have deservedly expanded so greatly that there is no possibility of appeal from the prefects of the praetorian guard. For although it was previously a question whether it was permissible to appeal from the prefects, and although this was permissible *de jure* and there did exist some precedents of people who had appealed, yet subsequently the right of appeal was rescinded by an imperial decision read out in public. For the emperor declared his faith that those men, who were brought to the greatness of this office on account of their exceptional industriousness after thorough testing of their fidelity and seriousness, would judge no differently on behalf of the wisdom and the beacon of his own exalted rank than he would have judged himself. 2. The praetorian prefects have been endowed with a further privilege, whereby there can be no *restitutio in integrum* upsetting their sentences in favor of those under the age of majority, save by the praetorian prefects themselves.

12

DUTIES OF PREFECT OF THE CITY

1 ULPIAN, *Duties of Prefect of the City, sole book:* All criminal matters whatsoever have been successfully claimed by the prefecture of the city as its own domain, and not only the crimes which are committed within the city but also those which have been committed outside the city but anywhere in Italy. So it is declared in a letter sent by the deified Severus to Fabius Cilo, prefect of the city. 1. He is to give a hearing to slaves who have taken refuge by the statue or who have paid with their own money for their manumission, when they make complaints against their masters. 2. But also when needy former masters (*patroni*) are raising complaints about the conduct of their freedman, he is to grant a hearing, especially if they claim to be ill and request the support of their freedmen. 3. They have power of relegation and of deportation to any island designated by the emperor. 4. In the opening passage of that same

letter, the following is written: "Since we have entrusted our city to you by way of *fideicommissum*," therefore whatever crime is committed within the city evidently belongs to the jurisdiction of the prefect of the city. Besides this, any crime committed within the hundredth milestone belongs to his jurisdiction, but anything an inch beyond the milestone falls outside his scrutiny. 5. A man must have a hearing before the prefect if he would allege that his slave has committed adultery upon his wife. 6. He also has power to hear cases under the interdict *quod vi aut clam* or the interdict *unde vi*. 7. Another type of case commonly remitted to the prefecture is that of tutors or curators who, having committed malversations in their tutorship or curatory, deserve more severe punishment than would be sufficiently provided by the *infamia* consequent on *de suspecto* proceedings. Such are the cases of people against whom it can be proven that they grabbed a tutorship by paying money for it or that in return for a bribe they took pains to secure that someone was given an unsuitable tutor or that they understated the amount of the ward's estate in consultation over disclosure of its contents or that they alienated property of the ward in a plainly fraudulent way. 8. The statement that the prefect is supposed to give a hearing to slaves making complaints against their masters is one we should accept in this sense: not as to slaves making an accusation against masters (for this is in no way permissible for a slave to do save in specified cases), but in the event that they should make a truthful expostulation and if they were to show in the prefect's court a case of savagery or of harshness or of starvation whereby their masters were oppressing them, or a case of obscenity in performance of which the masters had exercised or were exercising compulsion. This duty was given to the prefect by the deified Severus, the duty of protecting human chattels from prostitution. 9. Further, it is a duty of the prefect to insure that moneylenders deal honestly in all their business and observe relevant prohibitions. 10. When a patron alleges that his freedman has committed an act of contempt toward him or complains that his freedman is contemptuous in attitude or avers that he or his wife or children have suffered outrageous insult at the freedman's hands or anything of this sort, an approach is normally made to the prefect of the city, and his practice is to subject the freedman to correction according to the seriousness of the complaint, whether issuing a reprimand or ordering a flogging or going further in the way of punishment. For, indeed, freedmen often have to be punished. To be sure, if a patron can show that a charge was laid against him by his freedman or a conspiracy got up with his enemies, the punishment of being sent to the metal mines ought to be imposed on the freedman. 11. Supervision of the whole meat trade to secure that meat is on offer at just prices is another matter in the care of the prefecture, and thus the pig market is also under the prefect's supervision. Indeed, dealings in other cattle and herd animals, so far as they bear upon consumer offers of this kind, belong under his supervision. 12. Keeping the peace among the citizens and maintaining order at public spectacles are also held to belong to the prefect's supervisory function. Indeed, his duty is to keep military guardsmen stationed at various places to preserve the peace of members of the public and keep him informed what is going on and where. 13. The prefect of the city has power to ban people from both the city and any other regular districts, from trading, from professions, from advocacy, and from the law courts, for a time and in perpetuity. This power includes banning from public spectacles, and in the event of banishing someone from Italy he has power also to remove him from his own province. The deified Severus laid down in a rescript that persons alleged to have formed an unlawful association are also to be accused before the prefect of the city.

2 PAUL, *Duties of Prefect of the City, sole book:* Applications to him can also be made by or against bankers and in money cases generally, under a letter of the deified Hadrian.

3 ULPIAN, *Edict, book 2:* When the prefect of the city has crossed the boundary of the city, he has no official power, but he can appoint a judge outside the city.

13

DUTIES OF QUAESTOR

1 ULPIAN, *Duties of Quaestor, sole book:* The original occasion for establishing the quaestors was long long ago and almost earlier than all the other magistracies. Indeed, Gracchanus Junius reports in the seventh of his books on magisterial powers that Romulus himself and Numa Pompilius had each two quaestors whom they appointed not on their own say-so, but by popular election. But much as it may be doubted whether there was a quaestor during the reigns of Romulus and Numa, it is quite certain that there were quaestors when Tullus Hostilius was king. Quite the more widely held opinion among the ancients is that Tullus Hostilius was the first to bring quaestors into government. 1. That from the beginning they were called quaestors from the kind of inquests they conduct is stated in the writings of Junius and of Trebatius and of Fenestella. 2. The custom used to be for some of the quaestors to be allocated their provinces by lot, under a *senatus consultum* which was passed during the consulship of Decimus Drusus and Porcina, but clearly not all the quaestors drew lots for their provinces; for the emperor's candidates were excepted. They, in fact, fulfill their function solely in reading out imperial writings in the senate. 3. At the present time, the rule has come to be that both patricians and plebeians indifferently can be appointed quaestors; for this office amounts to the first step on the ladder of holding political office and of taking part in senate debates. 4. Of the quaestors, as we have said, some are the ones who used to be called emperor's candidates and who read out his letters in the senate.

14

DUTIES OF PRAETORS

1 ULPIAN, *Sabinus, book 26:* When the praetor is a son-in-power, his father can perform manumissions in his court despite that fact.

2 PAUL, *Sabinus, book 4:* Indeed, it is settled law that he himself can be emancipated or given in adoption in his own court.

3 ULPIAN, *Sabinus, book 38:* Barbarius Philippus, while he was a runaway slave, stood as a candidate for the praetorship at home and became praetor designate. His servile status was no kind of obstacle, says Pomponius, to his being praetor; as a matter of fact he did perform the functions of the praetorship. But let us consider: if a slave, so long as his status was unknown, exercised the praetorian responsibilities, what are we to say? That the edicts and decrees he issued would be null and void? Would that be to the benefit of those who had sued in his court either on statutory grounds or by some other right? The truth, I think, is that none of these edicts, decrees, and so forth, would be deemed nullities. For this is the more humane view. For the Roman people certainly was competent to have conferred this power on a slave, but, of course, if it had known he was a slave, it would have set him free. The right to do so then must all the more be held valid in the case of the emperor.

4 ULPIAN, *All Seats of Judgment, book 1:* The praetor has no power either to appoint himself as a tutor or to appoint himself a special judge.

15

DUTIES OF PREFECT OF THE CITY GUARD

1 PAUL, *Duties of Prefect of the City Guard, sole book:* In the times of our ancestors, a triumvirate had charge of guarding against fires. They were called nightmen on account of the fact that they worked while others slept. On occasion, aediles and tribunes of the *plebs* took a hand in this work. There was, however, a team of government slaves stationed around the portals and city walls, whence they could be called out at need. There had also been privately maintained teams for putting out fires either for payment or gratis. In the end, the deified Augustus preferred to take the care of this matter into his own hands

2 ULPIAN, *Duties of Prefect of the City Guard, sole book:* because several fires had broken out on one day.

3 PAUL, *Duties of Prefect of the City Guard, sole book:* For he believed that it fitted no one more than Caesar to watch over the safety of the commonwealth, and that no one else was up to the job. Accordingly, he established seven cohorts at suitable places, on the principle that each single cohort watched over two districts, there being a tribune in charge of each cohort, and over them all a man of the *spectabile* class, called the prefect of the city guard. 1. The prefect of the city guard tries cases of arsonists, burglars, thieves, robbers, and resetters except if it happens that the offender is so vicious and notorious that his case is remitted to the prefect of the city. Because very often houses go on fire through the negligence of the occupiers, he either chastises by beating those who have kept their fire too carelessly, or he gives them a severe dressing down and warning then lets them off the beating. 2. Housebreakings happen mostly in tenement blocks or in the warehouses where people store the most precious part of their fortunes; a store-chamber or a cupboard or a chest gets broken into. The custodians are very often punishable, just as indeed the deified Antoninus stated in a rescript to Erucius Clarus. For he said that Erucius could, when warehouses were burgled, hold an inquest concerning the slaves who were on guard, even though the emperor himself should have a part share in them. 3. It should be realized that the prefect of the city guard is obliged to keep watch throughout the whole night and to keep on the prowl accompanied and properly shod. 4. And equipped with hooks and axes, and he is obliged to admonish all occupiers not to let fires break out through some carelessness. Moreover, he is under orders to warn everyone to have a supply of water ready in an upstairs room. 5. As against the *capsarii* also, who engage for hire to look after people's clothes at the baths, he has been set up as a judge with authority himself to hold a hearing if they should have dealt fraudulently in looking after the clothes.

4 ULPIAN, *Duties of Prefect of the City, sole book:* The Emperors Severus and Antoninus issued rescripts to Junius Rufinus, prefect of the city guard, in the following terms: "You can also order to be beaten with sticks or flogged those flat-dwellers who have kept their house-fires carelessly. But those who are convicted of willful and malicious arson, you shall remit to our friend Fabius Cilo, prefect of the city. You ought to hunt down fugitive slaves and return them to their masters."

16

DUTIES OF PROCONSUL AND OF LEGATE

1 ULPIAN, *Disputations, book 1:* A proconsul holds his proconsular insignia wherever he is from the moment he leaves the city. But he only exercises power in that one province which has been assigned to him.

2 MARCIAN, *Institutes, book 1:* All proconsuls have jurisdiction from the very moment they leave the city, but not in contentious matters, only in consensual ones; for example, children and slaves can be manumitted before them, and adoptions effected. 1. Before the proconsul's legate, however, no one can execute a manumission, since he has no such jurisdiction.

3 ULPIAN, *Sabinus, book 26:* Nor can one effect an adoption before him; for certainly he cannot preside over a statutory action-at-law (*legis actio*).

4 ULPIAN, *Duties of Proconsul, book 1:* The proconsul has to watch that he does not overburden the province through too lavish hospitality; so warned our present emperor and his father in a rescript to Aufidius Severianus. 1. None of the proconsuls may have grooms of his own; instead of these, soldiers perform that service in the provinces. 2. While it is indeed better that a proconsul go out to his province without his wife, he can also do so with her, provided he is aware that during the consulship of Cotta and Messala the senate decided that for the future if any delinquency were committed by the wives of those who had gone off to take up office, they themselves would be held to account for it and to make satisfaction therefor. 3. The proconsul, before crossing the bounds into the province assigned to him, ought to send on an edict anent his own arrival; this should contain some commendation of himself, such as perhaps that he is on friendly terms with citizens of the province or is related to them, and, most important, it should excuse the inhabitants from coming to meet him either publicly or privately, on the ground that it is right and proper for everyone to receive him in their own country. 4. He will be doing the right and mannerly thing if he sends the edict to his predecessor and gives him notice on which day he will arrive over the boundary. For uncertainties and unexpected events are especially upsetting to provincials, and they interfere with business. 5. He must observe this point in making his entry, that he enters by that part of the province where such entries are customarily made, and that he pays attention to what the Greeks call *epidemiae* (stopping-off places) or *kataplous* (port of entry), whatever be the *civitas* to which he first comes or at which he first lands. The provincials set a high value on fidelity to that custom and to prerogatives of this kind. Some provinces even have it that the proconsul should come by sea. For example, the province of Asia, indeed carries it to this length that the present Emperor Antoninus Augustus on the entreaties of the Asians gave out a rescript imposing a requirement on the proconsul that he proceed to Asia by sea and that he land at Ephesus first of all the metropolitan centers. 6. After all these things, once he has entered the province, he ought to delegate his jurisdictional functions to his legate; but this he ought not to do before his entry into the province. For it is utterly absurd that someone should delegate to another what he does not have, delegating jurisdiction before taking it up himself (for the proconsul has no jurisdictional competence before he enters his province). But if someone should do so before entry, and should then remain of the same mind once he has entered, it must be held that the legate seems to have jurisdiction, not from that moment at which it was delegated to him, but from the moment of the proconsul's entry into the province.

5 PAPINIAN, *Questions, book 1:* It is sometimes possible for a proconsul to delegate jurisdictional functions, even though he has not yet arrived in the province. A case might be if he were to suffer some unavoidable delay on his journey, but the legate were to arrive right up to time in the province.

6 ULPIAN, *Duties of Proconsul, book 1:* Proconsuls commonly delegate to their legates the examination of prisoners also, that is, on the principle that they remit cases to the proconsul after a preliminary hearing of the prisoners, freeing by themselves those who are innocent. But this type of delegation is irregular; for no one indeed can transfer to another a power of the sword or of coercing other people granted to himself, nor therefore is the right to acquit accused persons transferable to someone before whom the accusation could not validly be laid. 1. As the proconsul has a free discretion to delegate or not to delegate jurisdictional functions, so by the same token the proconsul is entitled to terminate a mandate to exercise these functions, but

he ought not to do so without first consulting the emperor. 2. Legates ought not to consult the emperor, but their own proconsul, and it is his job to reply to the points of consultation put by his legates. 3. A proconsul is not absolutely obliged to decline gifts, but he should aim for a mean, neither sulkily holding completely back nor greedily going beyond a reasonable level for gifts. On this subject, the Deified Severus and the present Emperor Antoninus have most delicately given guidelines in a letter, whose words are as follows: "So far as concerns presents, attend to what we say: there is an old proverb 'neither everything nor every time nor from every person.' For certainly, it is unmannerly to accept from no one, but to take from everyone is utterly contemptible and to take everything offered is sheer greed." The provision contained in warrants of appointment that a proconsul or someone in another such office himself neither accept any gift or commission nor purchase anything save provisions as needed day by day, refers not to token presents, but to such things as go beyond the norm of hospitality. But neither may little presents be piled up to achieve the quality of substantial payments.

7 ULPIAN, *Duties of Proconsul, book 2:* If a proconsul arrives in some populous *civitas* or in the capital of the province, he ought without ill-grace to put up with hearing a commendation of the *civitas* and the singing of his own praises, since the provincial people hold that as a point of honor. He should also grant holidays according to the local customs and the practice which has previously obtained. 1. He should go on a tour of inspection of sacred buildings and public works to check whether they are sound in walls and roofs or are in need of any rebuilding. He should see to it that whatever works have been started, they are finished as fully as the resources of that municipality permit, he should with full formality appoint attentive people as overseers of the works, and he should also in case of need provide military attachés for the assistance of the overseers. Since a proconsul has the most complete judicial authority, there belong to him in person the powers of all those who exercise jurisdiction at Rome whether as magistrates or on an extraordinary commission.

8 ULPIAN, *Edict, book 39:* So that he has in the province authority greater than everyone else after the emperor.

9 ULPIAN, *Duties of Proconsul, book 1:* And there is in a province nothing which may not be admitted to process by his order. Of course, if there should be a case of a pecuniary kind involving a fiscal interest which is the concern of the emperor's procurator, he would do better to leave well alone. 1. Where a decree is required, it will not be valid for the proconsul to dispose of the matter by a writ; for all things whatsoever which require judicial hearing of a case are incapable of being disposed of by writ. 2. It behooves a proconsul to be patient with advocates, but to do so shrewdly, so as not to seem contemptuous; nor should he disguise his feelings on the point if he should detect people who are committing maintenance or champerty, and he should only allow to address the court those to whom his edict gives the right of audience. 3. Matters which a proconsul can dispose of *de plano* (out of court) are these: the issuance of orders for proper respect to be shown to parents, to patrons, and to the children of patrons; deterrent warnings can be validly issued *de plano* to a son whose father has laid an information against him to the effect that his conduct has not been as it ought to have been; and the same goes for correction of a disrespectful freedman, whether verbally or by chastisement with rods. 4. Accordingly, he is duty bound to watch that he has some system of ranking applications, and in fact to make sure that everyone's request gets a hearing and that it does not turn out that while the high rank of some applicants gets its due and unscrupulousness gets concessions middling people do not put their requests, either having quite failed to find advocates or having instructed less well-known ones, whose position is not one of any standing. 5. It will also be his duty in most cases to allow the use of counsel by petitioners who are: women, *pupilli*, those otherwise under a disability, or those who are out of their minds, if anyone seeks this for them. Even if there be no one to seek it, he ought to

give them it anyway. But if someone should represent himself as being unable to find an advocate because of his opponent's power, it is just as much incumbent on the proconsul to give him one. But it is wrong for anyone to be oppressed by the sheer power of his opponent; in fact, it tends to harm the reputation of the person who has charge of the province, if someone gets away with such overpowering behavior that everyone is afraid to take instructions as an advocate against him. 6. The foregoing remarks apply in common to all colonial governors and should be taken to heart by them too.

10 ULPIAN, *Duties of Proconsul, book 10:* Appointees will do well to remember that a proconsul is duty bound to carry on all the business of government right up to the moment of his successor's arrival, for the proconsulship is unitary and the well being of the province demands that there be someone through whose authority the provincials may transact their business. And so one is obliged to go on administering justice until the arrival of one's successor. 1. In the *lex Julia* on extortion and in the rescript of the deified Hadrian to Calpurnius Rufus proconsul of Achaea, there is an admonition to a proconsul not to let his legate leave the province before himself.

11 VENULEIUS SATURNINUS, *Duties of Proconsul, book 2:* If a matter should arise which calls for one of the heavier punishments, the legate must refer it to the proconsul's court. For he has no right to apply the death sentence or a sentence of imprisonment or of severe flogging.

12 PAUL, *Edict, book 2:* A legate to whom jurisdictional functions have been entrusted has the right to appoint a judge.

13 POMPONIUS, *Quintus Mucius, book 10:* Proconsular legates do not have any jurisdiction as of right, but only such as may be given by express mandate of the proconsul.

14 ULPIAN, *Lex Julia et Papia, book 20:* Proconsuls are attended by no more than six *fasces.*

15 LICINNIUS RUFINUS, *Rules, book 3:* Proconsular legates also can grant tutors.

16 ULPIAN, *Edict, book 2:* A proconsul lays down his command on entering the gate of Rome.

17

DUTIES OF PREFECT OF EGYPT

1 ULPIAN, *Edict, book 15:* The prefect of Egypt does not lay down his prefectorship and the command which during Augustus's reign was given to him by statute on the model of the proconsulship, until his successor enters Alexandria, even if he has entered the province earlier; this is stated in his warrant of appointment.

18

DUTIES OF GOVERNOR

1 MACER, *Duties of Governor, book 1:* Governor (*praeses*) is a general term, and so proconsuls and imperial legates and all people who govern provinces, although they may be senators, are called governors. Proconsul is a special title.

2 ULPIAN, *Sabinus, book 26:* A governor can effect an adoption in his own court, just as he can emancipate a son or a slave.

3 PAUL, *Sabinus, book 13:* The governor of a province has authority only over the people of his own province, and that only while he is in the province. For the moment he leaves it, he is a private citizen. Sometimes he has power even in relation to nonresidents, if they have taken direct part in criminal activity. For it is to be found in the

imperial warrants of appointment that he who has charge of the province shall attend to cleansing the province of evil men; and no distinction is drawn as to where they may come from.

4 ULPIAN, *Edict, book 39:* The governor of a province has in the province authority greater than everyone else after the emperor.

5 ULPIAN, *All Seats of Judgment, book 1:* The governor of a province cannot in his own right appoint himself as a tutor any more than he can make himself a special judge.

6 ULPIAN, *Opinions, book 1:* Let the governor of a province forbid illicit exactions and forcible exactions and sales or guarantees extorted through fear, perhaps without payment of any price at all. Let the governor also see to it that no one shall be the victim of crooked gains or losses. 1. That government has been conducted on the basis of erroneous information is not a bar to establishing the truth. Accordingly, the provincial governor must pursue the course which it is appropriate for him to take, having faith in whatever facts will be proven. 2. The provincial governor should be religiously zealous in preventing more influential people from inflicting wrongs on those of lower station and in seeing that those who defend the latter are not framed up on charges of infamous crime when they are innocent. 3. The provincial governor must see to preventing and, in case of detection, to putting down illicit services which are forthcoming on the pretext of giving help to the armed forces while actually aimed at alarming the public, and he must prohibit unlawful exactions being made in the guise of levying tribute. 4. The provincial governor must make it a matter of especial concern that no one be prevented from carrying on any lawful business, that no one carry on prohibited activities and that no innocent persons have penalties imposed on them. 5. The provincial governor shall make provision so that men of small means do not suffer the injustices of having their single lamp or their scanty furniture taken from them for others' use on the pretext of quartering newly arrived officials or soldiers. 6. The provincial governor must see to it that things are not commandeered in the name of the military which do not actually serve the common needs of the soldiery, but which some of them are crookedly claiming to their own advantage. 7. Just as, on the one hand, a doctor is not to be held at fault merely on the occurrence of death, yet, on the other, an unskillfully executed operation is imputable to him; so too the wrong done by someone who resorts to deceit of others when in danger ought not to be held blameless on the pretext of human frailty. 8. Those who rule entire provinces have full power of the sword (*jus gladii*), and they are also permitted to send people to the metal mines. 9. If a provincial governor discovers that a fine which he has imposed cannot be paid out of the present means of those whom he so sentenced, there should be some relaxation in the requirement to pay, and a reining in of the improper zeal of the fine collectors. A fine remitted on account of poverty by those who govern provinces ought not to be exacted.

7 ULPIAN, *Opinions, book 3:* A provincial governor ought to compel owners to repair buildings, sufficient ground having been shown on inspection of them. If they refuse, he should by the use of some competent remedy against them patch up the unsightly appearance of the buildings.

8 JULIAN, *Digest, book 1:* I have often heard our present emperor saying that a rescript, which states, "you may approach the officer who presides over the province," does not impose on the proconsul or legate or provincial governor the duty of personally undertaking the judicial examination. But he ought to weigh up whether to hear the case himself or to appoint a judge for that purpose.

9 CALLISTRATUS, *Judicial Examination, book 1:* In general, whenever the emperor remits matters back to provincial governors by rescripts such as "you may approach the officer who presides over the province" or the same with this addition: "he shall consider what steps he should take," a requirement of personally undertaking the judicial hearing is not imposed on the proconsul or legate. But even though "he

shall consider what steps he should take" be not added, he ought to consider whether he should hear the case himself or ought to appoint a judge.

10 HERMOGENIAN, *Epitome of Law, book 2:* To co-rulers and provincial governors belongs consideration of all the cases which in Rome are heard by the prefect of the city or the praetorian prefect or likewise consuls, praetors, and the rest of them.

11 MARCIAN, *Institutes, book 3:* All the various applications which in Rome have various different judges belong in the provinces to the governor's office.

12 PROCULUS, *Letters, book 4:* But although the officer who presides over a province has to take the place and fulfill the jobs of all the magistrates at Rome, nevertheless, attention must not be paid to what is done at Rome rather than to what ought to be done.

13 ULPIAN, *Duties of Proconsul, book 7:* It befits a good and responsible governor to see that the province he rules is peaceful and orderly. This he will achieve without difficulty, if he works conscientiously at ridding the province of wicked men and at seeking them out to that end. For he is duty-bound to search out blasphemers, robbers, hijackers, and thieves and to punish them each according to the evil he has done and to jail those who harbor them without whose help a robber cannot lie hidden for too long. 1. In the case of madmen whom their relatives cannot keep under control, there is a remedy to which the governor must resort, namely, that of confining them in prison. So held the deified Pius in a rescript. Certainly, it should be a matter of inquiry, according to the opinion of the deified brothers, in the case of a person who had committed parricide, whether he committed the crime in a fit of pretended madness or whether he was really and truly not *compos mentis*. The aim is that he be punished if he was pretending, but that he be confined in prison if he was really insane.

14 MACER, *Criminal Trials, book 2:* The deified Marcus and Commodus issued a rescript to Scapula Tertullus in the following terms: "If you have clearly ascertained that Aelius Priscus is in such a state of insanity that he lacks all understanding through the continuous alienation of his mental faculties, and if there remains no suspicion that his mother was murdered by him under pretence of madness; then you can abandon consideration of the measure of his punishment, since he is being punished enough by his very madness. And yet it will be necessary for him to be all too closely guarded, and, if you think it advisable, even bound in chains, this being a matter of not so much punishing as protecting him and of the safety of his neighbors. If, however, as very often happens, he has intermittent periods of relative sanity, you shall diligently explore the question whether in one such moment he committed the crime, and whether no indulgence is due to his illness. If you ascertain any such thing, you shall consult us, that we may consider whether the enormity of his crime (in the event of his having committed it when he could be held to have been fully aware) merits the infliction of extreme punishment.

"But since we have learned from your letter that his position and rank are such that he is in the custody of his own people or even in his own house, it seems to us that you will act rightly if you summon those by whom at the material time he was being looked after, and if you make inquiry into the cause of so neglectful an act, and if you make a decision against each one of them according as you find his culpability lesser or greater.

"For those who have custody of the insane are not responsible only for seeing that they do not do themselves too much harm but also for seeing that they do not bring destruction on others. But if that should happen, it may deservedly be imputed to the fault of those who were too neglectful in performing their duties."

15 MARCIAN, *Criminal Trials, book 1:* It is a point worth attending to, that he who

governs a province may not cross its boundaries unless to discharge a vow; and even then, he may not absent himself overnight.

16 MACER, *Duties of Governor, book 1:* It is warned by *senatus consultum* that only very sparingly should jurisdiction be exercised in relation to obligations contracted by provincial rulers or their aides and freedmen before entry into the province; this on the proviso that such actions as were on that ground not instituted are restored after any such person has departed from the province in question. If, however, something befalls a person quite against his will, for example, if he is a victim of an act of *injuria* or of theft, jurisdiction should be exercised up to the point of *litis contestatio*, and of production and bailment of allegedly stolen property or of a promise by the other party with payment of security for appearance or production of the thing.

17 CELSUS, *Digest, book 3:* If a provincial governor should happen to execute a manumission or appoint a tutor before he has had notice of his successor's arrival, these acts will be valid.

18 MODESTINUS, *Rules, book 5:* There is a plebiscite in which it is laid down that no governor shall accept any bounty or gift, save of eatables or drinkables such as may be consumed within a day or two.

19 CALLISTRATUS, *Judicial Examinations, book 1:* The administrator of justice ought to see that he makes himself easily approachable, but that he does not put up with any contempt of his court. Hence, it is added to warrants of appointment that provincial governors shall not admit citizens of the province into too close familiarity; for conversation on terms of equality breeds contempt. 1. But also when trying cases he must not go off like a firework at those whom he thinks wicked, nor be moved to tears by the entreaties of those who have fallen upon evil days. For it is not in the character of a firm and right-minded judge that his expression gives a clue to his emotions. And in sum, one ought so to conduct one's court that by one's personal excellence one enhances the authority of the high rank one holds.

20 PAPINIAN, *Replies, book 1:* The imperial legate, that is, the governor or co-ruler of a province, does not lose his command by abdicating it.

21 PAUL, *Duties of Assessors, sole book:* When a governor is conducting a hearing into a case of corruption of a slave or of debauchery of a serving maid or of buggery of a slave, if it should be alleged that the slave-overseer of some absent person has been corrupted, or a slave corrupted who is of such a kind that the matter extends not simply to the hurt done to the essential quality [of that slave] but to the perversion of the whole household, then he ought to take a very severe view of the case.

19

DUTIES OF IMPERIAL PROCURATOR OR *RATIONALIS*

1 ULPIAN, *Edict, book 16:* Whatever acts and deeds are performed by the imperial procurator, they obtain the same force and validity from him as if they had been done by the emperor. 1. If the imperial procurator makes a conveyance of a piece of property which belongs to the emperor as being his own property, then in my opinion he does not transfer ownership. For he transfers it in those cases in which he executes the conveyance as Caesar's agent with his express consent. Accordingly, if he should purport to act by way of sale or gift or settlement out of court, his act is a nullity. For his commission is not to alienate Caesar's property, but to administer it carefully. 2. It is a special feature of the imperial procurator that by his order a slave of the emperor can enter on an inheritance and that the procurator can, if the emperor should be named as heir, intermeddle with a rich inheritance and thereby perfect the emperor's heirship.

2 PAUL, *Views, book 5:* But if the estate to which the emperor is appointive heir be insolvent, the emperor is consulted once the matter has been thoroughly reviewed. For there must be inquiry as to the wishes of the appointive heir concerning entry on or repudiation of such an inheritance.

3 CALLISTRATUS, *Judicial Examinations, book 6:* Imperial procurators do not have power of deportation, for this is a penalty which they are incompetent to decide upon. 1. If, however, they should ban someone from entering lands belonging to the emperor as being of riotous disposition or otherwise injurious to the emperor's tenants, that person must keep off; so it was laid down in a rescript by the deified Pius Julius. 2. They do not then have power to permit any such person to come back; so it was laid down in a rescript of our present Emperors Severus and Antoninus anent an application by Hernias.

20

DUTIES OF THE *JURIDICUS*

1 ULPIAN, *Sabinus, book 26:* An adoption is competent in the court of the *juridicus*, since the statutory action-at-law (*legis actio*) is covered by his grant of power.

2 ULPIAN, *Sabinus, book 39:* By enactment of the deified Marcus, it has been granted to the *juridicus* who holds office at Alexandria that he may appoint tutors.

21

DUTIES OF ONE TO WHOM JURISDICTION IS DELEGATED

1 PAPINIAN, *Questions, book 1:* Any powers specially conferred by statute or *senatus consultum* or imperial enactment are not transferable by delegation of a jurisdiction. But the competence attached to a magistracy as of right is capable of delegation. Accordingly, magistrates are held to be in the wrong if they delegate their jurisdiction insofar as they are charged with the conduct of a criminal court under a statute or a *senatus consultum*, such as the *lex Julia de adulteriis* and any other like acts. The most powerful proof of this point is that it is expressly envisaged by the *lex Julia de vi* that anyone to whom its enforcement belongs may delegate that function if he goes away. Accordingly, he may only delegate after the commencement of his absence, since otherwise there would actually be a delegation by someone present in the city. Again if there should be an allegation that a master has been murdered by his household slaves, the praetor may not delegate the task of hearing the case, which he has under a *senatus consultum*. 1. One who has undertaken a delegated jurisdiction has no competence of his own but exercises the jurisdiction belonging to the officer who gave him his mandate. It is all too true that by the custom of our fathers *jurisdictio* (the power to declare rights) is transferable, but not the pure power of imperation which is conferred by a statute. Hence, no one holds that a proconsul's legate has power of punishment by a delegation of jurisdiction. PAUL notes: Where a power of imperation is inherent in a jurisdiction, the better view is that that power passes with delegation of the jurisdiction.

2 ULPIAN, *All Seats of Judgment, book 3:* When jurisdiction is delegated by a governor, his counselling functions cannot be carried out by the delegate. 1. If tutors or curators would like to sell landed estates, then only if good cause is shown may the praetor or governor permit them to. But if he has delegated his jurisdiction, by no means does that delegation carry with it power to deal with this question.

3 JULIAN, *Digest, book 5:* Even though it be a praetor who is exercising someone else's jurisdiction, still he does not act with the power of his own office but with that of the person by whose mandate he holds jurisdiction, so long as he is carrying out that person's functions.

4 MACER, *Duties of Governor, book 1:* Conduct of the trial in a case of "suspect tutors"

can be delegated. Indeed, it has been decided that for the benefit of *pupilli* such a delegation takes effect even under a general delegation of jurisdiction; the words of the enactment are: "The Emperors Severus and Antoninus to Braduas, Proconsul of Africa. Since you have granted to your legates the same jurisdiction as yourself, it follows that they have power to hold trials even concerning suspect tutors." 1. There may be delegation in the following cases: power to grant *bonorum possessio*; power to order possession by a person from whom the *cautio damni infecti* (guarantee against threatened damage) has been withheld; power to put a woman in possession of something in the name of her unborn child; and power to put a legatee in possession of something for the sake of preserving legacies.

5 PAUL, *Plautius, book 18:* It is obvious that one cannot delegate to another a jurisdiction which one holds by delegation. 1. When a jurisdiction is delegated to a private citizen, it seems that there is also delegated a power of imperation, albeit not a pure one; for there is no such thing as a jurisdiction without some modicum of coercive power.

22

DUTIES OF ASSESSORS

1 PAUL, *Duties of Assessors, sole book:* Practically every duty of an assessor (duties in performance of which students of the law exercise their skills) is comprised in the following heads: judicial hearings, motions, applications by writ, edicts, decrees, missives.

2 MARCIAN, *Criminal Trials, book 1:* Freedmen can act as assessors. But although people under *infamia* are not forbidden so to act by any statutes, nevertheless, I am of the opinion that they cannot perform the duties of an assessor, and it is reported that there is an enactment to this effect by imperial decree.

3 MACER, *Duties of Governor, book 1:* If a single province is subsequently divided and set up under two governors, as in the case of Germania and Mysia, someone who is a native of one part may act as assessor in the other, and he is not held to be acting as assessor in his own province.

4 PAPINIAN, *Replies, book 4:* When an imperial legate dies, the members of his staff are entitled to payment of their salary for the rest of the time of their appointments as made by the legate, provided they have not since then been at the same time members of someone else's staff. A different rule holds in case of one who received his successor ahead of time.

5 PAUL, *Views, book 1:* It is absolutely impermissible for a panel member while he is acting as an assessor to smuggle his own affairs into his own audience chamber; to have them raised in someone else's is not forbidden.

6 PAPINIAN, *Replies, book 1:* The advisory panel of the curator of a municipality is not closed to a man who belongs to that same *civitas*, since he receives no government salary.