Book VII.
Title XXXIX.

Concerning the thirty or forty years' prescription.
(De praescriptione XXX ve XL annorum.)

7.39.1. Emperors Diocletian and Maximian to Arriana.

Since you allege that they who had cast their eyes on your land, had brought it to pass in your absence that your lands were sold (to them) for a very small price by the president's office under the pretext of an annual tax of produce due from you, if the legal time has gone by since the day of the sale, the governor of the province will examine into the matter between you and will decide what is laid down in the public law. 1. If the legal time since the day of the sale, has not yet passed, however, the judge, after examination of your allegations, will do what the situation demands, knowing that if he finds that the purchase was illegal (not even), the price paid under a void contract should, according to the tenor of imperial statures, be returned to purchasers in bad faith.

Note.

The meaning of the law becomes plainer by reference to Bas. 50.14.3, which states that if thirty years have passed since the day of the sale, it cannot be set aside; if that period has not passed, however, an action lies to recover the property and have the purchase declared void.

7.39.2. Emperors Valentinian and Valens to Volusianus, City Prefect.

Owners of lands would be in bad shape if tenants at will thereof had the privilege not to be in any manner disturbed (in the possession thereof) after the lapse of forty years. The Constantinian law[1] only orders that the beginning of possession shall not be questioned in the case of those who are in possession for themselves and not for another, but it is not proper to call those possessors[2] who hold anything upon condition of payment of rent. 1. No one, therefore, who receives possession as tenant, may usurp the right of ownership by detaining another's property for a long time, lest owners might be compelled either to lose what they had leased, or to, perchance, forego the hire of tenants useful to them, or to annually and publicly proclaim their ownership.
Given July 24 (365).

7.39.3. Emperors Honorius and Theodosius to Asclepiodotus.

Just as actions in rem as to special pieces of property, so actions in rem as to an aggregation of properties (e.g. an inheritance) and personal actions shall not be extended beyond thirty years; and if any property or right is demanded, or a person is sued in any cause or suit, the plaintiff may be defeated by the prescription of thirty years. The same is true as to a plaintiff who attempts to recover a pledge or property hypothecated, not from his debtor, but from another who has been in possession a long time (thirty years). 1. Actions, therefore, not commenced before, have no life after a silence of thirty years from the time when they accrued. Nor shall it suffice (for anyone) that, pursuant to a

[1] [Blume] Not extant. C. 3.1.8 and C. 7.22.3 are thought to be parts of it.
[2] [Blume] See note to C. 7.32.3.

petition, he has received a special imperial rescript, though by notation, or that it (the rescript) has been filed in court, unless after the imperial rescript was sent, or a demand for (summons pursuant to the rescript) is filed in court, summons has (within the thirty years) been served by a process-server. Weakness of sex, absence or military service shall be no defense against this law, and minors only under the age of puberty - though protected by a guardian - are excepted from the provisions hereof. When minors have arrived at the age when they come under the care of a curator (i.e. after they have reached the age of puberty), the prescriptive period of thirty years applies to them the same as to others. 2. The bar of thirty years' prescription is applicable, however, to those actions (only) that have been considered perpetual, not to those which were anciently limited by (a shorter) time. 3. After the time mentioned no further right to commence an action exists, although a claimant may attempt to excuse himself by ignorance of the law. Given at Constantinople November 14 (424).
C. Th. 4.14.1.

Note.

Limitation of Actions.

We dealt in headnote 7.26, with prescription that, through possession, gives title to property. That, as there stated, is sometimes called acquisitive prescription. In the within law reference is made to extinctive prescription, or limitation of rights of action based on an obligation. The former deals with rights in rem, the latter with rights in personam. In the latter case the question of possession cannot, in the nature of the case, be involved. Without reference to possession, the creditor is simply arbitrarily refused a right of action. Prescription, as first always called usucaption, existed in the early Roman law, as to property adversely possessed, but not as to obligations. All rights of action under the civil law on obligations were at first all perpetual; they were never barred. But the principle of prescription, or limitation of action, was introduced when the praetor came to grant certain rights of action. These actions were frequently limited to one judicial year. D. 44.7.35; D. 25.2.21.5; D. 4.9.3.4. But the first law enacted for limitations of actions generally, was the foregoing law enacted in 424 A.D., which fixes a period of thirty years for the extinction of all actions. The subsequent law fixes a prescription of forty years for the cases not included in the previous enactment. By 7.40.1, Justinian fixed the limitation of all actions at thirty years, except hypothecary actions, the prescription of which he fixed at forty years in certain cases. See C. 7.36.2, and note. These enactments did not affect the ordinary prescription of ten or twenty years, not the limitation that applied to praetorian actions, nor to limitations provided by special laws.

Not all actions due entirely to the praetor were limited to one year. In D. 44.7.35 pr; D. 25.21.5; and D. 4.9.3.4, it is pointed out that actions for the recovery of property were perpetual, but penal actions, like that for the penalty of a theft, robbery etc. were limited to one year. The penal action for fraud was, however, extended to two years. C. 2.21.8. Criminal actions were generally limited to twenty years (C. 9.22.12), but the action for adultery was limited to five years (C. 9.9.5), and the action for treason was not limited at all. Bas. 60.41.47, note.

Illustrations of special limitation are the following: Certain actions against the fisc were limited to four years; C. 7.37; actions by the church and by pious foundations were first limited to one hundred years, later reduced to forty years. C. 1.2.23, and

Novels 9 and 111; actions for restitutions of rights were generally limited to four years (C. 2.52), but in some cases to one year. C. 2.53.5; note C. 7.35.2; an action to declare a will undutiful was limited to five years; C. 2.40.2; C. 3.23.16; C. 3.28.34; money lost in gambling could be recovered in fifty years, C. 3.43.1; an action because of money not actually paid on an attempted loan was barred in two years, C. 4.30.14; see also C. 5.73 and 74, as to property of minors. On account of wars, special period of limitation were fixed at times, to apply to particular cases and in particular countries, as shown by Nov. 36, and some laws from the appendix to the Justinian Novels, attached to this title. See Buckland 683.

7.39.4. Emperors Anastasius to Metronianus, Praetorian Prefect.

For the purpose of eliminating every method of doing harm, we decree that all defenses limiting the time for bringing actions provided for in the ancient law or given by imperial decrees, shall remain in full force, as if specially enumerated by name in this law, and shall, according to the tenor thereof, be a perpetual protection to all to whom they are or shall be available. 1. In order to supply whatever is not clearly embraced within the words or meaning of the enactments heretofore providing for limitation of actions, we ordain by this law, which shall endure forever, that any contract or action not expressly embraced within the oft-mentioned defenses as to limitation of action, but which by accidental or intentional interpretation has escaped the leashes of the above mentioned defenses, shall be subject to this our salutary enactment, and shall be void and barred after a period of forty years, and no right, private or public, that has become extinct by the silence of such forty years, shall be disturbed in any cause or in relation to any person. 2. But everyone shall be safe an fully protected by the present, salutary law in any right in which he has been undisturbed and for which no suit touching the main subject matter[3] has been commenced during such period, and shall also be fully protected in his status which he similarly enjoyed during the same time.[4]
Given at Constantinople July 29 (491).

7.39.5. The same to Thoma, Praetorian Prefect thru Illyria.

We do not permit the period of limitation of forty years to be used as a defense by curials, but they are compelled to acknowledge the status of their birth forever. For the (preceding) law of our Piety contemplates other situations, and nothing is thereby taken from former constitutions which plainly direct that curials and their children be returned to their native cities, without reference to any prescriptive period.

Note.

Curials (decurions) were compelled to look after the public business, including the collection of taxes, caring for the public buildings and highways etc. and accordingly were indispensable to the welfare of the empire. By reason of the burdens resting upon them, many deserted and attempted to escape from their position. Hence laws came to be enacted to keep them in their station. See C. 10.32, and subsequent titles.

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[3] [Blume] Re ipsa - recovery of the principal, e.g. instead of interest.

[4] [Blume] By C. 7.22.2, a man in good faith in possession of liberty for twenty years was protected. The difference, evidently is, that no possession in good faith was necessary in the limitation of forty years. Under this law, every sort of action is barred in forty years.

7.39.6. The same to Leontius, Praetorian Prefect.

Our Serenity has learned that some parties attempt to apply the imperial constitution of our Piety, which speaks of forty years prescription, to the prejudice of the payment of public taxes, and contend that if a tax or a portion thereof is not paid and the time mentioned or a greater time has elapsed, the arrears can not be demanded or collected when it must be known that such attempt is clearly contrary tot he intention and purpose of our law. 1. We, therefore, order that persons who are in possession of any property through a continuous period of forty years without legal interruption, they cannot be deprived of the possession or ownership thereof, but public imposts, municipal dues (civilis canon) or any other public contribution imposed on them must be paid and no limitation of time can be set up as a defense to them.

Note.

Special laws were occasionally passed, specially remitting old taxes, as for instance Nov. 147, and Nov. 148. Taxation is specially dealt with in Book 10 of the Code.

7.39.7. Emperor Justinian to Archelaus, Praetorian Prefect.

Since it is a well known law that an action on a hypothecation against third parties who detain the property hypothecated, is barred by the lapse of thirty years,[5] if the time is not interrupted as provided by law, including interruption by suit alone, or if no exception is shown in favor of a minor under the age of puberty, but that the claim against the debtor themselves or their heirs, either of the first degree or of other degrees, is not barred by the lapse of years, we have deemed it to be part of our forethought to correct that situation also, lest possessors of that kind might be held in almost perpetual fear. 1. We order, accordingly, that actions on hypothecations, brought to recover property which is either in the hands of the debtor or their heirs, shall not lie beyond forty years from the time that the right accrued, unless a summons is issued or the age (under puberty) mentioned intervenes, so that the only difference in regard to the right to recover the property from the debtor or his heirs and from third parties, shall be in the number of years, but shall in all other respects be alike; and the rights to bring a personal action shall remain as the former constitutions, in a spirit of justice, provided. 2. And since it has also been disputed in the courts, whether a creditor having superior rights can, after thirty years, disturb a later creditor who is in possession of the property hypothecated, as though he took the place of the debtor and was in possession for him, we have though it necessary to also clarify that point. 2a. And we ordain that while the common debtor lives, the prescriptive period of thirty years cannot be set up against the creditor with superior right, but the prescriptive period of forty years applies because while the former lives the creditor with superior right justly believes that possession by a creditor, inferior in right, is that of the debtor. 2b. But from the time that the debtor dies, the creditor with inferior right may, as possessor in his own right, set up the prescription of thirty years, and time shall be computed according to this distinction, so that the creditor inferior in right may oppose the limitation of thirty years during which he was in possession after the debtor's death. If he also wants to tack his possession after such death to the

[5] [Blume] See note to C. 7.36.2.

possession which he or the debtor had during the latter's life, then the prescriptive period of forty years shall apply, and he must show that he himself was in possession during the time which is lacking in the forty years' possession by which the debtor could have defeated the (prior) creditor. 3. The same rule as to computation of time shall be followed if the later creditor is ready to offer the debt due to the prior creditor, and the latter attempts to set up against him the prescriptive period of a long time (ten or twenty years).[6] 4. It is, further, more than manifest that in all contracts, in which stipulations, promises or pacts are made upon condition, or to be performed at a definite or indefinite time[7], the prescriptive period of thirty or forty years, which is set up against personal actions, or actions on a hypothecation, begins to run after the happening of the condition or the appointed, certain or uncertain, time. 4a. Whence it comes to pass that since in connection with marriages the repayment of dowry or prenuptial gift is usually put off to the uncertain time after death or divorce, the prescriptive period to be set up against personal actions or actions on a hypothecation, likewise commences to run after the dissolution of the marriage. 5. And it is also unquestioned that if a man to whom a debt is due, peaceably detains the property pledged to him, the prescriptive period is interrupted by this detention, if less than thirty or forty years respectively have run, and, in fact, much more than if the period had been interrupted by summons, since such detention is likened to joinder of issue. [8] 5a. And if a debtor gives a creditor a new due-bill for the purpose of acknowledging the debt, the prescriptive period is interrupted, in so far as it relates to the first due-bill[9], which continues in force, through the renewal as to all personal actions as well as hypothecary actions. For it is dishonest for a debtor, who, in order to avoid a suit by the creditor, gives a second due-bill for that debt to say the contrary. 6. So, also, where promises, legacies or other obligations require the giving of something each year, month or other particular time, it is clear that the prescriptive period mentioned is not computed from the beginning of such obligation, but from the beginning of each year, month or other particular time (in which something is due). 7. No right, forsooth is given to the person who holds property under emphyteusis (long lease) and has detained it for forty years or any other period of years, to claim that he has acquired ownership in such property by reason of the lapse of time, since property held by emphyteusis should always retain the same status, nor to a chief tenant or procurator of another's property to say, by reason of the lapse of any period of time whatever, that he ought not to restore it to the owner who wants to retake possession after the time of the lease has expired.
Given at Constantinople December 1 (525).

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[6] [Blume] Longam aevam possessionis praescriptionis - evidently the same as longi temporis praescriptio. See C. 7.36.
[7] [Blume] But certain to arrive at some future time.
[8] Blume wrote "Poste 556" in the adjacent margin.
[9] Blume penciled into the margin here: "see C. 2.7.23.3" and added a question mark. Scott's version reads: "If one of the debtors should give his creditor additional security for the purpose of securing his obligation, the time of the above-mentioned prescription will be considered as having been interrupted, so far as the original security is concerned, and the prescription in both personal and hypothecary actions will run from the date of the novation." 6 [14] Scott 177.

7.39.8. Emperor Justinian to Mena, Praetorian Prefect.

If a man has, in good faith, been in possession of any property for ten or twenty years by title of purchase, gift or any other contract, and has acquired the right to the defense of the prescription of a long time against the owners or against creditors claiming a hypothecation thereof, and he afterwards, by a fortuitous circumstance, loses possession of the property, he also has an action to recover it. The ancient laws, if correctly considered, also made provision for that. 1. But if a man (voluntarily) gives up his possession of property, whose owner or mortgagee thereof, is deprived (thereof) by the prescriptive period of thirty or forty years, he should not, we think, be given the above mentioned right indiscriminately, but with moderate distinction, so that, if he held the property in good faith from the beginning, he shall enjoy that right, but if he acquired it in bad faith he is unworthy thereof, so that if the new possessor was the original owner or mortgagee of the property and lost it by reason of the aforesaid defense (of prescription), he acquires the advantage of the detention. 1a. But if he (the new possessor) had no right to the property at any time, then permission is given to the former owner or the creditor who had the property hypothecated to him, as well as their heirs, to reclaim it from the unlawful holder, and it shall be no[10] defense that a prior possessor was fortified by the defense of the prescriptive period of thirty or forty year, unless such unlawful possessor is himself protected by the defense of the prescription of thirty or forty years, computed from the time that the preceding possessor who evicted (the original owner), lost the possession. 2. These provisions apply, however, only to occupants who acquired the property without violence. For if a man takes possession violently, the prior possessor may recover it in all cases. 3. And if a man detains it, not by violence, but pursuant to a judicial decree rendered when the prior possessor was absent, without answering in the suit, the latter may, as other owners of property, appear within a year, give a bond to defend the suit,[11] receive the property back subject to the result of the suit. 4. In case of contracts which draw interest, the defense of the prescriptive period of thirty or forty years shall accrue from the time that the debtor fails to pay the interest.
Given at Constantinople December 11 (528).

Note.

Under the first part of this law a possessor in good faith for the period of ten or twenty years, depending upon whether he lived in the same province as the owner or in a different province, is given the right, not alone to set up the prescriptive period as a defense, but also the right to recover the property, in case possession thereof is lost in some way. Previously the latter right did not exist. See headnote C. 7.26.

The law next deals with prescription of thirty and forty years. A possessor in bad faith could not rely on the ordinary prescription. Thirty or forty years of adverse possession was necessary in such case. If a man had adverse possession for that period in good faith, he had the right to recover the property in case possession of it was lost in some way, the same as he had that right in the case previously mentioned. But if he held it in bad faith and lost it in a peaceable manner, the law says that he is not deserving of that right. Notwithstanding this language, 9 Cujacius 979 thinks that he had such right

[10] Blume penciled into the margin here: "Poste 559."
[11] [Blume] See Steinwinter 155.

against everyone except the owner or mortgagee. This is, perhaps, doubtful, for the law next deals with the case where such third person, who previously had no interest in the property, obtained possession of it. And it is provided that in such case the original owner may recover the property, unless such third person acquired a prescriptive title of thirty or forty years, notwithstanding the fact that the prior possessor, who lost possession in a peaceable manner, had a good claim against such original owner. Such right to reclaim the property is expressly given to the original owner, but is not, at least expressly, given to the prior possessor. See Poste, Gaius 552, 557.

7.39.9. The same to Demosthenes, Praetorian Prefect.

Plaintiffs who cite defendants liable to them into court and put the suit in motion frequently fail to end it definitely, but thereafter remain inactive on account of the influence of the defendants or on account of their own weakness or for other causes - since many things that happen to men can neither be stated nor enumerated - and lose their right because a period of thirty years has passed by after they last brought suit, and that defense being set up, they, with just sorrow but without remedy, see their own fortune transferred to others.[12] 1. Correcting this, we do not permit this defense, arising in thirty years, to be set up in a case of that kind, but extend the period to forty years[13], though the action which was commenced is a personal action, since a case where a party remains entirely silent from the beginning is not like one where he makes a demand, comes into court, and commences the litigation, but is accidentally prevented from finishing it. 2. And though the plaintiff himself dies (without making use of the right), we decide that he may transmit his right to his posterity, and his heirs and successors may assert it, and cannot be defeated by the defense of the lapse of thirty years. The period of forty years, shall be computed from the time of the last-brought suit, after which both parties become inactive.
529 A.D.

[12] Blume wrote in the adjacent margin "Cujacius, Obs. 27; cc. 37."
[13] [Blume] The period of forty years began to run from the time that the litigation became quiescent. See also C. 7.40.1c. The sense of this law is that when a plaintiff becomes inactive in a suit, that is, abandons it, for the reasons stated, the prescriptive period begins to run, which evidently had been thirty years, but which was extended to forty years by this law. See Hunter 648; Colquhoun §1145. The reason for the extension does not exist in our time.