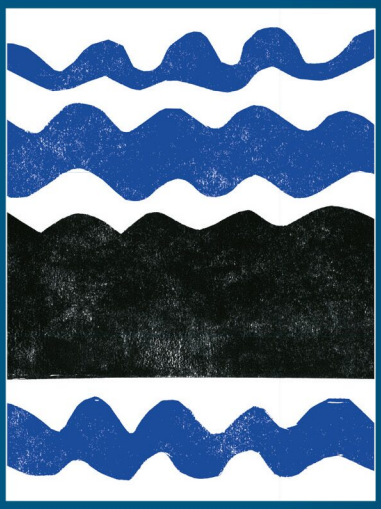
# *Shipwrecks, Legal Landscapes and Mediterranean Paradigms*

## GONE UNDER SEA



EMILIA MATAIX FERRÁNDIZ

MNEMOSYNE SUPPLEMENTS HISTORY AND ARCHAEOLOGY OF CLASSICAL ANTIQUITY

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Shipwrecks, Legal Landscapes and Mediterranean Paradigms

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# Shipwrecks, Legal Landscapes and Mediterranean Paradigms

*Gone Under Sea*

*By*

Emilia Mataix Ferrándiz


BRILL

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*Avo Optimo*

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A la belle étoile
J'ai vu ton visage gris
T'avais un chagrin d'amour
Les mensonges, c'est désespéré
Où est la cavalière?
Tu n'es plus brave
Je t'ai perdue dans la foule
Tu as coulé sous les flots
La mer était calme mais il pleuvait sans cesse
J'ai compté les bateaux, j'ai compté la tristesse
Et combien de vies cela a-t-il coûté?
Et combien de vies cela a-t-il coûté?
Avé Maria
Avé Maria

"Gone under Sea", ELECTRELANE (The Power Out 2004)

⁘

# Contents

# Acknowledgements

This book is the outcome of seven years of research on shipwrecks and Roman law, which started when I undertook my PhD and has continued into my subsequent academic career. I would like to thank my former supervisors Gianfranco Purpura, Carlos Sánchez Moreno-Ellart, and Aránzazu Calzada for their help and support during the inception of this research. I also owe a debt of thanks to all those who played their part in assisting with a variety of aspects of the research: Kaius Tuori, Jacob Giltaij, Rosa Mentxaka, Jean-François Gerkens, Antti Lampinen and Maijastina Kahlos for revising the drafts of this book in its different stages. Many thanks as well to my colleagues from the Centre of Excellence in Law, Identity and the European Narratives and from the Helsinki Collegium for Advanced Studies, who provided very helpful comments during my seminars there. This volume would not have been posible without the generous financial support of the Centre of Excellence in Law, Identity and the European narratives, funded by the Academy of Finland, the Helsinki Collegium for Advanced Studies, the Ghent University research group 'Structural Developments of Economic Performance in the Roman World', and the Käte Hamburger Kolleg (University of Münster).

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Of course, writing a book encroaches on your private life, and I could not have completed this one without the understanding and support of my beloved ones. Here it really is impossible to mention everybody, but I would like to acknowledge my friends for being there and celebrating my peculiar choice of profession. More generally, I want to thank my family, especially my brother, who has always patiently heard my stories, and my mother and father, for never pushing me in my choices and for their love and encouragement for the path I chose to follow. Thanks to Mikko, my *Gaius ubi ego Gaia*. Finally, this book is dedicated to the loving memory of my grandfather, who passed away during the final writing stages of my PhD, and whose passion for the sea deserves to be honoured by this volume.

# Abbreviations

| | |
|---|---|
| Bas. | *Libri Basilicorum* (Heimbach 1833) |
| BCE | Before Christian Era |
| CE | Christian Era |
| CIL | *Corpus Inscriptionum Latinarum* |
| C. | Codex of Justinian |
| Coll. | *Mosaicarum et Romanarum Legum Collatio* |
| CTh | Theodosian Code |
| ED | Enciclopedia del Diritto (65 vols.) Milan 1958–2004 |
| D. | Digest of Justinian |
| FIRA | *Fontes Iuris Romani Antejustiniani* |
| G. | Institutes of Gaius |
| Inst. | Institutes of Justinian |
| Lenel, *EP* | Lenel, O. *Das Edictum Perpetuum* (Leipzig 1927) |
| Lenel, *Pal.* | Lenel, O. *Palingenesia Iuris Civilis* (2 vols.) (Leipzig 1889) |
| NDI | Novo Digesto Italiano |
| NNDI | Novissimo Digesto Italiano |
| OCD | Oxford Classical Dictionary[4] (Oxford 2012) |
| PS | *Pauli Sententiae* |
| P.Oxy | Oxyrynchus Papyri |
| Pr. | *Principium* |
| Rudorff, EP | Rudorff, A.F. *De iuris dictione edictum. Edicti perpetui quae reliqua sunt* (Leipzig 1864) |
| SV | Staatsverträge des Altertums |

# List of Roman Jurists Cited

The dating is based on Domingo 2004.

| | |
|---|---|
| Africanus (Sextus Caecilius Africanus) | Late second century CE |
| Aristo (Titius Aristo) | First–second century CE |
| Aulus Ofilius | First century CE |
| Callistratus | Second–third century CE |
| Celsus (filius) (Publius Iuventius Celsus) | Second century CE |
| Gaius | Mid-second century CE |
| Iavolenus (Lucius Iavolenus Priscus) | Late first century CE |
| Labeo (Marcus Antistius Labeo) | c. 50 BCE–15 CE |
| Longinus (Gaius Cassius Longinus) | Late first century BCE–early first century CE |
| Macer (Aemilius Macer) | Third century CE |
| Marcian (Aelius Marcianus) | Third century CE |
| Neratius (Lucius Neratius Priscus) | Early second century CE |
| Papinianus (Aemilius Papinianus) | c. 140–212 CE |
| Paul (Iulius Paulus) | Early third century CE |
| Pomponius (Sextus Pomponius) | Second century CE |
| Proculus (Sempronius Proculus) | c. 10 BCE–70 CE |
| Sabinus (Massurius Sabinus) | Early first century CE |
| Scaevola (Quintus Mucius Scaevola) | Late second-early first century BCE |
| Servius (Servius Sulpicius Rufus) | c. 106–43 BCE |
| Tryphoninus (Claudius Tryphoninus) | c. 200 CE |
| Ulpian (Domitius Ulpianus) | 170–c. 223 CE |
| Volusius Maecianus | c. 110–175 CE |

# Note on Translations

To ensure that the texts cited in this book are also accessible to people who do not have a working knowledge of Latin, I have added translations to the key texts cited in the text, the footnotes and the appendix. Indeed, the fragments of the title *de naufragio* included in the footnotes have their own section at the end of the book, for which I have amended the 1985 English translation edited by Watson. For passage D.8.4.13pr. (Ulpian. 6 *Opin.*) from the Digest of Justinian, I have used the 2013 English translation of Marzano's book. For passages from other titles in the Digest, I have also amended these in line with the abovementioned edition by Watson. For passages from the Codex of Justinian, I have used the 2016 translation edited by Frier, based on the 1921 translation by Blume. For passages from the Institutes of Gaius, I have used the 1988 English translation by Gordon and Robinson. For passages from the Theodosian Code, I have used the 1952 English translations by Pharr. All passages taken from the works of Latin authors refer to the Loeb editions of those works. All other translations are my own, that being the reason why these texts lack a reference to the translator.

# Introduction: Shipwrecks and Maritime Cultural Landscapes

Any maritime landscape has cultural significance when it is associated with human activities.[1] How can we talk in a meaningful way about the relationship between any maritime landscape and the human mindset towards it? One way to approach the study of watery spaces is to view them through the lens of the maritime cultural landscape. This theory analyses the culture of maritime peoples within a spatial context, including any hermeneutic human relationship to the sea.[2] The maritime cultural landscape approach contrasts with the term 'seascape', which is used to describe any landscape viewed from the sea, using factors that are generally associated to land (such as the wind or currents) and therefore stressing the differences between land and sea.[3] Within this approach, I will explore the Roman conception of 'maritime space' through a study of the Romans' perception of shipwrecks, integrating the fields of Roman law and the social practices that took place within these maritime landscapes.[4] The aim is to challenge our understanding of the Roman environment and its legal identification by placing the focus on shipwrecks as events that establish a bridge between sea and land. I will explore the different Roman legal definitions of maritime spaces, and how individuals of divergent legal statuses, who were affected by shipwrecks in one way or another, interacted with these areas. Abstract though this approach may seem, the problems addressed are concrete and down-to-earth. The main purpose of the study is to chart and analyse the Roman conception of the maritime landscape through a close study of juristic literature and an archaeologically-based analysis of the landscape.

The main source studied throughout the book is the *edictum de incendio ruina naufragio rate nave expugnata*[5] (first century BCE);[6] as such, the different

1 Ford 2011, 1.

2 Westerdahl 1986; 1992, 9; 2011, placing this concept within the archaeological discourse, Jasinski 1994; and its practical application, Parker 2001. For a summary of the actual debates with associated literature, see Campbell 2020, 207–210.

3 See: McNiven 2003; Breen and Lane 2004.

4 Westerdahl 2009, 212–216, provides an extensive list of elements that can make up the maritime cultural landscape (e.g. shipwrecks, ports, villages, fortifications, place-names).

5 Hereinafter, *edictum de naufragio*. Title 47.9 of Justinian's Digest.

6 The dating of the edict is one of the book's themes, a topic connected with other issues such as lawmaking or targeting violent behaviour in the Roman Republic, which will be addressed in sections 1.3. and 1.4 of chapter one.

chapters of the book will address the different aspects linked with this legal source (even if some features may seem less 'maritime' than others).[7] The *edictum de naufragio* provided for civil actions that addressed behaviours involving violence associated with theft, seizing of property, or causing damage, performed at the same time and in the same place that a catastrophe occurred (e.g. a shipwreck or *naufragio*). The work bearing the title *de naufragio* is formed from fragments that range from the Republican period to the Severan period. Due to the considerable extent of time covered, we need to keep in mind that opinions that were held on these matters during these different periods of Roman history were liable to change, sometimes quite considerably. Therefore, the understanding of the maritime cultural landscape reflected in these texts will be temporally and personally bound to the individual jurist's views of the world. How did they perceive the world and organise its spaces? Moreover, what might this tell us about Roman concepts related to frontiers, and their relationship with their natural surroundings?[8] The study of the different fragments of the *edictum de naufragio* reveals that, even if the sea-land dichotomy predominates in the discourse, there are a range of views on the specific features of the Roman maritime cultural landscape, which reflect variations in cultural backgrounds, personal agendas, and political developments over time. Each moment of these jurist-landscape interactions is distinct in the sense that the nature and characteristics of cultural-environmental processes are tied to each moment in time and space.[9]

In addition, we need to keep in mind that 'Roman' is an umbrella term that encompasses great regional variety, as well as ethnically diverse cultures. As the Roman world was composed of a wide variety of far-flung regions, what needs to be stressed is that while a legal text could be an individual manifestation of a local mentality, it still reflects a conception of the maritime landscape that can help establish common traits and differences so as to arrive at a broader view. However, through the study of the different fragments forming the Digest's title, we can sometimes see a homogenisation in the ways that the issues were addressed, probably due to the jurists' strong ties to Roman Western culture. In terms of the people who interacted with a Roman maritime cultural landscape, their interactions can be thought of as layered and legally plural, since the interactions among people from different legal backgrounds and/or statuses would not only have influenced their understanding of the landscape,

7 For example, section 4.2. deals with behaviours that take place on land, but also reflect the different nuances of the edict.

8 Whittaker 2002, 82, also relates these thoughts to the idea of Empire.

9 Phillips 2007.

but also affected how law was applied to them in different areas. Here, the study of the Digest's title will move past the theoretical land-sea division and aim to provide a more nuanced perspective on the different perceptions of the sea as an environment, resulting in the creation of new legal conceptions of the physical landscape.

However, since this book deals with shipwrecks as events that happen between sea and land, it is necessary to define what 'maritime' is, in order to understand what is here identified as a maritime cultural landscape. In one article, C. Westerdahl asks: 'What is maritime? Is there anything exclusively maritime?' The aim of defining 'maritime' here is to unravel the relationship between people and the sea as one of the bases for explaining cultural history in general. It cannot be overstated how essential the sea is, whether humans have lived in direct contact with it or only held it as a permanent reference point.[10] In the case of Rome, one cannot argue that their society was established first and then the sea-land relationship followed. This is rather a question concerning the identity and cultural memory of people in relation to their physical context and their activities. The Roman calendar was organised around the life cycle: time was organised in relation to labour and production, and space in relation to the rural and urban landscape.[11] We need to think of the Romans' experience as their society slowly evolving from being based on the worldview of local farmers to a global Empire incorporating a plethora of cultures and perspectives.[12] In the Roman land-based economy—especially during the Republican era—their relationship to land had a legible history of law and politics that was violently inscribed through territorial lines, borders, and divisions, while the sea was perceived and positioned outside the forces of Roman legality. The latter observation fits well with the general view of the Romans' initial aversion to or lack of interest in the sea, based partly on Polybius' narrow-minded narration of the Roman-Carthaginian treaties,[13] and partly on the supposedly late development of their naval technology.[14]

What is the role of law in connecting land- and sea-spaces in the Roman world? How does space matter in Roman law and its associated identities? From the legal point of view, the maritime cultural landscape of the Roman

10 Westerdahl 2009, 192.

11 Carandini 2012, 5. That perception of the land can be appreciated in the careful work of the *agrimensores*. See: Campbell 2000.

12 This is one of the main points of Van Oyen 2020, 14–16. However, even if the Romans' economy was primarily devoted to farming that does not mean that they did not have maritime activity in the Archaic period; see Cifani 2022.

13 Polyb.1.20; 1.21.1–2, the legend of Polybius has been contested by: Harris 2017, 14–16.

14 Casson 1991, 171; *contra*, Cassola 1968, 27–34.

world could be described as a division between the land—which could be governed by the law of the Romans (civil law or *ius civile*)[15]—and the sea—which was guided by the laws of the peoples (*ius gentium*)[16] and by *ius naturale*—that which concerns the natural order of things.[17] As in most ancient empires, the basic tenet of law was based on the personality principle, not the area principle as is common in modern states.[18] Thus, being Roman was a matter of lineage or the acquisition of citizenship by an official declaration, but not residence. During the Republic and early Empire, most of the inhabitants of Rome and the Roman Empire were not citizens, but rather were subject to different categorisations that also influenced the law that was applicable to them.[19] Hence, in the Roman world law worked in a layered way, applying a personal legal principle (citizen *vs*. non-citizen) to a legally bounded or defined space (sea *vs*. land). Initially, these principles seem easy to understand and logical. *Ius gentium* was the law governing the relations of Rome with peoples other than the Romans,[20] and thus it is not surprising that it applied to the sea, which was a *medium* of contact among peoples but physically unmanageable, unlike land. However, the situation becomes more complicated, because the private field of *ius gentium* implies that its legal principles are accepted from the point of contact between Romans and foreigners, as soon as they become valid for Roman citizens. The latter view was very useful in terms of trade and allowed the establishment of foreign commercial arrangements from a very early period, but it is also an indication of how law adapts when there is a will to build on it.[21]

Therefore, for the purpose of this work I define 'maritimity' as the result of the actions of identifying and sorting terrestrial and maritime affairs that are conceptualised and managed through legal rulings, whether these are imposed by the central authority or by the peoples living in an area. This definition

15 D.1.1.6pr. (Ulpian. 1 *Inst.*) *Ius civile est, quod neque in totum a naturali vel gentium recedit nec per omnia ei servit: itaque cum aliquid addimus vel detrahimus iuri communi, ius proprium, id est civile efficimus.*

16 D.1.1.9 (Gaius 1 *Inst.*) 'what *naturalis ratio* introduced among all men is observed by all peoples and called *ius gentium*, as the law applied by all peoples'; D.1.8.4pr.–1 (Marcian. 3 *Inst.*) '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 *ius Gentium*'. More on this in chapter two, section 2.1.1.

17 D.1.1.1.3–4 (Ulpian. 1 *Inst.*).

18 Ando 2011b, 2–4; Tuori 2018, 201–218.

19 Scheidel 2007, 5–8 provides literature and figures to illustrate citizenry in different periods of the Roman world.

20 This is one of the three meanings of the *Ius Gentium*, see: Winkel 2013b, 3553. See also chapter two, section 2.1.1.

21 Frezza 1949, 29.

is based on the belief that there is a close relationship between Roman law and the society that produced it, and that many legal conceptualisations may be explained in terms of the peculiarities of how a society functioned.[22] In sum, in this work, 'maritimity' constitutes a category of understanding,[23] and more concretely a legal perception of the landscape. It can be appreciated that legal dispositions describing sea-land interactions are not so much a map of the physical archaeology of their landscapes as a map of the social conceptions from which their maritime cultural landscape has been constructed.[24] In these instances, laws defined the limits of some spaces and imposed rules on them. For the range of spaces included in this conception, norms did apply within their limits, leaving the external world largely or entirely beyond their reach.[25]

Nevertheless, the question is, how did shipwrecks resurface as events merging legal spaces? Was this always the case? The opportunities and dangers of seafaring were a prominent theme in ancient life.[26] In his famous essay, Blumenberg reflects on shipwrecks as one of humanity's oldest metaphors for life.[27] Blumenberg based his study on the fact that at some level we have all born witness to others' wrecks, standing in safety and knowing that there is nothing we can do to help, remaining fixed—whether comfortably or uncomfortably—in our ambiguous role as spectator. This is the impression that we can gather from reading the works of classical authors such as Homer or Hesiod, among others.[28] However, in the archaic Mediterranean, some violent sea practices related to plundering were allowed by law, and would not be legally conceived differently until the Roman Republic. This latter understanding resulted in a situation where even if violent acts were physically noxious, they were not against the law, which is why there was no need to apply specific remedies to address them.

In the Roman conception, the sea had agency over the subjects suffering a shipwreck, since it could give and take ownership of goods lost at sea, or free a

22 Crook 1967; Du Plessis and Cairns 2007, 139; Ando 2010, 78. *Contra*, Watson 2008, 64; 111; 158.

23 Tuddenham 2010, 8. Leidwanger 2020, 78, 'there is no predetermined inland limit to the maritime landscape, but a primary advantage is its focus on how the sea helped to structure life beyond its shore for the communities whose livelihoods and routines were tied into rhythms of seaborne interaction'.

24 Tuddenham 2010, 10.

25 Gargola 2017, 189.

26 e.g. Cic.*Tusc*.52; Sen.*Suas*.1; Tac.*Agr*. 249. See also section 1.1 in chapter one.

27 Blumenberg 1979.

28 See the list of authors mentioned by Huxley 1952, 118–124; Dunsch 2013, 42–59; 2015, 17–42.

carrier from liability in the case of wreckage.[29] While also acknowledging the power of the sea as an entity that can influence human behaviour, the focus of this study lies concretely on human thought and its role in constructing maritime landscapes.[30] In their texts, Roman jurists reflect on different kinds of sea-storm situations, to which they then apply legal institutions in order to organise and provide solutions to the catastrophes suffered by people in what was considered a space free from the rule of Roman civil law. In that respect, shipwrecks appear as events that bridge the gap between land and sea, because of the different legal remedies provided to deal with these catastrophes, which in turn enlarged the scope of land-based legal rulings. In that respect, we will see how civil law remedies were often applied to events that happened onboard ships, which is probably because, even if the Roman jurists did not phrase it in that fashion, they—as happens nowadays—considered ships as extensions of the land.[31]

When reading about these subjects in legal texts, different views can be found in addressing the hazards derived from such events, but some consistent features also emerge. This includes the acknowledgement of shipwrecks and their consequences as a violent act that should be compensated. Therefore, the legal regimes targeting violence in connection with these events placed territorial and extraterritorial limits on the application of Roman law to the vagaries of the natural world. This produced a dynamic connection between the conceptual categories of land and sea, characterised by the contantly adaptable character of human structures and institutions along the coast of the sea, and the completely malleable application of jurisdiction over the sea itself. This perspective places the spotlight on the special nature of the sea's border with the land, or even other watery bodies such as rivers or lakes, which will also be explored in this volume, so as to clarify the different Roman conceptions of these spaces. These elements can be interpreted through the maritime cultural landscape approach in order to explore how people perceived and understood the sea and used this knowledge and understanding to order and constitute the landscape and societies that they lived in or interacted with.

This book is divided into five chapters. Chapter one examines the archaic conception of shipwrecking as a right, and the changes that this conception underwent until the late Republican period. It also explores the origin,

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29 That constitutes the so-called *exceptio labeoniana*, located in D.4.9.3.1. (Ulpian. 14 *ad Ed.*) 'Hence, Labeo writes that if anything is lost through shipwreck or an attack by pirates, it is not unfair that a defence be given to the carrier'.

30 Campbell 2020, 207–225, with extensive bibliography.

31 Art 84 of the United Nations Convention on the Law of the Sea (UNCLOS).

background, and possible chronological dating of the *edictum de naufragio*, which punished robberies and other violent conducts that took advantage of catastrophic situations such as fires, wrecks, or attacks on ships. The chapter addresses other related issues, such as the development of the praetor's edict and the solutions imposed by praetorian law to address violent conflicts. Therefore, the analysis of this phenomenon relates to different problems, such as the risks of navigation or the combatting of piracy by the Roman Republican government.

Chapter two delves deeper into the nature of the edict, and therefore the subjects affected by it, and provides details of its spatial characteristics. The chapter goes beyond the exegetical analysis of the text, to place it in its spatial context and understand how that affected the interaction of individuals with their environment. It highlights the geographical dissemination of the Roman rulings concerning plundering, and how shipwrecks affected the status of the people that came into contact with them. The latter raises issues such as the definition of self, and the identity or personhood of the individuals associated with their spaces of interaction. In addition, this question targets the problem of change, whether of status or location, and how that was addressed in the legal language and taxonomies used to deal with sea-related problems. In view of this, the chapter underlines the flexibility and supposed openness of the Roman legal tools used to cope with the consequences of a shipwreck, and deals with the processual aspects of the actions spelled out in the *edictum de naufragio*.

Chapter three is concerned with how the event of shipwrecking affected the property of the people influenced by it. Therefore, its focus is one of the main institutions of Roman law: ownership and consequently, the things owned. This chapter stresses that one of the effects of the conception of the sea as a space unruled by Roman law, was that the sea therefore had agency over taking and giving back the property lost in a wreck. The latter leads to a discussion on the difference between *derelictio* and *deperditio*, in relation to the loss of goods, and on the consequences and legal qualification of the acts committed by the subjects who gathered up goods that had been deposited on the shore by the waves. The chapter closes with legal definitions of the spaces in contact with watery areas: starting with the complicated distinction between public and private in maritime spaces, and the possibility (or not) of establishing parallelisms with riverine spaces. In that sense, the sources written by jurists as well as public statutes highlight the legal divide between sea and land and the different regimes governing these spaces.

Chapter four explores the behaviour legally defined as loss wrongfully caused. In such an unpredictable space as the sea, losing control of a ship and

causing damage to other people's property would not have been an uncommon event. In this chapter, I have sought to further demonstrate how the Romans used legal analogies taken from their civil law to cope with the hazards that happened at sea, since they did not have control of that space, and there was no such thing as the law of the sea at that time.

Finally, chapter five is dedicated to violent or intentional harm, and targets issues such as the notion of piracy as private violence endemically performed and (sometimes) protected by the state, or as a more general threat to mankind that needed to be eradicated. The chapter also refers to the parallelisms established in the Digest's title with the land-based conduct of murderers or thieves, indicating that these reflected the Roman will to control the seas via legal tools that were used on the civilised land.

CHAPTER 1

# The Beginnings of a Mediterranean Paradigm

## 1.1 Introductory Remarks: Some Notes About the Sea in Ancient Thought

The sea is everywhere in the Greek and Roman landscapes; thus, to live far from the sea was to live in relative isolation, for the sea was the main highway for ideas as well as commerce. However, human bodies are not naturally suited to the sea; therefore, challenging it by entering or crossing it entails reimagining one's own identity and personal status in the face of the power of water. The latter is echoed in both literary and legal sources, even though the phenomena are expressed in different ways depending on the author's agenda when writing a piece. Literary sources generally present the sea as a hostile space for humans, but the variety of literary works and the diversity of realities and events described in these pieces highlights the authors' own views, with each focusing more prominently on some aspects.

One of the most common dichotomies is a focus on the sea as either a bridge or a boundary, which has been a recurring pattern in studies based on ancient literature.[1] In these works, the sea appears as an intermediary space between the worlds of the living, the dead, and the gods, evoking an aura of mystery and uncertainty. The ancient view of the sea promoted in literature, as a point of contact between the imaginary world and everyday reality, is paralleled in other cultures that preceded and followed Rome.[2] In that light, crossing the seas predicates the physiological transformation of the individual, suggesting that the subject has taken a leap of faith, risking their life by challenging the sea.[3] In addition, individuals who brave the sea make themselves intruders in a world beyond their own, confronting a realm inhabited by numinous forces and therefore beyond human domination.[4] As a way of appeasing this human invasion of the gods' realm, sailors could undertake various actions, such as making a solemn vow to be paid as soon as they stood on dry land,[5] performing

1 Blumenberg 1979; Dunsch 2013, 42–59; 2015, 17–42.

2 Morrison 2014.

3 Some authors compare sailing during a seastorm with the actions of an intrepid soldier who is the first to scale the walls of a besieged city; see Luc. (5.672–676), Seneca (*Ag*.502), and Silius Italicus (*Pun*.14.121–124).

4 Beaulieu 2015, 9, see also Lampinen 2022.

5 Hom.*Od*.1.3; Juv.12.81; Petron.*Sat*.103; Stat.*Silv*.3.2.

a ritual in a temple,[6] placing a votive painting or inscription in harbours or their surroundings.[7]

In contrast, legal sources tend to focus more on the practical challenges and effects of interacting with the sea. The latter highlights how the importance and meaning of the sea moves beyond the symbolic and utopian into the realm of the practical and tangible; for the jurist writing books about legal issues or providing advice on different matters, the sea was a problematic realm to which legal tools should be applied to avoid or repair the hazards resulting from interaction with it. Thus, it is not to these writings that we should look to construct a holistic perception of the sea in the Roman world, because their general point of view was that since for many (e.g. merchants) engaging with the sea was unavoidable, the realistic approach was to reduce the risk of harm and face the consequences of seafaring. The various dangers at sea arose from the unpredictability of weather conditions,[8] the vulnerable structures of ships, the lack of navigational devices, and finally, the threat of pirate attacks. All these made a sea voyage an extremely hazardous venture and a risk to life comparable to warfare.[9] However, even though jurists coincide in their understanding of the sea as a dangerous realm not governed by the civil law of the Romans, the solutions which they provided for similar problems vary from jurist to jurist and from one period to another. As legal texts were mostly devoted to providing practical solutions, and therefore the jurists' perceptions about the nature of the sea are partly biased by that heuristic aim, the reader is sometimes forced to read between the lines.

In literary sources, the sea not only sets the scene of action, but also the mood. A lonely shore is the background for a hero's prayerful grief,[10] while the tumult of waves mirrors the unrest in his mind. In contrast, a luminous sea promises a successful voyage: for the warriors sailing home from a righteous mission, the sea is the bright and broad path ahead.[11] Alternatively, the clashing waves evoke a dangerous distance between a hero's homeland and the place where the battle took place,[12] and the sea's grey depths are where supernatural beings and forces of nature abide.[13] Since the time of Homer, the sea

6 Verg.*Aen*.12.766–769; Hor.*Carm*.1.5.13–16.
7 Cic.*Nat.D*.3.89; Guarducci 1971, 219–223.
8 e.g. D.6.1.36.1 (Gaius 7 *ad Ed. Prov*.).
9 D.39.6.3 (Paul. 7 *ad Sab*.).
10 Hom.*Il*.23.59–61; 125–126.
11 Hom.*Il*.15.149.
12 Hom.*Il*.15.624–628.
13 Hom.*Od*.1.183; 2.420; 3.285; 4.474; 5.349; 6.170.

had personified the capriciousness of gods and the inevitability of fate.[14] Thus, undertaking a sea voyage meant entrusting one's fortune to the gods and to fate.[15] If the focus was placed on the survivors, then shipwrecks often presented the possibility of a change in their legal and social status.[16]

To the ancient mind, the sea was often seen as a sacred domain not to be violated by mortals, and drowning meant that one's spirit remained in a place from which there was no return.[17] Death by drowning, in itself unpleasant, is rendered doubly dreadful because it robs a man of the due rites of burial and the pious tending of his grave by his surviving relatives.[18] Indeed, for the ancients, death at sea meant that one's body would be eaten by fish and other beasts.[19] Propertius writes the lament for Paetus, who was drowned at sea, identifying it as a new kind of death, a death the man need not have risked had he stayed on land.[20]

But sometimes it was unavoidable to risk one's life at sea, as was the case for the various naval battles fought in antiquity. In these cases, those who lost their lives at sea found commemoration in the different monuments placed around the shore and the symbolism associated with some areas associated with a particular battle.[21] In addition to calling the sea 'cruel', 'bitter', 'deceitful', and 'treacherous', the Roman poets often refer to its most awe-inspiring quality, that of immensity. The sea is both *immensum* and *vastum*, contrasting with the insignificance of a boat tossed upon its fickle surface.[22] In law, however, the sea is first and foremost immense because a thalassocracy cannot afford to appropriate and preserve it by force. Therefore, jurists would qualify it as *res nullius*: it is the thing both of one person and of all people.[23] As such, it is both a space

14 Sen.*Med*.305–308; Juv.12.57–59.

15 Juv.12.5–24; Verg.*Aen*.1.50.

16 e.g., After the wreckage, the sailors' goods are stolen, and they are enslaved (Hdt.3.137–138); or the shipwrecked are thought to have insulted the gods (Lucian.*Dial.Mar*.2; Verg.*Aen*. 6.359; Ov.*Her*.6.103); their survival can be either acclaimed (Hom.*Od*.9), and they can be sacrificed to the Gods (Ov.*Met*.12.24–38; Hes.*Cat*.23.17–26), or massacred (Hom.*Od*.10.81–133). Finally, those shipwrecked who have lost everything could be forced to into begging: Juv.12.28; Phaedr.4.22.24–25; Pers.1.88–89. See also chapter two, section 2.2.3.

17 D'Agostino 1999; Lindenlauf 2004; Dunsch 2013; 2015; Campbell 2020, 215–216.

18 Tac.*Ann*.1.70, where *honestae mortis* refers to death on land and *inglorium exitium* to the fate of the shipwrecked. Otherwise, Ov.*Tr*.1.2.51; perhaps had in mind the Homeric epithet (*Il*.2.21.273) when he described death at sea as pitiable.

19 Hom.*Il*.21.203; Hor.*Epod*.10; Ov.*Tr*.1.2.56; Ov.*Her*.10.123; Plaut.*Rud*.512–513. Also, Purcell 1995.

20 Prop.3.7.31–32.

21 Reitz-Joosse 2016, 276–296; Rookhuijzen 2021, 213–228.

22 Aratus.*Phaen*.298.

23 D.1.8.2pr. (Marcian. 3 *Inst*.).

in which appropriation is considered to be an act contrary to natural law and a lawless space, or a space where the civil law of the Romans is in force only up to the point where it reaches land.[24]

Some maritime events had such agency over human beings that even if several authors wrote about them describing the dangers undergone, the different aims that characterised their writings provided different perceptions of them. Seneca describes storms as a force against which the might of man is powerless,[25] referring in a twofold sense to the crew and the passengers of a doomed vessel; they are both 'idle' (for action is of no avail) and they are 'cowards' (for they have missed out on a glorious death in battle).[26] Indeed, the contrast between the civilised areas governed by men and the savage sea is clear in Seneca: in his Agamemnon the ominous calm from the harbour provides an effective contrast with the storm which is soon to descend in all its violence.[27] Too often in Roman poetry, a storm makes a mockery of the helmsman's skill, the oars or ropes drop idly from the hands of the panic-stricken crew, and the shipmaster does not know which wave to break and which to ride, leaving the sea to decide their fate.[28] Only Juvenal described the skill and foresight of the grizzled captain, differentiating himself from the rest of the literary authors.[29] On the other hand, jurists refer to storms as obstacles which, owing to their wildness, justify the lack of guilt from victims when they are unable to fulfil an obligation.[30] Their brutality forces crews to take specific actions to protect human lives, and only in the case of survival is one required to compensate for the loss of others.[31] Probably ancient poets included such hazards to warn sailors about the dangers of the sea as well as add a dramatic and powerful tone to their works,[32] something entirely unnecessary and prejudicial in the case of juridical works.

Indeed, to that difference in purpose and style between legal and literary works, one needs to add the contrasting readerships of the two types of

24 See chapter three, section 3.1.

25 Sen.*QNat*.5.18.6.

26 Huxley 1952, 122. Other texts from Seneca (Sen.*Ag*.514–516), Silius Italicus (Sil.*Pun*.17.261–264) and Tacitus (Tac.*Ann*.2.23) explicitly or by implication point out the contrast between the 'brave' and the 'cowardly fate'.

27 Sen.*Ag*.590.

28 Luc.5.645–646; Ov.*Tr*.1.2.26; 1.2.49–50. On the wildness of the Mediterranean seawind: Hor.*Carm*.1.3.12–13; Stat.*Theb*.5.368–369; Ov.*Met*.11.490–491; Verg.*Aen*.1.53; 82–83.

29 Juv.12.32–33.

30 D.2.11.2.6 (Ulpian. 74 *ad Ed.*); D.4.6.38.1 (Ulpian. 6 *ad Leg. Iul. et Pap.*); D.6.16.1 (Paul. 21 *ad Ed.*).

31 D.14.2.4.1 (Callistrat. 2 *Quaest.*); D.14.2.10 (Labeo 1 *Pith a Paul.Epit.*).

32 See also Verg.*Aen*.1.122–123; Ov.*Met*.11.514–515; V.Fl.1.637–638.

literature. While literary texts could have been read by anyone, legal texts would have been read by specific people, who needed them to solve a problem derived from interaction with the sea. Therefore, a jurist would need to focus on how to help these people rather than to present a poetic and dramatic account of experiences at sea. The latter indeed highlights that the readership of legal texts would be much smaller, bearing in mind that indeed, travelling was more an extraordinary event than an everyday condition in Roman society.[33] Travel by sea was frequent for those who had recourse to it, but demographically this was a very small sample of the Empire's population.[34] Thus, if literary texts had a wider audience (even if that was mostly the Roman elite) than the practical texts from jurists on seafaring, it is possible that most people kept an idea of the sea as a savage realm that one should avoid.[35] In addition, we need to bear in mind that, on top of the practical scope of legal texts, most of the texts that we find in Justinian's Digest belong to jurists who worked during the high Empire, when trading routes were settled and seafaring, even if still dangerous, was not a rare phenomenon. In that sense, that perhaps means that they focus more on the practical aims of the text rather than on the symbolic nature of the sea in Roman culture.

Otherwise, the sea constituted a waterway that enabled the acquisition of new territories through conquest, and permitted Roman administration and control. Furthermore, being the quickest and cheapest way to travel, the sea facilitated the exchange of goods within the sphere of the civilised world and, particularly for the inhabitants of Rome, ensured the supply grain and other goods essential to their existence. Finally, sailing and navigation facilitated contacts between different cultures of the ancient world and allowed the flow of ideas and information and the exchange of knowledge and experience gained by ancient civilisations throughout the centuries. This clarifies the reasons why Romans were so keenly interested in protecting sailors and the goods transported by ships. One passage of Cicero depicts the sea as 'the most violent of nature's offspring' and refers to the art of seafaring as being able to tame its wildness and obtain supplies.[36] The latter highlights three key points: (1) that the sea was considered a savage and dangerous realm; (2) that it was nevertheless a source of income; and therefore (3) that people developed techniques to cope with its wildness and thereby obtain profit. However, for many literary

33 Woolf 2016a and 2016b.

34 Woolf 2016b.

35 On readership of ancient literature in the Roman world: Kenney 1982, 3–15; Starr 1987, 214, 223; Bowie 1994, 435–459; Johnson 2009, 323; Wiseman 2015.

36 Cic.*Nat.D.*2.152.

authors, even though the thirst for profit would be a reason for men to risk their lives at sea, this did not prevent them from depicting these men as misguided and reckless.[37] To sum up, writing about the sea normally entails dichotomies of different kinds: bridge *vs.* barrier, calm *vs.* violent, immensity *vs.* insignificance, or practicality *vs.* epic. The features and cultural importance of the image of the sea should not be reduced to the image portrayed through these dichotomies, but in these contrasting images one can see the importance of the sea in ancient Roman thought, as well as its impact on Roman society.

## 1.2 *Ius Naufragii*, or the 'Righteous' Plunder

The ancient *ius naufragii* implied that a shipwreck or its remains, upon reaching a foreign coast outside a trading hub recognised as such, belonged to those who took it.[38] This practice entailed not only pillaging from the shipwrecked, but also provoking a shipwreck in order to loot it.[39] The study of *ius naufragii* largely involves the issue of ownership of the wreck, and has given rise to three solutions wherein the wreck (1) belongs to the one who finds it; (2) belongs to the state which has authority over the coast where the shipwreck took place; or (3) continues to belong to its previous owner, who only has to assert his rights to recover it. The main questions here are why such a concept was adopted, how it was justified, and how it developed over time. By answering these queries, we will be getting to the heart of the knotty problem of the unity or plurality of the law applied to maritime domains.

In that sense, there are three inter-connected elements that had an impact on the origin and development of this legal practice. On the one hand, the Mediterranean basin was inhabited by different powers who, if not battling against each other, were trying to keep control over their own dominions. In fact, at a time when there was hardly any difference between foreigner and enemy, it was inevitable to consider as a bandit anyone who approached a port, even with a valid reason.[40] That translated into the ownership of things lost in a

37 Hes.*Op.*641; 678; Sen.*QNat.*5.18.16.

38 Alonso 2007, 219; Huvelin 1929a, 7–8; Rougé 1966a, 1467–1468; Apollod.*Epit.*6.7–8; Amm. Marc.15.2.2–3; Polyb.2.8; Plin.*HN.*2.73(71) and 7.57.11; Strab.5.4.2; 89.5.2; 17.3.20; Dionys. Per.47–49, and the existence of coastal areas with a large number of wrecks sunk near the sandy shores probably indicates that the wrecking of vessels by attracting them to the coast with signs was common, see; D.47.9.10 (Ulpian. 1 *Opin.*); Purpura 1986, 156.

39 Hdt.3.137–138.

40 e.g. Verg.*Aen.*1.563–564. It is this too-frequent attitude of the foreigner as enemy which

wreck, which might be the subject of *occupatio* and might become the property of the person who first acquired possession of them, as if they were *res nullius*.[41] In the historical process of the formation of real estate, that which also affects the ways of conceptualising the acquisition of objects, such as the institution of *occupatio*, loses its original function with the prevalence of derivative acquisition modes (e.g. *traditio*).[42] Thus *ius naufragii* was unavoidably linked with the ancient legal understanding of the sea and shores, and the people inhabiting or moving along them.

*Ius naufragii* was a maritime custom that changed through time, being initially conceived of as an individual practice, but later practised by diverse communities around the Mediterranean,[43] whose governments supported it, since they found it a means of subsistence, enrichment, and affirmation of their power.[44] Therefore, *ius naufragii* cannot be simply categorised as either a prerogative of state authorities, and therefore belonging to public law, or strictly as a subjective right of the individual, and thus corresponding to private law. As we will see throughout this work, it was practised by individuals as a source of income (sometimes accepted by the state), and in some areas of the Empire, the state, like some earlier (and later) states, retained the right to seize wrecks and have them auctioned.[45] These two possibilities would arise depending on whether or not the coast on which the shipwreck took place belonged to a powerful and highly organised state. In the first case the wrecks returned to those in power, while in the second they became the property of their discoverer.[46]

*Ius naufragii* was part of the economic activity sustaining coastal populations. Indeed, it is possible to find cases in which the rights of different communities to a wreck's booty, and both sides needed to find a compromise.[47] For example, the inhabitants of Salmidessos delimited the coast in order to

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brought about, e.g. the semantic evolution of the word *hostis*, which, according to the testimonies of Cicero (*Off*.1.12), Varro (*Ling*.5.3), and Servius (*Aen*.2.424), originally only had the meaning of foreigner; see: Huvelin 1929a, 7–8; Rougé 1966a, 1468.

41 We can define occupation as the legal act of taking possession of a *res nullius*, with the intention of making it one's own, considered by objective law as suitable for the acquisition of property. See Bonfante 1928, 50–57; García Garrido 1956, 273.

42 That affects institutions such as the *derelictio* or *deperditio*, which were key to determining the acquisition of wreck remains. See chapter three, section 3.2.1.

43 Aesch.*PV*.727; Diod.Sic.5.39.8; Hdt.1.166; Andrich 1904–1911; Rougé 1966b, 109; Moschetti 1977; Vélissaropoulos-Karakostas 1980, 162; Janni 1996, 453–470.

44 Strab.3.175–176, Chic García 2013, 17.

45 Fortunat.*Ars.Rhet*.1.13; Rougé 1966b, 341; Gibb 1999, 808.

46 Rougé 1966a, 1468.

47 Alonso 2007, 219; Scholten 2000, 11.

share what came to their shores from wrecks.[48] In another case illustrating this practice, a ship was wrecked in Knossos and two communities—Knossos and Tylissos—contested the cargo. This led to an agreement prohibiting looting from each other before settling on a share of the common loot.[49] However, from the moment the Mediterranean peoples started to understand that such a conception of wreck and wreckage was a serious impediment to mobility and exchange, they started—outside any theoretical conception of *ius gentium*—to develop some restrictions and rulings for *ius naufragii*.[50] Despite these limitations, it would not be until the start of the Roman hegemony in the Mediterranean, after their victory in the Punic wars, that the Roman conceptualisation of shipwrecking, as reflected in the *edictum de naufragio*, would start to gain prominence.[51]

Thus, at least officially, *ius naufragii* did not exist during the long Roman hegemonic rule over the Mediterranean; therefore, the remains of a wreck, either provoked or as a result of weather conditions, would remain the property of its legitimate owner. This opinion is strongly supported by reading the texts of the Digest in question; it would therefore seem that no problems arise in this area. Othewise, one may argue that the fact that jurists establish ways to deal with goods lost in a wreck indicates that indeed the practice was still alive and needed to be policed. A careful reading of legal texts and their confrontation with some rare extra-legal data leads us to think that the situation is much more complex than it is usually considered.[52] Indeed, Dio Chrysostomus (40–115 CE) in his oratio *euboica*[53] reproaches foreigners for unduly practising *ius naufragii*, because in doing so, they deprived citizens of a legitimate source of income. This speaks strongly of the legal plurality of the Mediterranean, where there was an official legal framework provided by the Roman Empire preventing *ius naufragii*, but with hubs where local populations still practised it for economic reasons.

### 1.2.1 *Ius Naufragii and Piracy*

It would be too optimistic to suppose that there is a clear-cut difference between *ius naufragii* and piracy, because both terms need to be understood

48 Xen.*An*.7.5.2; Van Effenterre 1942, 32–40 (Inscr.*Cret*.I.XVI. nº 4 B = Inscr.*Delos*, 1513 B); Vélissaropoulos-Karakostas 1980, 161.

49 Xen.*Hell*.6.5.1–3; Bengston 1975, n. 148.

50 See section 1.2.1.

51 It is also at that moment that Rome started to expand its trading networks along the Mediterranean, with many subsequent effects. For a summary, see: Stefanile 2017, 258–262.

52 See especially chapter five, section 5.1.

53 Dio Chrys.*Or*.7.31.

in relation to the legal framework established by a state. While an act of piracy falls outside the realm of wartime law and state violence, *ius naufragii*, even though it sometimes implied looting and *razzia*, belongs to the sphere of rights admitted by the ancient states, partly due to the conflictive political and societal environment of the ancient Mediterranean.[54] To make the picture even blurrier, merchants and pirates were not only tangled in an intricate dependence,[55] but they were also psychologically and practically parts of a single, long-lasting historical structure, the 'raid mentality', which essentially represented a specific mode of economic activity.[56]

The term 'pirate' appears for the first time in inscriptions from the third century BCE,[57] and several sources refer to them as *πειράθαι*, *praedones, latrones*, or *barbari*,[58] but it would not be until the Roman Republic that these would be labelled as enemies of all mankind.[59] In the Republic, their acts were characterised as being performed in groups, implying violence, and operating outside any legal framework. This stemmed from the idea that they did not constitute a *populus*, meaning a political and legal organisation with which it was possible to establish international relations, or to proceed to break them.[60] The characterisation of an act of piracy as a violent action carried out by a group outside the legitimate frameworks always proceeds to varying degrees from victims' subjective views of the wrong they have suffered. It places this action outside the framework of wartime law, outside conventions, and outside the limits of justice, whether of a private or public nature. Even maritime violence exercised outside the specific cases of war or treaties appears to have been increasingly in violation of the law, justifying, if necessary, a military intervention, it seems that a large part of the responsibility remained with the parties involved. This there-

54 As indicated by Ormerod 1997, 59–73. It is different in later periods, when the state of war is something exceptional; then it is easier to establish differences between privateer and private, between prize and booty. Privateers would seize spoils and justify this by claiming it was part of a just war, while pirates only acted for their own good and their acts found no legal justification. The latter is the approach as phrased by Grotius, which is not extensively treated in this work. Otherwise, see Kempe 2009, 393–395.

55 De Souza 1999, 22, 56, 201–202; Alonso-Núñez 2007.

56 Cassola 1968, 28; Gabrielsen 2001, 237; Bresson 2016, 418, who refers to using the 'economic rationality of violence'. The 'raid mentality' is still present nowadays, Dua 2017, 201.

57 Arnaud 2016, 21.

58 Pl.*Leg*.941; Hom.*Od*.16.426; Hdt.7.136.2; Plaut.*Mil*.115; Plin.*HN*.2.117; Suet.*Aug*.27.4; Lucian. *Dial*.D.1.122.

59 Cic.*Off*.1.11.33; 1.13.41; 3; 3.107; Cic.*Verr*.28.73; Cic.*Rosc.Am*.50.146; Livy.*Epit*.4.58.6; Arnaud 2016, 23–25.

60 The acts of piracy do not constitute acts of war, since the enemies are those peoples to whom Rome formally declares war, D.50.16.118 (Pompon. *Ad Quint.Muc*.).

fore leaves a great deal of room for interpretation and must be analysed through the filter of a relative polysemy which does not allow us to limit it strictly to the search for modern forms of piracy.

Before the Roman Republic, both *ius naufragii* and piracy were conceived by their practitioners as means of subsistence until they gradually came to be defined legally as noxious acts of private violence. The key difference between the terms would be that *ius naufragii*, as its name indicates, fell into the sphere of state violence and wartime law, and was therefore protected and sometimes even supported by the state. In contrast, piracy constituted acts of threatening or looting,[61] performed by groups acting outside the wartime law and its limitations as established by the states.[62] The possible limitations to *ius naufragii* were based on exercising power, negotiating, or simply threatening the other.[63] These consisted of practices that sought compensation for the damage caused, or built relationships with other populations,[64] and were known as androlepsía (*ἀνδρολεψία*), sýlan (*σύλαν*), or symbolai (*συμβολαι*), The first two refer to a sort of 'right of reprisal', which could penalise foreigners for damages committed by themselves or their community of origin, by kidnapping someone belonging to that group (*ἀνδρολεψία*).[65] Differently, the sylan implied that any citizen (or city) who considered himself injured by a foreign community or a citizen of the latter, could exercise a compensatory action against it.[66] When the city was the one suffering the damage, the action could be addressed to any member of the community, but when the injury affected a private individual, the revenge could only be inflicted on the aggressor.[67] On the other hand, symbolon constituted a contract that sealed a relationship between two parties,[68] which can

61 Thuc.1.4–5; Dem.*De Cor*.53.3; Eur.*Hel*.765–769; 1125.9; Ps.Apollod.*Bibl*.2.1.5; Hom.*Od*.3.69. 12; 3.71–74; Lys.22.14; Arist.*Polit*.1.1256; Polyb.2.4–5; 2.8–9.

62 Gabrielsen 2001, 225; Arnaud 2016, 24.

63 Rougé 1966a.

64 At least before the Romans established their dominion in the Mediterranean basin, as indicated in Rougé 1966a.

65 Dem.*De Cor*.21.82; 23.82.4; Polyb.8.50–51; *Lexeis Rhetorikai* in *Lex.Seg*. 213–230. 214.2; Bravo 1977; MacDowell 1963, 27–28; Vélissaropoulos-Karakostas 1980, 141–150.

66 *SEG* II$^2$ 1132; *SEG* IV$^2$ 1.68; *FD* III 2.68; *SGDI* II 2506; *CID* IV 12; *CID* IV 114; *SEG* IX 1$^2$; *SEG* IX 2.573; *SEG* XII 9.191; *IMT* Skam/NebTaeler 192; *SEG* II 533; *SEG* XL 609. Gioffredi 1980, 169; Purpura 2002; Bravo 1980; Pritchett 1991, 68–132; Garlan 1999, 108; Cassayre 2010, chapter two, 'Les conventions juridiques'; Dillon and Garland 2010, 164; Cecarelli 2013, 38.

67 Baslez 2008, 152.

68 Diog.Laert.4.46.9; 10.150; Eur.*Orest*.1130; *Rhes*.220; Plut.*Phil*.14.5.5. 15.7.2; 21.9.2; *Pel*. 30.8.2; *Marc*. 26.1.2; *Pyrrh*.20.3.1; Jones 1956, 217; De Ste Croix 1962a; 1962b; Gauthier 1972; Hopper and Millet 2016. However, Harris 2015, 8–12, indicates that the term *σύμβολον* in some legal contexts refers not to contracts but to actionable liabilities.

be symbolised in an object (e.g. ring, tablet).[69] These symbolai constituted the judicial conventions that fixed the arbitration procedures deployed in a treaty in order to settle the conflicts resulting from commercial practices at sea, and contributed to framing (but failing to eliminate) the use of maritime violence.[70]

Treaties also made it possible to place a boundary, however theoretical, between the legitimate and the illegitimate as regards the use of violence at sea, with a view to transferring property. Once the forms of maritime violence in times of war and peace are characterised, it becomes possible to define the illegitimate uses of maritime violence in the same way that brigandage constitutes an illegitimate use of violence on land.[71] Documents concerning this could be formulated in different ways, including through bilateral agreements, or by phrasing permission given by one of the parties involved. One of the Ras Shamra tablets—as early as the thirteenth century BCE—provides evidence of a letter in which the king of Tyre allows an Egyptian ship, wrecked on his shores outside a port, to leave in safety with its entire cargo.[72] Another example would be a letter from Ziaélas, a Bithynian monarch, in which he recognised the right of the inhabitants of Cos to asylum if they were wrecked on his shores.[73] We can also find treaties between coastal Greek cities and traditional pirate communities on Crete binding the pirates to respect citizens of the contracting state and their property.[74] Finally, the treaty concluded between Esarhaddon, King of Assyria (681–669 BCE) and Baal, King of Tyre (680–660 BCE), states that if a ship of Baal or the people of Tyre is wrecked off the land of the Philistines or within Assyrian territory, everything that is on the ship belongs to the king, but the ship could leave safe and unharmed.[75] Some of these assaults were committed as part of a 'raid mentality', and indeed that way of thinking and acting in consequence was mostly linked to a cultural and traditional way of acquiring goods, rather than a socio-political act of war.[76] In these historical and cultural contexts, the process of establishing the differences between *ius naufragii* and piracy along with its spatial dimension caused a dynamic negotiation of legal conceptions, politics, power, and identity.

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69 Vélissaropoulos-Karakostas 1977b; Cataldi 1983; Herman 1987; Zuccotti 1992, 305–439; Purpura 1995, 468–469.

70 Laqueur 1936, 469–472; Gauthier 1972, 102.

71 Frezza 1949, 29; Bederman 2001, 192; Ando 2020a, 123.

72 Villoreaud 1955, 74; Rougé 1966a, 1469–1470.

73 *Syll.*$^{3}$465; Vélissaropoulos-Karakostas 1980, 163–165.

74 e.g. *SV* iii.482.

75 Parpola and Watanabe 1988, 24–27.

76 Gabrielsen 2001, 226.

In sum, the difference between piracy and *ius naufragii* is not easy to define in the archaic Mediterranean, where there was a semi-permanent state of war ongoing, as well as an absence of a hegemonic power dominating the Mediterranean basin which could define what constituted violence and what did not. Therefore, on many occasions, it depends solely on the nuances of the individual cases. Both conceptions are logically tied to a political organisation, which establishes the limits of legality and considers who is and is not part of a given social group, what counts as necessity and what constitutes violence.[77] In addition, the perception is linked to a spatial sphere delimited by legal constructions enabled by the states. Piracy is not simply 'armed violence exercised through the use of ships', since the characterisation of these actions does not depend solely on the force exerted over something or someone, but also on how are these perceived in different places and by diverse cultures.[78] In that sense, the criminalisation and prosecution of piracy would not be based on principles of natural law, but rather on unilateral solutions to act against specific situations, and was closely related to the notion of, if not Empire, at least a politically organised community.[79]

### 1.2.2 *The Spatial Turn of the Ius Naufragii*

As its very name indicates, the maritime cultural landscape is a spatially bound notion that connects land and sea through the lens of the individuals who understood and experienced the areas under study. The theoretical nature of the *spatial turn* does not contradict the theory labelled as 'maritime cultural landscape', but instead includes this approach among its different trends. The spatial turn is a theoretical approach that places emphasis on space and place. While never ignoring the fact that we are temporally bound beings, the use of this approach in different fields of study has increasingly emphasised the importance of spatiality in understanding the history of the human being and their relation with the environment.[80] This approach demonstrates that space is no longer a neutral concept and cannot be considered independent from what it contains. Therefore, it also cannot be considered to be immune to his-

77 This problem is timeless, as highlighted by Dua 2017, 178: 'The concepts of resource piracy and defensive piracy remind us that in global coverage only certain actions are labelled as piratical: "piracy" and "legality" are loaded and polemical terms that are modes of legitimising certain actions while condemning others'.

78 De Souza 1995, 180; 1999, 10–11; Chic García 2013, 31–49; *contra*, Arnaud 2016, 22.

79 Cic.*Parad*.27; Shaw 2000, 361–403, 2004, 326–374; Benton 2011, 239–240; Ando 2020d, 1–3.

80 The story of the spatial turn and its associated bibliography can be found in Warf and Arias 2009.

torical, political and aesthetic changes.[81] In that way, space itself is a socially produced entity that is created, understood and experienced. This trend has been accepted in several studies on the Roman world, even if most of them fail to address the relation between the land and the sea.[82] Because of that shortcoming, this work considers the maritime cultural landscape as a way of integrating sea and land in the legal world of the Romans. Through this approach, it is possible to reassess the political and social underpinnings of the Romans' relation to their maritime landscape.

As mentioned previously, *ius naufragii* was practised outside areas which were either labelled as commercial hubs or identified by the authorities as safe spaces by public declaration.[83] The latter highlights the political dimension of this practice in the archaic Mediterranean, where the safe spaces were designated by public authorities and indicated their liaisons (or the absence of these) with individual populations. In this light, one of the first commercial locations that comes to mind would be the Greek *emporion*, which has generated vast literature in the past.[84] In addition to the *emporia*, it was also possible to trade thanks to the concession of the right to *asylia*, which supported the creation of bonds *inter gentes*, and protected vessels and cargoes from maritime reprisals, including state-sponsored piracy and depredation on the high seas.[85]

The term *emporion* changed over time, but in the archaic period it was broadly defined as any community involved in commerce. During the Classical period, the term came to indicate a community that was geographically delineated, with its own administrators and juridical apparatus.[86] Indeed, in the case of Greek law and the *emporion*, this categorisation is important because it reflects the existent dichotomy between land and sea spaces with regard to commercial litigation.[87] However, for my argument, instead of only focusing on

81 In many ways, the foundational text for the idea of political space is Foucault 1986; but the analyses of Lefebvre 1991 are more systematic and have been followed by Marxist and materialist geographers who have a significant role in the spatial turn, e.g. Soja 1989.

82 e.g. Spencer 2010; Scott 2012; Russell 2016a, 16–24, including a complete bibliography on the different uses of the spatial turn on classical studies. On the other hand, Nicolet 1991, 36, refers to the Roman power over land and sea thanks to its victory over piracy, and Horden and Purcell 2000, consider space as a historical actor on a large scale.

83 Huvelin 1929a, 7–8; Rougé 1966a, 1467–1468. And even then, the port authorities could refuse to let a vessel that looked threatening enter a port. See Cic.*Inv*. 32.98.

84 Such as: Vélissaropoulos-Karakostas 1977a; Bresson and Rouillard 1993, 26; Bresson 2000, 74–84; Dietler 2010; Etienne 2010; Demetriou 2011; 2012; Malkin 2012; Gailledrat 2014.

85 Glotz 1929, 267; Marotta 1996, 68 n.38, 74 n.68, 77; Van Berchem 1960; Rigsby 1996; Chaniotis 1996; Bederman 2001, 125.

86 Wilson 1997, 199–207.

87 Cohen 2005, 290–291, 302.

Greek *emporia*, we should think of these more generally as places that enabled trade; by doing so, the term becomes applicable to many of the trade enclaves that had fringed the Mediterranean ever since the Archaic period.[88] Commercial spaces where foreigners belonging to a community were authorised to trade were under state protection.[89] A focus on these areas seeks to recuperate an important dimension of how violence was addressed in the archaic Mediterranean, being regarded as acceptable with the exception of its occurrence in these safe spaces, which were designated via treaty or by identifying them officially, by virtue of public law. What is significant here is the link between violence and space, since suppression is necessarily connected to the establishment of control over territory and trade routes.[90]

In the ancient world, commercial hubs constituted safe areas that encompassed land and sea, and wherein individuals of different statuses could trade. Gradually, several populations began to boost traffic at their ports, leading them to establish import and export fees, and the transport of goods was carried out under the protection of the community.[91] That said, we should not understand these commercial enclaves as spaces featuring some specific infrastructure, but in line with the empirical purpose of serving trade, we shall think of them as being designated by the law of the states as such. Even in later periods, the legal definition of 'port' referred not to a place with specific infrastructure, but to a protected watery space where the functions allowing import and export took place, thus featuring control.[92] The latter means that a treaty agreed between states could establish a land and maritime space as a safe area where the right to wreck would not apply, making it available for sailing and/or trading. Therefore, in the case of a commercial enclave, we must ask where the protected space starts and ends. I am assuming that for these cases, the shorelines define the spaces of exclusion from the *ius naufragii*. Most probably, individuals sailing towards a commercial spot were not prevented from being wrecked and assaulted if they came ashore on the way.

One of the most famous examples of border delimitation treaties and actions by two large Mediterranean populations were the six treaties (five

88 For yet more studies on the Greek polis, see: Polanyi 1963; Casevitz 1993; Counillon 1993; Hansen 1997; Gailledrat et al. 2018, 12.

89 Baslez 2008, 159.

90 Vlassopoulos and Xydopoulos 2015, 8–9.

91 Dem.*De Cor.*88.53.6, Plut.*Cim.*7.

92 D.50.16.59pr. (Ulpian. 68 *ad Ed.*) *'Portus' appellatus est conclusus locus, quo importantur merces et inde exportantur: eaque nihilo minus statio est conclusa atque munita. Inde 'angiportum' dictum est.* Also, Philostr.*V A*.6.12, refers to a shore port as a place where controls of the goods traded took place.

authentic and one fake)[93] agreed between Rome and Carthage (509–279 BCE). Polybius describes their content, indicating the limits established for the Romans (and their allies) on navigation and anchorage in Carthaginian territory, as well as how trade should be conducted.[94] These treaties are very succinct in this field, and even if they establish rights and duties for the parties, along with identifying an international merchant (in this case, Rome), they do not confine trade to a concrete place. Instead, they indicate that Romans should not sail beyond the Fair Promontory (Cap Bon), and on this note, designated the area for safe navigation. It is well known that these treaties (especially the first one) bear witness to the unequal political position of these two Mediterranean powers.

Nevertheless, this is not the only example of a treaty by which Rome established limits to the *ius naufragii* and bridged the gap between land and sea. These legal instruments started as bilateral agreements and were created in the context of an envisioned or ongoing war.[95] The main difference here is that while the Roman-Carthaginian treaties delimitated concrete areas where navigation was safe or trade could take place, other treaties simply established friendship or alliance among the parties. In concrete terms, the Roman treaty with Maroneia (167 BCE)[96] indicates:

> [ποιεῖν τὸν δῆμον τὸν] Ῥωμαίων καὶ τὸν δῆμον τὸν [Μαρωνιτῶν καὶ] Αἰνίων τοὺς κεκριμένους ὑπὸ Λευκίο[υ Παύλου] ἐλευθέρους καὶ πολιτευομένους με[τ' αὐ]τῶν· Φιλία καὶ συμμαχία καλὴ ἔστω καὶ κατὰ γῆν καὶ κατὰ θάλασσαν εἰς τὸν ἅπαντα χρόνον, (the [Alliance of the demos] of the Romans and the demos of [the Maronitai and] those of the Ainioi judged by Lucius [Paulus] to be free and sharing in their state: There shall be friendship and good alliance by land and by sea for all time).[97]

The wording is like several other treaties between the Romans and the Greek states in the second century BCE, and in particular the treaty with Astypalaia (105 BCE):[98]

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93 Serrati 2006, 113.

94 The commercial focus is more noticeable in the first treaty (509 BCE), Polyb.3.22.8–10; see also, Scardigli 1997; Nörr 2005, 71–76, 160–167, 170–177, but there are also some dispositions in the second treaty (378 BCE); see: Polyb.3.24.10–11.

95 Ando 2020a, 117–118, refers to several examples of treaties. Later, these evolved into legal tools characterising the status of one city or its population in the Roman Empire, see Ferrary 1990, 235.

96 *SEG* XXXV 823. ll. 6–11.

97 Bagnall and Derow 2004, 90–92.

98 *SEG* XII 3.173. ll. 26–29 (= *IGRR* IV 1028).

> τω δήμω τω] [Ῥωμαίων και] τω δήμω τω * Αστυπαλαιεων ειρήνη και [φιλία] [καϊ συμμαχία] έστω και κατά γήν και κατά θάλασσαν [εις τον α-] [πάντα χρόνον] πόλεμος δε μη έστω. (This friendship and alliance shall be good for all time, both by land and by sea. […] between the People of the Romans and the People of the Astypalaians; let there be peace, friendship, and alliance both on land and on sea for all time; let there be no war).[99]

As can be imagined, the interest in these treaties lies in the mention of the sea and the land. These documents demonstrate the role of law in negotiating the gap between sea and land with the aim of avoiding war, and therefore violence, to encourage commerce. Nevertheless, are we just dealing with acts of public violence, such as war raids? These treaties may have prevented the exercise of *ius naufragii* between both communities; it was considered unlawful not because of the act itself, but because of the people it was committed against. The latter constitutes one of the key differences that the Roman conception of shipwrecking introduced through the *edictum de naufragio*. Labelling the *ius naufragii* as unlawful marked a change from the prior practices of delineating specific hubs where this conduct was prevented, as well as its banning via mutual negotiations and agreements. In this case, this conduct was inadmissible and banned, full stop.

These treaties attest a fragmented Mediterranean and establish limits to sea violence, still bearing in mind the limits of the areas bound by their negotiation. In that sense, the guiding idea appears to have been that maritime violence and war should be avoided, but the exercise of private violence was perhaps more difficult to control. Sea transit points constitute areas where economic and cultural traditions mingle and clash.[100] Thus, we need to bear in mind that perhaps there was an official or established framework of understanding certain practices depending on the main governmental power, while other traditions and customs could and would have remained in force and interfered with these general rules and principles.[101] In that sense, for the people for whom looting had always been part of their economic income, it would have been difficult to be told that this practice was not acceptable anymore.[102] Therefore, this element needs to be considered when examining culturally diverse Mediterranean areas. After all, any landscape is made up of multiple ideological and

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99 Transl. Sherk 1969, 56–58.

100 Knapp 1997, 154. Also, Mataix Ferrándiz et al. 2022(c).

101 I will explore this topic further in chapter two.

102 Raids were a source of economic income in the archaic Mediterranean for several Mediterranean populations, such as Dalmatia, Cilicia and Liguria, see: Diod.Sic.5.39.8; Strab.4.203.

interrelated components, which are best understood through considering its previous inhabitants.

## 1.3 But This Is *Vis*! When the Shore Meets the Sea

In the phrase from this section's title, Suetonius echoes the reaction of Julius Caesar who, when attacked on the Ides of March, shouted "*But this is vis!*" to his assailants, calling out their actions as violence.[103] While the term '*vis*' could be neutrally identified as force, in the context of the Roman Republic its meaning included conduct disrupting public order.[104] This section reflects on how the violence threatening the Roman Mediterranean expansionist project at times compelled the Romans to open and close the limits of various Mediterranean areas, including both land and sea. It goes without saying that this exercise contributed to a change in the maritime cultural landscape in the areas where these regulations were applied, as well as to the configuration of the Roman maritime cultural landscape that was in turn being gradually defined.

In one of his papers, Arnaud indicates: 'L'appropriation par l'état des espaces maritimes (…) s'appuie sur des droits ou se revendique du droit, mais se construit en règle générale sur la violence'.[105] With these words, he was referring to the different conflicts through which Roman power was extended to other regions.[106] However, his statement expresses exactly what I aim to argue in this section: that a spatial consideration permeates these rulings focused on the eradication of violence. In what follows, I will sketch out how two different legal enactments of the Roman Republic addressing violence shaped the Roman maritime cultural landscape, which was unavoidably connected to the Roman state's interests and ideology. The two laws addressed here were enacted prior to the *edictum de naufragio* and targeted organised sea banditry.

There are numerous studies on piracy,[107] and my intention in this section is not to echo them and their descriptions of the circumstances that made piracy

103 Suet.*Iul*.82.

104 Lintott 1968, 22–30; Fuhrmann 2013, 7015.

105 Arnaud 2016, 32 ('The appropriation by the state of maritime spaces (…) is based on rights or asserts the right, but is generally built on violence'). This is also the main argument of Prange 2013, 9–33.

106 According to Flor.2.13, Caesar paraded a representation of the sea as a defeated captive in his Gallic triumph in order to show that he had conquered farther-off lands than any other Roman general. Along the same line of thought, Vergil thinks of the sea as a new world over which Augustus' power can be extended, Verg.*G*.1.25–31.

107 Arnaud 2016, 527–536, covers the history of Graeco-Roman piracy with a wealth of references.

a threat to the Roman Republic. The pirates' insolence was growing gradually, reaching its apogee in the first century BCE, when they started being referred to as 'enemies of all mankind',[108] and not concretely of the Roman people.[109] That qualification legally justified combatting pirates and suggested that it was an obligation of all countries, who could take the measures that they considered appropriate; this even justified crossing borders and jurisdictions.[110]

Even if the acts of the pirates constituted a *crimen vis* and should have been addressed through Roman criminal law, the violence and extent of their acts effectively made piracy a separate criminal category.[111] Their actions were visibly differentiated from the ones committed by land bandits and resulted in the enactment of concrete legal dispositions to overcome that violence. This differentiation would become unnecessary later in the Empire because both sorts of banditry on land and sea were reduced to local roles.[112] The Republican period, however, was of great significance from the point of view of the theory of law and it should not be omitted in research on the Roman maritime landscape. The Roman Republican fight against piracy constitutes another episode in which it is possible to observe how the boundaries of the legal dichotomy between sea and land were crossed.

The first source is the *Lex de provinciis praetoris* (100 BCE), also known as the *Lex de piratis persequendis*.[113] Between 1893 and 1896, two inscriptions were discovered at Delphi, which, despite their fragmentary state and poor preservation, were identified as the Greek version of a Roman *Lex* that represented the Roman struggle against piracy in the Mediterranean.[114] In 1970, a new inscription discovered in Cnidos proved to be a copy of the Delphian law.[115] Indeed,

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108 Cic.*Off*.3.107 *'pirata non est ex perduellium numero definitus, sed communis hostis omnium'*.

109 This would have implied a series of procedures in terms of declaring war according to the *ius fetialis*, such as the *iusiurandum* as indicated in Cic.*Off*.3.108. See also, Catalano 1964; Loreto 2001, 69–73; Bederman 2001, 55–57. On the importance of this distinction as compared to later periods, see chapter two, section 2.2.1 and chapter five, section 5.2.2.

110 Tarwacka 2009b, 2012, 70, 73; 2018, 302, 309; Policante 2015, 26–50.

111 Tarwacka 2009a, 56–57.

112 See chapter five, section 5.2.2.

113 Knidos, column II. 1–31 and Delphi, block B, 8–14, quoted after: Crawford et al. 1996, 231–270.

114 The text of the law can be found in *SEG* III.378; and *FIRA* I, 121 ff. (text from F. Riccobono). A few years after its discovery, some authors erroneously identified this law with the *Lex Gabinia de bello piratico* (67 BCE). See: Cuq 1923; 1924a; 1924b; Jones 1926, 158. An extensive study of the epigraphic problems of both inscriptions can be found in Monaco 1996, 116–118.

115 To check the text of both laws separately, see Greenidge 1986, 279–282, and to check the

although most of the Cnidos inscription has nothing to do with the Delphic inscription,[116] there is a part, between columns II and IV, corresponding to the beginning and end of the law, which coincides with the Delphic inscription, although this is not a literal but rather a content match. The provisions contained in the laws from Delphi[117] and Cnidos[118] ensure navigational safety for Romans, Latins, and Roman allies by classifying these areas as Roman praetorian provinces. As such, this regulation forced eastern countries to undertake activities to prevent pirates from maintaining bases in their lands and to forbid them from seeking shelter in their ports.[119] However, some other countries were not keen on entering an anti-pirate alliance with Rome, which by that time had become more formidable than the pirates.[120]

One of the first elements that can be noticed here is that these laws were intended to create safe navigational spaces, free from violence, and this was

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combined text, see *SEG* XXVI 1227. Also, Giovanni and Grzybek 1978, 33–47; Summer 1978, 211–225; Martin and Badian 1979, 153–167; Avidov and Timoney 1995, 7–14.

116 Ferrary 2008, 102; the Greek version was not an official translation made in Rome and sent to the provinces, but was made by the governor of the Asian province.

117 Delphi copy, Block B, ll. 8–12 (ὁμοίως τ]ε̣ καὶ πρὸς τὸν βασιλέα τὸν ἐν τ[ῇ̣ ν]ήσῳ Κύπρωι βασιλεύοντα καὶ πρὸς τὸν βασιλ[έα τὸν ἐν Ἀλε]-|ξανδρείαι καὶ Αἰγύπ̣[τωι βασιλεύοντα καὶ ρὸς τὸν βασιλέα τὸν ἐπὶ Κυ]ρήνῃ βασιλεύοντα καὶ πρὸς τοὺς βασιλεῖς τοὺς ἐν Συρίαι βασιλεύον[τας, πρὸς οὓς] | φιλία καὶ συμμαχία ἐ[στὶ τῶι δήμωι τῶι Ῥωμαίων, γράμματα ἀποστελλέ]τω καὶ ὅτι δίκαιόν ἐστ[ιν αὐ]τοὺς φροντίσαι, μὴ ἐκ τῆς βασιλείας αὐτ[ῶν μήτε] τῆ̣[ς] | χώρας ἢ ὁρίων πειρατὴ[ς μηδεὶς ὁρμήσῃ, μηδὲ οἱ ἄρχοντες ἢ φρούραρχοι οὓς κ]αταστήσουσιν τοὺ[ς] πειρατὰς ὑποδέξωνται, καὶ φροντίσαι, ὅσον [ἐν αὐ]τοῖς ἐσ[τι] | τοῦτο, ὁ δῆμος ὁ Ῥωμαίω[ν ἵν' εἰς τὴν ἁπάντων σωτηρίαν συνεργοὺς ἔχῃ.) ([—And likewise] to the king who reigns in the island of Cyprus and the king [who reigns in] Alexandria and Egypt [and the king] who reigns in Cyrene and the kings who reign in Syria [who] have a relationship of friendship and alliance [with the Roman people, [he] sends letters] [in which it is said] that it is right that they take care that from their kingdom [or] from their territory or from their borders not [depart] [any] pirate [and that the magistrates or the commanders of garrisons that [they] designate give asylum to the pirates, and that [they] take care, as far as this [it will be possible], that the Roman people (them) have [as] coadjutors for security of all). (Trans. Crawford 1996, 254).

118 Cnidos Copy, col. II, lines 6–11 ([—] τῶι δήμωι Ῥωμαί-|ων κατὰ τοῦτον τὸν νόμον, ὅπως τῶν | ἐ[θν]ῶν μή τ[ι]σιν ἄδικα πράγματα [μήτε] | [—c.10—] πρά̣[γ]ματα γένηται, εἴπερ | κατεδίδοτο πράγματα, κατὰ δύνα-|μιν ποιεῖν ἄνευ δόλου πονηροῦ οἵ τε πο-|λῖται Ῥωμαίων οἵ τε σύμμαχοι ὀνόμα-|τος Λατίνου ὁμοίως τε τῶν ἐθνῶν, οἵτι-|νες ἐν φιλίαι τοῦ δήμου Ῥωμαίων εἰσίν, | ὅπως μετ' ἀ[σ]φ[α]λείας πλοΐζεσθαι δύνων-|ται καὶ τῶ[ν] δ[ι]καίων τυνχάνωσιν …) (11. 1–11 [—? it has seemed good?] to the Roman people according to this statute, so that to none of the nations may there befall injury or [insult], for [who]ever? shall have received a charge?, insofar as it shall be possible, to act without wrongful deceit, so that the citizens of Rome and the allies and the Latins, likewise those of the nations who are friends of the Roman people may sail in safety and obtain their rights) (Trans. Crawford 1996, 253).

119 Ferrary 1977, 619–660; Tarwacka 2009a, 39–41.

120 Monaco 1996, 177.

made possible thanks to a public law. The legal problem of suppressing piracy is compounded by the question of jurisdiction.[121] To the need to establish clear frontiers between territorial units, the Romans responded by classifying provinces and establishing their rule of law. In that sense, jurisdiction was not in question.[122] By contrast, the sea offered no such defined frontiers other than coastlines, variously defined in law. Therefore, these laws created a bridge between land and sea, keeping them safe from violent acts and establishing boundaries in given areas.

By being qualified as praetorian provinces, these lands came to have a legal significance. Becoming regions where the formulated law was valid affected not only the Roman people but also their allies.[123] In the case of the *Lex de provinciis praetoriis*, it is possible to observe how many of the limits that would normally apply to Roman regulation were trespassed in order to fight violence (even if the commercial and expansionist interests of Rome played a role as well).[124] We can see how a statute applies to Romans and non-Romans, and how it is valid both on land and at sea, since its aim was to allow for safe navigation. The urgency of the measures to target piracy (esp. Cilician) would have justified the exceptionality of these enactments.[125] An inscription from Astypalaia indicates that they had fleets capable of capturing cities, and were able to defeat the pirates on their own, but this does not mean that Rome's support was not necessary to successfully challenge piracy in these areas.[126] In addition, these laws bear witness to the increasing power of Rome, which was managing violence via legal statutes and not by bilateral treaties as before. In terms of jurisdiction, these laws represent the first hints of the Empire since the creation of the Roman hegemony in the Mediterranean was accomplished through the creation of provinces.[127] The laws of Delphi and Cnidos were legal enactments that aimed to last in the *longue durée*, and they implied a transformation of the political attitude of the Romans.

A different way of delineating the land and sea limits can be perceived in the *Lex Gabinia de bello piratico*, approved in 67 BCE by the tribune Aulus Gabinius.[128] At that time, the violent threat of pirates in the Mediterranean (partly

121 Anderson 1995, 178.

122 Strab.10.5.4; 14.5.2.

123 The latter effect has also been observed by Westerdahl 2003, 468–470, the concept of land in Scandinavia has, among other things, a direct legal significance; a "land" (province) is thus the area of validity of a formulated law.

124 This is also the argument of Tarwacka 2009a, 63–66; 2018, 299.

125 Strab.14.5.2.

126 *IG* XII$^3$ 171; Geelhaar 2002, 115–117.

127 Ando 2020a, 119.

128 Asc.*Corn*.72; Cass.Dio.36.

due to their strong position in the slave market) had even affected the grain routes, which in turn had caused an increase in its prices, and consequently heightened the risk of famine in Rome.[129] This crisis led to a tribune proposing that the Senate should grant *imperium infinitum* to the general Pompey during a three-year campaign to fight piracy.[130] On the territorial plane, Pompey was entrusted with the area of the entire basin of the Mediterranean Sea, from the Black Sea to the Pillars of Hercules, along with the coasts extending 80 km inland in order to include the caves where pirates were hiding.[131] The reason for defining such an extended territory was to ensure that the leader had the ability to persecute the pirates wherever they appeared or fled to. As de Souza points out, the most effective way to deal with pirates was to tackle them on land, taking away their bases of operation.[132]

From a constitutional point of view, the *Lex Gabinia* has an important role in the legal landscape of the Roman Republic. The *imperium* granted to Pompey was not extended to all the provinces, but still gave him the right to use his power over a very large territorial area, which indeed constituted a breach of the Republican constitution.[133] Such wide-ranging power resulted in a collision with the authority of the governors of individual provinces. According to Velleius Paterculus, Pompey had the same *imperium* in relation to the governors as the rank of proconsul.[134] Politically, to grant such extensive power to a single person was an entirely new situation, as was the fact that his power could be used on both land and sea. The latter demonstrates how flexible the limits of the law could be regarding its application in defined spaces when there was a public emergency, as piracy was in relation to the Republic's maintenance of order.

Cicero's discourse in defence of the *Lex Manilia* (66 BCE)—a legal enactment specifying that Pompey the Great be given sole command in the Third Mithridatic War—provides details on the spatial extent of his powers similar to what can be seen in the *Lex Gabinia*. Another important impact of this disposition for the spatial discourse that is the focus of our study can be clearly read in Cicero's words:

129 Brunt 1987, 179.
130 Tac.*Ann*.15.25.
131 Vell.Pat.2.31.2.
132 Souza 1999, 114.
133 Monaco 1996, 224–226.
134 Vell.Pat.2.31.2.

> Cic.*De Imp.Cn.Pomp*.56, *Itaque una lex, unus vir, unus annus non modo nos illa miseria ac turpitudine liberavit, sed etiam effecit, ut aliquando vere videremur omnibus gentibus ac nationibus terra marique imperare* (And the result was that one law, one man, and one year not only set you free from that distress and that reproach, but also brought it to pass that you seemed at last in very truth to be holding empire over all nations and peoples by land and sea.).
>
> Trans. H. GROSE HODGE

These phrases constitute the first literary reference to a victory 'on land and sea' in the broad sense of all lands and all seas.[135] The latter not only demonstrates an entanglement between land and sea, but also appeals to the extension of Roman power and jurisdiction over both areas. The two sources included in this section provide evidence of the shape of the Roman maritime landscape prior to the enactment of the *edictum de naufragio*. These laws labelled spaces to prevent violence committed against ships, but still lacked the refinement of the later dispositions targeting private violence mentioned in the next section. They are indicative of the will and need of the Romans (and their allies) to legally change the Mediterranean maritime landscape to provide safe spaces to navigate. That is obviously a political act, but within that act, there was a spatial change that bridged the gap between the civilisable land and the 'unruly' sea. Faced with the long-standing detachment and separateness of sea and land, the symbolic and political aspects of these texts have combined *ius civile* and *ius gentium*, along with additional functional measures. The fundamental gap was between the public need and the expansionist dreams of the metropolis. It may even be that some 'political' borders were indeed symbolic in some sense, rather than fixed geographically.[136] However, in reality, that *imperium* did not translate into *dominium* in the Roman case, and there was not effectively an extension of the state jurisdiction seaward.[137] The latter highlights that the sea was a free resource in the Greek and Roman world.[138] Indeed, Polybius, gives a list of the categories that were considered the property of the Roman people in Republican Rome; this includes rivers, lakes (or harbours), lagoons, public lands, and mines, but does not mention the seashore or the sea.[139]

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135 Nicolet 1991, 36.
136 See also a similar approach in Westerdahl 2003, 493.
137 Thomas Fenn 1925; Johnson Theutenberg 1984, 482; Tuori 2018, 203, 214.
138 Hasebroek 1926, 126; Purpura 2004a; Marzano 2013, 235–239.
139 Polyb.4.17.2.

The laws previously indicated specifically target piracy, and therefore, organised acts of global importance at the time. What happened then to the people who would keep on committing private acts of *ius naufragii* as a sustainable activity for themselves and their families? The latter leaves us with the difficult question of how private violent acts were targeted in these areas. Defining space to avoid violence is not only the first step towards fighting it, but it is also a way to signify the Roman space as violence-free. Other connected issues would be the range limits on the enforcement of these rulings, or the interaction of private space or interests in spaces considered public. These are, of course, complex topics, the dynamics of which I have only touched upon in this section, and which will be complemented by the chapters that follow.

## 1.4 *De Incendio Ruina Naufragio Rate Nave Expugnata*: A Roman Turn in the Conception of Shipwrecking

According to Rougé, the *ius naufragii* was still recognised during the Roman Empire and in fact was still used by several populations, underlining the legal plurality of the Roman Mediterranean.[140] However, even though assaults on ships must have continued to be committed during that period,[141] this practice was neither recognised nor accepted by the Imperial government.[142] The first century BCE brought the enactment of the *edictum de naufragio*, which brought limitations to the conduct as described with respect to the *ius naufragii*.

The edict developed the paradigm of the shipwreck as a legal concept into being perceived as an event from which the subject must be protected, both in terms of integrity and property rights.[143] Although these behaviours may already have been considered wrongful prior to the enactment of the edict,[144] the essential aspect brought forward in this disposition was that shipwrecking came to be considered as an act of private violence that must be legally targeted. Thus, the previous conception of shipwrecks as part of the practices

140 Rougé 1966a, 1478–1479; also signals Manfredini 1984, 2220–2221.

141 See e.g. Ulpian's fragment § 10 of the *edictum de naufragio*, referring to people attracting the ships to the shore to steal from them.

142 Consistent with Scialoja 1939, 685; Purpura 1995, 475; 1976, 73–75.

143 Some fragments of the Talmud of Jerusalem show that this conception is not shared in other cultures: see Talmud of Jerusalem, *Schequalim*.VII.2.; Talmud of Jerusalem, *Baba Qama*.X.2.

144 Indeed, Plautus' comedy *Rudens* refers to the unlawfulness of seizing property coming from a wreck (esp. 955–965) and it was probably written in 181–180 BCE. See: Charbonnel 1995, 303.

belonging in to the sphere of raid-mentality and wartime law were set aside, and in that sense, it was agreed that these events should be addressed through treaties and not through private legal remedies. As for the provision itself, the Digest states:

> D. 47.9.1pr. (Ulpian. 56 *ad Ed.*) *Praetor ait: In eum, qui ex incendio ruina naufragio rate nave expugnata quid rapuisse recepisse dolo malo damnive quid in his rebus dedisse dicetur: in quadruplum in anno, quo primum de ea re experiundi potestas fuerit, post annum in simplum iudicium dabo. Item in servum et in familiam iudicium dabo*.[145] (The praetor says: 'If a man be said to have looted or wrongfully received anything from a fire, a building that has collapsed, a wreck, a stormed raft or ship, or to have inflicted any loss on such things, I will give an action for fourfold against them in the year when proceedings could first be taken on the matter and, after the year, for the simple value of the things. I will likewise give an action against a slave or household of slaves').

This edict is one of the different sources targeting violence enacted in the first century BCE.[146] The last century of the Republic is known for its violent events, such as the disturbances resulting from the domination of Sulla,[147] the civil wars,[148] the constant threat of pirates,[149] the servile revolt of Spartacus,[150] and the return of Pompey.[151] Concerning the spatial context, both the military and diplomatic forces of Rome managed to impose order on the previous state of anarchy affecting diverse areas of the Mediterranean.[152] In addition, the ever-increasing spread of violence in daily life became, at the end of the Republic, much more than a sign of the times: the law (both praetorian and legislative) devised solutions to hold back its rise. In this context, the praetor's court, through the protection granted by awarding interdicts and the identification of illicit behaviours as *vis*, contributed to the enucleation of most of the

145 Text preserved in PS.5.3.2; Coll.12.5 and C.6.2.18 (294). Lenel thought that the last phrase was an interpolation, see Lenel *Pal* 2, 765–766 (§ 189); 1927, 396; also, Biondi 1925, 19; *contra*, Vacca 1972, 91–95.

146 See table four in the appendix.

147 Plut.*Sull*.31; Christ 2005, 21 ff.; Keaveney 2013, 124–128.

148 Brunt 1971, 116.

149 Monaco 1996, 78; Tarwacka 2009a, 29–35.

150 Shaw 2001, esp. chapter three.

151 Cic.*Caecin*.140.

152 Eckstein 2006, 3–5, 176.

instruments of social control for a society whose political and moral connective tissue was in the process of dissolving.[153]

Therefore, by identifying shipwrecking and the robbery committed because of it as events which should be punished, the praetor was establishing an instrument of social control by which all the subjects navigating along Roman coasts would be protected. Furthermore, this disposition bears witness to a new turn on the concept of violence from the last century of the Roman Republic, identifying several actions as unlawful. Previously, these actions were merely understood as undesired conducts.[154] Although outright violence in most settings was against the law, individuals and groups from every social status used *vis* to negotiate power struggles and life's frustrations.[155] The latter means that, on the one hand, we can find subjects using violence to obtain their aims, and on the other, the authorities sought to control these behaviours by formulating legislation to combat violence. Indeed, routine violence is a tendency found only in the later Roman Republic's pursuit of legitimacy in law and government.[156] It might suggest that the praetor's intervention by enacting the *edictum de naufragio* was made *adiuvandi iuris civilis gratia*—i.e., to support the protection existing before in the sphere of *ius civile* for similarly violent situations—and therefore dealt with situations not previously covered by the law.

In the context of the edict's enactment, *vis* became an ethical label judged by social practice and political notions that identified not only the act of shipwrecking as violent but also the actions deriving from it.[157] In that sense, this ethically-defined violence constitutes a form of social control responding to what was considered deviant behaviour. What is key here is that the edict makes no sense unless we consider the social realities affecting lawmaking in the Roman Republic. In this context, the *edictum de naufragio* defined the limits of land and sea and further imposed rules on them, but this legal exercise was not detached from society and politics.

In his volume of 1971, Labruna affirmed that the repression of violence in the Roman Republic started with the enactment of interdicts that prohibited

153 For different points of view, see Lintott 1968, 52–84; 1971; 1992; Harries 2007, 106–117; Cascione 2012, 287.

154 Labruna 1971, 10–11; 1972, 528; 1986, 11.

155 Fuhrmann 2013, 7015; Bryen 2013, 52, indicating that in Roman Egypt, violence was always conceived of as unlawful.

156 Williamson 2005, 388, 392.

157 Following Black's approach, the edict would constitute a normative evaluation, defining what is right and what is wrong, see: Black 1976, 165; 1984, 5; 27. Also, Clark and Gibbs 1965, 400–402.

the use of violence (*vim fieri veto*).[158] These interdicts were especially used for protecting Roman subjects who owned large estates in Italy from the violent actions of other landowners.[159] With this concrete prohibition 'against acting violently', the praetor created an effective tool for transforming the interests of the new leadership groups into an ideology. Labruna chronologically situated these events at the date of enactment of the *Lex de modo agrorum* (367 BCE) and the approval of the interdict *uti possidetis*.[160] Thus, these interdicts only marked the beginning of how violence in legal consideration came to be regarded as a plague against the state and private individuals. To connect the repressive ideology embedded in these enactments to our *edictum de naufragio*, we need to move forward in time, towards the last century of the Roman Republic.

The social turbulences of the first century BCE made violence or *vis* a recurrent issue in the repression of crimes and delicts.[161] In this context, the edict of Lucullus, which fortunately has been dated thanks to one of Cicero's speeches,[162] provides evidence of the legal repression of violent conducts taking place in Italian estates. The edict was intended to stop the continuous looting that the families of slaves, assembled in armed bands, carried out in houses located in the countryside. This action addressed behaviours which implied not only a risk for private subjects, but also a danger to public safety,[163] and it reflects a connection with the *edictum de naufragio*, in that both target violence and robbery.[164] Furthermore, these two edicts are also associated with the *actio vi bonorum raptorum* (D.47.8), which will be explained in detail in the next section.

All of these enactments targeted violent acts and punished them in a similar way. As is known, many of the edict's elements were also included in the edict of the following year.[165] In this case, by establishing a similar legal treat-

158 Labruna 1971, 33–39; 1972, 528; 1986, 286.

159 See also Roselaar 2010, 114–115.

160 According to Labruna 1986, 284–286, the interdict was approved simultaneously with the *Lex de modo agrorum*, but the reality is that it is not clear when the *interdictum uti possidetis* originated. According to Roselaar 2010, 116, it is likely that it was in the second century BCE, due to the amount of *ager publicus* available then, a large part of which was possessed by *occupatio*, so that the need for some sort of legal protection for the occupants may have been felt more urgently.

161 Vacca 1965, 562; Labruna 1971, 33–37; 1972, 525–538. See also section 3 of this chapter.

162 Cic.*Tul.*8–12.

163 Vacca 1972, 521–524.

164 Serrao 1954, 77–80; indicate that the edict was provided for the cases of damage and robbery, and that these behaviours could be punished by a single action.

165 Brennan 2000, 132–133.

ment of violence committed on land and water, the praetor was redefining the understanding of shipwrecking, as well as establishing a bridge between land and sea. On the one hand, it was very clear that these violent behaviours were not to be tolerated anymore, which exemplifies the Romans' intention to make navigation safe. On the other hand, the edict provided for civil actions that took place in waterways, which in the case of the sea did not constitute a space governed by the civil law of the Romans. Meanwhile, one would think that this edict would showcase the progressive expansion of Rome via the sea, due to their repression of violence occurring in waterways through civil law. In most instances, the Republican rulings targeting *vis* appear to have been restricted to acts *contra Rem Publicam*, such as riots and sedition.[166] The contrast with violence between individuals would then be classified as a form of *iniuria*.

Notwithstanding that, I think that even if the *edictum de naufragio* targeted delicts, it had an impact on how the act of shipwrecking was conceived, and in that sense, it affected both the public and private spheres. It was the symbol of a new political organisation of the Mediterranean, moving towards unity and safe maritime mobility. In addition, by reviewing the different fragments composing the Digest's title *de naufragio*, it is possible to see how different behaviours are included or can be considered as related to this disposition. In that sense, Riggsby provides quite a useful chart on the equivalences among delicts and public crimes based on specific types of unlawful acts, such as property damage (*vis*) and theft (*de sicariis*).[167] He echoes the differences between public and private, reminding us of the blurredness of these categories, especially if one considers the changes in punishment in the transition from Republic to Empire.

The praetor enacted norms that would apply to an inner space where he had jurisdiction (e.g. the city of Rome, the provinces), emphasising the idea of areas which were out of his control. That geographical limitation on the effectiveness of the *edictum* might have caused differences in the maritime cultural landscape of different areas identified by conquest, and as a result would not have enjoyed the same legal tools available in Rome. However, the analysis of the praetor's legal activity, especially toward the end of the Republic, provides evidence of how this magistrate framed the law, defined space, and connected it to different groups of people. In its turn, the edict characterises the Roman

166 Riggsby 1999, 151–157. These were part of the *Lex Iulia de vi* (17 BCE); see Mommsen 1899, 128–130; 655–657; Vitzthum 1966, 127–132; Giltaij 2013, 525, indicating that this law referred to precise questions concerning the different *crimina*. On the concurrence between *crimen* and *delicta* implying *vis*, see Balzarini 1969b, 34.

167 Riggsby 2016, 316–317.

maritime landscape as a space free of violence, thanks to the legal instruments enacted by the praetor and other magistrates representing the Roman state.

### 1.4.1 *Chronology and Historical Context of the Edict*

The years from 80 to 60 BCE offer a unique opportunity to observe the urban praetor creating particular provisions designed to repress violent events, and bear witness to the legal changes of the praetorian edict. At the time, the praetor was changing the background of the law, although the way in which he did so is still an open topic of discussion.[168] However, it is not easy to reconstruct the development of the praetor's edict, since only a few edictal dispositions are chronologically dated. Therefore, different scholars have tried to unravel the evolution of the praetorian edict by characterising it according to its language.[169]

From my point of view, the elements that help us date this edict are its historical context and the evolution of the civil procedure, events that influenced the *ius edicendi*, since Roman law is essentially formed by actions. Some of the clauses of the edict were maintained from year to year, although the praetors could introduce modifications in these dispositions.[170] As a result, I focus on some legal provisions that display features similar to the *edictum de naufragio*, which will help to establish a chronological frame of enactment for this disposition. As an additional note, Cicero's mention of *neque incendio neque naufragio* from the *paradoxa stoicorum* (46 BCE) helps to set a *terminus ante quem*.[171]

The social disorder of the decade between 80 and 60 BCE made violence or *vis* a recurrent issue in lawmaking. Despite the violence and latent crisis, the last years of the Republic constitute quite an active period for legal activity,[172] although what still remains unclear is whether actual access to justice at this time would have been limited.[173] Some dispositions for which we fortunately have a date are the *formula Octaviana* (79 BCE)[174] and the edict of

168 Brennan 2000, 133, 464; Dernburg 1873, 93–132, *contra*, Kelly 1966b, 341–345.

169 Dernburg 1873, 105–107; Daube 1956, 6; Kelly 1966b, 354–355, 349. Otherwise, Alan Watson compiled different key facts (table two in the appendix) that according to him could help to decipher the praetorian logic when publishing their edicts; see Watson 1970, 106–107.

170 Cic.*Verr*.2.1.44; Moatti 2015, 223.

171 Cic.*Parad*.6.51.8. For further texts in which the authors mention these events as related, see table one in the appendix.

172 Sherwin-White 1956, 7; Lintott 1968, 22–34; Labruna 1971, 6–27; 1972; Watson 1974, 32–33; Frier 1982, 238; 1985, 45–46; Riggsby 1999, chapter four; Williamson 2005, 350–357; Moatti 2015, 10, 96.

173 Du Plessis 2016, 5.

174 Rudorff 1845; Cervenca 1966, 312–316; Ebert 1968, 108–109; 1969, 404; Kupisch 1998,

Lucullus (76 BCE).[175] The first example was enacted by the praetor Metellus, who included in his edict an action aiming to protect subjects extorted by force or fear.[176] Balzarini[177] and Maschi[178] have indicated that this formula was at the same time the origin of the *actio de metus* (of unknown date), and of the edict of Lucullus, which was the origin of the *actio vi bonorum raptorum*.

Another provision is the *edictum de turba* (tumult), which unfortunately is not dated but reconstructed by Lenel as being placed in the perpetual edict next to the *edictum de naufragio* and *de hominibus armatis coactisve et vi bonorum*.[179] In fact, that disposition has similar features to the edict of Lucullus, the *actio vi bonorum raptorum*, and the *actio de naufragio*, since all these actions target violence and employ similar punishments. The *edictum de turba*, which targeted actions committed while there was a crowd, whether planned beforehand or not, resulting in damage caused to a third party.[180] One last source which is helpful in establishing the date of our edict is the *interdictum de vi armata*, approved by the praetor Lucius Metellus in around 73–71 BCE, which aimed to retrieve the property of people who had been deprived of it because of acts of armed violence.[181] This source is key in relation to Lucullus' edict (76 BCE), as well as its subsequent evolution into the *actio de hominibus armatis coactisue et ui bonorum*, because it sought to repress the same behaviour.[182] In addition, the edict of Lucullus (*de hominibus armatis coactisve et vi bonorum raptorum*) was a provincial norm approved by the *praetor peregrinus* in 76 BCE,[183] although it became part of the *album praetorium* in approximately seven years.[184] However, this edict could already have been incorporated

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471–474; Venturini 1994, 922–930; Calore 2011, 11–21, 125–154; although some authors think that this formula dates from the year 71 BCE; Von Lutböw 1932, 126–129; Hartkamp 1971, 191–193, 245–247.

175 Watson 1974, 105.

176 Cic.*Verr*.3.152; Lintott 1968, 130; Balzarini 1969b, 144–145; Frier 1982, 225; Tuori 2016, 64; Haubenhofer 2013, 165.

177 Balzarini 1969b, 142, 150.

178 Maschi 1966, 657.

179 Lenel *EP*, 391–396, § 187, § 188 and § 189.

180 Balzarini 1969b, 13.

181 In fact, when we read the *Pro Caecina* of Cicero (Cic.*Caecin*.41–48; 55; 60–61; 88), it is possible to appreciate that this injunction dates from the year 69 BCE.

182 Frier 1982, 237.

183 Asc.*Corn*.75.

184 Kelly 1966a, 15–16; Watson 1970, 65–67; Frier 1985, 52–57; Mancuso 1983, 384, denies the existence of the *album pretorio*, indicating that in fact the *praetor* approved several edicts during his charge.

into the edictal album back in 71 BCE, the date of Cicero's speech (*Pro Tullio*) in which he mentions it.[185]

The relationship between the *edictum de naufragio*, the edict of Lucullus and the *actio vi bonorum raptorum* is key to dating the first one. In fact, Lenel's edictum *perpetuum* (hereinafter, *EP*) placed the edict under the title *de vi turba incendio*, next to and following the provision of §187 *de hominibus armatus coactisve et vi bonorum raptorum* and §188 *de turba*.[186] In the order of the perpetual edict, this disposition is located after the title *de praedatoribus* and before the title dedicated to the crimes *de iniuriis*. Since the order of the perpetual edict is an order of actions, the determining connections of that order will be precisely those of the actions themselves. Furthermore, as can be seen in the Digest and in Lenel's *palingenesia*, the comments on these three different edicts belong to the same books written by Ulpian (l. 56) and Paul (l. 54). The latter demonstrates the accuracy of the location of these edicts in the perpetual edict of Julian, since Paul's work influenced that of Ulpian.[187] Apart from that, it is possible to find similarities in the fragments:

D. 47.8.2pr. (Ulpian. 56 *ad Ed.*) *Praetor ait: 'Si cui dolo malo hominibus coactis damni quid factum esse dicetur sive* ***cuius bona rapta esse dicentur****, in eum, qui id fecisse dicetur, iudicium dabo. Item si servus fecisse dicetur, in dominum iudicium noxale dabo'.*

D. 47.8.4pr. (Ulpian. 56 *ad Ed.*) *Praetor ait: 'Cuius dolo malo in turba damnum quid factum esse dicetur, in eum in anno, quo primum de ea re experiundi potestas fuerit, in duplum, post annum in simplum iudicium dabo'.*

D. 47.9.1pr. (Ulpian. 56 *ad Ed.*). *Praetor ait: 'In eum, qui ex incendio ruina naufragio rate nave expugnata quid* ***rapuisse*** *recepisse dolo malo damnive quid in his rebus dedisse dicetur:* ***in quadruplum in anno, quo primum de ea re experiundi potestas fuerit, post annum in simplum iudicium dabo.*** *Item in servum et in familiam iudicium dabo'.*

185 Cic.*Tul.*3.7.*Recuperatore, sunto. Quantae pecuniae paret dolo malo familiae P. Fabii vi hominibus armatis coactisve damnum datum esse M. Tullio, dumtaxat sestertium tot milium, tantae pecuniae quadruplum recuperatores P. Fabium M. Tullio condemnanto. Si non paret absolvitur*. Nicosia 1965, 145, proposes 72 BCE, but I trust the opinion of Vacca 1992, 222 more.

186 Lenel *EP*, locates the *edictum de naufragio* in the title 34 §189, classified as *de vi turba incendio ruina naufragio rate nave expugnata*.

187 Honoré 1982, 223, citing other authors is more typical of Ulpian than of Paul, which is why Ulpian is more likely to have copied Paul.

Indeed, Cuiacius indicated that the *edictum de naufragio* was unnecessary because the *actio vi bonorum raptorum* included the case defined in this edict, and applied the same punishment.[188] I have published elsewhere on the relation between these fragments and the edict of Lucullus; here, I will only summarise the details of their connections and affinities.[189] In sum, the coexistence of the *actio de naufragio* and *vi bonorum raptorum* in the Digest will be justified because the special edict (*de naufragio*) was older, and later the praetor approved a general action to target a larger number of cases. However, the compilers might have wanted to preserve the *actio de naufragio* in the edict, due to concerns over it being forgotten in case there was no other disposition dealing with these sort of events.[190] As for the placement of the *actio vi bonorum raptorum* in relation to the *actio de naufragio* in the Digest, I believe that the fundamental criterion that could have moved the compilers to order both actions in such a way, is the need to organise texts from the more general (addressing a larger number of cases) to the particular. Another example of texts organised in this way can be seen in the inclusion of section 4.9 (in relation to the *edictum de turba*) of title 47.8.[191] The dichotomy between specific and general actions is key when tracing the evolution of the dispositions mentioned.

As has been seen, D.47.9.1pr described the event targeted in the edict and its punishment, while in the case of the *actio vi bonorum raptorum*, these elements must be reconstructed through two texts. This sort of punishment is not directly mentioned, which can be justified by the fact that this edict was preceded by Lucullus' edict (76 BCE),[192] although Cicero had already mentioned the *in quadruplum* penalty in his *Pro Tullio* speech.[193] The reconstructions of the edict in relation to the fragment contained in the Digest and the text of Cicero pointed to some decisive differences between the two texts. These fragments say:

188 Cuiacius 1627, 1346; 1837, 293–294.

189 Mataix Ferrándiz 2019, 153–195.

190 D'Ors and Santacruz 1979, 655, explains the case based on the texts of Ulpian and Labeo about the special edict of defamation. The *actio de naufragio* appears in later fragments, which are listed in table one of the appendix.

191 Which states, *loquitur autem hoc edictum de danno dato et de amisso, de rapto non: sed superiori edicto vi bonorum raptorum agi poterit* (this edict talks about the damage caused and of what was lost, not of the stolen goods, while regarding theft, the superior edict can be used about goods stolen using violence).

192 Labruna 1971, 19–20, 'colpiva in modo più rigoroso ipotesi forse già previste dalla *Lex Aquilia* (seconda metà dal secolo III BC), e da esso mosse la giurisprudenza per la individuazione del delitto di rapina'.

193 Cic.*Tul.*8–12.

Cic.*Tul.*7–12: *Iudicium vestrum est, recuperatores QUANTAE PECUNIAE PARET DOLO MALO FAMILIAE P. FABI* ***VI HOMINIBUS ARMATIS COACTISVE*** *DAMNUM DATUM ESSE M. TULLIO. Eius rei taxationem nos fecimus; aestimatio vestra est; iudicium datum est in quadruplum.*

D. 47.8.2pr (Ulpian. 56 *ad Ed.*) *Praetor ait: 'Si cui dolo malo* ***hominibus coactis damni*** *quid factum esse dicetur sive cuius* ***bona rapta esse dicentur****, in eum, qui id fecisse dicetur, iudicium dabo. Item si servus fecisse dicetur, in dominum iudicium noxale dabo'.*

One of the first recognisable differences between both texts is that, according to Lucullus' edict, the men who committed the damage had to be armed. Besides, it is evident that the case included in the *actio vi bonorum raptorum* covered a larger number of scenarios, including not only alleged damage caused by gangs but also cases of goods stolen by force. The differences between these texts have led authors to propose very different theories concerning their evolution. What is important about these theories is that they are, in one way or another, describing the logic of the praetor when creating law, and in that way chronologically locating the edict of Lucullus with respect to the *actio vi bonorum raptorum*. This, in turn, provides traces through which to pinpoint the possible period of the *edictum de naufragio*.

Some have argued that the Digest's fragment is the combination of two edicts (*dolo malo hominibus armatis coactisve damnum datum* and *bona vi rapta*).[194] One related issue is whether the conducts of robbery and damage addressed in the edict were included from the beginning or were the result of a second evolution of the disposition.[195] Vacca thought that the *actio vi bonorum raptorum* was an edict created *ex novo*, although she understood that the edict presented substantial differences from Lucullus' edict in its later development, so this evolution would have been motivated by different

194 Cramer 1816, 67; Cohn 1873, 187–193; Von Savigny 1825; Mommsen 1899, 660–671; Lenel *EP*, 391–393; Ebert 1968, 127–132; Balzarini 1968, 378–379; 1969b, 58–65. There are divergent opinions about whether the modification of both provisions occurred on a date between 71 BCE (Cic.*Tul.*) and 131 BCE (codification of the perpetual edict by Julian) (Watson 1970, 106); or whether the reconstruction was the work of a post-classical jurist or a Justinian compiler (Balzarini 1969b, 46–47). Elsewhere, Serrao indicates that a first edict was possibly approved in 76 BCE, which was specified and better bound by a later praetor, and that it was this edict that was included in the perpetual edict of Julian, Serrao 1954, 77.

195 Keller 1851, 541–543; Huschke 1826, 195–197; Huvelin 1915, 804 n. 4; 1929b, 37. In the view of Rouvier 1963, 448–452, the edict underwent a first evolution that combined the *actio furti* and the *actio ex lege Aquilia*, so the actio was expanded covering robbery. *Contra*, Vacca 1972, 2–12.

social needs.[196] According to her, while the Republic sought to tackle situations through the repression of a specific situation (e.g. damage committed by an armed gang), with the arrival of the Principate there was an increase in the power of criminal repression in situations that endangered individual security and social peace.[197] Dispositions such as the *edictum de naufragio* are responses to crises, violence or *force majeure*, and so are therefore related to the situations that caused the need for such direct and concrete measures.[198] Later, perhaps with the codification of Hadrian's edict,[199] the trend seemed to follow the approval of more general edicts, e.g. *vi bonorum raptorum*, *actio de dolo malo*[200] or *actio de metus*, which included a larger variety of behaviours. In this way, the initial demand for actions punishing concrete events (such as the *edictum de naufragio*) gradually disappeared. During the Principate, the praetor tried to protect individual security, giving relevance to the diverse fields connected with *vis*, and extending the application of this concept into more general fields. The jurists made special efforts to cover violent theft, which was also comparable to robbery committed to take advantage of a catastrophe.[201]

That the expression *dolo malo hominibus* (*armatis*) *coactis* (*ve*) *in actio vi bonorum raptorum* remained in the title of the edict could be a reminder of Lucullus' original edict, but the presence of armed gangs would not be an essential requirement in the new provision. In short, once the original *ratio* that justified the existence of that edict had been superseded, the disposition had a broader repressive focus in the subsequent evolution.[202] These differences could be attributed to a jurisprudential elaboration affected by a diverse social and political reality that influenced the approval of Lucullus' edict. This ruling faced the need for a private criminal action against violence involving the use of weapons or being committed by violent groups. After that, the jurists pro-

196 Vacca 1972, 97–101.

197 Huvelin 1929a, 85–89, gives a number of actions in the edict that cover the assumptions of *furtum* and *damnum*. The consistent process by the praetor of joining the *furtum* and *damnum* in the edict and in the formula constitutes a work of simplification and unification.

198 Frier 1982, 233.

199 About this codification, the main sources of knowledge are Eutr.8.17; 8.55–57; Jer.*Chron.* 2.167; Aur.Vict.*Caes*.19.1–2; Hist.Aug.*Did.Iul*.1.1; CTh.11.36.26; CTh.4.4.7pr.; CTh.4.5.10.1; thus, all of them are postclassical. For different theories about the nature of this edict, see: Tuori 2006; 2007, 136–143, with related bibliography.

200 Lambrini 2009, 239.

201 Vacca 1972, 52–60, 105.

202 The reconstruction of the *actio vi bonorum raptorum* by Balzarini 1969b, 345, is very similar to the one of Lenel for the *actio de naufragio*.

ceeded to extend the scope of the edict so that it could cover a larger number of cases of violent theft without requiring the use of arms or the involvement of violent gangs.

Another issue is to provide an exact dating for the *edictum de naufragio*. Balzarini[203] thinks that shipwrecking was punished through the *Lex Iulia de vi*, implying that the edict was approved after that law (17 BCE). He bases his argument on a text from Marcian,[204] in which the Severan jurist says that the cases targeted by the *edictum de naufragio* are included in the range of the *Lex Iulia de vi*. Something similar can be seen in D.48.6 (*Ad legem Iuliam de vi publica*), specifically in § 3.5–6,[205] in which Marcian refers to several of the events targeted by the edicts of Lucullus, *de naufragio*, or *vi bonorum raptorum* as being included in the scope of the *Lex de vi*. The latter is a sign, in Marcian's opinion, of the fact that these violent behaviours could come within the scope of this law, probably to maintain adequate protection as the edicts punishing these behaviours had been in force for a long time. In addition, this is another example of how punishable types of behaviours assigned to the spheres of public and private *vis* appear to be mixed in the edict and its subsequent developments.[206] More details on how the actions associated with the *edictum de naufragio* functioned will be provided in the following chapters (especially chapter two).

In what concerns the chronology of the dispositions mentioned, the *actio vi bonorum raptorum*, due to its general take on targeting behaviours, seems to correspond to a different period from that of the *actio de naufragio* and *de turba*, which both include specific cases. Concerning the book 56 *ad edictum* from Ulpian, it is necessary to remember that the jurist wrote his comments *ad edictum* following Hadrian's *edictum perpetuum*. This compilation included the *actio vi bonorum raptorum* in the version that targeted a larger number of cases,

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203 Balzarini 1969b, 213–215, n. 85, *contra*, Cloud 1988, 583; 1989, 67, 436.

204 D.48.7.1pr–2 (Marcian. 14 *Inst.*) *Sed et ex constitutionibus principum extra ordinem, qui de naufragiis aliquid diripuerint, puniuntur: nam et divus Pius rescripsit nullam vim nautis fieri debere et, si quis fecerit, ut severissime puniatur*. For a translation, see chapter three, section 3.2.3.

205 D.48.6.3.3 (Marcian. 14 *Inst.*) *Item tenetur, qui ex incendio rapuerit aliquid praeter materiam*; 5. *Sed et qui in incendio cum gladio aut telo rapiendi causa fuit vel prohibendi dominum res suas servare, eadem poena tenetur*; 6. *Eadem lege tenetur, qui hominibus armatis possessorem domo agrove suo aut navi sua deiecerit expugnaverit*. (In the same way, he who in a fire has stolen something, except for the materials, is obliged to pay for it. 5. But he is also subject to the same penalty who has been in a fire with a sword or dart to steal, or to prevent the owner from saving his property. 6. It shall be subject to the same law who with armed men has driven the owner out of his house or field or his ship, or if he has attacked him with the help of others).

206 Riggsby 2016, 316–317.

and not the ruling depicted in the edict of Lucullus. Thus, even in his book *ad edictum*, he might have commented first on that general edict, even if the new version was enacted later than the edicts *de turba* or *de naufragio*. In sum, from my point of view, the *edictum de turba* was probably approved before Lucullus' edict, because although it punished behaviours carried out during situations of confusion, the penalty established was less severe than the one indicated in Lucullus' edict.[207] Following this, it was possible that in the same repressive spirit, Lucullus' edict—which maintained the penalty *in quadruplum*—was approved shortly afterwards. The *edictum de naufragio* could have been approved later, also including the same penalty as that of Lucullus' edict, and targeting both the acts of shipwrecking and robbery. This chronological order is hypothetical, although the connection among these three edicts is based on the interrelationship between violence, order, and politics.

207 See table three from the appendix.

CHAPTER 2

# The Nature of the *Actio de Naufragio*

One of the classic lines of any Roman law handbook is that 'Roman law constitutes a system of actions'. What does this mean? An *actio*, following the definition of the jurist Celsus (second century CE), is 'nothing other than the right of an individual to sue in a trial for what is due to him'.[1] This description indicates that there is an identification of a right with an action; and that to have an *actio* implies that a person's claim (based on their right) will be brought to court. Another related issue is the character of the action—that is to say, whether for example, the claim was brought under a certain set of circumstances even though 'legally' the *actio* claimed was not available (*in factum*), or whether it was based on a specific right, such as something that should be brought by a defendant under civil law (*in ius concepta*). In the case of the *actio de naufragio*, it seems that, as with many praetorian actions, the claim was based on the facts, characterising it as *in factum*.[2] The latter means that this edict was providing protection for cases where no standard civil law action was applicable, and therefore connects it with a wider audience.

In order to understand the nature, scope, and peculiarities of the *edictum de naufragio*—which in turn will provide an insight into jurists' ways of understanding law—I need to address the following questions: what sort of behaviours were included in the edict? Which jurisdiction was in charge of undertaking the cases brought by that action? Where did the conducts targeted in the *actio* take place, and how did that translate into legal procedure? The focus on these questions will illuminate issues on the spatial sphere of the *actio de naufragio*, the input that drove jurists' advice in relation to this *actio*, and the implications of these for the configuration of the Roman maritime cultural landscape.

1 D.44.7.51 (Cel. 3 *Dig.*) *Nihil aliud est actio quam ius quod sibi debeatur, iudicio persequendi.*

2 That was the case for the actions granted for violent robbery, tumult or theft, Rudorff 1997, § 185, 171; § 186, 173; § 187, 173; Lenel *EP,* § 187, 391; § 188, 395; § 189, 369. Also, Birks 2014, 159–160; 189–191.

## 2.1 Outline of the Behaviours Included in the *Actio de Naufragio*

The different behaviours associated with the *actio de naufragio* fell into the legal category of *delicta*, which is a difficult category to pin down, since in the Digest the word itself has a variety of senses.[3] However, Gaius' Institutes defined the term as including any obligation not arising from a contract,[4] and as examples gave the behaviours of *furtum, bona vi rapta, damnum iniuria datum*, and *iniuria*,[5] which in their turn were represented in our Digest's title *de naufragio*.[6] Broadly speaking, a *delictum* constitutes a wrongdoing being prosecuted through a private action and punished by a pecuniary penalty paid to the plaintiff.

In the case of the *actio de naufragio*, within a year of the unlawful act being committed, this translates into a quarter of the value of the thing stolen (*in quadruplum*); after that, the penalty constitutes the simple value of the thing stolen.[7] In addition, the *actio* included noxal liability,[8] and impossibility of passive transmission (preventing the heir from having a claim asserted against him).[9] In sum, noxal liability means that if any of these behaviours were committed by someone lacking legal capacity (a slave, a minor), the principal would be responsible for their behaviour. In her turn, Letizia Vacca justifies the specific inclusion of *noxal* liability based on the fact that it was not a concept inherent to one's own guarantees as associated with the provocation of a shipwreck.[10]

Even if the features of the edict and the behaviours addressed (generally speaking, theft and property damage) would have led to identifying it as a *delictum*, the different fragments composing the Digest's title include in their scope their equivalents in the public sphere (being then *de sicariis* homicide, or

3 e.g. Unlawful acts committed by subjects under twenty-five years old, D.4.4.47.1 (Scaev. 1 *Resp.*), see a more extensive list in Riggsby 2016, 313.

4 The contract-delict dichotomy contract/delict is complicated in terms of pinning down the behaviours included in each category. The way Gaius refers to it in this fragment tries to adjust to the complexities of both categories. For a discussion on the topic, see Birks 2014, 17–19.

5 Title 9.2 from the Digest.

6 G.3.88; 3.182.

7 D.47.9.1pr. (Ulpian. 56 *ad Ed.*) *in fine*.

8 §1pr. *Item in servum et in familiam iudicium dabo*.

9 D.47.9.4.2 (Paul. 54 *ad Ed.*).

10 Vacca 1972, 91–95; and Huvelin 1968, 120–125. Otherwise, Lenel *Pal. 2*, 11. (E. 189), 765–766 and Biondi 1925, 19, assume that the inclusion of a noxal action is an alteration of the original text.

*vis*).[11] However, the fragments including these behaviours related to public violence date to the Empire, and in that way indicate that in that period the concept of violence had achieved a broader sense than in the Republic. The latter bears witness to the thin line dividing the public and private domains of Roman law and highlights the many ways in which these concepts were constructed. Using the categories of offences and interests (e.g. public offences are those that threaten harm to collective interests), Riggsby suggests that indeed what we should think about are not the interests but the violations, and whether they are individual, generic, or collective.[12] Thus, the different remedies applied for the same behaviours included in the original *edictum de naufragio* in the Digest's title indicate how differently Romans viewed various offences, and that there was no objective matter of fact.

The different behaviours targeted in the edict are described in fragments 1–3 of the work, corresponding to Ulpian's book 56 on the praetorian edict, written under Caracalla, and provide an insight into the conception of the maritime cultural landscape at this time. The *edictum de naufragio* includes a civil action,[13] addressed cases of *rapere* (violent theft), *recipere* (taking back) and *damnum dare* (causing damage) performed at the same time and in the same place where a catastrophe occurred (*incendio, ruina, naufragio*).[14] In turn, the edict also applied when these behaviours occurred when a ship had been assaulted,[15] and during the assault.[16] In addition, the *Pauli Sententiae* (PS) fragment 5.3.2 belonging to the title addressing turmoil (*his quae per turbam fiunt*) which includes this *actio*, also addressses the behaviours of *suppresserit* (sinking) and *celaverit* (hiding from). Since the PS were compiled about 300 CE,[17]

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11 e.g. D.47.9.3.8 (Ulpian. 56 *ad Ed.*).

12 The equivalences among behaviours are pointed out by Riggsby 2016, 316–317.

13 Even if some criminal actions were admitted concurring with other *actiones reipersecutoriae*, in addition to criminalising the commissioning of a crime with a sum of money. See section 2.3 of this chapter.

14 Being fire, collapse of a building or wreck. D.47.9.1.2–5 (Ulpian. 56 *ad Ed.*) and D.47.9.2 (Gaius 21 *ad Ed. Prov.*).

15 D.47.9.3.1. (Ulpian. 56 *ad Ed.*) *Deinde ait praetor 'rate navi expugnata'. Expugnare videtur, qui in ipso quasi proelio et pugna adversus navem et ratem aliquid rapit, sive expugnet sive praedonibus expugnantibus rapiat.*

16 D.47.9.4pr. (Paul. 54 *ad Ed.*). This text includes one of the scarce fragments from the jurist Sextus Pedius (first–second century CE), compiled mostly in later fragments by Ulpian and Paul. That these jurists included the thoughts of Pedius in their comments probably indicates that his views agreed with their own, as said Dell'Oro 1960, 208; Marotta 2000, 209. For more details on Pedius's life, Giachi 1996, 69–123; 2005.

17 Levy 1969; Bianchi Fossati Vanzetti 1995; probably compiled in North Africa; Manthe 2000, 106–110.

the latter provides new nuances to our understanding of the edict in the post-classical period. There is one key point to highlight here: that the *actio de naufragio* is a civil action, and therefore belongs to the realm of the law of the land, although it addresses behaviours that took place both on land (e.g. the shore) and at sea (e.g. a ship). Following that, the *actio* appears as a remedy that bridges the gap between these two areas, and studying the ways that jurists tackled the different events provides a picture of the flexible nature of Roman law.

The *edictum de naufragio* addressed robbery committed on particular occasions (wreck, arson, collapse of a building), a typical feature of the praetorian edicts of the end of the Republic.[18] The essential element of this *actio* was no longer simply *vis*, but qualified violence, since the conducts included in the edict were committed under specific circumstances. For example, the title targets *rapina*, which constituted a form of robbery featuring the use of *vis*[19] that in this case would take place under catastrophic circumstances. The latter should be differentiated from the conducts of *vis* and *rapina* provided in the *actio vi bonorum raptorum*, for which the typical behaviour entails the use of arms or that the robbery was performed by a group of people.[20]

According to the edict, *recipere* should be commited with *dolus malus*, as explained by Ulpian in § 3.3,[21] indicating that someone who receives something from a shipwreck does not necessarily have wrongful intent. For that reason, the praetor could have decided to identify *recipere* with *dolus malus* because that behaviour did not include this feature *per se*.[22] On the contrary, *damnum dare* did not need to be commited with *dolus malus* in order to qualify as a behaviour encompassed in the scope of the *actio de naufragio*. However, in § 3.7 Ulpian considered that damage should have been committed, intending to differentiate it from the behaviour foreseen by the *Lex Aquilia* (objective liability).[23] But Labeo (first century CE) indicated that the *actio de naufragio*

18 Vacca 1972, 97–103, see also table four in the appendix.

19 D.47.9.3.5. (Ulpian. 56 *ad Ed.*). *Aliud esse autem rapi, aliud amoveri palam est, si quidem amoveri aliquid etiam sine vi possit: rapi autem sine vi non potest*. The relationship between *vis* and *rapina* was complicated because *vis* was a crime in itself, but in turn qualified the *rapina*, establishing its differentiation from *furtum*, see: Robinson 1995, 29; Harries 2007, 106–117; Birks 2014, 189.

20 Robinson 1995, 35.

21 D.47.9.3.3 (Ulpian. 56 *ad Ed.*) *Sed enim additum est 'dolo malo,' quia non omnis qui recipit statim etiam delinquit, sed qui dolo malo recipit*.

22 An opinion shared by Von Thur 1888, 64–68; Gerkens 1997b, 144; 2007, 18. This opinion is confirmed by various fragments, such as: D.13.1.14 (Iulian. 22 *Dig.*) or D.47.9.5 (Gaius 21 *ad Ed. Prov.*).

23 See chapter four.

(in relation to arson) would be guaranteed, even if there was not wrongful intent, following the *Lex Aquilia*.[24] However, the relationship between *iniuria* and *culpa* in the *Lex Aquilia* is unclear, and Labeo's text does not make the distinction easier, as one might wonder how a ship can be plundered negligently.[25] The jurists' different thoughts about this fragment were based on their conception of the violence implicated in the catastrophic circumstances (arson, shipwreck) that surrounded the event in a subjective or objective way.[26] The subjective view takes into account that the circumstances of the case could justify the conduct of the actor due to the exceptional nature of the situation.[27] In contrast, the objective view dictates that the nature of the superior force does not exclude the responsibility of the actor.[28] By introducing a subjective evaluation of these cases, it is made justifiable for Ulpian to expressly indicate that this action should be committed with *dolus malus*.[29]

Ulpian's extensive interpretation continues in § 4, in which the jurist included *abstulere* and *amovere* among the behaviours encompassed by the edict. This extensive interpretation has been qualified as an interpolation by Lenel, together with § 5–6.[30] Lenel believed that it was illogical for Ulpian to reintroduce an explanatory comment in § 3.4 when he had already explained *recepisse dolo malo* extensively in § 3. According to Vacca, Ulpian's speech appeared to be sufficiently unitary, since in § 3 the jurist took care to identify the case provided

24 D.47.9.3.7 (Ulpian. 56 *ad Ed.*) *Quod ait praetor de damno dato, ita demum locum habet, si dolo damnum datum sit: nam si dolus malus absit, cessat edictum. Quemadmodum ergo procedit, quod Labeo scribit, si defendendi mei causa vicini aedificium orto incendio dissipaverim, et meo nomine et familiae iudicium in me dandum? Cum enim defendendarum mearum aedium causa fecerim, utique dolo careo. Puto igitur non esse verum, quod Labeo scribit. An tamen lege Aquilia agi cum hoc possit? Et non puto agendum: nec enim iniuria hoc fecit, qui se tueri voluit, cum alias non posset. Et ita Celsus scribit.* See also, Gerkens 2007, 117; Gioffredi 1970, 45, 'col diritto classico, la valutazione dell'elemento psicologico è acquisita'.

25 Some clarification on Labeo's thought can be found in chapter four, section 4.2.3.

26 Gerkens 2005, 109. Subjective superior force is a force against which there is nothing to be done, even if one is trying very hard. Objective superior force is an instance that corresponds to an event of extraordinary violence. Before him, Mayer-Maly 1958, 63 and Ernst 1994, 293–298, established differences between cases affected by the *vis maior*.

27 As Ulpian established in this passage and in, D.9.2.15.1 (Ulpian. 18 *ad Ed.*). Otherwise, rescripts from Antoninus Pius can be also found in D.47.9.4.1 (Paul. 54 *ad Ed.*) and in Celsus, D.9.2.49.1 (Ulpian. 9 *Disp.*); D.43.24.7.4 (Ulpian. 71 *ad Ed.*); Iavolenus, D.19.2.59 (Iavolen. 5 *Labeo Post.*) and G.3.211.

28 As in the fragment of Labeo described by Ulpian, D.4.9.3pr. (Ulpian. 14 *ad Ed.*), see also D.43.24.7.4 (Ulpian. 71 *ad Ed.*).

29 Honoré 1982, 47–56; and 64, Ulpian's writings, portray more his opinion than the law *per se*.

30 Lenel *EP*, 396, § 189; *contra*: Karlowa 1901, 1344–1350. Also, Balzarini 1969b, 465.

in the edict, concerning subtraction, so it could be understood that it did not end in § 3.3, but continued in the following paragraphs.[31] Both *abstulere* (to take away) and *amovere* (to move) are behaviours included in *rapina* or violent theft.[32] Seeing that violence was inherent to the notion of *rapere*, Ulpian's comment probably aimed to characterise it as distinguished from *furtum*, and to illustrate what action was exercisable (either *actio furti* or *actio vi bonorum raptorum*). Gaius used the same logic in D.47.9.5 (21 *ad Ed. Prov.*), differentiating between *furtum* and *rapina* in relation to the violence used, and according to whether the abduction had been committed some time after the calamity when the objects had been stolen.[33]

In a 2007 communication, Gerkens asserted that § 8, § 9, § 10, § 11 and § 12.1 had been included under the title *de naufragio* only because the compilers were associating concepts and not because these fell within the original scope of the edict. According to him, in the postclassical period many actions had lost part of their individual nature in favour of criminal procedures, so that the compilers were only placing together all the concepts complementing what the edict stated.[34] I mostly agree with his reasoning, but on the other hand, it should be noted how Ulpian (D.47.9.1.1) mentioned the possibility of using either a civil or a criminal procedure. By mentioning both actions, Ulpian's phrase reflects the evolution of the Roman procedure, which was gradually absorbed by the *cognitio extra ordinem*, but still bears in mind the possibility of using this *actio*.[35]

What is the logic behind the inclusion of these fragments? All of them correspond to the behaviours of damaging property or committing robbery on the occasions of arson or wrecking but provide nuances to the case included in the *edictum de naufragio*. For example, § 9,[36] § 11,[37] and § 12.1[38] all defined

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31 Vacca 1972, 103, also thinks similarly, Manfredini 1984.

32 See: D.47.1.2.1–2 (Ulpian. 43 *ad Sab.*); D.47.2.21pr. (Paul. 40 *ad Sab.*); D.47.2.21.10 (Paul. 40 *ad Sab.*); D.47.2.46 (Ulpian. 42 *ad Sab.*); D.47.2.48 (Ulpian. 42 *ad Sab.*); D.48.13.4pr.–1 (Marcian. 14 *Inst.*); D.47.2.27.3 (Ulpian. 41 *ad Sab.*).

33 See D.47.9.1.2–5 (Ulpian. 56 *ad Ed.*); Vacca 1972, 102–105. Otherwise, see Balzarini 1969b, 466, who thinks that *vis* was not part of *rapina per se. Contra,* see Niedermayer 1930, 402 n.77.

34 Gerkens 2007, 5–9.

35 Something that also prevailed in the *actio vi bonorum raptorum*; and that can be observed in the Digest's title (§ 3.8; § 4.1; § 7; § 12.1) as well as in other related provisions: see table four in the appendix, and section 2.3.1.

36 D.47.9.9. (Gaius 4 *ad Leg. Duod. Tab.*). *Qui aedes acervumve frumenti iuxta domum positum conbusserit* (...).

37 D.47.9.11. (Marcian. 14 *Inst.*). *Si fortuito incendium factum sit, venia indiget, nisi tam lata culpa fuit, ut luxuria aut dolo sit proxima.*

38 D.47.9.12.1 (Ulpian. 8 *de Off. Pproc.*) *Qui data opera in civitate incendium fecerint, si humiliore*

and described different situations where arson had occurred, and established a distinction between chance situations and those committed with *culpa*.[39] In addition, § 12.2 (= *Coll*.12.5.1–2) referred to the criminalisation of subjects for starting a fire, which, as was usual in postclassical provisions, was graduated according to the social status of the offender (= § 4.1).[40] In addition, the quoted fragments describe the typical situation focused on by the edict, with the exception of § 8.[41] The latter established the obligation to repair damage caused unintentionally, something reminiscent of the provisions of the *Lex Aquilia*; in this case, I believe that the compilers associated the other fragments with the issue of the ownership of the goods surviving from the wreckage.[42]

Another argument would be that § 3.1 and § 10[43] refer to the instigation of a shipwreck. Therefore, it is possible to appreciate how the criminal behaviour not only includes theft committed on the occasion of a shipwreck, but also the instigation of a shipwreck (or fire) that had the aim of committing robbery and perhaps taking those captured as slaves. On the other hand, both § 3.8 and § 10 extend the scope of the *actio de naufragio* via the *Lex Cornelia de sicariis* (§ 3.8) and the *extra ordinem* resources of an Imperial magistrate (§ 10), highlighting that in the Empire, shipwrecking could be prosecuted in different ways. Indeed, § 3.1, as well as § 3.4 seem to include it in its repressive scope. Further, the text of the edict mentions *nave expugnata*, which according to Callistratus in § 6[44] referred to the case in which a ship was attacked, or in which some other actions meant to wreck the ship were carried out.

In sum, the main features of the behaviours included in the edict relate to either the theft or damage of property committed during or as a result of a dangerous, confusing, or catastrophic situation, and therefore involving violence *per se*. The behaviours described are qualified by the catastrophic circumstances in which they take place, and therefore they could be easily identified.

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*loco sint, bestiis obici solent: si in aliquo gradu id fecerint, capite puniuntur aut certe in insulam deportantur.*

39 Millelli 1983, 485; Gerkens 1997b, 127–129.

40 Alföldy 1984, 147, 215; Rilinger 1988, 34–38.

41 D.47.9.8. (Nerat. 2 *Resp.*) *Ratis vi fluminis in agrum meum delatae non aliter potestatem tibi faciendam, quam si de praeterito quoque damno mihi cavisses.*

42 The § 6; § 4.1; § 5; § 7; § 12pr. establish a similar punishment.

43 D.47.9.10. (Ulpian. 1 *Op.*). *Ne piscatores nocte lumine ostenso fallant navigantes, quasi in portum aliquem delaturi, eoque modo in periculum naves et qui in eis sunt deducant sibique execrandam praedam parent, praesidis provinciae religiosa constantia efficiat.*

44 D.47.9.6. (Callistrat. 1 *Ed. Mon.*) *Expugnatur navis, cum spoliatur aut mergitur aut dissolvitur aut pertunditur aut funes eius praeciduntur aut vela conscinduntur aut ancorae involantur de mare.*

The inclusion of related cases under the title shows the efforts of the Byzantine compilers to include all the possible behaviours corresponding to what was described in the edict and Ulpian's commentary on it. Moreover, the fragments included provide an insight into how shipwrecking was punished over time. On top of that, these fragments include civil remedies that apply to occurrences that take place between land and water, thus overstepping the limits of the law of the land.

### 2.1.1 *Ius Gentium and the Sea*

*Ius gentium*, commonly translated as 'the law of nations' is a complex legal concept, but there are three meanings that are usually associated with it (and I am glossing over quite a bit of literature here).[45] The first relates to interregional private law (related mostly to commerce) and the subsequent protection of the acts performed under that sphere by the *praetor peregrinus*.[46] The second refers to the philosophical nature of the concept and its relation to *ius naturale*, as can be found explicitly stated in several sources.[47] Finally, the third meaning is as international law, already manifest in some texts which, for example, characterise it as the law concerning ambassadors.[48] This section discusses *ius gentium* in a way that considers all three of these definitions. The main point here is that *ius gentium* was used to govern situations and spaces that were not under Roman sovereignty,[49] and thus involved non-Roman citizens, or that took place in areas outside of their control, such as the sea. It was the jurist Marcian (second–third century CE),[50] who wrote:

> D. 1.8.4pr.–1 (Marcian. 3 *Inst.*) *Nemo igitur ad litus maris accedere prohibetur piscandi causa, dum tamen ullius et aedificiis et monumentis abstineatur, quia non sunt iuris gentium sicut et mare: idque et divus pius piscatoribus formianis et capenatis rescripsit. 1. Sed flumina paene omnia et portus publica sunt*. (Therefore, no one is banned from going fishing

45 Winkel 2013b, 3553. Before him, Frezza 1949, 39, 49–51, refers to *ius gentium* as a mixture of the three definitions.

46 e.g. Grosso 1949, 395–400; Stein 2007, 8. However, even if many praetorian remedies were later considered as *ius gentium*, the connection between praetorian law and the emergence of the concept of *ius gentium* has been discarded by scholars such as Lombardi 1947; Fiori 2005; 2016, 127–129; Chevreau 2014, 308–315.

47 Cic.*Off*.3.5.23; G.1.1 (= D.1.1.9); D.41.1.1.1 (Gaius 2 *Cott.*). See also, Kaser 1993, 98–104.

48 D.50.7.18 (Pompon. 37 *ad Q.M. Scaevola*); Bederman 2001, 84–85.

49 However, the conception of the sea as something common to all men appears before Marcian, during the Republican period: Purpura 2004a, 166.

50 Orestano 1968, 254–255.

> to the seashore, if they keep clear of houses, buildings, or monuments, since these are not, as the sea certainly is, subject to the *ius 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 harbours are public property).

Marcian was a mysterious figure of whom we only know that he worked during the Severan period, that he probably had a role as magistrate,[51] and that he cared about what *ius gentium* consisted of, since the term appears in several of his texts.[52] The legal status of the sea as described in that fragment was complemented by other texts by the same author, in which he established that the sea is common property according to natural law:[53]

> D.1.8.2pr.–1 (Marcian. 3 *Inst.*) *Quaedam naturali iure communia sunt omnium, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique adquiruntur. 1. Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris*. (Some things belong in common to all men by ius naturale, some to a community collectivelly, some to no one, but most belong to individuals severally, being ascribed to someone on one of various grounds. And indeed, by natural law the following belong in common to all men: air, flowing water, and the sea, and there with the shores of the sea).

Having read these texts, there are two points to note. First, the sea is not subject to an individual's dominion and, therefore, is also not subject to Roman governance. Another jurist from the Imperial period, Celsus, shared a similar definition of the sea, but indicated that shores were the property of the Roman people.[54] Second, the land was governed by *ius civile*, the law of the Romans,[55] while the sea was the realm of *ius gentium* and *ius naturale*, the law of nations and natural law.[56] Despite the Roman imperialistic aims and propaganda, it is unlikely that the ideology of rule over land and sea extended to any practical attempts to regulate the use of the sea. Indeed, in a rescript formulated by

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51 D.1.6.2 (Ulpian. 8 *de Off. Proc.*) 'Aelius Marcianus, *proconsul Baeticae*', and Inst.1.8.2.

52 e.g. D.1.5.5.1. (Marcian. 1 *Inst.*); D.48.19.17.1 (Marcian. 1 *Inst.*); D.19.5.25pr. (Marcian. 3 *Reg.*); D.25.2.25pr. (Marcian. 3 *Reg.*); D.48.22.15pr. (Marcian. *Libro* …).

53 D.1.1.1.3 (Ulpian. 1 *Inst.*) 'natural law consists in what nature teaches to every animal'.

54 D.43.8.3pr. (Celsus 39 *Dig.*). Also, in Cic.*Top*.32.

55 D.1.1.6pr. (Ulpian. 1 *Inst.*).

56 Tuori 2018, 210–211.

Antoninus Pius in the mid-second century CE, the emperor decided to limit his own jurisdiction over the sea in favour of the *Lex Rhodia*:

> D.14.2.9. (Vol. Maec. *ex Lege Rhodia*) Ἀξίωσις Εὐδαίμονος Νικομηδέως πρὸς Ἀντωνῖνον βασιλέα· Κύριε βασιλεῦ Ἀντωνῖνε, ναυφράγιον ποιήσαντες ἐν τῇ Ἰταλίᾳ διηρπάγημεν ὑπὸ τῶνδημοσίων τῶν τάς Κυκλάδας νήσους οἰκούντων. Ἀντωνῖνος εἶπεν Εὐδαίμονι· ἐγὼ μὲν τοῦκόσμου κύριος, ὁ δὲ νόμος τῆς θαλάσσης. τῷ νόμῳ τῶν Ῥοδίων κρινέσθω τῷ ναυτικῷ, ἐν οἷς μήτις τῶν ἡμετέρων αὐτῷ νόμος ἐναντιοῦται. τοῦτο δὲ αὐτὸ καὶ ὁ θειότατος Αὔγουστος ἔκρινεν. (Volusius Maecianus, From the Rhodian Law) Petition of Eudaimon of Nicomedia to Emperor Antoninus: 'Antoninus, King and Lord, we were shipwrecked in Icaria and robbed by the people of the Cyclades.' Antoninus replied to Eudaimon: 'I am master of the world, but the law of the sea must be judged by the sea law of the Rhodians where our own law does not conflict with it.' Augustus, now deified, decided likewise.

It is not my intention here to go into detail about all the literature that this fragment has generated,[57] but only to highlight how an emperor who refers to himself as 'master of the world' deferred the jurisdiction of sea matters to a set of customary rulings such as the Rhodian sea law.[58] On that matter, even if the Rhodian sea law is a topic that has generated a vast amount of literature, the reality is that we do not know very much about that body of customs, except regarding some aspects concerning jettisoning (title 14.2 of the Digest).[59] However, it is presumed that the Rhodian law would have been a significant body of rules regulating maritime traffic, providing pragmatic solutions to sea matters but still not establishing rule over the sea. Even if treaties and legal rules targeting unlawful behaviours, such as piracy, established provisions that were meant to affect both land and sea (chapter one), the rule of the sea is a rare issue in what is known of ancient international law.[60]

The sources included in these previous paragraphs are from Imperial jurists, but since the *edictum de naufragio* constitutes a Republican source, it is neces-

57 e.g. Manfredini 1983; Purpura 1985a; Atkinson 1974; Pinzone 1982, 64–109; De Robertis 1940; 1987, 309–327.

58 Not to be confused with the Byzantine Rhodian sea law (*Nomos Rhodion Nautikos*). See: Ashburner 1909. Differently, Thomas Fenn 1926, 466–467, who thinks that the Glossator's interpretations of Roman texts conferred the power to govern the sea on the emperor.

59 Aubert 2007, 157–171; Mataix Ferrándiz 2017a, 41–59, for references to the extensive literature.

60 For example, there is no mention to it in Bederman 2001, or in classical works such as Mitteis 1891.

sary to search for the definition of *ius gentium* in that period. According to some authors, the texts from jurists prior to Hadrian (second century CE) ignore the concept of *ius gentium*,[61] while the jurists working after Hadrian engaged with quite a systematic exploration of the concept. According to Fiori, the concept of *ius gentium* existed already in the Republican period, and that the term appears more often in Imperial sources would correspond to an interest in systematising it.[62] Indeed, Republican sources do not relate *ius gentium* to a concrete legal field; they generally use it in reference to its international application,[63] even if some sources already refer to it in relation to private law.[64] We also need to remember that both *ius gentium* and *ius civile* operated in a non-hierarchical way with regard to other fields of law, since organising the legal sources in such a way seems natural to us, but was completely alien to the Roman tradition.[65]

The latter operated in line with the principle that people from different statuses occupied the same land.[66] For example, discussions on water in Roman Republican literature seem to begin with the assumption that water (and therefore, watery spaces or parts of them)[67] should be free and open to all.[68] That said, if the Republican sources point to the concept of *ius gentium* as the field that manages the alliances and associations with people other than Romans, how did that influence the praetor's conception of the sea when enacting the *edictum de naufragio?* Bearing in mind the personality principle attached to Roman law, and therefore, that jurisdiction was understood as referring to individuals and groups and not to areas, the praetor had an interest in providing protective measures to Roman citizens, even if the sea belonged to a realm outside the law of the Romans.

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61 Frezza 1949, 39; Chevreau 2014, 307.

62 Fiori 2016, 128–129; Talamanca 1998, 192, 225, affirms that *ius gentium* is a category created by jurists.

63 See n. 46; and also, Gell.*NA*.45 (referring to Cato); *contra*, Fedele 2020, 221.

64 Cic.*Off*.3.5.23; 3.17.69; 3.17.70; anticipating the mentions of Seneca (*Ben*.1.9.5; 3.14.3) and Quintilian (*Inst*.7.1.46), as well as the frequent mentions from jurists from the second and third centuries CE, such as D.1.1.9 (Gaius 1 *Inst*.) or D.16.3.31 (Tryph.9 *Disp*.).

65 Alonso 2013, 381.

66 Behrends 2006, 486–487.

67 See chapter three, section 3.4 for the division of shores and land, and therefore, the conception of the Roman maritime cultural landscape through time.

68 Bannon 2017, 61 n. 4, quoting D.7.4.23 (Pompon. 26 *ad Q.Muc*.), and Cic.*Top*.32. See also: Fiorentini 2003, 417–426; De Marco 2004, 23–41.

### 2.1.2 *Civilian Remedies for a Sea Space Common to All?*

In Roman aqueous landscapes (sea and/or river based), shipwrecks appeared as an unstable event that implied issues such as ownership, violence, or damage. The Romans tried to control the consequences of these unfortunate events by legal constructions—such as the *edictum de naufragio*—which, in their turn needed to operate in spaces located between land and sea, with the subsequent 'legal incoherences' and the creation of legal taxonomies to define the liminal spaces forming the maritime cultural landscape. Since the sea was conceived of as a space common to all, the Romans could not govern it through their civil law that involved citizens only.[69] However, here we are nevertheless presented with the *edictum de naufragio*, which provided solutions based on civil law. Therefore, a first look at the edict will make us think that it provided protection to citizens suffering from the dangers of the sea. In that way, shipwrecks appear as bridges between land and sea spaces, but it was the event itself, and the subject's suffering because of it, that dictated whether the *actio* should be used, and not that of the area where it took place. If we consider the personality principle rather than the area principle when associating the concept with a legal field, then the distinction between 'the law of the land' and 'the law of the sea' disappears, and we are left with discourses related to law and its practice.[70] In the first chapter, I highlighted the idea that the Romans aimed at politically (and legally) producing a maritime cultural space of safety to encourage navigation and trade. Following that, we need to think about who interacted in the legal scenarios described in the edict; and there are two discourses connected to that conundrum. The first one is related to the traditional interpretation of the praetor's activity and how the edict was enacted. The second addresses the sphere of effectiveness of the edict, or who was affected by that sort of ruling.

The praetor's edict was enacted annually and complemented the one approved the previous year. As well as this, when describing the chronology and features of the *edictum de naufragio* (chapter one), I have highlighted its similarities with other rulings targeting violence. That said, from the purely systematic perspective, the edict would be only one of a series of norms enacted to target violence. All these elements are perfectly reasonable but allow me to dig deeper into the social compound of the rule itself, and thus arrive at the second

69 D.1.1.6pr. (Ulpian. 1 *Inst.*). 'Publicus' should be understood here as open and accessible, and not as belonging to a concrete *populus*, as happened with political spaces such as the Roman forum: see Cortese 1964, 71; Russell 2016a, 46–47.

70 Following the principle of law's sovereignty over an area, Bederman 2010, 302–308, 341–345, advocates for establishing analogies over one or the other based on the practical needs of the defendants.

discourse. If the Roman intention was to create a safe navigational space, and the sea is a space where people from different origins navigated, can we think that legal dispositions regarding plundering could have only affected Roman citizens in Italian land? The latter would leave aside the cases when Roman citizens were affected by a shipwreck in a province, and those when foreigners who inhabited Roman lands suffered from that same unfortunate event. Not providing adequate legal tools to address these issues, when the Roman state advocated for the punishment of shipwrecking, would have gone against their project of Mediterranean hegemony.

One argument would be that the *praetor urbanus* only enacted edicts that affected citizens, and it would be the *praetor peregrinus* who approved edicts involving non-citizens.[71] However, during the period in which we placed the *edictum de naufragio* (first century BCE), both praetors approved independent edicts;[72] and the relationship between these edicts is unclear, as it was irrelevant to their actual legal activities. All praetors had the right (in their own *provinciae*) to hear cases between Roman citizens, or between citizens and foreigners, and in time we know they would even set up a framework for foreigners to contest a suit in the same way as Roman citizen.[73] We need to think of the Roman state as expanding its reach, and of maritime cultural landscapes as inhabited and navigated by subjects of differing statuses.[74] What was the legal mechanism that would have allowed non-Roman citizens to defend themselves in a case of being wrecked on a Roman coast and being robbed by the locals? Or how would a Roman citizen act against a foreigner who stole from their wreck?

One of the first ideas that comes to mind is that of utilising a legal fiction. That legal tool allowed that the *actio de naufragio* or the subjects involved in the wreck would have been translated across some boundary and the case thereby rendered justiciable by Roman courts using Roman procedure. Therefore, one question would be whether the subjects could have used this action 'as if' the event had happened on land, or 'as if' the person affected by a wreck was a Roman citizen. To the first condition, I shall say that Ulpian in his comment indicates that the edict also includes the events that happened at the very moment of the wreck, and even if he was writing in the third century CE, the phrasing includes the conditional *si*.[75] Perhaps it was one thing to apply a use-

71 Watson 1974, 76–80.

72 Martini 1969, 33–38; Torrent 2014, 1–2.

73 Daube 1951, 70; Brennan 2000, 125, 463–465.

74 Shipwreck was one of the risks involved when moving to Rome by sea, see: Noy 2000, 142–143.

75 D.47.9.1.5 (Ulpian. 56 *ad Ed.*).

ful fiction to an event that happened at sea, and another to grant an *actio* to someone who was not a Roman citizen, which would be the reason that I do not find references to *si civis esset* in the title *de naufragio*.

However, there are examples of Republican laws on jurisdiction in which provincial disputes are to be solved as 'if a praetor of the Roman people had ordered the matter to be judged in the city of Rome between Roman citizens'.[76] In that case, Ando was referring to the *Lex municipii Flavii Irnitanii*, a series of five bronze tables containing a Roman statute laying down the municipal regulation of Irni (southern Spain) signed by Emperor Domitian in 91 CE.[77] It is perhaps complicated to compare this statute to the *edictum de naufragio* (except perhaps due to the *infamia* element present in both rulings),[78] since to lay down a rule, it was often necessary to follow an indirect path.[79] The situation with praetorian fictions is a bit different, because then the issue is whether the praetor aimed to create a situation that seems true but was not,[80] or whether he was supplementing civil law by his edict, as was part of his function.[81] Considering the possibility that we are dealing with a fiction, I would like to draw attention to the *fictio civitatis* described by Gaius:

> G.4.37. *Item civitas romana peregrino fingitur, si eo nomine agat aut cum eo agatur, quo nomine nostris legibus actio constituta est, si modo iustum sit eam actionem etiam ad peregrinum extendi: ueluti si furti agat peregrinus aut cum eo, formula ita concipitur IUDEX ESTO. SI PARET ⟨L. TITIO OPE⟩ CONSILIOVE DIONIS HERMAEI FILII FVRTVM FACTVM ESSE PATERAE AVREAE, QVAM OB REM EVM, SI CIVIS ROMANVS ESSET, PRO FVRE DAMNUM DECIDERE OPORTERET et reliqua. Item si peregrinus furti agat, ciuitas romana fingitur. Similiter si ex lege Aquiliae peregrinus damni iniuriae agat aut cum eo agatur, ficta ciuitate Romana iudicium datur.* (Again, there is a fiction of Roman citizenship for a foreigner who is raising or defending an action established by statutes, if it is equitable for that action to be extended to a foreigner. For example,

76 Ando 2015a, 305; see also, Johnston 1999, 10.

77 Also called *Lex Irnitana*, see: *CILA* II.4.n.1201; González 1986.

78 Since violent robbery implied *infamia* (D.3.2.1 (Iulian. 1 *ad Ed.*); D.3.2.4.5 (Ulpian. 6 *ad Ed.*); D.48.1.7pr. (Macer. 2 *Iud.Publ.*), and that was an element qualifying the public condemnation prescribed in the *Lex Irnitana*.

79 Another case would be the *formulae ficticiae* uses in the *Leges Calpurniae* to punish foreigners for a *crimen repetundae* as if they were citizens (*FIRA* I 10.1.23). See Thomas 1995, 27.

80 C.4.19.6. *In re certa contrariae veritatis pro veritate assumptio*.

81 Thomas 1995, 21.

> if a foreigner is raising or defending an action of theft, the formula runs as follows: Let X be the judge. If it appears that the theft of a gold dish from Lucius Titius was carried out by Dio, son of Hermaeus, or with the aid or counsel of Dio, son of Hermaeus, for whatever, if he were a Roman citizen, he ought as a thief to pay as damages and so forth. Again, if a foreigner raises an action for theft there is a fiction of Roman citizenship for him. Likewise, if a foreigner raises or defends an action for wrongful loss under the Aquilian Act, the court grants him a hearing on the fiction of Roman citizenship).
>
> Translation by W.M. GORDON and O.F. ROBINSON

According to Gaius, foreignerscan be claimants as well as defendants in procedures relating to theft and wrongful loss before the *praetor urbanus*, and a legal fiction of citizenship was used.[82] This function was adopted to submit foreigners to the regime of delictual claims laid down by statute without distinguishing between the older *actio furti nec manifesti* (from the XII Tables) and the *Lex Aquilia*. First, it is not a coincidence when choosing this text that the unlawful behaviours described by Gaius are also contemplated in the repressive sphere of the *edictum de naufragio*. However, in the case of the edict the peculiarity is that the behaviours should have been committed before or after a catastrophe.[83] It has been debated whether the use of this fiction originated before or after the creation of the office of the *praetor peregrinus*.[84] Besides, Di Lella assumes that the fiction of citizenship was introduced by the *Leges Iuliae iudiciariae* of 17 BCE, since these laws introduced the procedure *per formulas*.[85] However, this view is quite unlikely, since the procedure *per formulas* must have been much older than the *Leges Iuliae*.[86]

According to Kaser, the *formula ficticia* of citizenship was used not only in the *actio furti nec manifesti* and the *actio legis Aquiliae* but also in cases where a claim was based on a penalty laid down in a statute.[87] Instead, Zulueta says:

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82 Ando 2020c, 44: 'the fiction is notorious because its operation requires the contingent bracketing of two legal principles of considerable ideological importance, namely, the sustaining of differential legal privilege between Romans and others, and the expression of that difference in respect of access to Roman legal forms'.

83 See e.g. § 3.7; § 5; this will be studied further in chapters three and four.

84 Zulueta 1953, 257, who points to the *praetor peregrinus*: compare to Kaser and Sackl 1996, 155–156; Mercogliano 2001, 42; Bianchi 1997, 305–308.

85 Di Lella 1984.

86 e.g. it is mentioned in the *Lex Rubria de Gallia Cisalpina* (col.1.ll. 23–40), Crawford 1996, 461, or the *tabula contrebiensis* (*AE* 1979.377).

87 Kaser 1993, 129.

'though there one would expect redress for *furtum* and wrongful damage to be treated as being *iuris gentium* and not requiring imitation from civil law. The multiple penalties, however, would not be *iuris gentium*'.[88] Whether the remedies could be classified as *ius gentium* or whether they were rooted in a statute should not be the important point here, but rather the fact that these remedies could also be used to help with cases involving non-Roman citizens, and that perhaps they were rooted in legal solutions that had been employed for some time. Indeed, Winkel, in the line of Daube, wonders if these *formulae ficticiae* could be explained both as a survival of the legal practice of ancient Roman law, when Rome was still concluding treaties of mutual legal assistance (*symbola*) with other nations, and as an efficient way of protecting or punishing privileged foreigners in the case of the two principal *delicta*.[89]

Therefore, we could think that in the Roman world, foreigners were first protected by treaties, and later they were able use this fiction to address cases of theft. In the same way, after the enactment of the *edictum de naufragio*, they could have used a similar fiction based on the formula of this edict to address robbery against ships. There might have been other options provided by the rise of Imperial power, but these would be based on the procedure *extra ordinem*.[90] If we classify these remedies as *ius gentium*, we can perhaps think of this category as the result of aggregating empirically observable phenomena to the categories labelled as *ius civile*.[91]

Even if the comments on the *edictum de naufragio* do not seem to use the language of a *fictio*, or to use this kind of *formula*, the reality of shipwrecks is that they happened between land and sea, and affected subjects of different legal statuses. Therefore, Gaius' texts shed some light on the blurriness of the legal problems posed by the short text of the edict. It demonstrates that law and practice were often negotiated by means of operations that could take the name of fictions, but what was meant is that these were a way to construe solutions by establishing analogies between situations that needed similar remedies, but in which one of them did not meet all the formal requirements of a certain legal tool.[92] Other elements to bear in mind concerning this issue are the procedures available for the issues arising from a shipwreck, but that will

88 Zulueta 1953, 258.

89 Daube 1951, 66–70; Winkel 2012, 878–879; 2013a, 299, as e.g. the *symbola* used for the issues that arose from sales between foreigners, as described in the Romano-Carthaginian treaties described by Polybius in 348 BCE (Polyb.3.42.16).

90 See section 2.3.1.

91 Ando 2015b, 55.

92 Ando 2015a, 319.

be further addressed in section 2.3 of this chapter. One important element here is that these remedies, being either used by statutes or edicts, 'stand in conflict with the formal rules that jurists and legal philosophers in Rome articulated regarding the relationship between jurisdiction, political boundaries, and the law of persons'.[93] However, in fact, jurists seem to have regularly been urged to produce solutions that were in contravention of their own political framework. The latter refers then to a larger phenomenon that is how these solutions, concretely in the case of the *edictum de naufragio*, shaped the maritime cultural landscape of safety and political stability for all the subjects involved in shipwrecks. It is impossible to know if that was part of the agenda that motivated the enactment of that edict, but what is clear is that it had an impact on the Roman legal landscape.

I should not ignore the problems that come with the issues asserted here, two of which deserve to be highlighted in the two sections that follow. One is simple but requires some effort by the reader to find it in the sources: the title *de naufragio* is deeply spatially embedded when one considers that law and legal concepts affect both people and places of different statuses. The second problem relates more broadly to the procedures and issues of jurisdiction that were dependent on a range of different historical settings. However, it would be foolish to think that these issues are not linked to the subject of legal status. Roman jurists did not understand the world as static—their interest was not in taxonomy. Theirs was a world in motion. That motion was manifested in the different solutions that, as in the case of the *edictum de naufragio*, reflect a conformity to law but allow a recognition of the gaps between social and legal facts.[94]

## 2.2 The Spatial Dimension of the *Actio de Naufragio*

What does it mean to refer to the spatial element of the *actio de naufragio*? On the one hand, the answer is evident: it refers to the places where the behaviours targeted in the *actio* took place, being either land or sea, and, if the former, either Roman or provincial land. Another element would be when shipwrecking was associated with other events that took place on land, or when the episodes that occurred at sea or on the shores were connected to the legal management of land (e.g. *fiscus*).[95] We need to think of the maritime cultural

93 Ando 2011a, 28–29.

94 As highlighted by Ando 2019a, 375–392.

95 See § 3.8; § 7 from the title *de naufragio*. Also, Hunter 1994, 262, indicates that the control and management of maritime activities also fits within the overall maritime framework.

landscapes as systems, in that they cannot be seen in isolation or simply in relation to the sea. They occupied positions between land and sea that cannot be appreciated only by looking at their relationships with the surrounding hinterland and other shores. Moreover, and connecting this discourse with the previous section, it refers to jurisdiction, to the court and the magistrate in charge of adjudicating the cases included in this *actio*. Both discourses are tightly connected with the social and political spheres of the Roman world.

### 2.2.1 *Inside the Jurists' Minds*

The different texts compiled in the title *de naufragio* include advice (*responsa*) from jurists who depict situations that occurred between land and sea, or who established parallel remedies to events occurring either on land or at sea. How did the Roman jurists conceive of legal space? Did they ever do so? It is clearly an impossible endeavour to read a dead man's mind, but after reading several texts, it seems that Roman jurists were well aware of the strong relationship existing between their law and space. Concerning the spaces where 'law' took place, both in Roman juridical thinking and linguistic use, *ius* (summarily defined as 'law') could be a place. Consequently, *ius* was not simply connected with space—*ius* produced space; it was space.[96] In principle, *ius* had no fixed place, but it was the magistrate's jurisdictional activity that brought judicial space into being, and therefore, *ius* as a domain came from him and his power (*imperium*).[97] In that sense, *ius* could not be defined architecturally or in topographical terms. Issues such as who was in charge of adjudicating the behaviours included in the *actio de naufragio* and what procedure would have been used to do so will be addressed in the last section of this chapter.

Meanwhile, what I am interested in here is clarifying the spaces where the jurists perceived that the behaviours included under the title *de naufragio* took place and were punishable. That corresponds to the landscape in which they considered that the civilian remedies included in the *edictum de naufragio* operated. In the fragments addressed, the jurists include shores, the sea,

96 Angelis 2010, 2.

97 D.1.1.11 (Paul. 14 *ad Sab.*) *Ius pluribus modis dicitur* (…) *Alia significatione ius dicitur locus in quo ius redditur, appellatione collata ab eo quod fit in eo ubi fit. Quem locum determinare hoc modo possumus: ubicumque praetor salva maiestate imperii sui salvoque more maiorum ius dicere constituit, is locus recte ius appellatur.* (The term *ius* is used in several senses (…) By a quite different usage the term *ius* 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 *ius*.) (Trans. Angelis 2010, 1).

and boats, composing what they conceived of as the legal maritime cultural landscape wherein the *edictum* was effective. The latter helps me understand their 'mental maps' concerning the behaviours associated with shipwrecking and included in the *edictum de naufragio*. The focus here is on what has been called, in maritime cultural landscape theory, the 'cognitive landscape'. The term denotes 'the mapping and imprinting of the functional aspects of the surroundings in the human mind'.[98] In simpler language, the term refers to the understanding of a landscape in the human mind referring to the activities taking place there, such as settlement, shipping, fishing, and their related cultural aspects.

It is a known fact that, when writing, Roman jurists had a method by which they identified and refined legal concepts by using different techniques, such as explaining the cases where a concept would apply.[99] However, did jurists consider extra-legal matters when defining the spaces where unlawful behaviour might take place?[100] For example, some of these 'extra-legal' elements could be the changing natural features of the landscape (e.g. waves, winds), or the activities carried out in these landscapes (e.g. seafaring, fishing), conceived of as social actions.[101] There are evident limits to figuring out the notions of maritime cultural landscape as understood by Roman jurists. It is possible to consider their views through the ways in which they defined the different areas of the landscape as either common or private and divided them as such,[102] but it is more difficult to assess what the influence of irrational aspects of maritime culture would have been on their depiction of the legal landscape.[103] In sum, the fragments reflect cases concerned with a particular factual situation that might actually occur, but the jurists mentioned only those aspects that had a bearing upon the legal problem that they wished to solve.[104]

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98 Löfgren 1981; Westerdahl 1992, 5.

99 Gordley 2013, 8–10.

100 According to Stein 2007, 30, 'although they were very conscious of the ethical dimensions of the civil law, the jurists studiously ignored all extra-legal matters, such as the economic context of a legal institution'.

101 Farr 2006, 91–92, viewed as an activity where decisions and choices must constantly be updated due to changing conditions, knowledge and skill can be seen as socially constructed.

102 e.g. fragments from book 4 of the Institutes of Marcian, (D.1.8.2pr–1; D.1.8.2.4), which are studied in detail in chapter three.

103 Such as taboos about entering certain harbours and magic sanction for certain areas, which may reflect special jurisdiction as far back as the archaic Mediterranean. See also Westerdahl 1992, 5 n. 1.

104 Gordley 2013, 12.

The fragments considered here are attributed to Ulpian and Gaius. Most of Ulpian's fragments (§ 1.5; § 3.1–2) are from his book 56 on the praetorian edict,[105] except for one fragment (§ 10), which is from his book of opinions.[106] Gaius' book on the provincial edict was written during the second century CE, under the reign of Antoninus Pius.[107] I will start chronologically with Gaius' fragment, in which he says:

> D. 47.9.5 (Gaius 21 *ad Ed. Prov.*) *Quod ita verum est, si aliquod tempus post naufragium intercesserit: alioquin si in ipso naufragii tempore id acciderit, nihil interest, utrum ex ipso mari quisque rapiat an ex naufragiis an ex litore* (This is true if some time has elapsed since the wreck; but if what happens occurs at the very time of the wreck, it is irrelevant whether the seizure be made from the sea itself, the wreck or the shore).

Here, in fact, Gaius is linking different spaces such as the shore and the sea through the event of the wreck and indicating that it is the accident that determines the ruling available, and not the space. In addition, Gaius' comment corresponds to the provincial edict, which makes one wonder again if the *edictum de naufragio* may have been provincial, and provides some explanation for the questions asked in section 2.1.2. Here, Gaius is trying to cover all the particularities of the event, especially bearing in mind that in the provinces many of the inhabitants would not have access to civil law, even on land, so that the event of a wreck was justification in itself to apply a rule and see to the recovery from the damage caused. It seems probable that the provincial edict was not very different from the one enacted in Rome,[108] and indeed his fragment does not differ from what Ulpian indicates in § 1.5 ('for things are said to come from a wreck which lie on the shore after the wreck. The better view is that the edict applies to the time'), or § 3.1, which refers to a robbery committed during the actual attack on a ship.[109]

Moreover, § 3pr. indicates that if something is stolen after the wreck, then the *actio* applicable will be the one for theft and not *de naufragio*.[110] In

105 Written under the reign of Caracalla, see: Honoré 1962c, 209–210.

106 Written under Caracalla. The authenticity of this book has been discussed by several authors, e.g. Honoré 1982, 217–218, with extensive literature.

107 Honoré 1962a, 67–68.

108 Liebs 2004a, 109. The variations between the urban and the provincial edict would be justified in the work of Justinian's compilers, according to Katzoff 1969, 428.

109 *Nam res ex naufragio etiam hae dicuntur, quae in litore post naufragium iacent. Et magis est, ut de eo tempore.*

110 *Qui autem rem in litore iacentem, postea quam naufragium factum est, abstulit, in ea condicione est, ut magis fur sit quam hoc edicto teneatur.*

§ 3.2,[111] Ulpian refers to the Augustan jurist Labeo to establish a parallel between a robbery committed in a house or a villa and one committed on a ship.[112] The parallelism established by Ulpian between bandits acting at sea and on land might correspond to a vision of his time, when crimes committed at sea did not constitute a *sui generis* crime and a threat to humankind, as they did in the Republic.[113] It is true that the Republican edict contemplated situations happening during or after catastrophes taking place on land and at sea, but in this fragment, Ulpian is directly referring to a straightforward robbery committed in a house. These last remarks highlight one key difference between the Republic and the Empire in terms of the maritime cultural landscape: when the shores and the seas were secure, private legal remedies such as the *edictum de naufragio* were extended to apply to a larger number of cases in lieu of applying a criminal statute.

The last fragment considered here is § 10, in which Ulpian describes how the surveillance of the provincial guards should help to prevent locals from causing wrecks.[114] The books of *opiniones* by Ulpian refer generally to provincial law, and are presumed to have been composed in a province.[115] Despite the fact that the Justinianic compilers may have included this fragment because it reflects that the implementation of the *ius naufragii*, as the *edictum de naufragio* suggested, was not allowed, the interesting point is that provincial fishermen were still committing these acts of wreckage.[116] The fragment reflects a fragmented maritime cultural landscape, both legally and politically, where Ulpian is indicating that the Roman authorities should act to prevent locals from wrecking ships in the provincial maritime cultural landscape, where these local practices evidently survived. The fragment is an example of the diversity of maritime cultural landscapes existing in the Roman world, some of which might still consider those practices as a way of life.[117] Hence the Roman maritime cultural

111 *Labeo scribit aequum fuisse, ut, sive de domo sive in villa expugnatis aliquid rapiatur, huic edicto locus sit: nec enim minus in mari quam in villa per latrunculos inquietamur vel infestari possumus*.

112 Even if it is not the case in this fragment, there are other fragments in which Labeo legally bridges the gap between land and sea, as with the *interdicto* on public rivers, see: D.43.1.1.17 (Ulpian. 68 *ad Ed.*), or concerning the *cautio damni infecti*, D.39.2.24.4 (Ulpian. 68 *ad Ed.*). See also chapter five, section 5.2.2.

113 Tarwacka 2009a, 56.

114 See also chapter five, section 5.1.2.

115 Honoré 1982, 219–220; Santalucia 1971, 27.

116 See also chapter five, section 5.1.2.

117 Duncan 2011; provides a model on how to assess the impact of local culture in the landscape.

landscapes could be perceived from a political angle. When I refer to 'political', it is in the sense of a maritime cultural landscape that encompassed a common landscape, and in which subjects could navigate in safety, as was prompted by the Roman state's political propaganda.[118] However, we need to consider that most of the jurists included in the title *de naufragio* wrote at the apex of classical jurisprudence, in a world wholly accustomed to autocratic stability; Ulpian's statement did not describe actual reality and certainly not the state of affairs in earlier eras of Roman civilisation; therefore, let us examine the geopolitical aspects of the *edictum de naufragio* in the next section.

### 2.2.2 *Geopolitical Aspects*

When referring to the geopolitics of the *edictum de naufragio*, I am dealing with the inalienable relationship between geography and politics in the Roman territories. From the perspective of this work, the political aspects are those connected with the control of shipwrecks and the establishment of peace along the Mediterranean coasts. The Roman interest in maintaining a peaceful Mediterranean was twofold: on the one hand, it was a symbol of their power and mastery of the seas;[119] on the other hand, it allowed mobility, which in turn allowed trade to keep flowing. This maritime landscape was a project shaped by the interest of the Roman state, and the contesting (or not) forces of the people inhabiting it.[120] In that sense, the *edictum de naufragio* constitutes a private ruling which, according to the dating that I proposed in chapter one, appeared to suppress the practice of *ius naufragii*, while piracy was addressed via public statute. Initially, the *edictum* would have been approved and adopted in Rome and Italy. However, as can be appreciated through the fragments compiled under the title *de naufragio*,[121] as well as related ones,[122] the edict itself or at least, the behaviours that it was targeting, was progressively adopted and enforced in provinces and via Imperial constitutions and statutes. These actions aimed at constructing a maritime cultural landscape that could be safely navigated, with Roman law seen as the key instrument for civilising

118 Here I follow the take on political and public space followed by Russell 2016a, 45–47, when referring to the Roman *fora*.

119 One key example of this is the *Res Gestae Divi Augusti* (*CIL* III.2.769 = *RG DA* 25.1), where the statement that he freed the sea of pirates was a part of his political propaganda. Indeed, Purpura refers to the legal implications of Augustus as *gubernator maris*/*gubernator mundi* and how this can be perceived in the iconography of the sculpture of the *prima porta* Augustus; see Purpura and Cerami 2007, 180–191.

120 In the line of Lefebvre 1991.

121 See § 3.8; § 4.1; § 4.7.

122 e.g. D.48.7.1.2 (Marcian. 14 *Inst.*); D.14.2.9 (Maec. *ex Lege Rhodia*).

those areas where shipwrecking was still a regular practice. The latter also had an impact on the cultural navigational landscape (e.g. lighthouses, *stationes*), because these structures grew and developed under the hegemonic power of Rome.[123] Such structures have always been used by mariners to navigate and understand their position, and their increase reveals a map of a pacified Mediterranean with increasing long-distance trade.[124]

In this section, I am going to discuss different legal fragments that refer to the *edictum de naufragio* and, where possible, examine their spatial dimension in order to understand the geopolitical impact of this edict.[125] Most of the texts are dated after the Republican period, and correspond to Imperial constitutions that extend the impact of the *edictum de naufragio* both chronologically and geographically. In that sense, even if it is possible to find different views on the legal texts dealing with shipwrecks, there are also some consistent features that emerge. One is the acknowledged significance of the sea (specifically the Mediterranean) as the chief reference point for many interpretations of legal events involving different subjects.[126]

Several fragments of the title *de naufragio* refer to thievery in shipwrecks that took place in provincial settings. The first one, § 10, refers to the authority of the *praeses provinciae* to ensure that fishermen did not wreck ships and take the remains from the shores. Another text is § 4.1, in which the Severan jurist Paul compiled an Imperial constitution whose authorship (Antoninus Pius[127] or Caracalla)[128] and character (if it is a rescript or an *epistula*)[129] have been widely discussed. I attribute the authorship of this Imperial constitution to Caracalla, who was addressing it to a provincial governor.[130] My assertion finds justification in the penalty of *deportatio* quoted in the fragment, which should be decreed by the *praefectus urbi* and not by a provincial magistrate, unless the latter appealed to the emperor, as can be appreciated in an Imperial

123 Christiansen 2014; 2015.

124 That is one of the key points of Keay 2020, 1–35.

125 Many of these texts are included in table one in the appendix.

126 Salway 2012, 230.

127 Cuiacius 1722, 752; Fitting 1908, 85; Flore 1930, 338–339, n. 7; Levy 1939; De Robertis 1939a; D'Ors 1942–1943, 43; Balzarini 1969b, 215, n. 85; Gualandi 1963, 70; Garnsey 1970, 119, 137–138, 163, 222, 225–226, 260; Marotta 1991, 334. These authors mostly base their arguments on D.48.7.1–2 (Marcian. 14 *Inst.*)

128 Augustinus 1579, 297; Haenel 1857, 135; Mommsen 1870, 103; Purpura 1995, 473, even if in a previous paper (1985a, 331) he attributed the text to Pius. Also, Manfredini 1984, 2209.

129 Palazzolo 1974, 57–58; and Sargenti 1983, 240, indicating that this is probably an epistula duplicating a previous rescript, and quoting examples such as D.42.1.33 (Callistrat. 1 *Cogn.*) or D.48.6.6 (Ulpian. 6 *de Off. Proc.*)

130 For more details, see Mataix Ferrándiz 2017b, 36–55.

constitution from Septimius Severus.[131] It would have been logical for Caracalla to have followed the politics of his father, and for Ulpian, who worked under his rule, to reflect it in his works. In addition, § 12 mentions one rescript by Caracalla and Septimius Severus which stipulated that a castaway is still the owner of their wrecked property, and which belongs to Ulpian's book 12 on the duties of proconsuls, therefore setting the text in a provincial context.[132] Finally, yet importantly, § 7 contains a rescript from Hadrian referring to the *praesides provinciae* as being in charge of imposing a severe punishment on people stealing from shipwrecks.

All these three fragments reveal different ways by which the scope of the *edictum de naufragio* was extended to the provinces. On the one hand, there is the advice provided to provincial magistrates by Ulpian in his books, being himself part of the Imperial chancellery during Caracalla's reign,[133] and therefore, representing the official narrative of the Empire. On the other hand, there are the rescripts compiled and commented on by Paul in his book 54 on the commentary on the edict,[134] and in the second book of *quaestiones* from Callistratus.[135] Both of them worked at the Imperial chancellery in the role of *magister libellorum* (chief of the petitions office),[136] and were assuredly well acquainted with the Imperial archives when they included these observations in their books, as they were expanding their impact and promoting the values of the Empire regarding how to punish shipwrecking in the provinces.[137] In areas were the Imperial authority was more delocalised, many of these local customs were probably still in use, and it was the duty of the Roman emperor to manage these situations and transform the maritime cultural landscape of the Roman Empire into a peaceful one.[138]

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131 D.48.22.6.1. (Ulpian.9 *de Off. Proc.*); D.1.12.7 (Ulpian. *l. Sing. de Off. Praef. Urb.*); D.26.1.9 (Marcian. 3 *Inst.*) More examples on how communication with magistrates at the time of the Severans in Daalder 2017, 2018.

132 Dell'Oro 1960, 51–60.

133 Dell'Oro 1960, 119; Honoré 1962c, 209.

134 Written during Caracalla's reign. See Honoré 1962c, 224; Klami 1984, 1834, Maschi 1976, 676, locates his work in a broad chronological timeline, between Commodus and Severus Alexander.

135 Probably written under Septimius Severus, see: Bonini 1964, 11–14; Honoré 1962c, 216; Mateo 2004, 202.

136 In the case of Callistratus, from 212 to 217 CE; and for Paul, from 200 to 212 CE. See Honoré, 1962c, 196, 207.

137 This phenomenon has been described as the 'maximation of Imperial constitutions' and involved an extensive knowledge of the archives of the Imperial chancellery. See: Archi 1986, 161; Volterra 1971, 832; Palazzolo 1980; Coriat 1997, 635–664; Varvaro 2006, 381.

138 These rescripts bear witness to the transformation that took place during the Severan

One last example—even if it does not belong to the *edictum de naufragio*—would be a fragment of Marcian's Institutes[139] in which the jurist first refers to the punishment of shipwrecking, first by the *Lex Iulia de vi privata*, and later via *cognitio extra ordinem*, as mentioned in an Imperial constitution from Antoninus Pius.[140] By including these references to the punishment of shipwrecks in his book, Marcian was detaching them from their statutory or casuistic origin and raising them as abstract principles of general applicability.[141]

Another discourse is reflected in the rescripts echoing the *edictum de naufragio* that were collected in later compilations, such as the PS (5.3.2) and the *libri basilicorum* (53.3.25).[142] That these collections include the *edictum de naufragio*, even rephrased or slightly abbreviated, reflects that it was still the aim of the compilers (from the fourth and the sixth centuries, respectively) to maintain a maritime cultural landscape free from the fear of wrecking.[143] Another case is C.6.2.18,[144] belonging to the title *de furtis*, which includes a rescript by Diocletian and Maximian subscribed at Nicomedia in 294 CE. The text refers to the penalty from the perpetual edict, meaning the private *actio*, as well as to the existence of a statutory penalty that should be the *quaestio de naufragii*,[145] which occupied one title from the Theodosian code (13.9) and another from Iustinian's code (11.6).[146] That *quaestio* was a late institution that aimed to provide protection for the *navicularii* working for the Roman *Annona*. I will examine this issue in greater detail in chapter five (sect.5.1.2), but a key point to highlight here is how these late emperors included the *edictum de naufragio* in this late rescript, extending the scope of this ruling into a later maritime cultural landscape both in space (Nicomedia) and time (fourth century CE).

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period stemming from the implication of the emperor providing legal advice, which made him the centre of a Roman legal universe that was located not in Rome, but wherever he was. See: Tuori 2016, 262–263.

139 Marcian's book was a kind of sourcebook written in the late Severan period and probably in an oriental province, see Ferrini 1929 and Andrés Santos 2004, with bibliography.

140 D.48.7.1–2 (Marcian. 14 *Inst.*).

141 Coriat 1997, 649–652.

142 *Qui vero ex naufragio vel nave expugnata qui dolo malo recepit, vel rebus damnum ibi dedit, intra annum in quadruplum, post annum in simplum tenetur*.

143 Indeed, it is possible that the crisis of the late Empire caused an increase in shipwrecking in different Mediterranean areas, see Rougé 1975, 194.

144 For the whole text see the table one in the appendix.

145 Manfredini 1986, 135–148.

146 Even though C.11.6.1 includes a rescript from Caracalla that refers to the interference of public authorities in cases of shipwreck, therefore not dealing with a *quaestio*, and placing itself in line with § 7 from the title *de naufragio*.

### 2.2.3 *Shipwrecks and Status*

Roman society presented itself as legally layered, since the law applied a personal legal principle (e.g. citizen, foreigner, Latin) to a legally bounded or defined space (by *ius civile* or *ius gentium*). However, that description needs nuancing in different ways. On the one hand, modern, dogmatic presentations of Roman law tend to offer taxonomies of the individuals interacting in Roman society (e.g. the son-in-power, the slave). However, Roman texts, especially when read in relation to the spaces where they operate, highlight the idea of motion; that is, on the one hand, there were personal changes in status, such as loss of citizenship, life or wealth, but on the other, there were people of diverse statuses moving within different legally designated spaces.[147] This section connects with the topic of shipwrecks, but is especially devoted to the idea of motion as affecting personal status, which affected the application of the rules in force in any maritime cultural landscape. I would like to note some nuances concerning issues such as the self, and the identity or personhood of the individuals associated with their legal identity. These are not simple questions, and therefore I will only be able to note some examples and issues here to give an idea of the problems involved in changes, whether of status or location, and how these were legally addressed when dealing with sea hazards.

Roman citizens who had been taken by an enemy as prisoners of war became slaves of the enemy (*captivus ab hostibus*), but they regained their freedom and all their former rights through *postliminium* (*ius postliminii*) when they returned to Roman territory.[148] In that sense, this change in status could happen on land or at sea, since wartime law applied equally in all landscapes. However, what happened when someone was kidnapped at sea by brigands?[149] These could have been described as either pirates, *latrones* or *praedones* (see § 3.1),[150] but the key point here is that, legally, they did not constitute an enemy according to wartime law.[151] The consequence of this legal categorisation was

147 Ando 2019a, 375–392.

148 G.1.129; and see Solazzi 1947, 228; Gioffredi 1950, 13; Bona 1955, 249–275; Cursi 1996.

149 These events were comically depicted in; Ter.*Eun*.107–115; 519–527; Plaut.*Mil*.118–120. One of the most famous hostages of such pirates was a young Julius Caesar, see: Plut.*Caes*. 2; Suet.*Iul*.74. Moschetti 1983, 879–880. These seizures were more common during the Roman Republic when piracy was more frequent and pirates kidnapped many people to sell them as slaves in markets such as Delos; see Strab.14.5.2.

150 See chapter five, section 5.1.2.

151 D.49.15.24 (Ulpian. 1 *Inst*.). *Hostes sunt, quibus bellum publice populus Romanus decrevit vel ipse populo Romano: ceteri latrunculi vel praedones appellantur. Et ideo qui a latronibus captus est, servus latronum non est, nec postliminium illi necessarium est: ab hostibus autem captus, ut puta a Germanis et Parthis, et servus est hostium et postliminio statum pristinum recuperat*. Also, Ziegler 1980, 98.

that individuals kidnapped by pirates could be sold as slaves, when indeed they were legally free.[152] The complicating issue here was how to demonstrate one's freedom and citizen status (something easier to say than to do). This unfortunate event could affect all kinds of people; we should not think that pirates discriminated when kidnapping people with the aim of selling them as slaves. In the case of Roman citizens, they could claim protection under the *Lex fabia* for *crimen plagii*, that is, for selling a free person as a slave.[153] However, it was also possible for aliens to claim liability, since the contract of sale (*emptio venditio*) belonged to the field of *ius gentium*,[154] and thus non-Romans could also benefit from its protection.[155] In sum, a free person could not be subject to a legal sale, and therefore in these cases the contracts will be declared null and void.[156] Even if it might seem that such events were more frequent during the late Republic, sources such as § 6 from the title *de naufragio*, some literature,[157] and especially sources from jurists of the Empire describing this issue in relation to the contract of sale, prove that these episodes could still occur.[158]

Even aside from kidnapping, the sea was a dangerous environment where shipwrecks happened and people died, abandoning belongings and affecting ongoing businesses.[159] For example, in D.39.6.3 (Paul. 7 *ad Sab.*) the jurist indicates that it is valid to donate *mortis causa* when one is going to embark on a sea venture, due to the dangers of seafaring. Another case from the Digest refers to the catastrophic events listed in the *edictum de naufragio* as influencing how gifts between a husband and wife or *fideicommissum* should be handled.[160] A shipwreck could also consign one's fortune to the depths of the

152 D.49.15.19.2 (Paul. 16 *ad Sab.*); De Martino 1975, 19; Ortu 2010, 11–12; 2012, 61–80.

153 *Lex Fabia* (PS.5.3.1; Coll.14.2.1; D.48.15); Lambertini 1980, 9–41; Tarwacka 2009a, 115–119.

154 D.18.1.1.2 (Ulpian. 33 *ad Ed.*).

155 Plautus refers to the *repromissio* of a sale contract in cases where the person sold was free, see Plaut.*Cur*.1.667–669, a comedy located in Caria.

156 Arangio-Ruiz 1956, 129–133; Reggi 1958, 242–272; Evans-Jones and MacCormack 1995; Rodeghiero 2004, 61–71.

157 Amm.Marc.14.7.5.

158 D.18.1.70 (Lic. Ruf. 8 *Reg.*); D.18.1.4 (Pompon. 9 *ad Sab.*); D.18.1.5 (Paul. 5 *ad Sab.*); D.18.1.6 (Pompon. 9 *ad Sab.*). Later sources indicate that jurists considered the contract valid if the buyer was not aware of the real situation, even if there was still a right to claim.

159 e.g. D.35.2.30pr. (Marcian. 8 *Fid.*). And then possibly leaving behind a grave reminding posterity of the cause of your death, *RIB*.I 544; *CIL* III 1899; *CIL* III 8910; *CIL* XIII 2718; *AE* 2005.162 = *AE* 2008.150. Finally, *CIL* IV 2103 honours how Caracalla survived a shipwreck. See also, Letta 1994, 188–190.

160 D.24.1.32.14 (Ulpian. 32 *ad Sab.*); D.36.1.18.7 (Ulpian. 2 *Fid.*); D.39.6.35.4 (Paul. 6 *Lex Iul. et Pap.*).

sea, effecting a sudden loss of financial status.[161] Wealth, together with holding an office and official status, was a hallmark of social standing, and could be used to yield juristic advantage in legal procedures, or to ask for legal advice from the emperor.[162] It is difficult to detail the effects of these changes in status from the sources, but they constituted dramatic turning points for the individuals affected by the wrecks, and need to be considered in this section, even in passing.

It is obvious that non-Roman citizens repeatedly crossed the Roman Mediterranean, and that, unfortunately, their trips often ended in disaster. Therefore, foreigners may have benefitted from having access to legal protection (initially) granted by civil remedies such as the *edictum de naufragio*. In section 2.1.2, I raised the possibility of using a fiction when subjected to a robbery as prompted by the civil remedies stemming from the *edictum de naufragio* during the Republican period. However, different texts indicate that through time there were different ways of protecting both citizens and aliens if they suffered a wreck. For example, § 3.8 includes a text from Ulpian in which the Severan jurist indicates that two *senatus consulta* (one of them dating to Claudius' era) specified penalties for individuals who caused a wreck, but did not provide help for people who suffered wrecking or who had goods stolen as a result of wrecking. These behaviours were assimilated into those addressed by the *Lex Cornelia de Sicariis*, which punished murderers.[163] That text appears again in a fragment from Marcian, in which the jurist directly refers to the prevention of wrecking (*naufragium suppresserit*).[164] The *senatus consultum* would then have especially protected foreign castaways and stood against the ancient *ius naufragii* that sometimes re-emerged during the Imperial period, despite the strong presence of a central authority.[165]

Indeed, another text from Marcian indicates that previously the *Lex Iulia de vi privata* (17 BCE) had included a penalty of a third of the value of the things stolen from a wreck, which was a lower penalty than the one specified in the *edictum de naufragio*.[166] Since this penalty was included in a statute, it would only be available to Roman citizens, unless the fiction described by Gaius for

161 Sen.*Tranq*.3; Petron.*Sat*.76. Indeed, several merchants inscribed stones praising the gods for ensuring that their cargo reached its destination safely, e.g. *CIL* III.8793; *AE* 1973.380; *AE* 2001.1462; *AE* 1983.721.

162 Kelly 1966a, 33–42; MacMullen 1974, 11–12; Taylor 2016, 357; Tuori 2016, 252.

163 See chapter five, section 5.2.1.

164 D.48.8.3.4 (Marcian. 14 *Inst*.). *et qui naufragium suppresserit* (…) *ex senatus consulto poena legis Corneliae punitur*.

165 Purpura 1995, 475; Talbert 1984, 433.

166 D.48.7.1pr.–1 (Marcian. 14 *Inst*.).

the *actio de furti* (G.4.37) could apply to these cases as well. Moreover, Marcian's fragment also described the existence of an Imperial constitution from Pius, in which the emperor established severe punishments for individuals stealing from wrecks.[167] It is possible to classify this text as in the line of other Imperial rulings specifying harsh penalties for these behaviours included in the edict, as can be appreciated from fragments § 4.1 and § 7 under the title *de naufragio*. These fragments indicate that such cases, whether affecting citizens or foreigners, lay in the hands of a provincial magistrate who would have decided how to apply the penalties indicated by the emperor.[168]

These are the provisions described in Roman law when dealing with shipwrecking and its related unlawful behaviours. However, there were perhaps also local solutions to deal with such events, whether through mutual agreements or symbolic gestures, stemming from archaic practices as described in chapter one. Therefore, when considering the Roman world and the different solutions provided in case one experienced a wreck, there is a need to accommodate a certain degree of fluidity concerning the law. We tend to think of legal systems as mutually exclusive, or at least well-defined. However, the Romans were much less rigid; theirs was a world in motion, and their interests were regulatory.[169] The political transformation that the Roman world underwent from the late Republic onwards affected the understanding of law, and who could gain access to it. The expansion of Rome as an Imperial power had profound implications for how they understood the particularities of social and cultural life in territories that they ruled over, but whose residents were now deemed aliens. These territories were connected by land and sea, and with the sea being the most efficient and economical way to move between them, it was to be expected that eventually some of the legal boundaries between land and sea, citizens and non-citizens, would start to blur.[170]

## 2.3 Processual Remarks

Litigants who wanted to pursue compensation for damages suffered in connection with a shipwreck had—at least apparently—a wide array of possible avenues to do so, as one realises when reading the fragments forming the title

167 D.48.7.1.2 (Marcian. 14 *Inst.*).

168 G.1.6; Richardson 2015, 48; Czajkowski 2017, 123.

169 Ando 2019a, 392.

170 Czajkowski and Eckhardt 2018, 30–31, refer to the relevance of laws of commerce for actual legal purposes, making the issue of enforceability a more pressing one.

*de naufragio*. In the Republic, when this edict was enacted, a citizen had access to a civil procedure that implied a more or less voluntary act of submission to his peers. However, as Ulpian tells us in §1.1, there was also the possibility of accessing criminal procedures. During the Republic, both criminal and civil procedures involved limited participation of magistrates such as the praetor, who presided over the selection of the jury and the conduct of the case, but the facts were assessed by a panel of *iudices*. These basic principles were an important part of the Roman political consciousness; Romans may have inherited a fundamental conviction that private citizens should decide lawsuits.[171] The progressive development of the Roman procedure into the *cognitio extra ordinem* gave the magistrates a more important role, as well as enhancing the importance of the Imperial authority in the procedure.

This section focuses on the different sorts of procedures available to the subjects affected by a shipwreck in the original *edictum de naufragio*, which constituted an exceptional circumstance that affected judicial procedures in different ways.[172] The questions targeted here include, the dichotomy between civil and criminal procedures, the legal access and judicial resources available to non-citizens, and which magistrates were in charge of the different procedures in the different chronological periods, as attested by the fragments. In outlining the issues addressed here—even if dealing with some procedural technicalities—the wealth of possible additional information will become apparent. These fragments refer, after all, to issues linked to topics such as Imperial integration, political control of the land, and control, not of the sea itself, but of the unlawful behaviours taking place in a space not governed by the law of the Romans. I shall come back to this throughout the book, but for the moment the present chapter will allow readers a brief insight into the procedural world of the *edictum de naufragio*.

### 2.3.1 *What Sort of Procedures Were Available?*

Throughout Roman procedural history, the duality between private and public repression has been a difficult point to define. This question arises again because of fragment D.47.9.1.1, in which a *laudatio edicti* (praise of the edict)

171 Turpin 1999, 501.

172 e.g. D.2.12.3pr. (Ulpian. 2 *ad Ed.*), refers to the *vadimonia* (a promise to appear in court by one of the parties involved in the trial) of the trials taking place in Rome (Lenel *Pal.* 2, 425). The fragment indicates that during harvest and vintage, when fewer cases could be judged because fewer labourers could be summoned, the behaviours included in the *actio de naufragio* constituted an exception. In addition, D.2.13.6.9 (Ulpian. 4 *ad Ed.*), which refers to the formal pronouncements in a trial, provides an exception for a banker who has lost his documents in a shipwreck, fire, or building collapse.

by Ulpian observes that the person affected by the offence could both file the private action provided for by the praetor in the edict and exercise a criminal prosecution against the defendant. It reads as follows:

> D.47.9.1.1 (Ulpian. 56 *ad Ed.*) *Huius edicti utilitas evidens et iustissima severitas est, si quidem publice interest nihil rapi et huiusmodi casibus. El quamquam sint de his facinoribus etiam criminum executione, attamen recte praetor fecit, qui forenses quoque actiones criminibus istis praeposuit*. (The utility of this edict is evident and its severity fair, since it is of public interest that nothing should be looted from these cases. And although there be criminal prosecutions arising from these crimes, the praetor is nonetheless right in propounding civil actions for such offences).

After reading this fragment, we need to consider two different things: the first is that what Ulpian refers to as a civil remedy is the praetorian *actio de naufragio*, while for the criminal remedy he was probably pointing to the *crimen vis* that was provided for in the *Lex Iulia de vi privata*.[173] Second, even if Ulpian was commenting on an edict of the Republican period, in his time, the use of the *cognitio extra ordinem* was widely extended in general, as the jurist mentions in several of his texts when describing the remedies available.[174] Ulpian's phrasing seems to indicate that the claimant had freedom of choice regarding the procedure considered appropriate to the case, and in that regard, I think that Ulpian is using *actio* in the sense of a legal remedy more than in a technical sense. A similar take is presented by the jurist in D.47.2.93 (Ulpian. 38 *ad Ed.*).[175] In this fragment, in which *civiliter agere* was contrasted with *criminaliter agere*, the *actio furti* constitutes a sample of the progressive extension of the public sphere (with the *cognitio extra ordinem*) to encompass an unlawful behaviour in principle conceived of as civil. Although this alternative was not a general

173 D.47.8.2.1 (Ulpian. 56 *ad Ed.*); Balzarini 1969b, 221.

174 e.g. D.43.32.1.2 (Ulpian. 73 *ad Ed.*); and D.47.11.5–10, belonging to the books *de officio proconsulis*.

175 D.47.2.93 (Ulpian. 38 *ad Ed.*) *Meminisse oportebit nunc furti plerumque criminaliter agi et eum qui agit in crimen subscribere, non-quasi publicum sit iudicium, sed quia visum est temeritatem agentium etiam extraordinaria animadversione coercendam. Non ideo tamen minus, si qui velit, poterit civiliter agere.* (It must be considered that the action of theft is exercised more than necessary nowadays, and the one who exercises it assents to a criminal action, not as if the trial were public, but because he has considered that the recklessness of the actors should also be punished with an extraordinary penalty. However, if one wanted to, he could exercise the action by civil means).

principle of the criminal process, it did occur in some cases, so that sometimes the same case could be exposed either to the *ordo* or to the *cognitio*.[176]

The distinction between the alternative procedures of the *ordo* and the *cognitio*, and the later *civiliter–criminaliter* differentiation (which can generally be observed in the testimonies of late jurists),[177] respectively refer to the criminal compensatory aspects of the matter.[178] The latter does not constitute a convention that arose in Ulpian's time, but was already mentioned in a fragment of Julian referring to the punishment of theft. The fragment belongs to Julian's *Digesta* (153–160 CE),[179] in which the jurist was commenting on the praetor's edict on theft, which indicates that the jurist was referring to a principle that was applied before his time.[180] The *furtum* could be considered a crime or a delict, and the choice of the type of action was awarded to the person affected by the inclusion in the fragment of *aexistimandus est elegisse viam* (one can evaluate in which way to choose). Another example of that choice is provided by Gaius (3.213), who indicated that the victim *liberum arbitrium habet* (has freedom of choice).[181]

One question here concerns the reasons that may have led an individual to choose one procedure or the other. By means of the civil process one could obtain a multiple of the value of the object in question, while in the extraordinary process a patrimonial advantage was not assured, since the penalties pointed towards the punishment of the offender (e.g. § 4.1; § 7; § 12.2). It must be clarified that when Ulpian elaborated on his comment on the edict, the prosecution of specific behaviours implying thievery, such as ones committed on the occasion of a shipwreck, were surely more likely to have achieved satisfaction from the extraordinary procedure, since during the Severan period the

176 D.47.1.3 (Ulpian. 2 *de Off. Proc.*) *Si quis actionem, quae ex maleficiis oritur, velit exsequi: si quidem pecuniariter agere velit, ad ius ordinarium remittendus erit nec cogendus erit in crimen subscribere: enimvero si extra ordinem eius rei poenam exerceri velit, tunc subscribere eum in crimen oportebit.* (If someone wanted to exercise the action arising from delict, if his interest was to obtain a sum of money, he would have to be referred to the ordinary process, and he would not be obliged to initiate a criminal accusation, unless he wanted to claim via an extraordinary punishment, then he would have to subscribe a criminal accusation.) Pietrini 1996, 26; Scapini 1992, 147.

177 The use of *civiliter* and *criminaliter* is typical from the postclassical period. An example can be found in D. 47.2.93 (Ulpian. 38 *ad Ed.*)

178 Balzarini 1969b, 272–275, who believes that the introduction in the *civiliter* fragment is later in § 1.1. See also, García Garrido 1993, 263.

179 Liebs 2004b, 104.

180 D.47.2.57.1 (Iulian. 22 *Dig.*).

181 G.3.213.

application of the *extra ordinem cognitio* was greatly extended.[182] A process of elaboration by the Senate and the Imperial chancellery led to a progressive extension in the application of criminal laws, including in these new species that initially were only considered as punishable in the private sphere. In sum, for actions in which the petition[183] was identified with a search for a patrimonial reintegration, private actions were used (to which a compensatory function was assigned),[184] while public actions were assigned a punitive function.[185]

The extension of the *cognitio* convinced some scholars that the trials differed in relation to their object and not their structure, so that the procedure could have both civil and criminal jurisdiction.[186] In that sense, another question focuses on the possibility of combining both criminal and civil processes. Initially, some classical scholars pointed out the possibility of accumulating procedures when both processes followed the same *rationale*.[187] Otherwise, most scholars accepted the possibility of combining processes, even if some indicated that one of the procedures would prevail over the other.[188] The latter appears to be explained by Paul as a matter of coordinating both actions, understanding that a private action could be used as a preliminary enquiry with respect to a public action, especially in cases of violent theft.[189] However, the Severan author does not mention the possibility of accumulating processes, which from my point of view seems to be a dogmatic construction from traditional scholarship. Indeed, Balzarini thinks that in the classical period—or at least after Julian—extraordinary criminal sanctions could not be combined with actions of a private criminal nature that emanated from the praetorian edict.[190] The claimant had the ability to choose, but the procedure *extra ordinem* prevails in cases of thievery committed under specific circumstances.

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182 Balzarini 1969a, 272–276, who believes that the introduction in the *civiliter* fragment is later in § 1.1, see also García Garrido 1993, 263.

183 De Dominicis 1967, 223–227.

184 D.47.1.3 (Ulpian. 2 *de Off. Proc.*), that the private action is conceived as a return towards a patrimonial purpose.

185 Vacca 1972, 897.

186 De Marini Avonzo 1956, 198.

187 Mommsen 1844, 252; Savigny 1850, 114.

188 e.g. De Sarlo 1937, 317–332; De Marini Avonzo 1956, 176; Vacca 1994, 895–898.

189 D.48.1.4 (Paul. 37 *ad Ed.*) *Interdum evenit, ut praeiudicium iudicio publico fiat, sicut in actione legis Aquiliae et furti et vi bonorum raptorum* [...] (It sometimes happens that there may be a preliminary inquiry by means of a private action before a criminal trial, such as an Aquilian action, an action for theft or for goods taken by force). Also, D.48.6.5.1 (Marcian. 14 *Inst.*).

190 Balzarini 1969a, 285–311.

Therefore, it might seem that Ulpian was referring to both actions in order to note the civilian option that the edict originally included, but bearing in mind that in his time, for that sort of behaviour, the *extra ordinem* procedure would have been the safest option.

### 2.3.2 *Who Is the Judge?*

The status of the judge placed in charge of a claim could indicate details such as where the procedure took place (Rome or its provinces), or whether the subjects involved were citizens, aliens, or both. This section focuses on the procedures available for the cases included in the *edictum de naufragio* at the time when it was enacted (first century BCE). In that way, it is possible to understand the spirit of this ruling, even if later the procedure underwent changes that led to the behaviours falling within its scope being judged under the *cognitio extra ordinem*. The reconstruction of the procedures available in the Republican period bears witness to the interstate connections of this edict.

In Roman texts, and especially in those surviving from the western Mediterranean, the primary methods of accommodating foreigners in Roman courts were procedural. One of these methods was the use of fictions, as I have indicated in section 2.1.2; or, as seems to have happened in the case of the *edictum de naufragio*, by appointing judges who could deal with the procedure quickly, even if it involved foreigners. The latter is based on the reconstruction of the procedural formula for the *actio de naufragio*. As is known, a *formula* consisted of a written document by which, in a trial, authorisation was given to a judge to condemn the defendant if certain factual or legal circumstances appeared to be proved, or to absolve him if this was not the case. For the case of the *actio de naufragio*, I need to turn to the following reconstruction made by Rudorff:

> *Recuperatores sunto. Quantae pecuniae paret N^um N^um* (*servum, familiam N^um N^um, in hoc anno quo primum experiundi potestas fuerit*) *ex incendio* (*ruina naufragio rate nave expugnata*) *quo de agitur A^o A^o quid rapuisse* (*recepisse dolo malo*) *damnumve dedisse, tantam pecuniam* (*quadruplum*) *aut noxae dare recuperatores N^um N^um A^o A^o condemnate, si n. p. a.* (Let it be the judges. How much is it possible to demand from Numerius Negidius (or the family or slave from Numerius Negidius, in the first year from the moment when this action was exercisable) from the fire (or the collapse of a building, a shipwreck or the spoil from a ship) in which Aulo Agerio is litigating against the person who commits robbery (or receives something with harmful intention) causes damage, the amount

(quarter) for which a noxal action is provided. Judges, condemn Numerius Negidius, or if it does not seem right, absolve him).[191]

Following this reconstruction of the formula, we can see that Rudorff included *recuperatores sunto* in his heading, thus assigning the judgment to these judges. *Recuperatores* were jurymen (usually three or five) who acted in Roman civil proceedings as judges. It seems that they may have been first established by international treaties for cases involving foreigners, as can be appreciated in several sources from the first century BCE,[192] and related scholarly literature.[193] Their involvement in judicial processes associated with foreigners is evident when reading different laws dating back to the Roman Republic, such as the *Lex Acilia Repetundarum*,[194] the *Lex Agraria*,[195] or the *Lex Latina tabulae Bantinae*.[196] However, these judges were also involved in procedures that took place during the Empire, as attested by several authors who reflect on their relationship to the praetor's edict, or provincial matters.[197] Indeed, the *Lex Irnitana*, in addition to establishing the *fictio* of citizenship for the subjects of the procedure, mentions the intervention of *recuperatores* and relates that their functions underwent some changes as the Republican period gave way to the Empire.[198]

One advantage of a trial before *recuperatores* seems to have been its celerity, including the fact that it could be held even on *dies nefasti*, when other judicial business could not be conducted.[199] In addition, it was possible to impose a time limit within which they must deliver their judgment.[200] One way to determine which cases could be judged by *recuperatores* is to examine Lenel's reconstruction of the praetorian perpetual edict, in which the actions corres-

191 Rudorff 1997, 173–174.

192 Fest.20.726–730 [*reciperatio est cum inter civitates peregrinas lex convenit, tu res privatae reddantur singulis, recuperenturque*]; Aelius Gallus, *'De verbis ad Ius civile'* in Huschke, Seckel and Kübler 1908, 13.3 [*cum inter populus et reges nationesque et civitates peregrinas lex convenit, quomodo per reciperatores reddantur res reciperenturque, resque privatas inter se persequantur*], Livy.*Epit*.26.48.8; 43.2.1–3; Cic.*Verr*.2.117; Cic.*Caecin*.9; *Archaic Latin Inscriptions. Law and Other Documents* (Loeb Class. Library), 35.

193 Bongert 1952, 103; Schmidlin 1963; Luzzatto 1965a, 56; Kaser 1966, 143; Lintott 1990; Kaser and Sackl 1996, 357.

194 *CIL* I$^2$ 583.

195 *CIL* I$^2$ 585. ll. 34–37.

196 *CIL* IX 416.

197 Gell. *NA*.20.1.14; *FIRA* II.6.2.1; *Lex Ursonensis* (*CIL* II$^2$ 5.n. 1022); Bongert 1952, 130.

198 Johnston 1968, 68.

199 Kelly 1976, 42–45.

200 Schmidlin 1963, 130.

ponding to *recuperatores* appear in titles XXX–XXXVI.[201] These correspond to: *De aqua et aquae pluviae arcendae* (XXX); *De liberali causa* (XXXI); *De publicanis* (XXXII); *De praediatoribus* (XXXIII); *De vi turba incendio ruina naufragio rate nave expugnata* and *De hominibus armatis coactisve et vi bonorum raptorum* (XXXIV); *De iniuriis* (XXXV); and *De re iudicata* (XXXVI).[202] In sum, *recuperatores* could evidently hear a wide variety of cases,[203] but no obvious common feature is discernible in them, save perhaps elements of urgency and public interest, such as offences that are prejudicial to public order, safety or (physical) *iniuria*.[204]

Unfortunately, for the case of the *edictum de naufragio* the only evidence available is that of Rudorff and Lenel's reconstruction, establishing the involvement of these magistrates in these trials. However, many fragments from Cicero's *Pro Tullio* refer the *actio ex edictum Luculli* to the competence of *recuperatores*.[205] The similarity between this case and our edict has been demonstrated in the first chapter, and if the *edictum de Lucullo* targeted both damage and theft with violence, the *recuperatores*, who were competent for the *actio vi hominibus armatis coactisve*, were also competent for the *actio vi bonorum raptorum*. Finally, for the same reasons, the same procedure must have been available for the edicts *de turba* and *de incendio ruina naufragio rate nave expugnata*, since an argument of analogy can be applied to these two edicts.[206] One last element illustrating the outline of the procedure followed for the *edictum de naufragio* needs to be brought out from two fragments of Gaius, in which he says:

> G.4.104–105. *Legitima sunt iudicia, quae in urbe Roma uel intra primum urbis Romae miliarium inter omnes ciues Romanos sub uno iudice accipiuntur; eaque e lege Iulia iudiciaria, nisi in anno et sex mensibus iudicata fuerint, expirant. et hoc est, quod uulgo dicitur e lege Iulia litem anno et sex mensibus mori. Imperio vero continentur recuperatoria etquae sub uno iudice accipiuntur interveniente peregrini persona iudicis aut litigatoris; in*

201 Lenel *EP*, 377–410.

202 Pugliese 1963, 209–211, he noted that the alleged section comprising *iudicia recuperatoria* has been organised dogmatically by Lenel, and that it is not homogeneous, because some *iudicia* promised in those clauses are not attested as *recuperatoria* by the sources but are only supposed to be so by the scholarship. In turn, Gagliardi 2012, 380–383, proposes a possible reorganisation of the titles.

203 G.4.46; G.4.141; G.4.185, *inter alia*.

204 Schmidlin 1963, 143; Kaser 1966, 142–144.

205 Cic.*Tul*.1.1; 3.7; 5.10–11; 17.41, *inter alia*.

206 Bongert 1952, 152.

> *eadem causa sunt, quaecumque extra primum urbis Romae miliarium tam inter cives Romanos quam inter peregrinos accipiuntur* (104. Actions founded upon law are those which are brought in the city of Rome, or within the first milestone from that city, between Roman citizens before a single judge. Those brought under the *Lex Iulia Iudiciaria* expire after the lapse of a year and six months, unless they have been previously decided; and this is the reason why it is commonly stated that under the *Lex Iulia* a case dies after a year and six months have elapsed. 105. Actions derived from the authority of a magistrate are those brought before several judges, or before a single judge, if either the latter or one of the litigants is an alien. These actions belong to the same class as those which are brought beyond the first milestone from the city of Rome; whether the parties litigating are Roman citizens or aliens. Cases of this kind are said to be derived from the authority of the magistrate, for the reason that the proceedings are only valid as long as he who directed them to be instituted retains his office.).
>
> Trans. W.M. GORDON and O.F. ROBINSON

My general view on this text is that Gaius is a legal historian here: the distinction between legal and praetorian (*ius civile/ius honorarium*) no longer applied to his context,[207] but he is demonstrating that there used to be differences between types of actions that can be explained by virtue of their origin, which might be a function with respect to the laws in the provinces.[208] According to Gaius, trials that took place within a mile from Rome between Roman citizens and before one Roman judge were called legitimate (*iudicia legitima*), and they all rested on statutory law. All others, in which one of these conditions was not satisfied, depended on the *imperium* or power of the magistrate, and were called *iudicia imperium continentia*. One key difference between these two procedures was that while the legitimate trial expired eighteen months from the joinder of issue, the others expired with the *imperium* of the magistrate. Therefore, the celerity associated with the *recuperatores* will find justification here, since the *actio de naufragio* would be granted by a magistrate such as the praetor, whose *imperium* expired after one year. Obviously, it is quite easy to imagine that many trials dealing with violence committed in relation to a shipwreck would have taken place more than a mile away from Rome, especially bearing in mind that the city was not built by the sea.[209] In addition, Gaius'

207 Honoré 1962a.

208 For a general overview, see Czajkowski and Eckhardt 2020.

209 e.g. Keay 2012, 33–67.

fragment 105 should be compared to Marcian's text in which the Severan jurist refers to violently robbing a shipwreck as a behaviour included in the *Lex Iulia de vi privata*, and therefore leans on a statute.[210] However, one can imagine many trials dealing with these matters that involved both citizens and aliens, since the connection of this disposition with foreigners is based on the sea mobility that largely defined the Roman world[211] Roman law was often reactive rather than pre-emptive, devising new and revised rules in light of cases brought before the magistrates.

The *actio de naufragio*, which appears to be a civil measure but also procedurally allowed the involvement of both foreigners and citizens, contributed to the image of a Roman cosmopolitan Mediterranean landscape that protected individuals who had suffered a wreck, even if that was far from the reality. As for how this translates into the maritime cultural landscape, spatial considerations permeated the letter of laws and edicts as well as their practical implementation by magistrates, defining spaces and connecting them to the actions of magistrates, to groups of people, or to certain local or cultural norms.[212] This in turn speaks strongly about the political organisation of the Roman world and its changes through time, which permeated the legal organisation of its spaces.

210 D.48.7.1.1 (Marcian. 14 *Inst.*).

211 e.g. Moatti 2004.

212 Gargola 2017, 187–223; also, Keith and Evans 2011, who highlight the importance of legal documents for providing glimpses of maritime culture.

CHAPTER 3

# The Sea Gives, and the Sea Takes: On Ownership

The concept of ownership plays an important role in all periods of Roman history, and even if the Romans did not develop a dogmatic analysis of the right to property, they identified different categories in order to define what could and could not be owned.[1] However, the sea appears to have been a problematic element in legal articulations of property, since no one could possess it or exclude others from it.[2] This chapter will mostly focus on how humans try to claim and control elements of the world around them, in particular when their lives have been affected by a sea or river, either because they had suffered a shipwreck, or even as a result of mere interaction with these spaces. As it cannot be otherwise, the chapter also considers the human interactions and behaviours that take place in these contexts, and how these affect their own or other people's relationships with each other and their environment. The study of these issues will open the discourse to other phenomena and unravel a wide array of questions, because the multiple categories attributed to dominion and law lie at the heart of the vast majority of social relations. In addition, legal categories of ownership connect land and sea and have an effect on how individuals conceive of themselves in a social context.[3]

## 3.1 The Sea and Its Power

There is an extensive bibliography on Roman sea power, in which scholars describe how its military power, deployed on or from the sea was a key component of its expansion and growth.[4] In a simple sense, sea power has been exercised for as long as human beings have used ships for military purposes.[5] Nonetheless, the term 'sea power' also refers to the power exerted by a state through its capacity to use the sea for both military and civilian purposes (e.g.

1 Kantor 2017, 66.
2 As a *res communis omnium,* cf. D.1.8.2pr.–1 (Marcian. 3 *Inst.*).
3 Kantor, Lambert and Skoda 2017b, 26; in the same book, 183.
4 e.g. Thiel 1954.
5 Hornblower 2016.

fishing, exploitation of resources).[6] In that sense, the definition and demarcation of borders are as fundamental to establishing private and collective rights of ownership as they are for political allegiance.[7] However, what does it mean to hold property at sea?

In the classical world, Roman jurists divided the universe into things over which individual human beings could have patrimony and things that were seen to lie outside this system (*res extra commercium*).[8] While land could be fenced in and enclosed, and so was fair game for conquest and control, flowing water or the sea lay outside the threshold of individual patrimony, and were seen as belonging to humanity at large.[9] The latter belief connects with the principle of the freedom of the seas, which is one of the milestones of international maritime law, but which was not conceptualised in this way in antiquity.[10] Therefore, no individual could lay claim to or impose any right upon the sea itself. However, there are some nuances to this assertion derived from events or activities related to the seashore, or to some fishing rights, as I will explain in the last section of this chapter. Ulpian, in his sixth book of opinions says:

> D.8.4.13pr. (Ulpian. 6 *Opin.*) *Venditor fundi Geroniani fundo Botriano, quem retinebat, legem dederat, ne contra eum piscatio thynnaria exerceatur. Quamvis mari, quod natura omnibus patet, servitus imponi privata lege non potest, quia tamen bona fides contractus legem servari venditionis exposcit, personae possidentium aut in ius eorum succedentium per stipulationis vel venditionis legem obligantur.* (The seller of the estate Geronianus had imposed a clause on the estate Botrianus, which he was keeping, so that tuna fishing could not be practised against it. Although it is not possible to place a servitude by private contract on the sea, which by its nature is accessible to everyone, nonetheless because the good faith of the contract demands that the conditions of the sale should be observed, the persons in possession or those who succeed to their rights are committed by this clause of the stipulation or the sale.).
>
> Trans. MARZANO 2013, 246

6 The term was first coined by Mahan 1890, who outlined the conditions affecting the sea power of nations.

7 Westerdahl 2003, 467.

8 D.18.1.34.1 (Paul. 33 *ad Ed.*), see also Buckland 1975, 182–186.

9 See D.1.8.2pr–1 and D.1.8.4pr–1 (Marc 14 *Inst.*), also in chapter two, section 2.1.1. Also, D.43.8.3.1 (Celsus 39 *Dig.*) 'the sea, like the air, is for the common use of humankind'.

10 Purpura 2004a, 165–166; Fiorentini 2003, 53; 434; Marzano 2013, 235–239, with several literary references, *contra*, Dumont 1977, 53–57.

In this fragment Ulpian deals with the sale of a coastal farm that includes a ban on fishing for tuna that affects the buyer. Leaving aside the issues concerning tuna fishing, an activity that can take place on the shore as well as at sea,[11] the key point here is that it is impossible to impose servitude on the sea, since it is conceived of as something that belongs to everyone.[12] Several texts of jurists from different periods discuss this phenomenon, relating it to different legal institutions, but in sum sharing the same conception as for the sea. For example, Pomponius, in his twenty-sixth book on the instructions of the Republican jurist Quintus Mucius,[13] wrote:

> D.7.4.23. (Pompon. 26 *Quint. Muc.*) *Si ager, cuius usus fructus noster sit, flumine vel mari inundatus fuerit, amittitur usus fructus, cum etiam ipsa proprietas eo casu amittatur: ac ne piscando quidem retinere poterimus usum fructum. Sed quemadmodum, si eodem impetu discesserit aqua, quo venit, restituitur proprietas, ita et usum fructum restituendum dicendum est.* (If a field in which we have a usufruct is flooded by a river or by the sea, the usufruct is lost since even the bare ownership is lost in such a case; indeed, not even by fishing can we preserve the usufruct. However, just as only as the bare ownership is revived if the water recedes on the same flood tide with which it came, so too it must be held that the usufruct is restored).

Therefore, the sea was not only a boundary between legal realms, but also a defining feature of ownership. As in the case of a shipwreck, the sea could grant an individual ownership, but it could equally take it away.[14] By 'take it away', I mean that whatever is overrun by water becomes part of the sea or river and is therefore included in the property of all humankind. In the fragment quoted above, the right of usufruct disappears when the land upon which it is constituted is flooded by the sea, but that right is reconstituted once the sea has receded. Later, Paul, in his fifteenth book on civil law, provides a list of ways in which one can lose possession of a place, such as if it becomes a religious site, or in the following case:

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11 Purpura 2007, which would imply that this text refers to a private owner who does not wish to be disturbed by these fishing activities. Marzano 2013, 247, shares his opinion, and locates the events taking place in this text near Acholla in Tunisia.

12 And a servitude is based on the right of a person, other than the owner, primarily the proprietor of a neighbourly immovable, to make certain use of another's land. See: Franciosi 2002, 105; Fiorentini 2003, 424; Purpura 2007, 2163, 2173.

13 Written under Antoninus Pius, cf. Orestano 1966, 271–274.

14 Tuori 2018, 210–211.

> D.41.2.30.3 (Paul. 15 *ad Sab.*) *Item quod mari aut flumine occupatum sit, possidere nos desinimus, aut si is qui possidet in alterius potestatem pervenit.* (Likewise, we cease to possess what is occupied by the sea or a river or if the possessor should pass into the power of another).

A similar approach to that in the above text can be read in an earlier fragment from Pomponius, in which the author indicates that a building constructed in the sea can be private, but that the power of the sea can take property away from the owner and make it part of the public realm.[15] But how can one build something in the sea, and make it private? Many texts from the jurists mention the construction of piles (made of strong timber or Roman water-hardening concrete, one supposes) in the sea as a foundation, which would enable one to build something that could be deemed private.[16] The logic behind that is that someone is using a space that has been built *ex novo*, and indeed, Pomponius, in his thirty-fourth book on civil law, established a parallel between these piles and an island that arises from the sea:

> D.41.1.30.4 (Pompon. 34 *ad Sab.*) *Si pilas in mare iactaverim et supra eas inaedificaverim, continuo aedificium meum fit. Item si insulam in mari aedificaverim, continuo mea fit, quoniam id, quod nullius sit, occupantis fit.* (If I put piers into the sea and build upon them, the building is immediately mine. Equally, if I build on an island arising in the sea, it is mine too; for what belongs to no one is open to the first taker).

The example of the island arising from a sea or river is a classical juristic case for dealing with *occupatio* of *res nullius*, in the case of the sea, or with *alluvio*, in the case of the river.[17] The difference lies in the fact that it was quite uncommon

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15 D.1.8.10 (Pompon. 6 *ex Plautio*) *Aristo ait, sicut id, quod in mare aedificatum sit, fieret privatum, ita quod mari occupatum sit, fieri publicum.* (Aristo says that only as a building erected in the sea becomes private property, so too one which has been overrun by the sea becomes public) (Transl. Monro).

16 The Romans created a specific concrete for use in the sea as maritime construction expanded, as we can see in Brandon et al. 2014; Stefanile 2015b, 34–39.

17 D.41.1.7.3 (Gaius 2 *Cott.*) (= Inst.2.1.22) *Insula quae in mari nascitur* (*quod raro accidit*) *occupantis fit: nullius enim esse creditur. In flumine nata* (*quod frequenter accidit*)*, si quidem mediam partem fluminis tenet, communis est eorum, qui ab utraque parte fluminis prope ripam praedia possident, pro modo latitudinis cuiusque praedii, quae latitudo prope ripam sit: quod si alteri parti proximior sit, eorum est tantum, qui ab ea parte prope ripam praedia possident.* (An island arising from the sea (a rare occurrence) belongs to the first claimant, for it is held to belong to no one. An island arising from a river (a frequent occurrence), if indeed it appears in the midstream of the river, is the common property of those who have

to have an island emerge from the sea,[18] while it was common, thanks to the imperceptible accretion or deposit of soil in a riverbed, to have an island appear in a river. Would this be an exception to the general rule that the sea belongs to everyone? I think that the logic behind this reasoning is that an island that appears in the sea, as this was a shared space for all humankind, belongs to the category of *res nullius*, things that do not belong to anyone, and therefore the first claimant can take possession of them.[19] The situation is different when an island appears in a river, in which case the rule was that the riparian owners up to the middle line of the river owned the island, unless it lay wholly to one side of a riverbank, in which case it acceded to that bank.[20] In the case of the sea, there is always that contrast between what is the common property and what could be owned because piles were built and something was constructed on top of them. Indeed, even if one could build piles in the sea, it was still necessary to bear in mind that the seashores were also the property of the Roman people.[21]

To sum up, the sea was a realm beyond control, which was a fact that could also interfere with one's ownership as a legal actor. In addition, while there was the possibility of establishing some private rights on a public seashore or at sea, these could always be disturbed by the power of the sea, or because they interfered with a public realm. Finally, the texts included in this section reflect upon civil law—that is, the law of the Romans—but the position of foreigners must also be borne in mind. In the words of Gaius, 'among non-citizens (foreigners or *peregrini*) there is only one type of ownership: a man is either an owner or is not considered an owner',[22] which translates into the fact that these subjects could benefit from possession and usufruct and would also be affected by the power of the sea in the same way as Roman citizens were.[23]

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holdings on either bank of the river, to the extent that those holdings follow the bank; but if it lies to one side of the river rather than the other, it belongs only to those who have holdings on that bank).

18 D.41.1.7.3 (Gaius 3 *Cott.*) *insula quae in mare nascitur* (*quo raro accidit*).

19 D.41.1.1.1 (Gaius 2 *Cott.*), as happened in the case of fish and animals taken at sea. Riccobono 1968, 569.

20 D.41.1.7.3 (Gaius 3 *Cott.*).

21 D.41.1.50 (Pompon. 6 *ad Plaut.*); D.43.8.3.1 (Celsus 39 *Dig.*).

22 G.2.40.

23 Kantor 2017, 63, quoting some sources as examples.

## 3.2 When Humans Mediate in the Ownership of Things

The previous sections have dealt with the power of the sea in granting and depriving rights and have emphasised that not even the sovereignty of the Roman order could curtail that dominance. In this section I will focus on shipwrecks, and in what way these events affected ownership. On the one hand, there is the view that whatever is overturned or sinks into the sea is lost, and becomes part of the sea itself; but what if the objects wash up on land, carried there by the waves? What happens if humans interfere to cause these events and thus take ownership of the cargo of the ship? Does the consideration of the original owner regarding their goods matter here?

Even if the alterity of the sea identified it as a realm beyond human sovereignty, that Roman legal considerations applied to ownership of the savaged goods contributed to framing the maritime cultural landscape of the Roman world as a space where the owners were protected when faced with the hazards of navigation and unlawful human intervention derived from these events. In addition, the legal classifications given in the following sections to describe the different situations stemming from a wreck highlight how these categories are entangled, and how it is the small nuances that would lead the decisions made in a given *de facto* situation, in one direction or the other. One element that I would like to highlight from many of the fragments cited in these four sections is that all the different legal classifications regarding the situations mentioned by the jurists apply either when an item touches the land or when it is taken from a ship. This might connect the events with spaces where the legal categories belonging to the law of the Romans had sovereignty (on land, on a vessel).

The latter makes one wonder whether objects floating in the water would have benefitted from these legal conceptions, and it does seem to have been the case, as the items rescued from a wreck could not be qualified as *res nullius* unless they had been abandoned, and were definitely not parallel with items washed up from the sea.[24] It is obvious that a person who seized goods from the sea would later bring them onto the land, where they could then be judged according to Roman categories. Nevertheless, that the Roman civil law categories also applied to events that took place at sea (and not in a ship, but in the water itself) demonstrates how these concepts could transcend the dichotomy of the civilised land and the 'unruly' sea.

24 Plaut.*Rud*.970–990, referring to a fisherman that claims that a trunk caught by his nets belongs to him, just as the fish caught with that same net.

In addition, despite the (apparently) homogeneous opinion of jurisprudence concerning topics such as theft and abandonment of cargoes, or their loss, there were those who argued that a multiplicity of conflicting maritime customs survived into the Imperial age. The most significant example of this conflict between different maritime practices is precisely in the practice of wreckage and its related events.[25] In this matter, three different customs could have coexisted in different places: the attribution of the wreck to the one who took possession of it; the seizure and sale of wrecked goods by state officials; and the return of the goods to the rightful owner.[26]

### 3.2.1 *Derelictio vs. Deperditio*

Ownership is the right to a thing, irrespective of whether the owner has any control or enjoyment of it. It implies the legal capacity to operate on something according to the owner's pleasure and to exclude everybody else from doing so. Therefore, one essential element here is that of the owner's jurisdiction over a thing, and what actions pertaining to that item would confer ownership to another person, or, on the contrary, qualify that subject as a thief. In the case of items that were abandoned with the intention of getting rid of them (*derelictio*), there was a debate among Roman jurists about whether these could be claimed by whomever took first possession of them (*occupatio*), considering that such items do not belong to anyone (*res nullius*).[27] The situation varied when goods were considered lost by the owner, because in these cases the owners still considered them to be their own. Concerning the case of shipwreck, the first-century CE jurist Iavolenus wrote:

> D.41.2.21.1 (Iavolen. 7 *ex Cass.*) *Quod ex naufragio expulsum est, usucapi non potest, quoniam non est in derelicto, sed in deperdito*. (Whatever is expelled from a wreck cannot be owned nor acquired with the passing of time, because it has not been abandoned but it has been lost).

This fragment belongs to a series of fifteen books in which the author epitomised the thoughts of the Republican jurist Cassius Longinus.[28] In a different book from the series, the jurist reiterates this idea, indicating that whatever is salvaged from the sea does not belong to the salvor unless the original owner

25 Rougé 1966b, 339–343; 398–402.
26 Purpura 2004b, 18, 25.
27 D.41.2.1.1. (Paul. 54 *ad Ed.*) See Romano 1960, 545–548.
28 Nörr 1984, 2957–2978.

considers that thing to be lost.[29] Moreover, when goods have been deposited on the coast because of a catastrophic situation such as a shipwreck, they should not be considered as abandoned but as lost, since they perished at sea.

Even if these books were written during the late first century CE,[30] they reflect the thoughts of a late Republican-early Empire jurist, who was reflecting the views of his time. At that time, the *edictum de naufragio* was published and therefore there was the starting point of an interest in protecting the property of seafarers.[31] Iavolenus belonged to the Sabinian school of legal thought, which influenced his views about the moment when a thing could be considered abandoned.[32] Sabinus and Cassius held that an object immediately ceased to be attached to someone from the moment that object was abandoned,[33] whereas, in the view of Proculus, it continued to be theirs until it was taken into possession by someone else.[34] The Sabinian view is probably older, and seems to be reflected in some rhetorical sources, which indicate that a ship or cargo that is abandoned is missing; these sources refer to an immediate state of loss.[35] There are two other sources belonging to the Republican period, one being a fragment from the *Rhetorica ad Herennium*,[36] and the other from Cicero's *De inventione*,[37] which refer to the same type of case. Essentially, the texts indicate that whoever abandons a ship during a storm, shall lose everything; the ship and the cargo shall belong to those who have remained on the ship.

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29 D.41.1.58 (Iavolen. 11 *ex Cass.*), the Sabinian view is what persisted later, see: PS.2.31.27; Inst.2.1.47.

30 Plin.*Ep*.6.15; Orestano 1961, 261; Viarengo 1980, 35; Manthe 1982, extensively reviewed by Bona 1984, 401–461.

31 Both Riccobono 1896, 265–271; and Bonfante 1918, 327–335, think that in the archaic conception, what was thrown overboard was abandoned and the owner lost their rights over it. Similarly, Andrich 1904–1911, 1307. However, this conception would have been abandoned in classical law; see Romano 2002, 157.

32 Stein 1972, 28. Moreover, MacCormack 1969, 119–120, indicated that the Proculian jurist developed early rules to conceive of possession based on terms of *animus*, which was however sometimes contested by the Sabinian jurists.

33 D.41.2.21.1 (Iavolen. 7 *ex Cass.*); D.41.1.58 (Iavolen. 11 *ex Cass.*); D.41.7.7 (Iulian. 2 *ex Minicio*); D.14.2.8 (Iulian. 2 *ex Minicio*); D.41.1.9.8 (Gaius 2 *Cott.*); D.14.2.2.7 (Paul. 34 *ad Ed.*); D.47.2.43.11 (Ulpian. 41 *ad Sab.*).

34 D.41.7.2.1 (Paul. 54 *ad Ed.*); D.47.2.43.5 (Ulpian, 41 *ad Sab.*). Perhaps the Sabinian view can lead to abuse, when trying to avoid land tax. See: Daube 1961, 389.

35 Rougé 1966b, 336–343; Vacca 1984, 71–73.

36 *Rhet.Her*.1.2.19.

37 Cic.*Inv*.2.51.153.

One fragment from Petronius' Satyricon described this sort of event,[38] and it is also mentioned in rhetorical treatises from the Imperial period.[39] However, the rhetorical treaty by Marius Victorinus (fourth century CE) indicates that at that time, the abandonment of the floating cargo due to a shipwreck no longer resulted in loss of property. The application of the old custom should therefore be considered now as a manifestation of piracy and condemned as such.[40] The latter can point to an evolution of the perception of *derelictio*, which changed over time, but it is objectively difficult to assess the reliability and traceability of these fragments, since they belong to literary works or rhetorical treatises and, in that sense, could be distorted, especially if one looks at the advice from the Sabinian jurists.[41]

In contrast, the Digest texts point out that the owner would not lose ownership of goods lost due to a wreck, unless the owner had considered these goods to be abandoned. Goods lost at sea were items separated from their natural destiny and were thus not susceptible to acquisition by natural ownership (*occupatio*).[42] However, these could perhaps be salvaged from the bottom of the sea. In that sense, we know about the existence of paid divers (*urinatores*) who were in charge of recovering lost cargoes.[43] These are attested in Latin inscriptions associated with the ports of Rome, where they seem to be organised in guilds (*corpora*), either by themselves or with fishermen.[44] Their intervention is visible in some wrecks,[45] and it is clear that their activity influenced legal issues concerning the consideration of cargoes as lost or abandoned.[46] I think

38 Petron.*Sat*.114.

39 Hermog.*Περὶ στάσεων*.1.141; Fortunat.*Ars.Rhet*.1.16.

40 Marius Victorinus.*Rhet*.51.

41 Corbeil 2010, 72, who says that this case contains the same unreal coincidences and unlikely development also found in Sen.*Cont*.2.153–154.

42 Such as fish, who did not belong to anyone, see D.41.1.1.1 (Gaius 2 *Cott*.).

43 D.14.2.4.1 (Call 2 *Quaest*.); D.47.2.43.11 (Ulpian. 41 *ad Sab*.); D.47.2.43.8 (Ulpian. 41 *ad Sab*.); PS.2.7.3; or in Varro.*Ling*.5.126. Also, Purpura 2004–2005, 197, thinks that *urinatores* are attested in Aesch.*Supp*.407–409, in response to Nardi 1984. In addition, Livy. 14.10.3 describes how they were used, during the Macedonian war, to recover the treasures of Pella, which were thrown into the sea by Perseus of Macedonia to prevent them from falling into the hands of the Romans. Also, Maniscalco 1999, 145–156.

44 *AE* 1982.131; *CIL* VI 1872; *CIL* VI 29700; *CIL* VI 29702; *CIL* VI 40638; *CIL* XIV 303.

45 The first example is the *Madrague de Giens*, whose cargo was incomplete with part of it covered with seaweed, see: Tchernia, Pomey and Hesnard 1978, 97–110; Pomey 1982; Pomey and Gianfrotta 1997, 21–22; Tchernia 1988. Other examples (even if these are less impressive than the *Madrague*) are *Saint-Gervais III* and *Laurons II*; see: Liou 1980; Gassend, Liou and Ximenès 1984, 103–105.

46 Aubert 2020, 201–202.

that their activities must have been somewhat limited in terms of where they could act and in which contexts (not on the high seas, obviously).[47] Therefore, one very possible reaction from someone who had suffered a wreck would have been to believe that their goods were lost, unless they were wrecked near a coast. If we follow the theory that beaching was a common occurrence for Roman merchant ships involved in coastal trade, and we bear in mind the dangers involved in this practice, it is not difficult to imagine that many ships were wrecked near to the coast, and that their cargoes would have arrived on land after being washed up.[48] The situation looks different when we think about rivers, whose shallow depth allowed the goods to be recovered more easily.[49]

Thus, we can think of different situations whose interpretation would traditionally be centred on identifying the intention to abandon the object (*animus dereliquendi*) as an essential element of *derelictio*, the lack of which would have prevented jurists from recognising the throwing of goods into the sea or the forced abandonment of a ship as a true *derelictio*.[50] Therefore, the problem lay in concretely ascertaining whether the goods belong to someone, and when someone was interested in establishing ownership of the goods, they would need to ascertain the situation, assume the burden of proof, and determine whether the goods could be owned through continuous possession in good faith (*usucapio*). In the case that none of these situations was possible, it would have been possible to propose an *actio* for theft, or theft performed with violence (*actio furti, actio vi bonorum raptorum, actio de naufragio*).[51]

Even if there is a certain *consensus* on these matters in the Digest, the elements of material abandonment and the intention of no longer having the thing as one's own, are not phrased by Roman jurists in the same exact terms. Jurists focused their attention on the question of whether something recovered from the sea or washed up on the shore could be considered as definitively lost by the owner.[52] In that regard, it is important to consider that the act of casting

47 It seems that the maximum dive depth in antiquity would have been between 27 and 36 metres. See: Ath.3.93; Ashburner 1909, and, Frost 1968, 182–183.

48 Votruba 2017, 9, quoting literature regarding this discussion.

49 D.41.213pr. (Ulpian. 72 *ad Ed.*).

50 Vacca 1984, 92–95.

51 See section 3.2.3.

52 In addition, one needs to bear in mind the different casuistic solutions depending on whether item was *mancipi* (e.g. an amphora) or *nec mancipi* (e.g. a slave); see: Vacca 2012, 21–22.

cargo overboard was not usually carried out by the owner but by the shipmaster or their crew, and therefore it was assumed that this could not be conceived of as abandonment.[53]

### 3.2.2 *Animal Likeness: Ferarum Bestiarum and Their Casuistry*

Although the previous section analysed relevant casuistic solutions adopted by Roman jurists regarding items lost from a wreck, there are some texts not mentioned previously that could offer a slightly different perspective on the problem of ownership of the *res ex naufragio*. Some of the Digest's texts divagate and establish analogies between cases concerning *occupatio* of animals and things lost at sea, and, therefore, this short section will be devoted to analysing these in order to gain a deeper understanding of the issues related to things lost from a wreck. In that regard, Roman jurists begin by differentiating animals into two kinds:[54] wild (*ferae*) or domesticated. Wild animals are those that do not belong to anyone (*res nullius*) and can be acquired by anyone by *occupatio*.[55] However, wild animals can be tamed, meaning that they would be under the power of man, although not in a constant way,[56] since they sometimes escape, but they retain the instinct to return (*animus* or *consuetudo revertendi*).[57] On the other hand, domestic animals are considered the property of their owners, even when these are not at hand, as long as they could be retrieved, and anyone taking them would be considered a thief.[58]

Therefore, the discussion here focused on when one can be considered to have lost ownership of one's own animals, such that these can be appropriated by someone else, or when one can be considered to have ownership over a wild animal. From these angles, it might seem that there are some clear similarities with things lost from a wreck, since one of the key questions here is when these

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53 See title 14.2 from Justinian's Digest and section 3.2.4. from this chapter.

54 Differently, García Garrido 1956, 274–291 differentiates among wild, tamed and domesticated, where 'tamed' constitutes an attribution of wild animals. Frier (1982–1983, 105) reminds us that the jurists did not use any specific term to refer to naturaly tamed animals, since *mansuetur* is used for wild animals which have been tamed. Also, Daube (1959, 64–65) ignores this point, what leads to confusion.

55 G.2.67 (= Inst.2.12–15); D.41.1.5.2 (Gaius 2 *Cott.*); D.41.1.5.5 (Gaius 2 *Cott.*).

56 Due to their wild nature, many animals are only tamed when shut in hives, cages or *vivaria*. See: D.41.2.3.14–15 (Paul. 54 *ad Ed.*).

57 G.2.68 (= Inst.2.16); Coll.12.7.10 described the diverging views of Proculus and Celsus on the ownership of wandering bees, Celsus' opinion being the one followed later on by Paul (D.41.2.3.16 (Paul. 54 *ad Ed.*); D.47.2.6 (Paul. 9 *ad Sab.*)) and Ulpian (D.9.2.27.12 (Ulpian. 18 *ad Ed.*); D.10.2.8.1 (Ulpian. 19 *ad Ed.*)). For the discussion and motivation of these jurists on their reasonings, see Frier 1982–1983, 105–114.

58 D.41.1.5.6 (Gaius 2 *Cott.*); D.41.2.3.13 (Paul. 54 *ad Ed.*).

animals become *res nullius* and therefore susceptible to acquisition by *occupatio*. In that sense, a certain excerpt from the commentary of Ulpian's *ad edictum* is relevant: the Severan jurist refers to a case analysed by Pomponius in which somebody's pigs were snatched by wolves, but these were successively saved by the courageous intervention of a neighbour, who pursued the predators with his hounds. The excerpt is quite long, but the important part reads as follows:

> D.41.1.44 (Ulpian. 19 *ad Ed.*) (...) *Si igitur desinit, si fuerit ore bestiae liberatum, occupantis erit, quemadmodum piscis vel aper vel avis, qui potestatem nostram evasit, si ab alio capiatur, ipsius fit. Sed putat potius nostrum manere tamdiu, quamdiu reciperari possit: licet in avibus et piscibus et feris verum sit quod scribit. Idem ait, etsi naufragio quid amissum sit, non statim nostrum esse desinere: denique quadruplo teneri eum qui rapuit. Et sane melius est dicere et quod a lupo eripitur, nostrum manere, quamdiu recipi possit id quod ereptum est. Si igitur manet, ego arbitror etiam furti competere actionem: licet enim non animo furandi fuerit colonus persecutus, quamvis et hoc animo potuerit esse, sed et si non hoc animo persecutus sit, tamen cum reposcenti non reddit, supprimere et intercipere videtur. Quare et furti et ad exhibendum teneri eum arbitror et vindicari exhibitos ab eo porcos posse.* ([...] If, then, ownership is lost in this way, the thing will belong to the first taker on being freed from the beast's mouth, just as a fish, wild boar, or a bird, which escapes from our power, will become the property of anyone else who seizes it. But he thinks that it is rather the case that the thing remains ours so long as it can be recovered; and even when writing about birds, fish, and wild animals, this, however, is true. He also says that what is lost in a shipwreck does not cease forthwith to be ours; indeed, a person who seizes it will be liable for fourfold its value [...]).
>
> Trans. WATSON, amended by author

This specific case was phrased by Pomponius and compiled in one of Ulpian's edictal comments. It raises the issue of the loss of ownership of a domestic animal (in this case, a pig) which was dragged away by a wild animal (in this case, a wolf). It is evident that the case may be viewed from various perspectives, and that Pomponius considered these. One of the possible solutions is to treat the pig as a wild animal that has been domesticated in the sense of being controlled by a swineherd. In terms of this solution, it is possible to claim that a pig which is lost from the control of its owner and ends up in the jaws of a wolf becomes *res nullius*, just like the wolf itself, and therefore subject to *occupatio*.[59]

59 Lambertini 1984, 195.

However, the prevailing opinion was that, in accordance with the general rule, a person did not lose ownership of a domestic animal after losing possession of it.[60] As a result, the owner had the right to recapture the snatched animal. Ownership cannot be lost as long as the thing that has been taken away, in this case a pig, a domestic animal, still exists.[61]

On the other hand, Pomponius concludes by saying that things lost in a wreck do not cease to belong to the original owner.[62] The analogy with the case of the pigs is based on the fact that ownership is not lost, because things are taken away from the owner by natural causes in contexts such as suffering a shipwreck or being attacked by wolves. Domestic animals are easy to compare to things lost in a wreck, because they are the property of the owner, and ownership continues even though possession is lost, when there was no intent to abandon them.[63] As happens in several fragments from the title *de naufragio*, theft of the objects lost in a wreck is considered theft and punished as such.[64] *Derelictio* of domestic animals is an issue not mentioned by any jurist, probably because, given the economic profit that these generate for farm owners, it would have been absurd to get rid of them.[65] However, refusing to recover the beasts could be paralleled with the intention of abandoning them.[66]

Another text by Proculus analyses the question of a wild boar caught in a trap and the responsibility of a person who had freed it from the trap, in consequence of which the wild animal reacquired natural liberty and became again *res nullius*. The text says:

> D. 41.1.55 (Proc. 2 *Epist.*) *In laqueum, quem venandi causa posueras, Aper incidit: cum eo haereret, exemptum eum abstuli: num tibi videor tuum aprum abstulisse? Et si tuum putas fuisse, si solutum eum in silvam dimisissem, eo casu tuus esse desisset an maneret? Et quam actionem mecum haberes, si desisset tuus esse, num in factum dari oportet, quaero. respondit: laqueum videamus ne intersit in publico an in privato posuerim et, si in privato posui, utrum in meo an in alieno, et, si in alieno, utrum permissu eius cuius fundus erat an non permissu eius posuerim: praeterea utrum in eo ita haeserit aper, ut expedire se non possit ipse, an diutius luctando expediturus se fuerit.*

60 García Garrido 1956, 284–285; Ibid. 196–197.
61 D.9.2.2.2 (Gaius 7 *ad Ed. Prov.*).
62 D.41.1.58 (Iavolen. 11 *ex Cass.*); D.41.2.21.1 (Iavolen. 7 *ex Cass.*).
63 Ibid.
64 D.47.9.3.5 (Ulpian. 56 *ad Ed.*); D.47.9.5 (Gaius 21 *ad Ed. Prov.*).
65 Frier 1982–1983, 113. Especial importance is given to cattle, being *res mancipi*. See García Garrido 1956, 282, with references.
66 Vacca 1984, 81, n.91.

> *Summam tamen hanc puto esse, ut, si in meam potestatem pervenit, meus factus sit. Sin autem Aprum meum ferum in suam naturalem laxitatem dimisisses et eo facto meus esse desisset, actionem mihi in factum dari oportere, veluti responsum est, cum quidam poculum alterius ex nave eiecisset.* (A wild boar fell into a trap which you had set for such purpose, and when it was caught in it, I released it and carried it off. Can it then be considered that I took away your boar? And supposing that it was yours, would it cease to be or remain your property if I had set it free in a wood? Again, if it ceased to be yours, what action would you have against me? Should it be an *actio in factum*? He replied: Let us consider whether it be relevant that I set the trap on private land or on public land and, if on private land, whether it was my own or another's and, if another's, whether I set the trap with the owner's permission or without it; furthermore, let us consider whether the boar was so caught that it could not extricate itself or could do so only by lengthy struggling. But I think that the final result is that if it has come into my power, the boar has become mine, but if you had released my wild boar into its natural state of freedom and thereby he ceased to be mine, I should be given an *actio in factum*, as was the opinion given when someone casted out another's glass from a ship.).
>
> Trans. WATSON, amended by author

Following the text, wild animals could be compared to things that have been abandoned consciously, either because the owner wanted to do so, or because there was a reason of *force majeure*.[67] Wild animals are free by nature, and even if they have been tamed or hunted, they will recover their freedom when they have escaped from our control.[68] Thus while animals can escape and in that way become *res nullius*,[69] in the case of objects, it would be only the intention of the owner to abandon the thing or their lack of care, that would provoke the loss. Proculus does not consider it important whether the trap was located on private or public land, which implies recognition of every man's right to hunt. In comparison with the right to fish, the right to hunt seems to have been more liberal, since even if fishing is an *ius hominis*, fishermen can access the sea or shores but must keep clear from private buildings.[70]

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67 D.41.2.21.1 (Iavolen. 7 *ex Cass.*); D.41.1.58 (Iavolen. 11 *ex Cass.*); D.41.7.7 (Iulian. 2 *ex Minicio*); D.14.2.8 (Iulian. 2 *ex Minicio*); D.41.1.9.8 (Gaius 2 *Cott.*); D.14.2.2.7 (Paul. 34 *ad Ed.*); D.47.2.43.11 (Ulpian. 41 *ad Sab.*).

68 D.41.1.5.1 (Gaius 2 *Cott.*); D.41.2.3.2 (Paul. 54 *ad Ed.*).

69 D.41.1.3.2 (Gaius 2 *Cott.*).

70 D.1.8.4pr.–1 (Marcian. 3 *Inst.*). See also sections 3.1. and 3.3.1.

Finally, Proculus refers to an *actio in factum*,[71] comparing the release of the wild boar with a glass thrown out by a third person from a boat. From my point of view, there are three situations in which this event can be compared with the things lost in a wreck. First, there is the responsibility for safeguarding an object binding the *nautae* due to the *receptum nautarum*.[72] However, the *exceptio labeoniana* removed liability from the carrier,[73] and given that Labeo and Proculus were more or less contemporaries, it could be that the latter was unaware of Labeo's disposition—although this is not very probable. However, Proculus' text mentions not a wreck but the event of an item cast overboard, and therefore it could fit into the scheme of carrier's liability and therefore into the availability of the *actio in factum*. Secondly, there is the liability of the carrier for keeping goods safe when they were hired to transport cargo, but it was unclear whether the cargo owner leased the ship.[74] Finally, there are the cases of jettison, in which a third person (e.g. a member of the crew) throws cargo overboard, and even if the owner did not aim to abandon the object, the danger of the situation leaves no other choice. In such cases, the object could perhaps be seen as abandoned because of the lack of choice from the owner, and, following the *Lex Rhodia*, if the ship and its crew had survived, they would receive compensation.[75] What emerges, therefore, from this issue is an example of how the Roman jurists worked within relatively narrow conceptual categories to obtain solutions to broader problems.

### 3.2.3 *Jettisoning*

Jettisoning is the practice of throwing goods overboard to lighten and consequently save a vessel, as well as the lives of those onboard.[76] Briefly speaking, carriers were to compensate the owners of jettisoned goods relative to the value of the goods saved as a result, a practice which has been considered to be an early form of maritime insurance, whereby the winners are called upon to relieve the losers through a sort of imposed and organised sense of solidarity.[77] This phenomenon has long been part of seafaring, with the dangers of

71 Hughes 1974, 189, who thinks that the only analogy drawn here by the jurist with the goods lost in a wreck is due to the availability of the *action in factum*.

72 D.4.9.1pr. (Ulpian. 14 *ad Ed.*).

73 D.4.9.3.1 (Ulpian. 14 *ad Ed.*).

74 D.19.5.1.1 (Papin. 8 *Quaest.*). See also Du Plessis 2012, 87.

75 D.14.2.1 (Paul. 2 *Sent.*); D.14.2.10.1 (Lab. 1 *Pith a Paul. Epit.*).

76 Curt. 5.9.4; Juv.12.33; Acts of the Apostles.27.18–19; D.14.2.2.2 (Paul. 34 *ad Ed.*); D.14.2.4.1 (Callistrat. 2 *Quaest.*); D.14.2.6 (Iulian. 86 *Dig.*).

77 Aubert 2020, 200. Bear in mind that the concept of insurance, meaning an amount paid in advance to someone to prevail in case an accident happens, did not exist in antiquity.

navigation not having changed since ancient times.[78] For the Roman period, the *Lex Rhodia* is considered the primary source of knowledge for the practice of jettisoning and other risks associated with navigation. Unfortunately, we do not know that much about the law itself, but some fragments of it from different periods provide scattered evidence,[79] indicating that the law was concerned with private law practices for merchants and sailors who plied their trade at sea.[80] The discovery in the harbour of Rhodes of a Latin inscription on a column that records the definition of the *Lex* by Paul reported in D.14.2.1,[81] has led to different interpretations,[82] but a recent revision by Badoud identifies the inscription as authentic, and confirms that it was carved following the application of the *Lex Rhodia* to be included and inserted in Roman law.[83]

There is no doubt that the nature of the *Lex Rhodia*, its integration into Roman law, and many other related issues are of great interest, and will still be subjects of discussion among scholars for some time. However, in this section I want to focus on the act of casting goods overboard itself (*iactus mercium*), and how that legally affected ownership in relation to the *actio de naufragio*, as well as the issues concerning *derelictio* and *deperditio* mentioned above. In one fragment extracted from the Digest title on the *Lex Rhodia*, Paul, in his thirty-fourth book, commenting on the praetorian edict, says:

> D.14.2.2.8 (Paul. 34 *ad Ed.*) *Res autem iacta domini manet nec fit adprehendentis, quia pro derelicto non habetur*. (Jettisoned goods remain the property of their owner; they are not treated as having been abandoned and so do not become the property of whoever collects them).

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Instead, there were other forms to provide warranties for risk, see: Silberschmidt 1926, 9–16; Huvelin 1929a, 95–100; Gaurier 2004, 129–132 (quoting Livy.*Epit*. 23.49 and 25.3); Damiani 2008, 64; García Vargas 2016, 121; Thomas 2009, 264–273.

78 Mataix Ferrándiz 2017a, 41–59, with literature explaining the development of the practice over time.

79 PS.2.71–75; Title 14.2 Justinian's Digest.

80 Contrary to the view that it contained rules concerning the rule of the sea or sovereignty over it, or the possession of and dominion over the high seas, see: Rougé 1966b, 408–410.

81 D.14.2.1 (Paul. 2 *Sent.*) *Lege Rodia* [*Rhodia*] *cavetur, ut si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est* (The Rhodian law provides that if cargo has been jettisoned in order to lighten a ship, the sacrifice for the common good must be made good by common contribution).

82 Marcou 1995, 609–639; Purpura 2002, 280; 2013, 16–17; Ruggiero 2010, 425–426.

83 Badoud 2014, 451–452. Also, Aubert 2020, 199 provides the recent reading by Badoud and mentions a forthcoming volumen on the *Lex Rhodia*.

The text is part of Paul's commentary on an edict concerning the contract of letting and hiring, dating back to the second century BCE.[84] The different fragments from Paul's commentary on this edict (D.14.2.2.1–8) instruct the cargo owners on what to do in case their goods have to be jettisoned to lighten a ship. After describing details concerning how to enforce their contract, the jurist indicated that the goods thrown overboard still belong to the owner, and not to the person picking them up. In this case, the carrier and the crew oversaw throwing the goods overboard, but the intention was not to abandon these goods, and it is assumed that they would return them if they knew that they had reached the coast safely. These principles are explicitly expressed in Julian's second book on the jurist Minicius (second century CE), where the author indicates the impossibility of pacifically acquiring ownership of these goods (*usucapio*), since these still belong to a third person.[85] However, that Julian mentions someone aiming to establish ownership presumes good faith on behalf of the taker, while a fragment from Gaius reminds us about the possibility of appropriating something with devious intentions:

> D.41.1.9.8 (Gaius 2 *Cott.*) *Alia causa est earum rerum, quae in tempestate maris levandae navis causa eiciuntur: hae enim dominorum permanent, quia non eo animo eiciuntur, quod quis eas habere non vult, sed quo magis cum ipsa nave periculum maris effugiat. Qua de causa si quis eas fluctibus expulsas vel etiam in ipso mari nanctus lucrandi animo abstulerit, furtum committit*. (It is another matter with those things that are jettisoned in stress of seas to lighten the vessel; they remain the property of their owners; for they are not cast overboard because the owner no longer wants them, but so that the ship may have a better chance of riding out the storm. Consequently, if anyone finds any such things washed up by the waves or, for that matter, in the sea itself and appropriates them with a view to gain, he is guilty of theft).

As Gaius indicates, if someone appropriates a thing with the intention of making profit, that could be labelled as theft. The text belongs to Gaius' books on common matters and presents a view that aligns with § 5 of the title *de naufragio*, belonging to his commentary on the provincial edict (155 CE).[86] Regarding both fragments, it is possible to appreciate that Gaius, as well as the other jurists

84 Du Plessis 2012, 22–23.

85 D.14.2.8 (Paul. 34 *ad Ed.*); D.41.7.7 (Iulian. 2 *ex Minicio*).

86 Liebs 2004a, 112, who also dated Gaius' *rerum cottidianarum* books at 166 CE. However,

quoted previously, understood abandonment as a requisite for acquiring ownership of things thrown off a ship. Ulpian is the only jurist proposing a different interpretation of this issue that aims to exclude the possibility of an *actio* for theft against the person who finds an object on the coast and takes it in good faith.

> D.47.2.43.11 (Ulpian. 41 *ad Sab.*) *Si iactum ex nave factum alius tulerit, an furti teneatur? Quaestio in eo est, an pro derelicto habitum sit. Et si quidem derelinquentis animo iactavit, quod plerumque credendum est, cum sciat periturum, qui invenit suum fecit nec furti tenetur. Si vero non hoc animo, sed hoc, ut, si salvum fuerit, haberet: ei qui invenit auferendum est, et si scit hoc qui invenit et animo furandi tenet, furti tenetur. Enimvero si hoc animo, ut salvum faceret domino, furti non tenetur. Quod si putans simpliciter iactatum, furti similiter non tenetur*. (If a person takes what is jettisoned from a ship, is he liable for theft? The issue turns on whether the goods are abandoned or not. If the mind of the person jettisoning was such that he expected that the goods would be lost and thus that whoever found them would appropriate them, a reasonable general assumption, there would be no theft. But if he was not of that mind but of the conviction that if the thing survived, it would still be his, then it could be taken away from the finder. In addition, if the latter had an idea that this was so but took the thing with larcenous intent, he would be liable for theft. If, though, he took it with a view to preserving it for its owner, he would not be liable for theft. Nor would he be if he thought it to have been simply discarded).

This text is one of the diverse fragments of Ulpian dedicated to commentary on the delict of theft (D.47.2.43.4–11), in which the jurist emphasised the importance of the subjective requirement of *animus* on the part of the subject. Moreover, the most interesting element of this text is when the jurist describes how the aftermath of jettisoning the cargo is viewed by the owner, that even if the intention was not to abandon the goods, they were resigned to the (probable) event of not recovering them. A ship abandoned by its crew was abandoned by it with the sole intention of saving lives and consequently the captain or the *magister navis*, representatives of the owner or the shipowner, have

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the authorship of this work has been disputed by the scholarship, with many authors indicating that it was written after Gaius' death, see: Martini 2012, 173–175, with extensive literature.

relinquished in all rights of possession over the vessel which normally disappears after being abandoned. Therefore, whatever can be recovered later belongs to those who do so.

We might consider what would happen, then, if the owner considered the goods to be abandoned, and the finder took them, but then some time afterwards the owner came to know who had taken their goods and their whereabouts. This might seem to be a hypothetical situation, but some fragments of Plautus' *Rudens* refer to fishermen who found a box in the sea, and they thought about keeping it, but someone threatened them with telling the owner that they stole the box from him.[87] In that case, we should consider the principle of the non-retroactivity of a situation that took effect previously.[88] Secondly, another element implied in Ulpian's text is that of the finder's intention, being either to keep the things for themselves or to take them in order to make a profit. Either way, I think that one key element of Ulpian's text, is the idea that the finder knew that the goods came from a wreck or a ship that had suffered dangerous circumstances.[89] The latter is an essential feature when considering the fragments from the title *de naufragio* dealing with these events.

### 3.2.4 *Direptio*

As could not be otherwise, when fragments of the title *de naufragio* address cases involving things lost in a shipwreck, they also tackle the risk of these goods being pillaged. The definition of *direptio* (pillaging, sacking) is phrased thus by Ulpian in § 3pr–1:

> D.47.9.3pr. (Ulpian. 56 *ad Ed.*) *Quo naufragium fit vel factum est, si quis rapuerit, incidisse in hoc edictum videatur. Qui autem rem in litore iacentem, postea quam naufragium factum est, abstulit, in ea condicione est, ut magis fur sit quam hoc edicto teneatur, quemadmodum is, qui quod de vehiculo excidit tulit. Nec rapere videtur, qui in litore iacentem tollit*. (Where a wreck occurs or has occurred, if someone seizes something from it, this edict applies. A person who takes away something lying on the shore after the wreck, however, is in such case a thief rather than subject to this edict, as would be someone who takes something that falls from a vehicle. Nor is someone regarded as looting who picks up something lying on the shore).

87 Plaut.*Rud*.955–965, see also, Charbonnel 1995, 309–322.

88 For a general overview of this subject, see Broggini 1966, 159; 167, who mostly discusses statute law, but also indicated that the edicts covered future events. Exceptions to this principle are given by Cicero (*Verr*.2.1.42), but only apply to criminal cases with evil intent.

89 Vacca 1984, 119; 155.

In this text, Ulpian follows the line of thought previously presented in D.47.2.43.11, highlighting the importance of *animus*, but also of the context in which the removal is performed. Indeed, the following fragments of § 3.1–2 complement his description and highlight the importance of the removal taking place during or immediately after a shipwreck to qualify as belonging to the sphere of the *edictum de naufragio*.[90] Indeed, that is one key element differentiating this action from regular theft, as I will explain further in the next section. In addition, under the title regarding the *Lex Iulia de vi privata*, we find one fragment from Marcian that establishes penalties under that statute for people pillaging from shipwrecks:

> D.48.7.1.1–2 (Marcian. 14 *Inst.*) *Eadem poena adficiuntur, qui ad poenam legis Iuliae de vi privata rediguntur, et si quis ex naufragio dolo malo quid rapuerit. 2. Sed et ex constitutionibus principum extra ordinem, qui de naufragiis aliquid diripuerint, puniuntur: nam et divus Pius rescripsit nullam vim nautis fieri debere et, si quis fecerit, ut severissime puniatur*. (The same penalty is inflicted on those who fall under the penalty of the *Lex Iulia on vis privata*, as also on anyone who with malicious intent seizes anything from a shipwreck. 2. In addition, however, in accordance with the Imperial constitutions, those who steal anything from shipwrecks are punished *extra ordinem*; for the deified Pius wrote in a rescript that there must be no *vis* shown to sailors and that if anyone does so, he should be punished most severely).

According to that fragment, Marcian was proposing two possible punishments: either the confiscation of a third of their patrimony and infamy under the *Lex Iulia*, or a penalty chosen by the magistrate in charge of the *cognitio extra ordinem*. It is difficult to know what exact event moved the emperor to enact such a strict prohibition, but another fragment from the same book of Marcian also reflects the emperor's concerns over violence, via a rescript addressed to the Thessalians.[91] Other fragments from the title *de naufragio*, including Imperial constitutions (§ 4.1; § 7; § 12), follow the same line of thought, as I will describe shortly. However, the fact that the text of these rescripts was included in the Digest indicates that the provisions came into common use and may be considered as the general norm governing Roman maritime landscapes. In

90 See chapter two, section 2.1.

91 D.48.6.5.1 (Marcian. 14 *Inst.*), also D.5.1.37 (Callistrat. 5 *Cogn.*) refers to that rescript but attributes it to Hadrian. According to Bonini 1964, 108, an attribution to Marcian seems more plausible.

addition, this indicates that shipwrecking and its related conduct had not disappeared over time, especially in the provinces, to which these fragments seem to be particularly addressed.[92]

The last part of § 3.8, belonging to Claudius' era, indicates that those pillaging from a wreck should provide to the *fiscus* as much as the *condemnatio* for the *actio de naufragio* established. This legal measure is part of a longer fragment that refers to the provocation of wrecks, punishing those culpable as if they were murderers.[93] The fiscal measure undertaken in the Claudian period could perhaps be linked to the famine and food crisis of the years 40–41 CE,[94] which could have compelled the emperor to persuade the merchants to put to sea in the winter,[95] as well as granting them privileges in order to entice them to provide food supplies for Rome.[96] That the measure was addressed to protect private carriers should not surprise us, since Roman private merchants were in charge of this supply.[97] In this way, this measure may have sought to protect carriers as well as to gain a bit of profit for the Imperial treasury, in contrast with the measures indicated in D.39.4.16.8; D.47.9.7; 47.9.12pr. and C.11.6.1, which openly forbade the *fiscus* to collect any wrecked goods. These fragments underline that at the time of Caracalla, it seems that the *fiscus* could demand the payment of toll taxes but had nothing to do with wrecked cargoes.[98] One fragment of Fortunatianus' *Ars rhetorica* (before the fourth century CE) indicates the opposite view; this can be considered perhaps a sign of the change in Caracalla's policy, which was again in force during Justinian's reign and included in his *codex*.[99] Otherwise, it could be considered to be either ignorance on the part of the writer of the actual practice in force, or simply a reflection of the activity of the *publicani* as witnessed by the writer, who considered that to be lawful

92 See chapter two, section 2.2.2.

93 Some more details on this text will be provided in chapter five, section 5.2. See also, Manfredini 1984, 2211–2225.

94 Suet.*Claud*.18.2.1–9.

95 Sen.*Brev.Vit*.18.5; Suet.*Claud*.19; 26.5; 31; 39.1; Cass.Dio.59.17.2; Joseph.*AJ*.19.6; Aur. Vict. Caesar.4.3. Garnsey 1988, 221.

96 Sirks 1980, 283–294.

97 As manifested in the inscriptions of the Dressel 20 Baetican oil amphorae, see Broekaert 2008, 212; and Mataix Ferrándiz 2022(a).

98 Ferrarini 1963; Solazzi 1939, 254; Purpura 1976, 72. One imaginative paper published some years ago interpreted this measure as reflecting the will of Caracalla to protect the shipwrecked, because he had also suffered a shipwreck himself, even if there is no real proof of that; see Pinzone 1982, 67.

99 Fortunat.*Ars.Rhet*.1.13. *Quae est simplex definitio? Cum unam rem simpliciter definimus ut: naufragia ad publicanos pertineant. Cuiusdam naufragae corpus cum ornamentis ad litus expulsum harena obrutum est, id publicani eruerunt.*

(even if perhaps the *publicani* were simply abusing their power).[100] Finally, one last hypothesis on this text points to the possibility that the rhetor was referring to *navicularii* working in the service of the state.[101]

Three fragments (§ 7; § 4.1. and § 12) from the title *de naufragio* refer to wrecked goods, and even if they impose different repressive measures, they are all unanimous in that they forbid a third person to pick up the goods, since it must be the owner who collects them (§ 12), and it is quite clear that goods found on the shore belong to a wrecked ship.[102]

The text of § 7 belongs to the second book of *quaestiones* by Callistratus, which was written during the Severan period, and provides advice for the types of cases that, sometimes took place in the provinces.[103] Callistratus mainly focused on problems that imply the use of the *cognitio extra ordinem* procedure, and commonly used Imperial constitutions to solve them. Callistratus' fragment refers to an earlier Imperial constitution from Emperor Hadrian, which establishes that even if a ship has been wrecked on a shore where there were private buildings, the owner of that property would still not be entitled to collect the wrecked goods. This assertion is in line with Roman law's consideration that the sea and the shore were common to all people (D.1.8.2.1), and therefore, when someone builds something on it, the shore remains in the public sphere even though the building belongs to an individual.[104] This view offered protection to carriers in cases where the owners of shoreline villas were the ones causing the wrecks, and then obtaining ownership of the goods because the ship had crashed on their land. In cases where these individuals are proven to have looted, the provincial governor will inflict a penalty as if they were thieves.[105] The owners should not interfere with the wrecked things at all, which in turn implies that they are not even compelled to exercise guardianship over them.[106] Finally, the text refers to the possibility of gathering witnesses who can provide testimony at a hearing in cases where someone has suffered from a wreck and wants to compel the local authorities to pursue a prosecution.[107]

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100 Solazzi 1939, 254–255, who thinks that the abuses of the *publicani* may have forced Caracalla to use that sentimental tone in his rescript compiled in C.11.6.1 (*Quod enim ius habet fiscus in aliena calamitate, ut de re tan luctuosa compendium sectetur?*).

101 Rougé 1966b, 340. See also chapter five, section 5.2.4 and Mataix Ferrándiz, 2022(b).

102 These texts with a translation can be found in the appendix.

103 Honoré 1962c, 216; Puliatti 1992, 23–27.

104 D.41.1.14pr. (Nerat. 5 *Membr.*).

105 This is along the same lines as § 3.3 of the title *de naufragio*.

106 Honoré 1962c, 216; Puliatti 1992, 23–27.

107 A later fragment compiled in C.11.6.2 (372 CE) indicates that in cases where someone has

Taking a different approach, § 4.1 establishes different penalties according to the *status* of the people pillaging from the wrecks, which reveals a typical feature of the late procedure *extra ordinem*.[108] The punishment would then depend on the classification of the offenders, either as citizens of high status (*honestiores*) or low or humble status (*humiliores*).[109] This distinction—which first appeared in the second century CE and settled in the third century CE—[110] was based on ranked privilege, meaning that the *honestiores* were subject to lighter penalties, while the *humiliores* were subject to various forms of the death penalty and condemnation to the mines, to public works, and to whipping or beatings. However, our fragment in fact describes a trichotomy, in which different penalties would be applied to *honestiores, humiliores*, and *sordidiores*. The category of *sordidior* mentioned here is unique in the Digest, and I have argued elsewhere that perhaps the term refers to the quality of the booty, since in many other sources *sordidior* refers to objects,[111] and the text, *praeda* could be interpreted in that way.[112] In addition, § 4.1 indicates that the penalty will be applied in the light of the status of the offender and the gravity of the offence. However, even if the fragment mentions the *status* of the offenders, what needs to be stressed here is that the different punishments for different subjects largely depended on whether they were free or enslaved, as these categories may have worked better in different contexts, especially when applied to provincial areas.[113]

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suffered a wreck, the local magistrate will go near where the event happened and gather testimonials to bring these to the local authorities and speed up the process.

108 e.g. PS.5.22.1; PS.5.25.10; D.47.11.10 (Ulpian. 9 *de Off. Proc.*); D.48.8.1.5 (Marcian. 14 *Inst.*); D.48.8.3.5 (Marcian. 14 *Inst.*). See also: Santalucia 1989, 255.

109 On the *honestiores–humiliores* dichotomy, see Cardascia 1950, 305–307; Garnsey 1970, 163–164; Alföldy 1984, 146–162; Rilinger 1988, 46–70; Balzarini 1988; Höbenreich 2000, 241–253.

110 See D.48.5.39.8 (Papin. 36 *Quaest.*); D.48.10.15.3 (Callistrat. 1 *Quaest.*); PS.5.25.2; 5.4.10, and Rilinger 1988, 13–20; Höbenreich 2000, 243; Pugliese 1982, 767–780.

111 Mataix Ferrándiz 2017b, 47–54; e.g. Apul.*Apol*.34.2; Mart.*Epig*.1.103.5.

112 Because the transitive verb *dabis* needs to be completed by an accusative, which was then the function of *liberos*. The conclusion will be that *praeda* will be qualified with the adjective *sordidiores* (bearing in mind that the writer has committed the mistake of not coordinating plurals and singulars or anacoluthon), and completed by the verb to be, so *erunt*. Together with that, the differentiation in the text lies in the quality of the goods stolen, is they were of high value (*gravior*), or in the contrary, if they were broken or dirty (*sordidiores*).

113 Marotta 1988, 216; furthermore, the terminology used to define social orders was not stable, and therefore the distinction between free and enslaved would be generally applicable, see: Bauman 2002, 128; however, De Robertis 1939b, indicates that the terminology became stable in the Severan period, and the fragment D.48.19.10pr. (Macer 2 *de Iud. Publ.*) indicates that the penalties are the same for slaves and *humiliores*.

To sum up, the fragments from the title *de naufragio* provide different penalties depending on the period when the Imperial constitution was released, but all of them maintained the opinion that the initial owner of the shipped goods retained ownership of the goods when wrecked, lost, or jettisoned. The difference lies in the fact that these fragments always view the event of the wreck as qualifying the situation, and in that way, they indicate that no one should interfere with collecting the booty, because it is obvious that it belongs to a wreck. And whether the intention was to obtain a straightforward profit for the pillage or there was a more devious aim for these behaviours, there were some specific qualities that defined whether the action should be punished as theft or robbery.

### 3.2.5 *Stealing from Shipwrecks: One Peculiar Case*

In its classical conception, theft was confined to cases involving a physical carrying away (*ferre*) of goods. However, during the course of the Republic, the notion was extended very considerably until it covered almost any species of dishonesty.[114] For that reason, there was more than one action associated with it; but the most common was the *actio furti nec manifesti* (the claim for non-manifest theft), which went right back to the Twelve Tables and appears in a fiction of citizenship described by Gaius which I have detailed previously.[115] It is probable that robbery, before the enactment of the praetorian *edictum*, was punished like a case of *furtum nec manifestum* with a penalty of double the value of the thing stolen (*in duplum*).[116] The seriousness of the robbery in comparison to the *furtum nec manifestum* could have pushed the praetor to introduce some specific actions, modelled on the more serious type of *furtum manifestum* with a penalty *in quadruplum*.[117] Regarding that, I have previously explained the relation between the edicts *vi bonorum raptorum* and *de naufragio*, as well as referred to the possibility, established by Ulpian, of using remedies from both private and criminal law (at least during his time).[118] However, the distinction between theft and robbery is not always crystal-clear. In that sense, § 5 under the title *de naufragio* contains a text from Gaius' book 21 of

114 Albanese 1956, 87–89; 1958. Indeed, the typical definition by Paul summarizes the delict as 'the removal of something with theftful intent and aiming to obtain a gain', see D.47.2.1.3 (Paul. 39 *ad Ed.*).

115 G.4.37, see chapter two, section 2.1.2.

116 Vacca 1972, 145–148.

117 Dirksen 1824, 592; Gulli 1880; Mommsen 1899, 381; Karlowa 1901, 409; Ferrini 1904, 228; Brasiello 1939; Albanese 1953, 42; Vacca 1965, 545; 1972, 77; Balzarini 1969b, 395; Fenocchio 2008, 192.

118 See chapter one, section 1.3; and chapter two, section 2.3.1.

the commentary on the provincial edict, in which the jurist establishes some differences between an ordinary theft or robbery and stealing from shipwrecks:

> D.47.9.5 (Gaius 21 *ad Ed. Prov.*) *Si quis ex naufragio vel ex incendio ruinave servatam rem et alio loco positam subtraxerit aut rapuerit, furti scilicet aut alias vi bonorum raptorum iudicio tenetur, maxime si non intellegebat ex naufragio vel incendio ruinave eam esse. Iacentem quoque rem ex naufragio, quae fluctibus expulsa sit, si quis abstulerit, plerique idem putant. Quod ita verum est, si aliquod tempus post naufragium intercesserit: alioquin si in ipso naufragii tempore id acciderit, nihil interest, utrum ex ipso mari quisque rapiat an ex naufragiis an ex litore. De eo quoque, quod ex rate nave expugnata raptum sit, eandem interpretationem adhibere debemus.* (If someone removes or seizes something salvaged from a wreck, fire, or collapse of a building and put it in another place, they will be liable on the action for theft or that for things taken by force, even though they were unaware that it comes from a wreck, fire, or collapse of a building. Many are of the opinion that where someone appropriates from a wreck something that is lying washed up by the waves, the same applies. This is true if some time has elapsed since the wreck; but if what happens occurs at the very time of the wreck, it is irrelevant whether the seizure be made from the sea itself, the wreck or the shore. We must adopt the same interpretation in respect to what is seized from a raft or ship which has been stormed).

Most of Gaius' comments on the provincial edict seem to have been written under the reign of Antoninus Pius,[119] who, as we have seen previously, had established strong punishments for pillaging from a wreck.[120] However, this fragment underlines the fact that there was a possibility of using a private action or other remedies *extra ordinem* for the events deriving from a shipwreck. The fragment repeats the traits that would qualify for the *edictum de naufragio*, and the fact that it corresponded to the commentary on the provincial edict seems to indicate that in many cases there was not such a large difference between the edict of the *praetor urbanus* and the provincial edict.[121]

According to the text, someone who took something that was rescued from a shipwreck from the shore was liable for theft or robbery, if it happened sometime after the wreck. However, if that same person took the object from a

119 Honoré 1962a, 67–68.

120 D.48.7.1.2 (Marcian. 14 *Inst.*).

121 Martini 1969, 43–48; Guarino 1969, 154–171.

sinking ship, a vessel under attack, or from the coast as the wreck was happening, or knew that the thing came from a wreck, then the *edictum de naufragio* applied. That might qualify the behaviour referred to in the text of the edict as a particular kind of robbery.[122] Gaius' mention of the *actio vi bonorum raptorum* might be another sign that this *actio* encompassed the behaviours targeted in the *actio de naufragio*, and that this broader version of the *edictum* was the one compiled in Julian's perpetual edict, which Gaius was copying.[123]

In the text, Gaius uses the words *subtraxerit aut rapuerit*, and I think that the element of the time elapsed after the wreck, and whether the act was carried out furtively, need to be considered here. *Subtrahere* is definitely a behaviour contemplated in the delict of theft,[124] but if this took place only after the wreck, it would be considered as belonging to the conducts targeted in the *edictum de naufragio*. A similar approach can be seen in Ulpian's § 1.5, § 3pr. and § 3.4–5, in which he mentions the behaviours *rapere* and *amovere*; the latter behaviour does not imply force or violence, but if it is carried out during a wreck or just after it, it still falls within the scope of the edict.[125] Indeed, according to Gaius, when something belongs to a wreck and is seized as that event is happening or just after it, it would fall under the *edictum de naufragio*, whether the goods are taken from the shore, the ship, or the sea itself. In another fragment, Gaius specifies that if someone collected something from a wreck that was floating at sea (therefore, after the wreck has happened) with the intention of obtaining a gain, then they would be guilty of theft.[126]

In sum, the removal of the thing, or in any case its apprehension at the time of a shipwreck, implies of itself responsibility under the terms of the *edictum de naufragio*. Intent is necessarily present in this behaviour (what the defendant knows or should have known mean the same thing here). Thus, when an action or removal occurs under circumstances that do not allow us to know the origin of a thing, specific malice is necessarily implied; that is, the precise awareness of the origin of the thing is necessary. Given the principles that were established regarding the subject of objects lying on a beach (*res iacens*), we must believe that an *actio* for theft would always have been an option, unless the defendant proved that he had believed that the thing was abandoned (*pro derelicto habita*).

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122 Tarwacka 2009a, 111–112.

123 See chapter one, section 1.3.1, and Vacca 1965, 545.

124 e.g. D.44.7.34.2 (Paul. *de Conc. Act.*); D.47.2.14.1 (Ulpian. 29 *ad Sab.*)

125 Vacca 1972, 104–105.

126 D.41.1.9.8 (Gaius 2 *Cott.*).

## 3.3 Ownership between Land and Water: Mental and Legal Chorographies

Chorography is the art of describing or mapping a country, and is concerned with the significance of places, regional descriptions and characterisations and local histories, and the representation of these characteristics. The discipline is rooted in classical antiquity, and is described in a variety of classical texts, though few explicitly chorographical works have survived from antiquity.[127] These descriptions of regions and places were often instilled with the enthusiasm engendered by an expanding Empire, which affected their perceptions of space.[128] Roman jurists described the landscapes occupied by the sea or land with regard to their civil law in a similar way, considering the land to be a realm of precise rights and duties, while the sea was a space beyond their sovereignty, and even rivers represented limitations to their governance. One clear example of the legal limits of this distinction between land and sea would be D.47.10.14 (Paul. 13 *ad Plaut.*) in which Paul indicates that the interdict which can be used in a sea context is the one regarding the possession of land (*uti possidetis*).[129]

In this section, my intention is to see how jurists legally described landscapes in relation to watery spaces, i.e. either seas or rivers. Their views reflected the domain of influence of Roman civil law, its limitations, and the methods they employed to attempt to govern these watery realms. What the jurists expressed about their maritime or riverine landscapes is not necessarily a map of the 'real world' but nevertheless of a world that a person of the time who lived in it would recognise. Their descriptions capture a particular interpretation of their world that provides an insight into their legal and political conceptions of land and sea, which hinge on what they deemed was important in their historical moment. I have already presented in previous sections some texts concerning the human relationship between the concept of ownership and the sea. In the next sections, I would like to explore how the interactions between land and water were conceived of by the jurists in their own ways to establish the boundaries between public and private domains, and whether the dichotomy established between sea and land translated in similar ways to riverine spaces.

### 3.3.1 *The Gradual Domination of Wild Nature*

Nature is one of the central concepts of Roman culture, generating both the Bucolics and the Georgics, Pompeian frescoes and major philosophical works.

127 e.g. Pomponius Mela. In addition, Rohl 2012, surveys the literature on the topic.

128 Nicolet 1988, 12–14; Whittaker 2002, 83–90.

129 See also, Klingenberg 2004, 37–60.

Hence the widespread feeling that nature would have been from the outset a fundamental notion of the Roman mentality, the potentialities of which would have gradually been expressed in all areas of culture.[130] The Roman perceptions of the world surrounding them can be perceived through their transformations of nature, so there is a need to link the naturally real from the culturally imagined.[131] The attitude of the ancients towards nature is so broad a subject that I must state here that my purpose is not to provide an exhaustive treatment, but only a suggestive sketch of the ways the Romans tried to dominate the nature related to maritime landscapes. In connection with that, the focus is mostly teleological, meaning that their interactions with nature were adapted to some end or purpose.

One well-known fact is that the Roman landscape was strongly marked by the work of man through the irrigation works, the aqueducts, the road system and the borders that delimited it from the people considered barbarians. Regarding agriculture, the literature on the topic—Cato, Varro, Columella—reveals no love of nature, but rather an interest in utility and profit. Protection of nature was only important if preservation of resources—with a view towards future profit—was a factor.[132] The Romans transformed their surroundings to achieve their goals and celebrated, in an emphatic way, the so-called *homo faber* who, as Cicero wrote, was able to create a second nature with his hands.[133] Cicero's Stoic interlocutor describes the universe and includes the geographical features of the earth itself, its water, plants, and natural resources, animals, the race of men, the works of men, the sea, the islands, coasts, and shores, marine animals, the air and sky, the sun and its regular orbit, the moon and planets and their orbits, and the stars.[134] The list suggests that human civilisation, as well as the products of its labour, were considered an integral part of the natural landscape. Therefore, humankind was the creator, and thus had the right to dispose of nature, which it had subjugated, as happened with the case of channelled rivers.[135] Ultimately, the Roman world and its management of nature could not exist without the power of the government, but as Cicero says, seas obey the universe (*sine quo nec domus ulla nec civitas nec gens nec hominum universum genus stare nec rerum natura omnis nec ipse mundus potest; nam et hic deo paret, et huic oboediunt maria terraeque*).[136]

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130 Lévy 1996, 18.
131 Similar perceptions can be found in Ingold 2000, 7–9.
132 Thommen 2012, 79–84.
133 Cic.*Nat.D.*2.156–157.
134 Cic.*Nat.D.*2.98–104.
135 Cic.*Nat.D.*2.152. See also section 1.1.
136 Cic.*Leg.*3.3 (transl. Loeb.).

However, even if the sea was still considered a realm that could not be completely tamed or dominated by human force or law, there were ways in which Romans manifested and symbolised their governance over the maritime world. One notable example of Roman domination of seashores is the *villa maritima*, which, by the first century CE, had become a metaphor for human control over nature and a symbol of civilisation imposed on the natural landscape.[137] One of Purcell's three stereotypical ways in which the 'powerful' express control over nature by altering the landscape was by tampering with the sea, as happened with private constructions such as *villas*.[138] Indeed, these constructions were built in such a way that they could be seen from the sea, to express the power of the owner to tamper with the sea, but also as representative of the Roman people who owned the seashore.[139] Indeed, the notion of taming implies control and an awareness of the events and processes that shape the physical environment. Thus, the maritime cultural landscape represented by these villas changed its significance as much as the constructions of these buildings was carried out by different hands. During the Republican period, to look at the Roman *villae maritimae* from the Campanian coast would have been like browsing an address book of the Roman jet-set of the time,[140] while later, many *villae* were owned by the emperor and his circle, as well as wealthy people.[141] Therefore, the maritime cultural landscape represented by these *villae* embodies the political and economic power of the different periods of Roman history, and how these forces dominated the savage sea.[142] Statius' poem celebrating Pollius' maritime villa in Surrentum is a way to present the owner of the house as a creator, and therefore a tamer of nature.[143]

Building *villae* was not the only way Romans manifested their supremacy over nature; they also domesticated and tamed wild animals, obviously accom-

137 Werner Mayer 2005, 200; Marzano 2007, 21–27.

138 Purcell 1988, 191–203.

139 Lafon 2001, 122–123; Marzano 2007, 23–24. The research carried out on the underwater remains of *villae maritimae* demonstrate that many of these included structures built on the seafloor, underlining their powerful position on the sea. See: Stefanile 2015a; Stefanile and Pesando 2015; Petriaggi et al. 2020, 1199–209.

140 Such as the case of Lepidus Porcina, 125 BCE (Val.Max.8.1); Lucullus and Metellus (Varro. *Rust*.1.13.7; Cic.*Leg*.3.13.30); Cicero (Cic.*Att*.1.13; 12.36), Pompey (Cic.*Mil*.20.54); or Agrippa Postumus (Marzano 2007, 693). A representative location is Sperlonga, Lafon 1981, 297–353.

141 Suet.*Aug*.72.2; Marzano 2007, 269 (Nero); 276–277; 279; 383; 403; 457 (Sperlonga, Tiberio); 531 (*Sextus Quintilius Condianus* and *Sextus Quintilius Valerius*, both consuls in 151 CE); 681 (*Albinus Caecina*, member of the noble *Caecina* family from Volterra and *praefectus Urbi* in 415 CE.)

142 Rothe 2018, 42, '(the) very luxurious *villae maritimae* on the Bay of Naples had a basic common denominator: The Roman elite ideology of landedness (…)'.

143 Stat.*Silv*.2.2; esp. ll. 54–59.

panying that exercise with its corresponding narrative. The taming of animals and nature is a common exercise in different historical periods, and in the end it is what all human groups have in common; the narratives tell us as much about how the narrators view their own humanity as they do about their attitudes and relations with animals.[144] One of the narratives presented in this volume concerns the otherness of the sea and its hostility,[145] which was also extended to fish, since these came from the sea, a dangerous anti-world which could turn upon people.[146] So the act of enclosing fish in *piscinae* and *vivariae* had not only a functional meaning for the *villae* that ate them, but also symbolised the power of mankind over the sea and its creatures. In this case, the narrative of domination was manifested in the acquisition of ownership over the creatures kept in these artificial environments,[147] the privilege of having fish installations as decoration,[148] and in the profits earned from aquaculture.[149] Regarding aquaculture, this activity sometimes required minimal human intervention in terms of modification of the environment (this was known as 'extensive' aquaculture, and used natural resources available as well as perishable materials), while intensive aquaculture employed man-made masonry or rock-cut fishponds. The latter indicates that there was no need for massive efforts to be made to build and alter the environment to feed the narrative of human domination over nature's wilderness: it sufficed that humans used its resources for their own benefit.

### 3.3.2 *Public and Private Realms: Sea and Shores*

What does it mean to call a space 'public' or 'private'? Things were classified according to whether they could be owned privately or not, a distinction of obvious practical importance. Even if some things or spaces were not susceptible to being acquired by individuals, or even by the Roman state, these needed to fit into some juridical category, so as to manage the interactions with land and flowing water, and establish the applicable categories of ownership. In that sense, the sea was affirmed as a thing common to all (*res communis omnium*),[150]

144 Ingold 2000, 61.

145 See section 1.1.

146 Purcell 1995, 134.

147 D.41.2.3.14 (Paul. 54 *ad Ed.*); see also section 3.2.2.

148 Marzano 2013, 217–224.

149 Ibid. 202–212.

150 D.1.8.2pr. (Marcian. 3 *Inst.*); Thomas Fenn 1926, 466–481, the glossator's interpretations of Roman texts argued that the Emperor had the power to govern the sea, reflecting the views of their time. Falcon 2016, 139, identifies this category as similar to *res nullius*, even if it is distinct from it.

and therefore not subject to private property (and there was no extension of state jurisdiction seaward). The famous passage of Marcian D.1.8.2pr. (Marcian. 3 *Inst.*) in which the jurist includes the sea in that category has been widely discussed to determine issues such as the origin of that classification or its rationale.[151] In that regard, the most widespread opinion is that the category of *res communes omnium* was part of the *res publicae* (belonging to the state and the Roman citizens),[152] and was only separated from it during the later classical period.[153] The latter responds to a mutation in the configuration of *populus* and *res publicae* as the Empire grew and the Roman state was strengthening its institutions, which was not underestimated by the jurists. While Ulpian had already indicated the need to juridically configure a new category by which sea and seashore were accessible to all,[154] it was Marcian who established the classification. Above all, the constitution of a new category outside the *res publicae* responds to the context in which Marcian wrote his works, responding to the exigencies of the exploitation of the seas, as well as to the traffic of subjects from different legal backgrounds along their shores.[155] Indeed, the profiteering of *aqua profluens* became more and more frequent and economically important, requiring a juridical treatment that was not easy to adapt to pre-existing schemes that only included the use of public things by citizens. Consequently, Marcian did not construct a category based only on the strength of pure philosophical reminiscences or for reasons of cultural tradition, but rather responded to needs of a practical and logical nature.[156]

Moreover, the seashore was declared to be free of access for all people to exercise the right of fishing.[157] However, one essential trait of Roman law is that it was interpreted, not created. That meant that even if these abovementioned principles were the standards, there was space for nuancing these broad definitions through an understanding of different individual cases. Here, I would like

151 Mommsen 1889, 131; Pernice 1900, 5; Sokolowski 1902, 43; Perozzi 1928, 598, Robbe 1979, 118–123; Arangio-Ruiz 1984, 171.

152 As were the ports and rivers, see. D.1.8.4.1 (Marcian. 3 *Inst.*).

153 Grosso 1941, 29–33; Branca 1941, 205–207; Scherillo 1945, 76–81; Dell'Oro 1963a, 287–290; Cortese 1964, 74; Fiorentini 2010, 44–48; Lambrini 2017, 112–115; Dursi 2017, 5–12, Schiavon 2019, 113–143. The impossibility of including this category in a system of immediate application explains why it was not included in the principal compilations; see Behrends 1992, 7.

154 D.47.10.13.7 (Ulpian. 57 *ad Ed.*); Dell'Oro 1963a, 274–275; 288–290.

155 On the relation with this fragment with *ius Gentium*, see section 2.1.1.

156 Some literary fragments refer to the particular nature of the sea, see: Plaut.*Rud*.4.3.35; 4.3.38; 4.3.42; Cic.*QRosc*.26; Ov.*Met*.6.349; 8.187; Verg.*Aen*.7.229; Sen.*Ben*.4.28. Even if Sini 2008, 2, underlines the importance of these sources to shape Marcian's thought.

157 D.1.8.4pr. (Marcian. 3 *Inst.*), see also Thomas Fenn 1925, 716–717.

to think about two activities that took place on the seashores and affected the maritime landscape, namely the construction of buildings or other structures, and fishing. Both endeavours were carried out both publicly and privately, and their legal and spatial spheres were intermingled on many levels. Indeed, that was the case in many fields, which is the reason that defining what is public and private in the Roman world was problematic and needed to be understood in the context of the spaces targeted.[158]

Regarding the seashores, their legal status was a bit unclear, varying from 'not belonging to anyone',[159] to 'being open to all', to 'belonging to the whole people'.[160] Therefore, they belonged to no one and to everyone at the same time. More important than their legal status was the actual use of the seashores, which were accessible to everyone. During the reigns of Hadrian and Antoninus Pius, it is possible to appreciate an evolution with respect to the status of the seashore. It was increasingly interpreted as something that was either free of use for all, or public in the sense of belonging to the Roman people, and *ergo* to the Roman state, and as such liable to be leased.[161] From reading the Digest, it seems that private constructions were allowed when they did not interfere with public use, but they are ambiguous about indicating whether or when an official permission to build these structures was needed.[162] In that sense, a text from Pomponius (second century CE) suggests the need to obtain a decree from the praetor in order to build anything on the seashore.[163] To the meaning of that text, we need to add the limitations implied by the assumed public use of the shore.[164] As early as the first century BCE, the *tabula Heracleensis* (45 BCE),[165] containing the *Lex Iulia municipalis* (ll. 66–75) indicated the illegality of building in public places without taking into consideration the disturbance to the *usus publicus*. The same goal appears in later praetorian dispositions that used interdicts to protect places such as rivers, shores, and ports from being rendered less accessible to ships or useful for fishing.[166]

158 Russell 2016a, 25–40.

159 D.41.1.14pr. (Nerat. 5 *Memb.*).

160 e.g. D.18.1.51 (Paul. 21 *ad Ed.*).

161 Marzano 2013, 253, referring to D.47.10.13.7 (Ulpian. 57 *ad Ed.*); D.43.8.3pr. (Celsus 39 *Dig.*).

162 D.41.1.50 (Pompon. 6 *Plaut.*) *vs.* D.43.8.4 (Scaev. 5 *Resp.*).

163 Ibid.

164 D.43.8.4 (Scaev. 5 *Resp.*); D.43.13.1.7 (Ulpian. 68 *ad Ed.*).

165 *CIL* $I^2$ 593 = *ILS* 6085 = *FIRA* $I^2$ num. 13.

166 D.43.8.2.1; D.43.12.1pr.; D.43.12.1.17; D.43.12.1.19–21; D.43.8.2.9; D.43.8.2.11, all fragments belonging to Ulpian's book 68 on the praetorian edict, composed during the reign of Macrinus (Honoré 1982, 172.).

Indeed, § 7, § 8, and § 12pr. describe the limits of private property when a catastrophe such as a wreck occurs. If a wrecked ship or its cargo arrived on the shore of a private property, the owner was forbidden from picking up the salvaged goods, which otherwise would fall under the scope of the edict and would be identified as *direptio ex naufragio*, or theft qualified with violence, stemming from the catastrophic situation. If we follow Russell's conclusions on public and private space (qualified with a political twist), what makes the space *publicus* is not collective ownership but the absence of individual control.[167] In the case of private constructions erected on seashores that were common to all, the owner had limited control when a shipwreck occurred and interacted with their property, and could not curtail the use of their land for public means such as fishing. In addition, in the fragment D.39.1.1.18 (Ulpian. 52 *ad Ed.*), Ulpian defended the principle of the freedom of building structures in the sea or on the shore (*in mare vel in litore*). However, the Severan jurists indicated that whoever builds something on these premises should be aware that they are not building on their own land (*in suo non aedificet*), which would otherwise be theirs by virtue of the *ius gentium* and not *ius civile*.[168] The case of the *villae* sustains the assertion made here of the vague categorisation of public and private spheres in the Roman world, which seems to be especially noticeable in areas where there is an interaction between land and sea. The case also underlines the ineptitude of Roman civil law in taking care of certain situations that needed to be brought under the umbrella of the *ius gentium*.

Another way to exert control over the sea, in the view of Purcell, was through the construction of ports, harbours or anchorages.[169] Being both public places and part of the sea, their regimes of appropriation and uses were subject to the same praetorian rules as the sea, rivers, or bodies of fresh water in general.[170] Several interdicts (orders issued by *praetors* and proconsuls), issued at the request of a claimant, took steps to protect seashores and riverbanks from being used as dumping grounds and/or construction sites, and to prevent the construction of anything that would affect the existing quality of the harbour facilities for sailing, mooring, and other port-related activities.[171] A well-known

167 Russell 2016a, 32–41; see also, De Marco 2004, 83, 85, referring to the seashores as *communis*, because their use is not exclusive, but accessible to everyone. That is in line with D.50.16.17pr.–1 (Ulpian. 10 *ad Ed.*).

168 De Marco 2004, 87–88.

169 Purcell 1988, 193.

170 D.1.8.2.1 (Marcian. 3 *Inst.*); D.43.1.1.17 (Ulpian. 68 *ad Ed.*); Bannon 2010, 61.

171 D.43.8.2.1–2 (Ulpian. 68 *ad Ed.*); D.43.13.1.12 (Ulpian. 68 *ad Ed.*). In addition, there was the possibility of using an *actio iniuriarum*, but this opened the way to compensation for the harm done, not to restoration to the previous status, see: D.43.8.2.9 (Ulpian. 68 *ad Ed.*).

fragment from Ulpian[172] indicates that the term 'port' (*portus*) designated an enclosed, safe space where activities related to the import and export of goods took place. According to Lenel's reconstruction,[173] this fragment was part of a commentary on the edict concerning rivers being characterised as public, and was located palingenetically after the *edictum de via publica et itinere publico reficiendo* (on the reparation of public roads and ways).[174] Ulpian defines *portus*, in a nuanced way as a public space that should be protected. The first thing to be noted from Ulpian's definition is that it references a protected space, without specifying whether it was natural (e.g. *limen*) or artificial (e.g. *kothon*),[175] and thus it probably includes both categories. There are two traits in Ulpian's text that can help define a space as a *portus*, and then qualify it as a public area: the first one concerns the protection of the ships entering and mooring in a port, and the second refers to the import and export activities that took place in ports. Both functions are related and need to be contrasted with the infrastructure of the port, which allowed for the navigation and protection of ships. Addressing the same issue, Impallomeni divides the different structures of a port according to their use.[176] However, the latter constitutes a taxonomical but impractical exercise, since a port needs to be understood as a whole, composed of diverse elements that allow for both protection and transit.[177]

The other notion included by Ulpian in his definition is that of *statio*, which he defines in the same book *ad edictum*, indicating that we derive *statio* from 'to stay': therefore, a place is indicated where ships can stay in safety, constituting part of the shore's structures that allow the passage of ships.[178] The generic nature of Ulpian's reference, allows one to recognise in the *statio* not only the fixed river port with anchorage and storage facilities, but also any type of place

172 D.50.16.59pr. (Ulpian. 68 *ad Ed.*). More on this fragment in Mataix Ferrándiz 2023.

173 Lenel.*Pal.*2.811 § 1514.

174 This fragment may be related to D.43.12.1.16–17 (Ulpian. 68 *ad Ed.*), concerning the interdictal protection to prevent uncontrolled building on seashores and/or riverbanks.

175 Carayon 2017.

176 Impallomeni 1996, 594–595.

177 One clear example of the incongruence of Impallomeni's assertion is the Imperial port of Rome, which combined both the Claudian and the Trajanic basins, built in different ways and designed to meet different aims. On the one hand, the Claudian basin would have offered protection from the waves, but little safety from wind (Tac.*Ann*.15.18), while the Trajanic basin offered a stable microclimate in which to moor, repair, and perform other activities related to imports and exports. See Keay 2012, 33–65.

178 D.43.12.1.13 (Ulpian. 68 *ad Ed.*). Some inscription witnesses the placement of these *stationes* in zones where a river and the sea are in contact, e.g.: *AE* 2007.01228 = *AE* 2009.01212. See also Coarelli 2019, 11–20.

where a ship could stop in safety.[179] This polysemy is noticeable not only in the legal sources, but also in the archaeological evidence, which displays the polyfunctionality of *stationes*, as well as the diversity of the features associated with ports. In the context of this definition, these fixed places would have been located in association with a port where ships could stay in safety, but also where cargoes were controlled and taxes collected.[180] Therefore, with his definition, Ulpian was referring to ports not necessarily as places with a specific physical layout, but as systems with related human labour. This latter point highlights that ports and *stationes* could be used to delimit the landscape and extend the power of the state to control the space occupied by them. Even if the sea was held in common by all, this does not mean that public power would not be extended to the sea in order to patrol the coasts, gather taxes, monitor fishing activities, or prevent the provocation of wrecks.

Indeed, Juvenal, in his typically satirical and hyperbolic tone, refers to the effort that the Roman state took to monitor the coasts due to the financial gains derived from fishing.[181] However, in the Roman world, fishing was—at least in theory—an activity open to everyone,[182] although the Roman state obtained revenues from it,[183] and indeed many of the structures needed for large-scale fishing were not affordable for the average fisherman.[184] However, the public character of this activity at sea can be appreciated because people could fish (*ius piscandi*) in ports without suffering the usual limitations imposed by the presence of private buildings, monuments, or estates.[185] Fishing must have

179 Fiorentini 2003, 170–172, highlights that Ulpian's texts link the *statio* to different spaces, such as seaports or river ports availing ships to stop there. Also, Luzzatto 1965b, 174, indicates that *stationes* were associated with navigation, and not with port procedures.

180 e.g. D.19.2.60.8 (Lab. 5 *post. a Iavolen. Epit.*); D.43.12.1pr. (Ulpian. 68 *ad Ed.*); D.43.12.1.17 (Ulpian. 68 *ad Ed.*), as for example happened in the case of Ephesos, (see: Cottier 2008, ll. II 26–28; §10; 42–45, §17); Gaul, in places such as *Massalia*, (see Hesnard and France 1995); *Lugdunum* (*CIL* XII 255) and Arles (*CIL* XII 717); or Egypt, (see Rossi 2015, 193–208.).

181 Juv.4.52–53 (After all, who would dare to put a fish like that on sale or to buy it, when even the beaches are crowded with spies? Right away, the ubiquitous inspectors of the seaweed would be tackling the naked oarsman. (…) If we believe Palfurius or Armillatus, anything in the entire ocean that is rare and fine belongs to the Imperial treasury, wherever it swims. So, the fish will become a gift, so it won't go to waste.) (trans. Morton Braund).

182 Inst.2.1.2; D.1.8.4pr–1 (Marcian. 3 *Inst.*).

183 See for example the *Lex Cauniorum de piscando* (*SEG* XIV 638), or other sources referring to the gathering of taxes from the use of the facilities located where these activities take place, De Laet 1949, 206–210, 235–255; Purpura 2004a, offers a detailed list of references.

184 Marzano 2013, 266–267.

185 D.1.8.4pr.–1 (Marcian. 3 *Inst.*); D.1.8.4.2 (Gaius 2 *Cott.*). Some inscriptions belonging to the eastern part of the Mediterranean attested to customs due on the fish landed at the har-

been a rather common activity in Mediterranean ports, judging from the references in legal texts, the existence of fishponds in ports and the fishing traffic surrounding these structures.[186] The situation was different in internal waters and lagoons, areas which could be owned by private individuals, municipalities or the Roman state.[187] The latter raises problems based on individual ownership, instead of connected with individuals and areas that belonged to all humankind.

### 3.3.3 *Riverine Spaces*

What do rivers and the sea have in common in Roman legal thought? In the Digest, rivers are classified as elements (as were the air, and the sea), and most of them are considered public spaces by the third century CE.[188] In that sense, I have previously referred to the works of Marcian, also from the third century CE, in which he refers to the public nature of the sea and its shores.[189] Concerning rivers, we can distinguish (not without difficulty) between the public and the private, generally according to the legal nature of the places they pass through, and therefore establishing a parallelism between the regime of the soil and that of the flowing water.[190] That notion of public rivers progressively encompassed canals as well, because these took their water from the rivers.[191] In contrast, defining the riverbanks seems to have been difficult, as we can find different interpretations by different authors, but a *consensus* was still reached by the third century CE in that riverbanks were considered public from the point where the banks sloped down toward the water.[192] Beyond that point, ownership of the banks belonged to those whose landholding was contiguous with them and who had any trees on the banks.[193] The latter is justified

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bour and brought for sale in the urban market, and not a tax on fishing; see *epistula Adriani de re piscatoria* (*IG* II² 1103) and the Neronian inscription from Ephesos from *I.Eph.*Ia 20. Some examples of fishing ports are indicated in Ugolini 2020, esp. chapter two.

186 Ørsted 1998, 29; Marzano 2013, 252, 691.

187 Marzano 2013, 242, quoting different examples.

188 D.1.8.2.1 (Marcian. 3 *Inst.*); D.1.8.4.1 (Marcian. 3 *Inst.*), D.43.13.1.2 (Ulpian. 68 *ad Ed.*); Inst.2.1.2.

189 Chapter two, section 2.1.1.

190 Franciosi 1997; Masi Doria 2004, 202.

191 D.43.14.1.8 (Ulpian. 68 *ad Ed.*).

192 During Trajan's reign, Neratius considered it to be public by nature, see: D.41.1.1.1 (Nerat. 5 *Reg.*); in the second century CE, Celsus and Gaius thought that the ownership of a riverbank was private, but its use was public: D.1.8.5 (Gaius 3 *Cott.*) and D.41.1.30.1 (Pompon. 34 *ad Sab.*). Finally, during the third century CE the riverbank seems to have become public, following the development of a more restrictive definition, see: D.43.12.1.5 (Ulpian. 68 *ad Ed.*); D.43.12.3.2 (Paul. 16 *ad Sab.*). See also Lonardi 2013, 31.

193 D.1.8.5 (Gaius 2 *Cott.*).

in that, when dealing with the protection of rivers and river-related areas, the legal remedies balance *utilitas publica* and private interests.[194]

In addition, other features such as navigability,[195] the possibility of diversion,[196] the abundance of fish,[197] or whether the waters were perennial or seasonal[198] helped qualify rivers as public. Of these features, navigability was the one that attracted the most attention from the jurists, which highlights their importance as channels for transport.[199] That being said, the public character of a river ensured that nobody could claim ownership over it, or act in a way that would damage the river.

The praetorian edict on public rivers established that no one should do anything to or put anything into a river, or onto its banks, that could make the passage of a boat more difficult.[200] Indeed, public rivers, as well as public roads, were protected via interdicts, by which the actor aimed to prevent any violence being caused in these spaces.[201] The similarities between sea and river spaces becomes apparent in a fragment in which Ulpian, commenting on the edict on public rivers (from an unknown date), and quoting Labeo, says that nothing shall be done in the sea or on the shore by which the anchorage, landing, and passage of a boat is made worse.[202] Therefore, the public nature of the watercourse also guarantees its public use, and no one can appropriate it or act in such a way that its purpose is harmed by it. This principle, fixed by the edict of the praetor, is followed by Gaius[203] and Paul;[204] at first, it came under the *ius gentium*, and he consequently identified these spaces as being outside the realm of the civil law of the Romans.

As happened with the sea, a river was not only a boundary between legal realms, but also a defining feature of the concept of ownership. Pomponius, in his thirty-fourth book on civil law, indicated that the alluvion restores what

194 Fiorentini 2003, 256–259.

195 D.43.12.1.17 (Ulpian. 68 *ad Ed.*).

196 The engineering interventions in river spaces are a symbol of nature which has been tamed and improved by humans, as indicated in Cic.*Nat.D*.2.152, and Purcell 2017b, 159–164.

197 D.1.8.4pr. (Marcian. 3 *Inst.*).

198 D.43.12.1.2.3 (Ulpian. 68 *ad Ed.*).

199 De Marco 2004, 111–112; Arnaud 2012, 338–343; Campbell 2012, 200–244.

200 D.43.12.1pr (Ulpian. 68 *ad Ed.*).

201 Labruna 1971, 61, quoting D.43.12.1.15 (Ulpian. 68 *ad Ed.*) and 528. Also, D.43.20.1.13 (Ulpian. 70 *ad Ed.*) Labeo mentions a case about Hierapolis in Phrygia, attesting to the validity of the regulations concerning public water.

202 D.43.12.17 (Ulpian. 68 *ad Ed.*) (trans. Watson).

203 D.1.8.5pr. (Gaius 2 *Cott.*).

204 D.43.12.3pr. (Paul. 16 *ad Sab.*).

the flood of the river took away; because the ownership of the land would thus be restored to its original owner.[205] However, even if these spaces were legally characterised in similar ways by the jurists, there was also an essential difference between them that probably stems from the fact that a river is a delimited space between two lands, while a sea opens towards an empty horizon. If one looks at the writings of Roman land surveyors (*agrimensores*), even if they recognised these features as boundaries with the land, they also considered their associated issues for the practical application of law for landholders.[206] Their accounts definitely refer to the sea as a boundary in their area calculations, and they therefore excluded it from their maps.[207] Similar views can be formulated from the epigraphic evidence of the *cura riparum*, showing that the state took responsibility for its relationship with the riverine environment and tried to regulate the use of rivers.[208] Even if we know of the existence of paid divers, or *urinatores*, most of the sea bottom may have been seen as an unreachable space for the Romans, while a river bed would not constitute such a remote zone.[209]

Because of their potential destructive power, rivers and their related water channels were at the heart of many provisions concerning the rights of neighbours, landholding, and of course the disputes caused by disruptive groups.[210] The avulsion and alluvion produced by the river flow often caused islands to rise from the riverbed.[211] This is a textbook case to teach one of the ways of acquiring ownership (*accessio*) of things that do not belong to anyone (*res nullius*). In the classic fragment of Gaius, the island would belong to either one or the other of the individuals that owned the land on the opposite riverbanks (or to both), depending on whether the island appeared on one side or the other of the riverbed.[212]

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205 D.41.1.30.3 (Pompon. 34 *ad Sab.*), in a similar way, D.1.8.10 (Pompon. 6 *ad Plaut.*). The case may have been quite common, as it is referred in the records of Roman land surveyors, such as Ag.Urb.*Cont.Agr.*42.18–25.

206 Campbell 2012, 83–86, 98–100.

207 Dilke 1971, 115; Campbell 2000, 177, 197, 390; Guillaumin 2007, 109–110, 138, 143, 151.

208 Lonardi 2013, 32–47.

209 They oversaw cleaning the riverbed to ensure navigability. See, Lonardi 2013, 50–51.

210 Campbell 2017, 26.

211 The difference between them is that while the avulsion caused land displacement by the force of a river (D.41.1.7.2 Gaius 2 *Cott.*), alluvion consisted of the imperceptible accretion or deposit of soil on a person's land through the flow of a river (D.41.1.7.1 Gaius 2 *Cott.*). For more details, Barra 1998, 5–35; Campbell 2012, 110–116, quotes different examples addressed by land surveyors while assessing landholders' issues.

212 D.41.1.7.3 (Gaius 2 *Cott.*), and nuancing the case discussed in this text, see D.41.1.65 (Lab 6 *Pith.*).

One fragment from Neratius' second book of responses compiled in the title *de naufragio*,[213] refers to an event taking place in a river space, providing evidence of an event that would not have been uncommon in the Roman world:

> D. 47.9.8. (Neratius 2 *Resp.*) *Ratis vi fluminis in agrum meum delatae non aliter potestatem tibi faciendam, quam si de praeterito quoque damno mihi cavisses*. (If your raft should be brought onto my land by the force of the river, you will not be able to exert control over it unless you first give me a *cautio* with respect to any prior damage to me).

The text refers to the force of a river stream that brings a raft onto someone else's land, potentially causing damages. Anyone who has caused damage to the owner of a land, even without intent, must repair the damage caused or may not recover the ship. This fragment introduces the topic of the possible objective liability of a raft owner who inadvertently caused damage due to a force that he was unable to avoid, an issue that will be addressed in depth in chapter four. This event seems to have attracted the attention of Neratius, who is mentioned by Ulpian in the following fragment:

> D.10.4.5.4 (Ulpian. 24 *ad Ed.*) *Sed et si ratis delata sit vi fluminis in agrum alterius, posse eum conveniri ad exhibendum Neratius scribit. Unde quaerit Neratius, utrum de futuro dumtaxat damno an et de praeterito domino agri cavendum sit, et ait etiam de praeterito caveri oportere*. (If a boat has been driven onto someone's land by the force of a river's current, Neratius says that they can convene an *actio ad exhibendum*. Hence, Neratius asks if the landowner should be given a *cautio* only for the future damages or also for the past, and then he says that he should also be given this for the past damages).

If a river has pushed a raft onto someone's land, Neratius says that they can call an *actio ad exhibendum* on the one asking to recover it, with the condition that a caution shall be given to repair future and past damages (which means the

213 Neratius Priscus was part of the council of Trajan and Hadrian, and it is believed that his books of responses were compiled after his death, and thus do not follow the original order in which they were written, according to: Scarano Ussani 1977, 137–138; 1979, 7–8; Syme 1957, 485; Greiner 1973, 22–35; Sixto 2004. However, apart from this fragment, there were two other fragments related to *ratis vi fluminis in agrum alterius delata*: D.10.4.5.4 (Ulpian. 24 *ad Ed.*); and D.39.2.9.3 (Ulpian. 53 *ad Ed.*). Contrary to the opinion of this fragment from book 39 of the Digest, it seems possible to deduce that § 8 was originally written by Neratius, seeing that even Ulpian indicated *Neratius autem scribit*.

damages caused by the raft being driven onto the land and the damages that will be caused when it is removed). It seems, at least for the classical period, that this *actio* had processual autonomy and that in this case it induced the landowner, to let others take things from the fund that were not his.[214] However, both texts seem to indicate that this permission was subordinated to the promise of paying the damages, and until that occurred the landowner could retain the raft.[215] It is especially interesting that in this text, Neratius considers both the shipowner and the landowner, while Ulpian, by including this in his commentaries on the edict,[216] was extending the effect of Neratius' reasoning.

At this point—and also considering that Neratius probably took part in the *consilium* of Hadrian—it is more than legitimate to assume that, concerning the edict in question, he wanted to project this approach to the sinking of a small boat on a river onto the wider plane of shipwrecked seafarers from large transport vessels.[217] These procedures aimed to force the landowners to allow the recovery of the *res ex naufragio* by the original owner, but only if there was a promise to repair the damage, or the salvaged goods could be retained by him. Therefore, the interpretation put forth in this text fits well with the cases of the seashore's landowners who took things from wrecks, since the *actio ad exhibendum* or similar remedies based on this *actio* applied in cases in which it was proven that these objects were salvaged from a shipwreck. The latter can be appreciated in the solution provided in § 7 of the title *de naufragio*, which specifies that landowners who had suffered damages to their property because of a wreck could ask the governors or *praefecti* for a solution to their problem, but should never touch the salvaged goods before that, or they would be considered thieves.

In relation to the procedure, Ulpian indicates that in the case of a river bursting its banks so that if the flooding water disturbed previously marked boundaries, these would be restored by a surveyor.[218] This later point highlights what is probably the key difference between the riverine and sea spaces, being that the river spaces were susceptible to being maintained, controlled, and organised, while the sea was not. For that reason, we do not find texts in which surveyors restore or assess borders on the seashore, and while we can find several dispositions in the Digest dealing with the maintenance, management, and protection of rivers, springs, and canals, we do not find similar dispositions for the sea. This again underlines the unpredictability of the sea.

214 Marrone 1957, 446–502; 2001, 187–188.
215 Nardi 1947, 393–415; Branca 1937, 250 n. 3.
216 See also D.39.2.9.3 (Ulpian. 53 *ad Ed.*).
217 Manfredini 1988, 377.
218 D.10.1.8pr. (Ulpian. 6 *Opin.*). On the role of surveyors in court, see Israelowich 2019, 15–16.

CHAPTER 4

# It Happened at Sea

What could possibly go wrong on a sea venture? Romans were well aware that they did not always have everything under control when navigating the seas, and that sometimes compelling circumstances could cause harm to third parties, whether intentionally or not. A vessel could run out of control and collide with another ship, be driven ashore on someone else's land and wreck on the bank, or even break other people's fishing nets when sailing.[1] In relation to these events, the delict labelled *damnum iniuria datum* (loss wrongfully caused) dealt with different matters concerning damage caused to another's property. The *edictum de naufragio* was no exception to this precedent when dealing with wrongful acts, since it addressed behaviours stemming from a catastrophic situation, which could force individuals to act according to sudden impulses or even irrationally, and cause losses to someone else's property.

This chapter will focus on the wrongful damage caused by or derived from shipwrecks. This damage could only be labelled 'wrongful' in the case that there was no lawful excuse (e.g. *force majeure* or self-defence) for what was done.[2] In this regard, the sea seems like a perfect space to find an excuse for these events, as it is an uncivilised, unpredictable space, which cannot be dominated by humans. However, that is not how the Roman jurist perceived loss and damage to property. The different texts examined in this chapter will show that the main point in Roman law was that if someone had caused a loss that could have been avoided, they should repair the damage. In this way, a lack of knowledge and understanding of the range of variables involved in navigation (*peritia*),[3] that might be considered negligence (*culpa*), alongside the intentions of the parties concerned, entered the picture when evaluating whether the loss could have been avoided or not. These elements were considered extra contractually, because the loss wrongfully caused might have exceeded the contractual benefits arising under the express terms and conditions assumed in a contract.[4]

1 D.9.2.29.3–5 (Ulpian. 18 *ad Ed.*).

2 e.g. D.9.2.5pr. (Ulpian. 18 *ad Ed.*).

3 Martin 1990, 302–303; 2002, 161–162; for a more general approach, see Martin 2001, 107–129. I must note here that *peritia* is not only involved in navigation, but in any activity that requires certain knowledge or skill.

4 Even if negligence is a concept widely considered in contractual liability. e.g. D.19.2.25.7 (Gaius 10 *ad Ed. Prov.*); D.17.1.26.6 (Paul. 32 *ad Ed.*); D.17.2.52.4 (Paul. 31 *ad Ed.*).

## 4.1 Seizing Space by Using Legal Institutions

The work of jurists from different periods provides food for thought on how loss and its circumstances were legally targeted. As happened recurrently in Roman jurisprudence, in the title *de naufragio* events that took place at sea were paralleled with cases that took place on land.[5] This will allow me to show how similar solutions were sometimes applied to legally diverse spaces. In that way, it will be possible to see how Roman jurists bridged the gap between land and sea and appreciate the adaptability of Roman law in addressing the misfortunes derived from a wreck and similar catastrophes.

### 4.1.1 *Damnum Iniuria Datum and Shipwrecks*

The notion of loss wrongfully caused was developed in *the Lex Aquilia de damno*, a plebiscite of unknown date, but probably enacted before 217 BCE.[6] The *Lex Aquilia* introduced general provisions on wrongful damage to property and largely superseded old provisions and specific cases mentioned by the Twelve Tables and other statutes. The *Lex Aquilia* was quite narrow in its verbal formulation, but its scope was greatly expanded by a combination of juristic interpretation and praetorian intervention.[7]

One key extension was enlarging the scope for foreigners, who would be able to sue on the basis of the *Lex Aquilia* through the fiction that they were citizens.[8] The scholarly literature on the *Lex Aquilia* is vast, and it is not my intention to indicate here all the references that deal with the topic, rather, I will focus on its reflection in the title *de naufragio*.[9] Two of the three chapters of the law are relevant to the development of the delict of loss wrongfully caused. More concretely, chapter three penalised cases in which someone caused loss to another by burning (*urere*), breaking (*frangere*), or destroying (*rumpere*) their property.[10]

The *edictum de naufragio* addressed private violence, which constituted a form of *iniuria*,[11] and was therefore punished in a more rigorous way than the

5 See § 1.2; § 3.2 or § 3.7.

6 D.9.2.1 (Ulpian. 18 *ad Ed.*) and G.3.210–219. Honoré 1972, 138, 145–150, proposes around 200 BCE.

7 Valiño 1973, 21; Gerkens 2009, 82.

8 G.4.37, 'Again, there is a fiction of Roman citizenship for a foreigner who is raising or defending an action established by statutes, if it is equitable for that action to be extended to a foreigner'. See also chapter two, section 2.1.

9 For some general notions and literature, see: Zimmerman 1996, 998–1013.

10 D.9.2.27.5 (Ulpian. 18 *ad Ed.*); Daube 1936, 253; MacCormack 1970, 164–178; Paschalidis 2008, 321–363.

11 Riggsby 2016, 316.

hypothetical cases already foreseen by the *Lex Aquilia*. This edict individualised the delicts committed in relation to a shipwreck.[12] In essence, the edict looked back at *furtum* and *damnum iniuria datum* and dealt with misappropriation, but dealt with it by means of different actions. Among the conducts provided for in the edict, (*rapere, dolo malo recipere, abstulere, amovere, damnum dare*), the only one that derives from the *Lex Aquilia* is *damnum dare*, and even for this behaviour it is necessary to consider things on a case-by-case basis, because many cases featured implied evil intent (*dolus malus*).[13] In that case, the loss inflicted on the owner had to be the result of a wrongful, physical, and direct act of a wrongdoer upon a something tangible.[14]

It appears to be explained quite clearly by Ulpian, who in § 3.4 indicates that the *actio de naufragio* applies to a person inflicting damage on things that belong to a wreck. However, whether the act committed was suited to an action deriving from the *Lex Aquilia* or other specialised laws depended on the specific elements of each case. The latter would have had an effect on the penalty applied, since the *actio de naufragio* establishes a higher penalty (of quadruple the value of the item) than the *actio ex lege aquilia* (of double the value of the item).

Title 9.2 from the Digest presents different cases involving shipwrecks, and all of them are included in book 18 of Ulpian's commentary on the praetorian edict. The Severan jurist provided comments on the verbs *rumpere* and *corrumpere*, and sometimes extended the liability for these behaviours to other situations, such as:

> D.9.2.27.24 (Ulpian. 18 *ad Ed.*) *Si navem venaliciarum mercium perforasset, Aquiliae actionem esse, quasi ruperit, Vivianus scribit.* (If someone pierces a merchant ship with cargo, Vivianus wrote that they would be guilty under the action of the *Lex Aquilia*, as if they have broken it).

In this case, Ulpian quotes the preceding jurist as Vivianus (or Iulianus)[15] and equates the action of piercing (*perforare*) a ship with *rumpere*,[16] but by using

12 Labruna 1971, 19–20; 1986, 19n31.

13 Gerkens 1997b, 143.

14 e.g. D.4.3.7.7 (Ulpian. 11 *ad Ed.*); Albanese 1950, 5–20; De Robertis 2000, 98–99; Zilotto 2000, 79–83.

15 The *vulgata* edition of the Digest mentions Iulianus instead of Vivianus. The age difference between the two jurists would have been approximately one century. While Julian worked during the reign of Hadrian (Hist.Aug.*Hadr*.18.1), Vivianus worked during the first century CE. See: Russo Ruggeri 1997.

16 The verb *perforare* is also used in D.9.2.27.30 (Ulpian. 18 *ad Ed.*), in a lemmatic comment-

the adjective *quasi* (almost) for the verb, the author is highlighting that this exercise constitutes a pragmatic and analogical extension of the verb *rumpere*.[17] The same use can be perceived in other fragments from the Digest, in which conducts such as straining or pulling an object are assimilated to *rumpere*.[18] The text is not entirely clear, and when reading it is difficult to see whether the relevant element of the text is the ship or the cargo. Spagnuolo thinks that this text is paired with the previous one by an antiphonal structure, and since § 23 refers to the mule, this text would address the ship.[19] However, the cargo is no less important in the text, because the piercing of the ship would render the cargo ruined anyway,[20] as the ship would sink.[21]

In that sense, in § 3.8 of the title Ulpian indicates (quoting a *senatusconsultum* from Claudius' time) that removing the nails from a ship equates to being responsible for the fate of the whole ship.[22] Reading that text it is possible to understand that this behaviour not only affected the ship but also the cargo and the people who were on board. I have written elsewhere about Ulpian's way of thinking about collectivities,[23] but what is important here is that, in this text, that conduct is not punished by the *Lex Aquilia. Abstulere* is a behaviour that fits best in the delict of theft or *rapina*,[24] while an act such as piercing fits better with the verb *rumpere* from the Aquilian liability, even if for this case both behaviours had the same result for the ship and its cargo.[25] These nuances are key for distinguishing when the Aquilian liability applied, because while the statute was being commented on by jurists, new subjective values were applied to decide what was reprehensible under that statute.

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ary on *frangere*. Contrarily to Lenel *Pal. 2*, 530, Rodger thinks that this fragment is part of Ulpian's comment on *rumpere*, see: Rodger 2007, 196.

17 Spagnuolo 2020, 171–194.

18 D.9.2.27.18 (Ulpian. 18 *ad Ed.*) and D.47.10.15.39 (Ulpian. 77 *ad Ed.*).

19 Spagnuolo 2020, 187–188, 192. Also, MacCormack 1971, 5.

20 Musumeci 2010, 347–352; Valditara 2016, 206; Sanna 2017, 366; Lorusso 2018, 208.

21 Spagnuolo 2020, 188, maintains that an unloaded ship will not sink. This could be the case, even if none of the technical reasons to sustain that argument are particularly strong. The weight—and therefore displacement potential—of seawater allows the ship to float. An unloaded ship which has been pierced will take on water that has to be pumped out, but if it is lighter, then it is less likely to be affected by this. Perhaps a heavily laden ship that is pierced cannot bear the added weight.

22 *Senatus consultum Claudianis temporibus factum est, ut, si quis ex naufragio clavos vel unum ex his abstulerit, omnium rerum nomine teneatur.*

23 Mataix Ferrándiz 2015, 525–540.

24 See § 3pr.; § 3.4 and § 5 from the title.

25 Purpura 1995, 469.

Damages caused indirectly or by simple omissions created no liability under the statute.[26] Going back to § 8 of the title *de naufragio*, the text established the obligation to repair damage caused unintentionally, but not under the provisions of the *Lex Aquilia*.[27] The loss would have been produced by inanimate things, a type of damage against which the owner of the fund was protected only if, having perceived the danger, he had promptly initiated proceedings for the feared damage (*cautio damni infecti*).[28] Specifically, the *actio legis Aquiliae* was not applied because the requirement of the *damnum corpore datum* was not met, since the damage was caused by an inanimate thing impelled by the force of the river, and thus lacked an active participant who could have been held responsible.

### 4.1.2 *Loss Wrongfully Caused*

Throughout this book I have repeated that the sea was a space that was difficult to control, and that the Romans were the first people to consider the risks of navigation from a legal perspective when planning a venture. Contractually, there were different legal mechanisms to cope with the uncertainties of sea travel, including diverse kinds of agreements, loans, and securities.[29] The sea's ever-changing conditions have always made seafaring a highly variable practice,[30] especially in antiquity, as navigation consists of a series of decisions made from instant to instant based on the local context.[31] These individual actions can, in turn, have a cascading effect on the whole journey. The state of the sea, time of day, type of cargo, experience of the crew, and other factors all impact the decisions made by human actors at specific points in a journey, and these decisions do not necessarily result in the desired outcome, meaning that no two journeys are identical.[32] This latter point emphasises that, even when planning a sea venture in great detail, things can still go wrong: the cargo can be lost, or the ship wrecked, or the vessel can cause wrongful damage to someone else's goods.

However, does that mean that the consequences of their behaviour at sea, even considering the risks of navigation, were excusable? The answer is that on

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26 Valditara 2005, 17–19.

27 For a translation, see the appendix, and chapter three, section 3.3.2.

28 Branca 1937, 367–375; Marrone 2001, 189.

29 Kupiszewski 1972; Litewski 1983; Jakab 2022; Fiori 2022.

30 These unstable weather conditions sometimes resulted in wrecks, such as happened to Paul the apostle NT 2 *Cor*.11.25, or Emperor Marcus Aurelius Antoninus (Hist.Aug.*M.Ant.* 27.2).

31 The fear of shipwreck also explains the practice of potential travellers asking for divine advice on whether to travel by sea, see: Cic.*Div*.2.14; Noy 2000, 142.

32 See Campbell 2022, which quotes several literary examples of decision-making at sea.

most occasions, it was not. One example of this assertion is the text D.19.2.13.1 (Ulpian. 32 *ad Ed.*). In this fragment, Ulpian explains a case when a carrier contracted to convey freight to Minturnae tranfers the cargo to another ship when getting from the sea to a river and that ship sank. The carrier would be guilty of fault if he acted against the lessor's will, or if he transferred the cargo to an inferior ship. On the one hand, this text highlights the importance of what was agreed in a contract between parties (the *lex contractus*).[33] On the other hand, it also indicates the importance of the expertise of the carrier in terms of knowing the quality of performance of a ship, but also of the features of the routes taken when shipping cargo around. In sum, a good sailor should have known better, and warned the lessor of a freight that transhipping was going to be involved in the journey.

Another example would be D.44.7.1.4 (Gaius 2 *Aur.*), which described one case when a person loaned silver tableware to someone else and indicated that if he were to take it with him on a sea journey, he would be liable for it even if it was lost owing to an attack by pirates or shipwreck. The justification was that even if these cases were considered *force majeure*, the debtor put the loaned object at risk by sending it off it on a sea trip.[34] A similar comment is given for the episode described in D.17.1.26.6 (Paul. 32 *ad Ed.*), in which it is considered that a mandatary cannot ask the mandator for the extra money spent in case of a pirate attack or shipwreck, because these events are considered accidents and do not apply to the liability implied in the contract of mandate.

In sea contexts, the notion of *imperitia* (lack of skill) means that the captain might have decided not to sail based on his expertise and experience and the insight that was expected of him, as a prudent and professional practitioner of his craft.[35] One example of this is the fragment D.9.2.29.2 (Ulpian. 18 *ad Ed.*), in which Ulpian wonders what action would be available if a boat caused damage through colliding with another boat's skiff. In this text, Ulpian quotes the first-century CE jurist Proculus,[36] and underlines not only the importance of the expertise of the captain, but also the good choices and skill of the crew when managing a ship.[37] If the vessel was governed recklessly, the sailors would be

33 As highlighted by Du Plessis 2006.

34 Tarwacka 2018, 307. Similar case is presented by Gaius in D.13.6.18pr. (Gaius 9 *ad Ed. Prov.*).

35 Something that can be appreciated in other texts such as D.14.1.1pr. (Ulpian. 28 *ad Ed.*); D.6.1.36.1 (Gaius 7 *ad Ed. Prov.*). The paradigm of the responsible role would be the figure of the *paterfamilias*, understood as what a diligent man would have foreseen; see D.9.2.31pr. (Paul. 10 *ad Sab.*); D.13.6.18pr. (Gaius 9 *ad Ed. Prov.*), and not only for his own things but also the ones kept for others; D.44.7.1.4 (Gaius 2 *Aur.*). MacCormack 1974, 203.

36 Honoré 1962b; Krampe 1970.

37 D.9.2.29.2 (Ulpian. 18 *ad Ed.*) *Et ait Proculus, si in potestate nautarum fuit, ne id accideret,*

subject to an *actio ex lege Aquilia* for colliding with another's ship.[38] The text does not mention acts prior to the loss, nor conduct which would have been available to the sailors that could have prevented the damage, since they should have known, as skilled people, that they should keep the ship under control while navigating.[39] The jurist's phrasing is quite simplistic, but it fits well with the idea of contingent movement by a ship. The captain and crew were aware that the marine environment was subject to changing circumstances, which is why sailors had to make decisions with each change in the wind; therefore, their fault would lie in not making these decisions and essentially demonstrating a lack of due diligence.

Moreover, in Roman law, *culpa* (negligent behaviour) did not require conscious risk-taking, and it was not judged by the individual defendant's own, perhaps limited, ability to appreciate the consequences of their conduct, and was not excluded by the fact that something more than general knowledge would have been needed to avert the disaster.[40] That said, it is understandable that some extraordinary events could not have been averted and avoided by the sailors.[41] However, their expertise may have allowed them to prevent an accident; if they did not use these skills, the loss could have been considered negligence, which was inexcusable and potentially criminal.[42]

The last bit of the fragment suddenly mentions the lack of liability of the *dominus navis* (shipowner) under the *Lex Aquilia*.[43] Even if the owner of the ship generally took care of choosing the captain, who would then take care

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*et culpa eorum factum sit, lege Aquilia cum nautis agendum, quia parvi refert navem immittendo aut serraculum ad navem ducendo an tua manu damnum dederis, quia omnibus his modis per te damno adficior: sed si fune rupto aut cum a nullo regeretur navis incurrisset, cum domino agendum non esse* (…) Proculus says that if it was in the power of the sailors to prevent the collision and it happened through their fault, an action under the *Lex Aquilia* can be brought against them, because it matters little whether you do damage by letting your boat run loose or by bad steering or even with your own hand, because in all these ways I suffer damage caused by you; but if a rope broke or the vessel ran into mine when no one was in control of it, no action can be brought against the owner).

38 Ibbetson 2003, 497.

39 Paschalidis 2008, 353.

40 Birks 2014, 206–207.

41 D.50.17.23 (Ulpian. 29 *ad Sab.*).

42 See for example D.17.2.52.4 (Paul. 31 *ad Ed.*) or D.50.17.23 (Ulpian. 29 *ad Sab.*).

43 Pérez Simeón 2001, 7–11, also thinks that the *exercitor* would be liable for the *actio in factum adversos nautas* (D.4.9.1pr.) and not *ex lege Aquilia*. Van Dongen 2014, 245, states that in the event of accidental loss, no action based on the *Lex Aquilia* could be brought by the owner of the damaged ship, and quotes examples of early modern law following Roman law.

of choosing the crew,[44] on many occasions the crew was formed by slaves of the shipowner, whose actions were the responsibility of their owner since they depended on him.[45] However, if we read the *glossa* of the text, the exclusion of liability is justified for the simple reason that Aquilian liability does not apply to damages caused by inanimate objects. The responsibility of the owner of an object for the damages caused by it was based exclusively on the existence of property rights, and it was extremely variable. These are situations in which the owner had a duty to keep an object in good condition (such as a house at risk of collapsing).[46] Instead, this text does not refer to any maintenance of the ship, and only mentions cases where a rope was broken, or the ship was out of control.[47]

Ulpian's comment on the event follows in § 4, in which the Severan jurist pursues the same pattern as in previous fragments. If a ship collides with another and the damage is the fault of the helmsman or the captain, they will be subject to Aquilian liability, while the shipowner will not be guilty of negligence in the same circumstances.[48] Moreover, § 3[49] indicates that no action will lie against the sailors, if they could not have done anything other than cut the ropes.[50] A different reasoning is offered for the case indicated in § 5,[51] where

44 D.14.2.2 (Ulpian. 28 *ad Ed.*). According to Schipani 1969, 198–242, the shipowner would be liable for any damage caused in any case.

45 Aubert 1994, 46–116; 1999, 151–152.

46 e.g. D.39.2.7.1 (Ulpian.53 *ad Ed.*); D.39.2.6 (Gaius 1 *ad Ed. Prov.*).

47 D.39.2.24.4 (Ulpian. 81 *ad Ed.*); the force of the sea is something that even buildings cannot resist.

48 D.9.2.29.4 (Ulpian. 18 *ad Ed.*) *4. Si navis alteram contra se venientem obruisset, aut in gubernatorem aut in ducatorem actionem competere damni iniuriae Alfenus ait: sed si tanta vis navi facta sit, quae temperari non potuit, nullam in dominum dandam actionem: sin autem culpa nautarum id factum sit, puto Aquiliae sufficere.* (If a ship had sunk another ship that was heading against it, Alfenus says that it is possible to release an action for wrongful loss against the pilot or *gubernator*. But if the ship had gone with such force that it would have been impossible to moderate it, no action is to be brought against the owner. If this had occurred due to the fault of the sailors, I believe the action of the *Lex Aquilia* is sufficient).

49 D.9.2.29.3 (Ulpian. 18 *ad Ed.*); *3. Item Labeo scribit, si, cum vi ventorum navis impulsa esset in funes anchorarum alterius et nautae funes praecidissent, si nullo alio modo nisi praecisis funibus explicare se potuit, nullam actionem dandam.* (Labeo also writes that if the ship had been driven by the force of the winds against the ropes of the anchors of another ship, when the sailors had cut the ropes, and even then, the ship had been able to untangle itself, no action should be taken).

50 Accursius et al. 1627, 1038, n. f, in which Accursius also mentions the *actio de naufragio*.

51 D.9.2.29.5 (Ulpian. 18 *ad Ed.*) *Si funem quis, quo religata navis erat, praeciderit, de nave quae periit in factum agendum.* (If someone has cut the ropes that hold a ship, an *actio in factum* could be brought with respect to the ship that sank).

there is a wrongful loss of the mooring rope, but the action is offered *in factum* because the consequences from this act were not only damage to the moorings but also that the ship was lost.[52]

In all these texts, there is no direct mention of a possible consequence of the events described, which is that on many occasions the ship would have sunk. Even if in these cases the wreck may have been caused by a lack of diligence and not by evil intent, a ship does not necessarily sink immediately, and there are still larcenous acts that can be committed while the wreck is happening, as Pedius described in D.47.9.4pr.[53] These behaviours are also considered by Ulpian in § 1.5 and § 3pr. of the title *de naufragio*, so it must not have been rare to take advantage of such catastrophes. In § 4.1 Emperor Caracalla indicated that taking what cannot be saved from a wreck (*peritura collegerint*) does not constitute robbery. This assertion could be only be justified by the fact that these goods were taken before the ship was effectively wrecked and were in danger of being lost under the sea.[54] In contrast, if the goods reached the shore, the person taking them would have been guilty according to the *edictum de naufragio*.[55] The latter establishes a seemingly small but key difference between land and sea, and highlights the savage nature of maritime spaces.

If the force of the sea would have caused the complete loss of the ship and goods anyway, then nobody was liable, even when goods were grabbed from a ship that was sinking. However, if these goods reached land, their legal consideration was then different, and so was the liability of any individuals interacting with them. In these cases, the *edictum de naufragio* was available, as well as other legal tools such as the *actio vi bonorum raptorum* or the *actio furti*. This understanding qualifies the Roman maritime cultural landscape as a safe space bounded by their civil private laws. The latter is another argument for the agency of the sea, which cannot only take ownership, but also empower someone to take other people's goods with impunity.

## 4.2 Establishing Parallels with Land Case Studies

The use of dissimilar scenarios to explain how a legal principle behaves in different situations is not a rare occurrence in Roman law. Indeed, it appears

52 Barton 1974, 23; Corbino 2007, 32.

53 D.47.9.4pr. (Paul. 54 *ad Ed.*) *Pedius posse etiam dici ex naufragio rapere, qui, dum naufragium fiat, in illa trepidatione rapiat*.

54 Gerkens 1997a, 152–157, compares this case to the one described in § 3.7 of the edict.

55 See § 7 and chapter three, section 3.1.

clearly established in the simple phrasing of the *edictum de naufragio*, by relating a catastrophe happening in water to others taking place on land (fire and collapse of a building).[56] However, even if the events calling for the use of these legal remedies occurred due to similar behaviours or events,[57] the specific affairs took place in contrasting spaces. I am not only mentioning this fact due to the range of applications of civil law, but also because different spaces entailed different hazards, and these need to be understood in context. The case of *turba* is also included in this section,[58] since it corresponds to an edict that has several connections with the *edictum de naufragio*, due to the context in which it was enacted and the kinds of wrongdoings targeted.[59] An examination of the following three cases will characterise the peculiarities of the areas where these behaviours took place, and how they redefined the relationship between land and sea.

### 4.2.1 *Turba* (*Tumult*)

The *edictum de turba*, and the edicts *de naufragio* and *vi bonorum raptorum* are concerned with *damnum* (loss), and all three have in common the element of disorder. The essential differences between the *actiones de naufragio* and *vi bonorum raptorum* and the *actio de turba* are that in the latter the behaviours targeted should not be committed by gathering a gang (either armed or not)[60] and it does not include violent robbery among the conducts targeted.[61] The edict addresses loss wrongfully caused, as well as misappropriation (theft) committed by a crowd, and this context is enough to presume the ill-intent of the offender, who does not need to have caused the tumult to have been considered in the scope of this edict.[62] In this sense, it looks back at *furtum* and *damnum iniuria datum*, which are listed in Gaius' enumeration of delicts.[63] The behaviours targeted in this edict were probably subsumed into the scope of the *actio vi bonorum raptorum* in its latest version, when it was compiled in Had-

56 As can be appreciated in other edicts such as D.4.9.1pr. (Ulpian. 14 *ad Ed.*) and D.14.1.1pr. (Ulpian. 28 *ad Ed.*).

57 D.39.2.24.4 (Ulpian. 81 *ad Ed.*).

58 D.47.8.4pr. (Ulpian. 56 *ad Ed.*); Lenel. *EP*, §183.

59 See chapter one, section 1.3.1.

60 D.47.8.4.6 (Ulpian. 56 *ad Ed.*); Balzarini 1969b, 262–264; Vacca 1972, 48–51. When individuals cause damage in a crowd with the use of arms, they will be criminally punished, PS.5.3.3, and if their intent is to commit murder, they fit in the scope of the *Lex Cornelia de sicariis et veneficis*, see: D.48.8.1pr. (Marcian. 14 *Inst.*).

61 D.47.8.4.9 (Ulpian. 56 *ad Ed.*).

62 D.47.8.4.6 (Ulpian. 56 *ad Ed.*).

63 G.3.182.

rian's perpetual edict.[64] This collection was part of a process of organising and generalising legal tools, which resulted in the loss of individuality of this remedy, as well as depriving it of the particular political character that it had when it was enacted.

The *edictum de turba* was established during the late Republic, when the latent climate of violence in politics and society may have lead the praetor to enact a disposition targeting the losses caused by people who took advantage of a crowd to inflict loss or make things go missing.[65] As with most of the Republican edicts that have been preserved (which are not many), the chronology of this edict is uncertain, but I have suggested elsewhere that it most likely belongs to the last century of the Republic.[66] Some years later, Labeo (quoted by Ulpian) related *turba* to the general category of creating a disturbance.[67] In his turn, Ulpian wrote at the apex of classical jurisprudence, in a world wholly accustomed to autocratic stability; his comments on this edict did not describe actual reality and certainly not the state of affairs in the earlier eras of Roman civilisation.[68] Indeed, the word *turba* generally refers to a disturbance, and can apply to a crowd gathered in a wide variety of contexts.[69] However, bearing in mind the sociopolitical ambience of the time when this edict was enacted, the term *turba* also had a political meaning, linked to lawmaking in the city of Rome and its spaces. In fact, the *glossa*, commenting on § 3 of the edict,[70] which described what can be labelled as a crowd, indicated that the *comitia populi tributa* could

64 See chapter one, section 1.3.1.

65 D.47.8.4pr. (Ulpian. 56 *ad Ed.*).

66 Mataix Ferrándiz 2019, 164–165. See also Birks 2014, 191.

67 D.47.8.2pr. (Ulpian. 56 *ad Ed.*).

68 He described a crowd in a general way also in D.47.8.4.3 and D.47.8.4.6 (Ulpian. 56 *ad Ed.*). Lawmaking was in the hands of the emperor by the time of Ulpian, see for example, Honoré 1994.

69 e.g. Fagan 2011; Russell 2016b.

70 D.47.8.4.3 (Ulpian. 56 *ad Ed.*) *Turbam autem ex quo numero admittimus? Si duo rixam commiserint, utique non accipiemus in turba id factum, quia duo turba non proprie dicentur: enimvero si plures fuerunt, decem aut quindecim homines, turba dicetur. Quid ergo, si tres aut quattuor? Turba utique non erit. Et rectissime Labeo inter turbam et rixam multum interesse ait: namque turbam multitudinis hominum esse turbationem et coetum, rixam etiam duorum.* (By what number do we recognise that a mob exists? If two people fight, we will certainly not understand that this happened as part of a mob, because it will not be said with reason that two people form a mob, but if there are more, ten or fifteen people, it will be said that there is a mob. Then, what will be said if there were three or four? There was certainly no mob, and Labeo says with much reason that there is a great difference between a mob and a quarrel, because a mob is a grouping and gathering of a multitude of men, while a quarrel is a meeting of two people).

be considered.[71] I would like to highlight this notion in order to relate the space where a crowd interacted with the Roman maritime cultural landscape, which also had a political meaning constructed through legal dispositions such as the *edictum de naufragio*.

One of the most notable works on this topic is that of Millar, who demonstrated how the politics of the crowd were central to the great changes that took place year after year during times of unrest. Millar especially highlights the role of the crowd during the years 80–70 BCE,[72] the period during which I presume this edict was approved.[73] Pomponius, in his 'sourcebook' (*liber singularis enchiridii*), dating to the last years of Hadrian (the first half of the second century CE), refers to the citizenry reunited in the *forum* to exercise their political capacities.[74] The aim of quoting Pomponius here is to highlight that if the crowd that the praetor was originally considering in his edict referred to one gathered in the *forum*, it did not constitute a general audience. The focus on the role of the citizen had the effect of excluding women, slaves, foreigners, and other marginalised groups from the political community (whether or not they were physically excluded from the crowd). The crowd was not 'the community' but 'the correctly constituted citizen body of free adult Roman males' (even if they were poor).[75] Even if the word could be used in a general sense, when applied to that concrete setting, it also suddenly takes on a strongly political sense. It highlights the political spirit of the remedy included in the edict as belonging to civil private law, and therefore being associated with citizenship, and the status of the people forming the crowd. The latter does not mean that foreigners would have been physically excluded from the general crowd, and we know that it was possible for them to make a claim for theft or damage via the fiction of citizenship.[76] Many of the edicts approved during that decade (80–70 BCE) had a strong political connotation connected to their spatial realms, because they aimed at controlling the violence that had become a plague in Rome.[77] In the case of the sea, the *edictum de naufragio* likewise provided civil remedies for a space not governed by Roman civil law. Indeed, many of the remedies provided in the *edictum de naufragio* became effective when the wrecked ship or the salvaged goods touched land, and thus under-

71 Accursius et al. 1627, 1344, n.h(c).
72 Millar 1998, esp. 49–123.
73 See chapter one, section 1.3.1, and table three in the appendix.
74 D.1.2.2.9 (Pompon. *L.S. Ench.*).
75 Russell 2016a, 46; Nippel 1995, 15.
76 G.4.37.
77 Lintott 1968, 6–34; Mataix Ferrándiz 2019, 163–165.

lined the divide between land and sea spaces and their associated legal connotations. Somewhat differently, the *edictum de turba* also constituted a tool of civil law that took on a strong political connotation when applied to a crowd gathered in the *forum* during the exercise of their political rights.

### 4.2.2 *Ruina* (*Collapse of a Building*)

The uncontrollable collapse of a building is another of the situations envisaged, together with fire or shipwreck, in the *edictum de naufragio*. The logic behind connecting these events is that when they occur they cause a state of chaos, and some people may take advantage of this to cause damage or seize objects.[78] The inclusion of building-collapse in the *edictum de naufragio* is not disentangled from the social realities of the late Republican period, since according to literary sources the *insulae* of the time suffered from many problems that often resulted in structural collapse.[79] These shortcomings were unfortunately not only present during the Republican period but also in the Empire, and included the use of poor building materials, the inadequate construction of foundations, and inexpert and careless workmanship.[80]

This was especially the case for poor tenants, who suffered from an ignorance of the building regulations that applied to property owners, builders, and officials.[81] As in the case of shipwrecks, the edict applied not only to the goods stolen from an actual building which had collapsed, but also from any adjacent premises.[82] In addition, Ulpian indicates that the building must have already effectively collapsed, and that the edict would not apply if the building was just about to crumble.[83] Several texts from later periods mention the collapse of a building as a lawful excuse for not having to fulfill obligations, such as not repaying a loan due to the fact the subject (the building) no longer existed, or not handing in documents on time for a trial.[84] This continuous reference to the edict demonstrates that it was still useful long after its publication.

### 4.2.3 *Incendium* (*Fire*)

The Digest title *de naufragio* mainly provides remedies for events involving a wreck or fire, which were conjoined due to the type of conduct that constituted

78 D.47.9.3.2 (Ulpian. 56 *ad Ed.*).
79 Cic.*Att*.14.9.1. Van der Bergh 2003, 460–461.
80 Juv.3.190–196; Sen.*Ep*.90.43; Frier 1977, 36.
81 Yavetz 1958; Scobie 1986, 404. For example, the *Senatus Consultum Hosidianum* (54 CE) was concerned with the maintenance of buildings, but it was concerned with appearance and not with the social necessities of the poor. See: Phillips 1973, 94.
82 D.47.9.1.3 (Ulpian. 56 *ad Ed.*).
83 D.47.9.1.4 (Ulpian. 56 *ad Ed.*).
84 Table one in the appendix.

the delict, which is in turn influenced by the catastrophic situations that they generated. Indeed, when Ulpian comments on the edict, he says that looting takes place because of the confusion and alarm caused by a fire, and includes goods pillaged from any land adjacent to the scene of the fire.[85]

Notwithstanding Ulpian's clarification, most fragments from the work dealt either with the intentional provocation of a fire or with cases in which the defendant intended the looting but claimed that it was justified by circumstances. The fragments from the title addressing fire belong to different periods, starting chronologically with § 9:

> D.47.9.9 (Gaius 4 *ad Leg. XII Tab.*) *Qui aedes acervumve frumenti iuxta domum positum conbusserit, vinctus verberatus igni necari iubetur, si modo sciens prudensque id commiserit. Si vero casu, id est neglegentia, aut noxiam sarcire iubetur aut, si minus idoneus sit, levius castigatur. Appellatione autem aedium omnes species aedificii continentur* (A person who sets a building or a sheaf of wheat set beside a dwelling on fire should be bound, flogged, and put to death by fire, if their act was deliberate and conscious. If, however, they did it by chance, that is, by negligence, they are to make good the wrong, or if their means be inadequate, be more lightly punished. The expression 'building' includes every kind of edifice).

Gaius' comment belongs to *tabula* VII.10,[86] and the severity of the penalties included in the text bears witness to the archaic nature of the Twelve Tables.[87] However, his comment also remains current, clarifying that the term '*aedes*' encompasses all kinds of buildings.[88] In that way, Gaius was including the Roman country house, as well as the urban *insulae*, which were so common throughout the Empire.[89] Regarding the *insulae*, many sources refer to fires as a common occurrence in these types of buildings.[90]

Gaius' comment exemplifies the variety of criminal and civil sanctions available, depending on the behaviour committed.[91] On the one hand, the jurist offers a glimpse into the criminal punishments established in the Twelve Tables, which were partly influenced by the *talio* and reflect an element of ven-

85 D.47.9.1.2 (Ulpian. 56 *ad Ed.*).
86 Lenel.*Pal*.1.244.
87 Santalucia 1988, 427; 2009, 29–31; La Rosa 1998, 369; Pólay 1986, 73.
88 D.50.16.211 (Florent. 8 *Inst.*); D.19.1.15 and D.19.1.17.7 (Ulpian. 32 *ad Ed.*).
89 Frier 1980, 1; 39–60.
90 Juv.3.190–204; Gell.*NA*.15.1.2–3.
91 As could be perceived in D.47.9.1.1 (Ulpian. 56 *ad Ed.*). See also chapter two, section 2.3.

geance, such as burning alive anyone who consciously sets fire to a house.[92] On the other hand, the jurist's inclusion of elements such as chance (*casus*) is considered to have been interpolated by various scholars, probably because they thought that Gaius wrote his comment only following the spirit of the Twelve Tables.[93] However, other scholars thought that the use of *neglegentia* could be a gloss inserted to give a technically accepted meaning to *casus*, which perhaps already had multiple connotations for Gaius.[94] Leaving these questions aside, these terms drew a distinction between the intentional and unintentional (not planned) lighting of a fire, and their relative sanctions are indeed genuine.[95] For its part, *casus* constituted the first system of liability known in Roman times outside the sphere of *dolus*, which implied intentionality from the parties.[96] Later, writing during the Severan period,[97] Marcian included *fortuitus* in a text that also concerned fire:

> D.47.9.11. (Marcian. 14 *Inst.*) *si fortuito incendium factum sit, venia indiget, nisi tam lata culpa fuit, ut luxuria aut dolo sit proxima.* (If a fire be caused by chance, it merits indulgence, unless the carelessness was so conspicuous as to be ranked as being close to deliberate intent).

Here Marcian is using *fortuitus* in the same sense as Gaius, that is to say, not excluding fault from the targeted behaviour. Therefore, it should be understood that Marcian said that when the fire was caused unintentionally, it must be forgiven. In contrast, Gaius does not indicate any nuances for *casus*, but only distinguishes it from wrongful intent and establishes a lighter punishment for cases when someone sets fire to buildings without full knowledge of the consequences of this action.[98] Marcian therefore takes up the rule stated by Gaius and indicates that only instances of severe negligence could be considered as intentional harm. In his turn, by indicating diverse penalties and including intentionality as an element to consider for establishing them, Gaius was stating the substance of the rulings as applied in his own day but maintaining the

92 Bauman 2002, 114.

93 Considered as interpolated by Ferrini 1899, 145; Costa 1921, 42–48; Brasiello 1937, 206, n. 21; *contra*, Muciaccia 1977, 75, quoting *Coll.*1.11.2–3.

94 MacCormack 1972, 393–394 n. 6; 1981, 117; Wacke 1979, 553; Molnár 1986, 481–482 and n. 53. For arguments that the precise statement is not Gaius', see Gioffredi 1970, 40; Wittmann 1972, 21–22; Pólay 1984, 179–180.

95 Cursi 2012, 300–301.

96 *Casus* is defined in *Coll.*1.7.1. See also Muciaccia 1977, 67.

97 De Giovanni 1983, 91–146.

98 Robinson 1977, 339.

influence of the Twelve Tables in his comment.[99] The latter can be appreciated in the fact that Gaius establishes different penalties but does not refer to the *Lex Aquilia* for these cases, since the plebiscite was approved at a later date.[100] Nevertheless, for cases in which the damage is caused through a purposeful act, § 3.7 includes a text that involves several elements that may remind one of the cases mentioned in section 4.1.2. The fragment is included in book 56 from Ulpian's edict:

> D.47.9.3.7 (Ulpian. 56 *ad Ed.*) *Quod ait praetor de damno dato, ita demum locum habet, si dolo damnum datum sit: nam si dolus malus absit, cessat edictum. Quemadmodum ergo procedit, quod Labeo scribit, si defendendi mei causa vicini aedificium orto incendio dissipaverim, et meo nomine et familiae iudicium in me dandum? Cum enim defendendarum mearum aedium causa fecerim, utique dolo careo. Puto igitur non esse verum, quod Labeo scribit. An tamen lege Aquilia agi cum hoc possit? Et non puto agendum: nec enim iniuria hoc fecit, qui se tueri voluit, cum alias non posset. Et ita Celsus scribit*. (What the praetor says about the infliction of damage is applicable only if the damage is deliberate: for if wrongful intent is absent, the edict does not apply. How then does what Labeo writes apply, if when a fire arose therein, I demolished my neighbour's house in self-defence, and an action should be granted against both me and my slaves? Since I have done this to preserve my own premises, I am lacking evil intent. I think, therefore, that what Labeo writes is not true. But would it be possible to proceed under the *Lex Aquilia* in such circumstances? Again, I think not; for a person does not act wrongfully if they act to protect themselves when they had no other option. And so writes Celsus).[101]

The fragment describes the situation of a subject who, by fleeing from a burning home, brings about the destruction of his neighbour's house. According to Labeo, this event should be punished since a loss has been caused, while in Ulpian's opinion (following Celsus) there would be no penalty for the subject or for his slaves, since they had acted in this way without *iniuria* or *dolus*

99 MacCormack 1972, 382–383, 392; Sitek 2007.

100 D.9.2.27.7 (Ulpian. 18 *ad Ed.*).

101 This fragment has been considered to have been altered by De Martino 1939, 44–45; Beinart 1952, 287 n. 3; Longo 1970, 334–335; Schipani 1969, 207; contra; Gerkens 1997b, 102, who is right to indicate that it would have been strange for the compilers to alter one text to cause a controversy between jurists from the same school, and justifies these scholars' claims about the incorrect analysis of the text from the perspective of a 'state of necessity', which is a concept that was not conceived of until the nineteenth century.

*malus* mediating their attitude. In this text, the most important justification for wrongful damage is self-defence, limited to the force necessary to prevent any anticipated harm to oneself, and not extending to measures = exceeding this limit of proportionality, as for instance blows struck in revenge.[102] Two other texts from the Digest deal with losses wrongfully caused due to a fire and present divergent thoughts from both Celsus and Labeo.[103] Their discrepancies are based on the different remedies proposed to deal with the damage, being either the solutions derived from the *Lex Aquilia* or the interdict *quod vi aut clam*.[104]

Similarly, in the case of § 3.7, the divergent opinions of Celsus and Labeo are justified because they are thinking of different legal solutions. In the case of Celsus, the regime of the *Lex Aquilia* would not apply because there is no ill-intent from the offender, as happened in the case of the boat pushed towards another by the force of the wind.[105] Instead, Labeo is thinking of the *edictum de naufragio* in the fragment,[106] and since 'to receive' is the only conduct included in the scope of the delict that requires wrongful intent, the rest, as they cause a loss, are presumed to include bad intent.[107] Labeo's conception is also connected to his context, because in his time establishing the presence of *dolus*, or evil intent, was not a requirement for granting the action.[108] On the contrary, for Ulpian, in keeping with the time in which he developed his legal work, it was necessary to consider the psychological element in the case by introducing the requirement of evil intent.[109] Labeo's interpretation of the *damnum iniuria datum* corresponds to a classic notion of the *Lex Aquilia*, by which anyone who causes damage, whether by action or omission, is responsible for it.[110] Ulpian introduces a new vision of the problem of loss wrongfully caused based on the specific case and its subjective elements.

Contrasting with this text, § 12.1[111] from the work reflected the punishment for setting a fire in the Severan period, and graduated the penalties according

102 Self-defence is a concept also associated with fear, see: D.40.12.16.1 (Ulpian. 55 *ad Ed.*); D.4.2.1 (Ulpian. 11 *ad Ed.*); Tafaro 1974, 57.

103 D.9.2.49.1 (Ulpian. 9 *Disp.*) and D.43.24.7.4 (Ulpian. 71 *ad Ed.*).

104 Gerkens 1997b, 148.

105 D.9.2.29.3 (Ulpian. 18 *ad Ed.*).

106 Von Thur 1888, 64–68; Gerkens 1997b, 143.

107 See § 3.3. and § 1pr.

108 Gerkens 2005, 117.

109 Gioffredi 1970, 45.

110 e.g. G.3.211; D.47.10.1pr. (Ulpian. 56 *ad Ed.*).

111 D.47.9.12.1 (Ulpian. 8 *de Off. Proc.*) *Qui data opera in civitate incendium fecerint, si humiliore loco sint, bestiis obici solent: si aliquo gradu id fecerint, capite puniuntur aut certe in insulam*

to the social rank of the offender.[112] The sanctions available correspond with those provided in the *Lex Cornelia de sicariis et veneficis*,[113] a statute that had also influenced § 3.8 from the title *de naufragio*. The fragment only referred to the event of an intentional fire that took place in a city, as other fragments from the Digest did, and included capital punishment for these cases.[114] Fragment 12.1 was part of book 8 on the office of the proconsul compiled by Ulpian in the third century CE, in which the jurist compiled many rescripts that addressed Christians.[115] For that reason, it would not be surprising to see that similar penalties were applied to the Christians who were accused by Nero of setting fire to Rome in 64 CE.[116] However, the penalties included in the fragment are not what we have to consider when comparing the fragments on arson; rather, we should consider the intentionality of the offenders in causing the catastrophe.[117]

The key element in the inclusion of fragments § 9 and § 12.1 in the work is that these justify that the provocation of catastrophes such as wrecks, fires, or the collapse of a building should be included in the edict, even if they are not specifically mentioned in § 1pr., including the phrasing of the edict. The latter challenges the opinion that these texts dedicated to arson are only included in the title due to an association of ideas.[118] In addition, it underlines the connection of this edict with the *ius naufragii and* reaffirms its importance to the Roman quest to keep its seashores peaceful.

The last point of this section has addressed the connection between events taking place at sea and on land. It refers to the causality of the event of a fire or collapse of a building, as referred to in § 1.4.[119] As can be noticed when reading the fragment, here Ulpian only refers to the events of a fire or collapse of a build-

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*deportantur*. (Those who deliberately start a fire in a city, if they be of lower rank, are usually thrown to the beasts; but if they be of some status, they would be subject to capital punishment or certainly deported to an island).

112 Cardascia 1950, 336; Sitek 2007, 10.

113 Coll.12.5; D.48.8.1pr. and D.48.8.3.5 (Marcian. 14 *Inst.*).

114 D.48.19.28.12 (Callist. 6 *de Cogn.*); *Coll*.12.2.4; 12.6; PS.5.3.6; 5.20.1.

115 Plescia 1971, 131.

116 Tac.*Ann*.44.15; Plin.*Ep*.10.96; Suet.*Ner*.38.121; Cass.Dio.62.229; Saumagne 1962, 344–345; Albanese 1982, 46.

117 MacCormack 1972, 388.

118 Gerkens 2007, 6.

119 D.47.9.1.4. (Ulpian. 56 *ad Ed.*) *Si suspicio fuit incendii vel ruinae, incendium vel ruina non fuit, videamus, an hoc edictum locum habeat. Et magis est, ne habeat, quia neque ex incendio neque ex ruina quid raptum est*. (If there was a suspicion that there was going to be a fire or a collapse which does not actually happen, let us see whether this comes within the scope of the edict. And the better view is that it does not come, for nothing is seized from either a fire or a collapse).

ing, but not of a shipwreck. The latter is connected to the idea of contingent navigation as referred to in section 4.1.2. It seems that the Severan jurist had in mind the conception that, while events taking place on land such as a fire or the collapse of a building could be predicted and prevented, a shipwreck was difficult to foresee and avert. Indeed, suffering from a shipwreck could be used as an excuse for the abandonment of obligations such as liability for a cargo lost (at least from the time of Labeo onwards), even if it was normally protected by the necessity of acknowledging the reception of the load (*receptum nautarum*).[120] Other similar cases would be the exemption from liability for failing to repay a loan, or for the death of a slave.[121]

This distinction among otherwise similar events was justified partly by the savage nature of the sea, but also by the very nature of ships, which, as Ulpian reminds us, is to put to sea and sail.[122] Therefore, on the one hand, it is understandable that the jurists aim to compare different catastrophic events to examine the efficiency of the legal remedies and principles about which they were writing. However, even if the events possessed some similarities, the nature of the spaces in which they took place was different, not only because the sea was a space unable to be grasped by the law of the Romans, but also simply because of its uncertain and unpredictable nature. The *edictum de naufragio* established a relative gap in the dichotomy between land and sea by repressing via private law the events related to a wreck and the wreck itself. However, its efficiency was limited due to the savage nature of the sea, and therefore in many cases it would only have applied once the consequences of the wreck (e.g. the seizure of goods) were manifested on shore. As we will see in the following chapter, for cases such as homicides the commentary on the edict refers to other statutes that could provide solutions for these events, highlighting the need for public remedies to address some events taking place at sea.

120 D.4.9.3.1 (Ulpian. 14 *ad Ed.*).

121 D.13.6.1.8pr (Gaius 9 *ad Ed. Prov.*); D.6.1.36.1 (Gaius 7 *ad Ed. Prov.*). However, a later constitution from 294 CE (C.33.2.5) indicates that the lack of liability is not automatically assumed, and that the carrier will be bound to repay the loan in the case that he did not include the exception of shipwreck in the agreement beforehand.

122 D.7.1.12.1 (Ulpian. 17 *ad Ed.*).

CHAPTER 5

# Causing Intentional Harm at Sea

We move now to the cases in which shipwrecking and its associated wrongs resulted from an intentional act by the offender. While terms such as contingent movement were considered in the previous chapter, in these cases the acts of intentional harm imply that the defendant acted with a specific intent that was the proximate cause of the plaintiff's injuries. The topic of intentional harm has been briefly referred to previously, when discussing the scope and nature of the *edictum de naufragio* and the origins of this enactment.[1] However, there are some aspects connected to this disposition and its associated behaviours that have not benefitted from a detailed study and thus will be addressed here. Therefore, the following sections will focus on the different fragments collated under the Digest's title *de naufragio* which date after the enactment of the edict (first century CE) and reflect how different facets of intentional shipwrecking were addressed by later jurists.

## 5.1 Shipwrecking Far after the Enactment of the *Edictum de Naufragio*

As has been noted throughout this book, the *edictum de naufragio* was enacted in the first century BCE to punish robbery and other violent acts connected with shipwrecking. However, the influence of the edict and the behaviours it targeted did not stop with the end of the Republican period but continued through the Empire and even into late antiquity. Three fragments under the title *de naufragio* (§ 3.8, § 6, and § 10), as well as other texts compiled in the Digest, even if not under to that title, mention and address intentional shipwrecking.[2]

In addition, other fragments assembled in later codes witness the importance of legally addressing shipwrecks and managing their consequences.[3] I have argued elsewhere about the role and importance of the transmission of the *edictum de naufragio* in the later Empire, and these sources will not be studied in this chapter.[4] The next section will address some of these frag-

1 See chapter two.
2 D.4.9.3.1 (Ulpian. 14 *ad Ed.*); D.13.6.8pr. (Gaius 9 *ad Ed.Prov.*); D.14.2.2.3 (Paul. 34 *ad Ed.*).
3 The titles C.11.6 and CTh.13.9 (*de naufragiis*).
4 Mataix Ferrándiz 2022(b).

ments and their features, underlining how this activity was still present in many Roman maritime landscapes, and the different ways in which intentional shipwrecking and its consequences could be avoided, fought against, or repaired.

### 5.1.1 *Hubs of Violence in the Mediterranean and How to Legally Target Them*

It is a well-known fact that the late Republic was a violent period,[5] and in the case of seafaring, the results achieved by underwater archaeology have been interpreted as proof of the intensity of piracy during the first century BCE.[6] The large number of shipwrecks corresponding to this period, together with the fact that many of them carried marks of violence on the keel or carried arms in their cargo, seem to support this generalised opinion.[7] However, although archaeological evidence can indicate that a wrecked ship suffered a violent attack, it does not necessarily mean that these marks of violence correspond to a pirate assault.[8]

The Augustan propaganda,[9] as well as the *princeps*' creation of magistracies to survey the sea,[10] convinced some scholars that shipwrecking and piracy were practically extinct during the Roman Empire, and especially during the *Pax Augusta*.[11] For example, the wreck *Cabrera D* (1–15 CE) included helmets

5 See chapter one, section 1.3.1.

6 Parker 1992, fig. 3: Parker's graph shows a progressive increase in the number of known wrecks from about 600 BCE to 200 BCE, followed by a rapid rise to a peak in the first century BCE. In addition, Candy 2020, 55–57, indicates that these shipwrecks could also attest to some limited economic growth at the time.

7 Lamboglia 1952, 131–236; 1957, 138–139; 1964, 258–266; Cavazutti 1997, 197–214; Beltrame 1999, 155–162; Gianfrotta 1981, 227–242; 2001, 212; 2013, 51–66; Parker 1992, 84, 196.

8 Arnaud 2016, 22. For example, Gianfrotta 2001, 213–214, mentions an anchor from a shipwreck in Manatea (Sicily) bearing the inscription *MENA*, indicating the name of the exercitor and suggesting that this ship was part of a fleet, and that it sank after encountering pirates. However, that is only his interpretation, and there is no real proof for this argument.

9 Augustus indeed claimed to have stopped piracy in the Mediterranean, proclaiming 'I freed the sea of pirates' (*mare pacavi a praedonibus*); see. *CIL* III.2.769 (= RG DA 25.1). However, the line alludes to his rival Sextus Pompey; see. Livy.*Per*.123; 127–128, and Fuhrmann 2012, 95 n. 23. Other sources that claim the benefits of the Pax Augusta are, Hor.*Carm*.4.5.17; Strab.3.25; Philo.*Leg*.146; Plin.*HN*.2.118; Prop.3.4.1; 3.4.11; 3.4.59; Suet.*Aug*.22.

10 Purpura 1985b, 106. However, roles such as the *praefectus orae maritimae*, in charge of surveying shores for pirate threats, existed since the Republican period. See: Barbieri 1941, 276–277; 1946, 176–177; Ozcáriz Gil 2014, 42.

11 Ormerod 1997, 257; Braund 1993, 106–107; Noy 2000, 142. More generally on Roman peace, Woolf 1993, 171–194.

in its cargo, something that according to Parker could only be justified by the presence of soldiers on board and not the self defence of the crew, since this wreck dates to the *Pax Augusta*.[12] However, there is no evidence to support this argument. Although seafaring and trade were safer during the Imperial period due to several factors,[13] small-scale, opportunistic piracy persisted.[14] In fact, Parker's diagram shows how the number of shipwrecks dropped only very slightly in the first century, rather more so in the second century, and then sharply in the third century, with continued diminution in the fourth and fifth centuries.[15] However, many epigraphical and literary sources demonstrate that piracy became a more serious problem during the third century crisis, forcing the Roman authorities to take extraordinary measures to suppress it.[16] In sum, wreck remains are evidence of the violence prevailing at sea during the Imperial period, although it is not clear that the activities of pirates were the cause, and at least in the Mediterranean basin this violence should be mainly attributed to privateers.[17] The situation was different in the outer seas (Black and Red),[18] where pirates threatened the transport of profitable goods from southern Arabia and India,[19] which is the reason why the Romans were forced to implement protective measures for these routes.[20] This last aspect points to the link between violence and space: the avoidance of intentional shipwrecking (either by pirates or privateers) was necessarily connected to control over territories and routes.[21] However, it is unlikely that the ideology of rule over land and sea extended to any practical attempt by the Roman Empire to regulate the use of the Mediterranean.[22]

It is possible to define two problems in relation to the repression of maritime violence in the provinces. The first one is connected to the limited resources available to Roman authorities,[23] which meant that they acted to repress these

12 Parker 1992, 84.

13 Especially the development of trade routes; see Rougé 1966b, 343. For a general view, see Wilson 2011, 33–39; 54.

14 De Souza 1999, 205–213. However, the boast had some merit: Piracy did not become a serious problem again until late antiquity: see Moschetti 1983, 873–910.

15 Parker 1992, fig. 3.

16 De Souza 1999, 218–224.

17 Amm.Marc.14.7.5; D.18.1.70 (Lic.Ruf. 8 *Reg.*); D.18.1.4 (Pompon. 9 *ad Sab.*); D.18.1.5 (Paul. 5 *ad Sab.*); D.18.1.6 (Pompon. 9 *ad Sab.*). De Souza 1999, 204–224.

18 Strab.11.2.12 (referring to the Heniochoi).

19 Gupta 2007, 37–51.

20 O.Krok.41; 68; 87; 88; Plin.*HN*.6.26.101; Philostr.*VA*. 3.35. De Souza 1999, 207.

21 Vlassopoulos and Xydopoulos 2015, 9. Also chapter one, section 1.2.

22 De Souza 1999, 205.

23 Epictetus (*Disc*.3.13.9) observed that Roman emperors could do nothing to prevent ship-

events only on some occasions, perhaps only when Imperial interests were threatened, or an influential person made a complaint.[24] When referring to 'limited resources', we need to think about two types in particular: on the one hand, legal assets, and on the other hand, the effective number of magistrates and other subjects available to police the diverse regions composing the Roman Empire. On this last point, it seems that the concomitant growth of police forces in some areas curbed but did not eliminate the incidences of violence.[25]

Concerning legal resources, it is necessary to go back to the famous text of D.14.2.9 (Vol. Maec. *ex Lege Rhodia*), in which Caracalla denied protection to a shipwrecked citizen called Eudaimon and directed his case to the competence of the Rhodian sea law.[26] What this meant was that the emperor decided to limit his own jurisdiction over the sea, and that his decision was voluntary, with him choosing whether or not to respond to a query or hear a case.[27] It needs to be highlighted that in all periods Roman society tolerated—even embraced—a high (by our standards) level of violence. Under the emperors, much violence came from the ruler himself and his representatives. In this case, by cherry-picking whether to investigate the case or not, the emperor or his delegates in the provinces left not only Eudaimon, but also many other citizens, unprotected from the violence they suffered at sea, even if the ideology predicated by the Imperial propaganda was rather different.[28]

In practice, Roman law was thought to have been imposed by Rome in an effort to civilise the many and varied subject communities of the Roman Empire who still practised shipwrecking. This, indeed, was an important tool—both ideological and practical—in the Imperial project, the method par excellence by which a degree of unification could be achieved.[29] However, what cannot be forgotten when thinking about the Roman Empire is the historical imbrication of systems of conquest and control in the provinces.[30] The nature

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wrecks except to provide some protection and redress for merchants and travellers against the wreckers. Later on (400 CE), that seemed to be the situation for carriers being looted on their way to Rome to deliver goods for public supply; see CTh.13.5.29.

24 e.g. Millar 1981, 66–67; Hopwood 1983, 173; 182 n. 2; Braund 1993, 207; Nippel 1995, 100, 103, 113.

25 Kelly 2007, 158; Fuhrmann 2012, 49–52.

26 Already mentioned in chapter one, section 1.2. and chapter two, sections 2.1.1 and 2.2.2.

27 Tuori 2016, 108; 2018, 206; see also section 5.2.2 of this book.

28 Kelly 2007, 158; 172.

29 Czajkowski and Eckhardt 2018, 3.

30 Ando 2020b, 348–349.

and extent of Roman influence following the occupation of a territory needs to be understood not only forward in time, but also backwards.

That said, many provinces that became Roman had a long tradition of practising shipwrecking and piracy, which at some point was even strongly linked to the formation of their communal identity and power.[31] In addition, since the formation of the Empire implied a progressive conquest, while some of the provinces that were taken by the Romans may have tried to eradicate piracy within their boundaries, other neighbouring areas might have just kept on committing raids and plundering[32] these newly added Roman provinces.[33] In these cases, many attacks would not have been carried out solely as a way of obtaining booty, but also as a defensive act against piracy committed by other groups against them.[34] For example, Judea was widely known as an area where piracy was perpetrated before the Roman occupation of the province, as when Pompey attacked the area in 63 BCE.[35] Culham indicates that piracy was an intrinsic element in Judea's insurgency against Rome,[36] while Roth argues that a wave of piracy preceded any revolt against the Romans in Judea.[37] Even if such piracy did have an association with the insurgency, this activity existed before Pompey's attack and persisted afterwards. Indeed, Josephus notes that piracy was a problem when Vespasianus was in the region of Judea in 68 CE, indicating that pirates seriously threatened the shipments of grain carried along the coast of Phoenicia and Syria.[38] If pirates were still active in that region during the Roman Empire, this could mean either that they were not confronted by the

31 e.g. Cilicia and Crete, see Brulé 1978; Shaw 1997, 199–233; Avidov 1997, 5–55. For the case of the Roman take-over of the Polemonid kingdom of Pontos in 63 CE, see Tac.*Hist*.3.47–48 and De Souza 1999, 208–209. On the relation between violence, citizenship and politically organised community, see: Shaw 2000, 361–403, 2004, 326–374; Benton 2011, 239–240; Ando 2020d, 1–3.

32 Purcell 1995, 134, indicated that certain places were so poor that their inhabitants were reduced to dependence on the sea, which could have favoured their inclination for piracy and plunder. See Dua 2017, 178. Also, Dio Chrys.*Or*.7.31., which refers to the practice of plundering as a privilege only reserved for the citizens inhabiting an area and not foreigners.

33 See the case of the Chauci, who carried out raids in Gaul in the first century CE (Tac.*Ann*.11.18).

34 The Frisians attacked ships belonging to the Usipi, crewed by men who had deserted the Roman army in Scotland in 83 CE and sailed across the North Sea to the German coast, Tac.*Agr*.28; Cass.Dio.56.20.

35 Bellemore 1999, 102.

36 Culham 2011; also, De Souza 1999, 209.

37 Roth 1991, 424–425.

38 Joseph.*BJ*.2.9.2; 2.12.1; 3.9.2; 3.414–417.

local authorities strongly enough to eradicate them, or that this practice was strongly imbricated in the customs of the area, or perhaps both.

### 5.1.2 *Some Cases in Point*

Fragment 10 from the work *de naufragio* includes a text from Ulpian's first book of opinions, which generally refers to provincial law and practices.[39] It says the following:

> D.47.9.10 (Ulpian. 1 *Opin.*) *Ne piscatores nocte lumine ostenso fallant navigantes, quasi in portum aliquem delaturi, eoque modo in periculum naves et qui in eis sunt deducant sibique execrandam praedam parent, praesidis provinciae religiosa constantia efficiat.* (The dutiful perseverance of the provincial governor shall ensure that fishermen do not deceive sailors at night, by displaying a light, as if they were being guided towards some port, thereby leading the ship and its passengers into danger, and obtaining for themselves a damnable prize).

The text describes how the surveillance of the provincial guards should help to prevent local fishermen from instigating wrecks[40] by using lights to attract ships to the shore and wreck them there.[41] The false-light technique described by Ulpian was also explained by Aelianus,[42] who connects its practice to Euboea, a well-known pirate haunt in previous periods.[43] It is difficult to assess whether Ulpian was specifically referring to this area, but it is an example of the diversity of maritime cultural landscapes that existed in the Roman world, some of which might still have considered those practices as a way of life even after incorporation into the Empire.[44] We ought to consider that many of the towers built along provincial coasts were the shoreline terminal points of the

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39 See also chapter two, section 2.2.1.

40 Fishermen wrecking ships appear in literature from different periods, such as Hom. *Od.*10.81–133 and Petron.*Sat.*114.

41 There was one fishing technique that implied the use of lit torches at night, and even if it is unclear whether Ulpian was specifically referring to that activity, we know that it was employed in the provinces. See, Plin.*HN.*9.33; Hom.*Il.*21.22–24; Hes.*Sc.*209–215; Oppian. *Hal.*5.425–447, and Gell.*NA.*2.8. See also, Martínez Maganto 1992, 228; Bekker-Nielsen 2005, 88; Beltrame 2007; Marzano 2013, 35.

42 Gell.*NA.*2.8.

43 Concerning Eubea, see: Hdt.7.13; Dio Chrys.*Or.*2.7; Strab.17.3.20; Dem.*De Cor.*18.241; all talk about an area called Yonnesus, located between Thessaly and Euboea; Aeschin.*In Tim.*2.72; Thuc.6.4.5; and Atalante was fortified to help guard Euboea (Thuc.2.69).

44 Duncan 2011, 267–289; provides a model on how to assess the impact of local culture on the landscape.

local inland surveillance and control networks, not lighthouses or light towers built in an homogeneous way by the same authority.[45] That said, since these signal posts could take different shapes, it is not surpising that fishermen could trick sailors into believing that the light they shone came from one of these towers. In addition to the service provided by such towers and lighthouses, signalling with fires was a practice commonly used in antiquity as an aid to navigation, which underlines how this wrecking practice could confuse seafarers.[46]

One question here would be whether Ulpian was referring specifically to fishermen, or whether he mentioned them as a way of suggesting that all people living on the shores were possible shipwreckers.[47] Even if the traditional perception of fishermen was that they were poor (and many of them were),[48] some evidence seems to suggest that at the apex of the Empire, many fishermen were not in such need that they had to wreck others to survive.[49] However, the situation could have differed in different Mediterranean areas, and the fact that many regions based their economy on the land and not on the sea, could have forced many fishermen to opt for this as a way to survive.[50] Plundering appears as a recurrent theme in Imperial literature,[51] but fishermen could hardly be classified as pirates, as on most occasions they seem to have been more opportunistic scavengers than people ready to fight for the booty. Indeed, Petronius depicts the greediness of fishermen who, observing a wreck, rushed in their small boats to seize the plunder. However, when they saw that the ship still had people on board ready to defend their belongings, they changed their plans from plunder to rescue.[52]

Ulpian's first book of opinions was for the most part devoted to establishing a meticulous description of the fundamental duties of the *praeses provinciae*,[53]

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45 Christiansen 2014, 234; 2015, 68–69.

46 Corre 2004, 60, quoting the case of the Rhone river.

47 As these practices were attested in Eur.*Hel*.766–769; Eur.*IA*.198; Apollod.*Epit*.6.7–8.

48 Purcell 1995, 134; Mylona 2008, 67–74; Grainger 2021, 52, 54, 101–102. Some texts depict them as going from one villa to another, stealing fish from the *vivaria* of wealthy villa owners.

49 Corcoran 1963, 102; Marzano 2013, 39.

50 This phenomenon has been underlined for the case of Somali piracy by Dua 2017, 178: "to understand the transformation of fishermen into pirates requires an exploration of the long and complex interplay between sea and land and between fishing and pastoralis".

51 Sen.*Cont*.1.6–7; 7.1; Dio Chrys.*Or*.7.31.

52 Petron.*Sat*.114.

53 In this case, the fragment concretely belongs to the title '*de officio praetoris et praesidis*'; see: Lenel.*Pal.2*, 1002.

the individuals who judged these sorts of activities locally.[54] The mention of *religiosa constantia efficiat* is reminiscent of the phrasing of other Imperial constitutions (concretely, *mandata*) from the Severan period.[55] Through the *mandata principis*, the provincial governors were charged with the suppression of *latrones, sacrilegii, plagiarii*, and *fures*.[56] However, these mandates were not limited to imparting the generic precept of keeping the province peaceful and calm, but also generally introduced some nuances about the jurisdictional and disciplinary activity of the *praeses*. That said, the classification of Imperial constitutions does not imply that the functions of these legal tools could be mixed. Actually, Cuiacius classified the fragment as a rescript, and indeed the text seems to correspond to one in which the emperor or a secretary acting in his name, was replying to a citizen indicating that the Imperial magistrates were taking care of the safety of navigation along provincial coasts, that were theatened by locals.[57] At any rate, the fragment reflects a fragmented maritime cultural landscape, both legally and politically. On the one hand, there is the legal landscape where Roman authorities should act to prevent locals from wrecking ships or looting them, following the official rulings. On the other hand, there are the local maritime cultural landscapes, where these local practices survived as a common activity of fishermen and other plunderers.

Another way to avoid suffering the effects of a pirate attack or a wreck would be simply not to engage in a sea journey, or at least not to do so when one had responsibilities with respect to others. And even if shipwrecks or pirate attacks were considered as *force majeure*, there are sources that mention the possibility of anticipating an attack on a ship.[58] Therefore, not paying attention to the possible risks could be interpreted as being the fault of someone who did not respect the due diligence of their obligations.[59] This was the case described by Gaius in his ninth book on the provincial edict:

> D.13.6.18pr. (Gaius 9 *ad Ed. Prov.*) *Quod autem de latronibus et piratis et naufragio diximus, ita scilicet accipiemus, si in hoc commodata sit alicui res, ut eam rem peregre secum ferat: alioquin si cui ideo argentum commodaverim, quod is amicos ad cenam invitaturum se diceret, et id pere-*

54 Roselaar 2016, 130.

55 Santalucia 1971, 25, 143, referring to C.5.51.3; C.5.63.1 and C.7.58.4. Santalucia also believed that it corresponded to an Imperial constitution that has not been directly preserved.

56 Dell'Oro 1960, 162–163.

57 Cuiacius 1596, *ad tit.* VI lib. XXXVIII *Digesti.*

58 P.Laur.I 6; P.Köln.iii 147; Jakab 2008, 1–16; Alonso 2012, 47–53. Seasonality could also be a factor in avoiding pirate attacks, see Beresford 2012, 237–257.

59 See chapter four, section 4.1.

> *gre secum portaverit, sine ulla dubitatione etiam piratarum et latronum et naufragii casum praestare debet.* (What is said about robbers, pirates, and shipwreck is to be understood as applying only to the case in which something is lent to someone to take to distant places. Otherwise, if I lent to someone silver tableware, because he said that he had friends invited for dinner, and he took these on a sea trip, he would undoubtedly be liable also in the case of pirates, thieves, and shipwreck).

It was obviously Gaius' intention to describe the limits and features of liability in a loan; and in that sense, he probably listed the cases of piracy and shipwreck so as to name situations of *force majeure*, when the responsibility of the borrower was in doubt. In such cases, the situation would be a *casus mixtus*, since the borrower would have put the loaned object at risk.[60] However, Gaius was writing his book on the provincial edict, and was considered to have been living in the provinces himself.[61] Perhaps his provincial context had an impact on his writing, underlining that shipwrecking and piracy were events that often happened in the provinces. Moreover, Gaius used the same example to reiterate the importance of taking due diligence when one is bound by an obligation, in this case, a loan.[62] This text, as well as the following D.4.9.3.1 (Ulpian. 14 *ad Ed.*) could also be considered in the light of loss wrongfully caused, as highlighted in chapter four. However, these have been included in this section in order to highlight the dangers of piracy and wrecking practices still in force during the Roman Empire.

The jurists discussed numerous situations in which shipwrecks or pirates, considered as *force majeure*, influenced the extent of the liability of one of the parties in an agreement. Besides the abovementioned case, another well-known fragment is a text by Ulpian in which he refers to *receptum nautarum*:

> D. 4.9.3.1 (Ulpian. 14 *ad Ed.*) [...] *at hoc edicto omnimodo qui receperit tenetur, etiam si sine culpa eius res periit vel damnum datum est, nisi si quid damno fatali contingit. Inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem ei dari.* (By this edict, one who receives property is liable in any circumstances, even if it is lost or the damage is caused without his fault, unless this happens through an

60 Tarwacka 2018, 307–308.

61 Mommsen 1887–1888, 221 thought that Gaius' comment on the provincial edict was based on the edict of the province where he was living, which could have been proconsular Asia, according to Honoré 1962a, 79–90.

62 D.44.7.1.4 (Gaius 2 *Aur.*).

> unavoidable accident. Hence, Labeo writes that if anything is lost through shipwreck or an attack by pirates, it is not unfair that a defence be given to the carrier).

*Receptum nautarum* implied an agreement, added to the main contract of lease, by which a carrier assumed control of goods for transportation and safekeeping until they arrived at their destination. Thus, by virtue of the *receptum nautarum*, the carrier was liable for anything that happened to the cargo during transport, except in cases of pirate attack or shipwreck, as noted by Labeo (first century BCE).[63] Therefore, this text gathers the findings of two jurists from different periods: On the one hand, Ulpian, from the Severan period, and on the other hand, Labeo, from the Augustan era (first century CE). They both indicate that, even considering the grounds of a praetorian edict where one is responsible for a cargo loaded onto a ship, one would not be liable in the case of a wreck or attack by pirates. We may wonder if they only quote these events as examples of *force majeure*, or as plausible hazards to be faced at sea. And in that sense, I should say that both elements could have influenced the jurists' phrasing, since both were consistently present during the Roman Empire.

Another hypothesis about this text would be that before Labeo, a pirate attack may not have been considered as an exemption from liability because piracy was so widespread that it would have been antieconomic for the cargo owners to have to shoulder the burden of every pirate attack, and to avoid these would have been part of the expertise expected from a skilled carrier. In contrast, during the high Empire, piracy was supposed to have been a minor risk, mostly practised in the provinces. Thus, to suffer a pirate attack during that period would have been considered accidental or the product of the carrier's bad luck.

The final fragment included in this section belongs to the Digest title corresponding to the *Lex Rhodia* on jettison, but which in fact is part of Paul's commentary on the contract of lease:[64]

> D.14.2.2.3 (Ulpian. 34 *ad Ed.*) *Si navis a piratis redempta sit, Servius Ofilius Labeo omnes conferre debere aiunt: quod vero praedones abstulerint, eum perdere cuius fuerint, nec conferendum ei, qui suas merces redemerit*. (If a ship is ransomed by pirates, both Servius Ofilius and Labeo indicate that everyone should contribute to this loss. But the owners must bear the

63 De Robertis 1952, 85–86; Ménager 1960, 385–411; Robaye 1987, 72.

64 Lenel. *Pal* 2. 1038–1039.

> loss of any property stolen by brigands, and anyone who ransoms his own goods has no claim to a contribution).

This is another text that includes the opinion of jurists from different periods: Paul (third century CE), Labeo (first century CE), and Servius and Ofilius (first century BCE). The mention of the dangers of shipwrecking in the texts of these three jurists is a sign of the practice's persistence through the ages. In this passage, three cases are analysed: the attack of a ship from the hands of the pirates, the seizure of property, and the ransoming of goods by only one of the merchants involved, turning against their colleagues. These three cases are compared to the treatment of jettison, because the *ratio legis* of the fragment is the same, inquiring as to how the parties on a boat are would settle if one merchant suffered a loss to save all the others. In sum, according to the text the only way to establish a settlement is to act in the common interest.[65]

All things considered, there were different ways to avoid being shipwrecked, from defending oneself,[66] to avoiding taking risks when undertaking an obligation. On top of that, there was (supposedly) an institutional framework that aimed at preventing and repressing these sorts of behaviours. However, this framework was often insufficient or inefficient, forcing people to find their own ways of avoiding such violent situations.[67] In that sense, we need to think of a multi-layered maritime cultural landscape: on the one hand, there is the landscape depicted by the Imperial propaganda and the regulations in force, that is, the official landscape promoted by the Roman Empire where the peace was brought to the provinces and shipwrecking was banned. On the other hand, there was the landscape perceived by the people who were conquered and what they considered 'law' (in this case, referring to *ius naufragii*), which was rooted in their own customs and practices.[68]

## 5.2 Intentional Wreckage

The previous sections have introduced the topic of intentional harm by referring to shipwrecks caused by ill-intentioned privateers or pirates and their

65 Aubert 2007, 163; Tarwacka 2019, 86–88.

66 Petron.*Sat*.114; Macrob.*Sat*.3.6.11.

67 A similar phenomenon occurred with the institutional failure to enforce contracts, which left traders on their own in finding ways to create trust and protect themselves. See Terpstra 2013; 2019.

68 Ferrarini 1963, 91, quoting examples from different historical contexts.

continued activity during the Roman Empire. This section will provide further insights into these types of misconducts, focusing on related topics such as boarding a ship and how to legally address this event. It will also focus on the legal qualification of ship wreckers during the Imperial age, which in turn reflects the social reality of the time when these events took place. In addition, the final part will address the converse of being shipwrecked by someone else, that is, wrecking one's own ship.

### 5.2.1 *Boarding and Taking a Ship* (De Nave Expugnata)

The act of storming a ship with evil intention constitutes the typical scenario when describing a pirate attack.[69] However, there is scarce archaeological evidence to document this practice, which sometimes can only be evinced indirectly. A possible example of evidence of an attack carried out against a vessel is the Kyrénia (310–300 BCE), a small boat which was found in the north of Cyprus, bearing spearheads embedded in the outer part of the keel.[70] The armed conflict that characterised the time of the shipwreck (the wars among the *diadochi*) makes one wonder if the attack was carried out by pirates or privateers taking advantage of the situation. Aside from this case, the fact that other shipwrecks were carrying arms could perhaps suggest the need to protect the cargoes being transported against attacks, even if this is not the only possible justification.[71] Another piece of indirect evidence could be the Digest's reference to 'people who are given a position of authority on a ship on account of security' (*ναυφύλακες*).[72] Unfortunately, not much is known about these individuals,[73] who in Latin are called *custodes navium* (armed people in charge of protecting the cargo).[74] It is possible to find mentions of people with the same role in the context of Indo-Roman trade.[75]

In the third century CE, Ulpian's comment on the *edictum de naufragio* does not refer in any text to people protecting the ship, but when describing 'storm-

69 e.g. Heliod.*Aeth.*5.33.22–28. Otherwise, boarding without evil intent is described in D.9.2.29.2 and § 4 (Ulpian. 18 *ad Ed.*). See also chapter four, section 4.1.2.

70 Pomey and Gianfrotta 1997, 168–169; Katzev 2007, 286–299.

71 D.48.6.1 (Marcian. 14 *Inst.*) refers to 'arms which are customary to travel by sea'.

72 D.4.9.1.3 (Ulpian. 14 *ad Ed.*).

73 Partly because the attention placed on this text has focused mainly on the mention of *cheirembolon*. For example, D'Ors 1948–1949, 254–259; De Marco 1999; Vélissaropoulos-Karakostas 2001, 209; Purpura 2014, 127–152.

74 Amm.Marc.15.2.2–3; Plin.*HN.*6.26.101; Polyb.2.4–5; Strab.89.5.2; Vélissaropoulos 1980, 82–86; Purpura 2014, 130.

75 De Romanis 1997, 104; Tomber 2008, 27.

ing', seems to imply that the people on the ship could defend themselves and even steal from their assailants:[76]

> D.47.9.3.1 (Ulpian. 56 *ad Ed.*) *Deinde ait praetor 'rate navi expugnata'. Expugnare videtur, qui in ipso quasi proelio et pugna adversus navem et ratem aliquid rapit, sive expugnet sive praedonibus expugnantibus rapiat.* (Then the praetor says: 'On a raft or ship taken by storm'. It would be regarded as storming if someone seized something in the actual battle or fight with the raft or ship, whether they themselves are an attacker or seized the thing from the pirates).

In this text, the Severan jurist indicates that the term refers to a person who steals things from ships, whether being the actual assailant or using the confusion while brigands are attacking. Ulpian's description of *expugnare* regarding the *edictum de naufragio* is broader than what was conceived of in a later statute, the *Lex Iulia de vi publica* (between 19 and 16 BCE), as described in D.48.6.3.6 (Marcian. 14 *Inst.*).[77] The fragment refers to those subjects who would expel the owner from their house, land, or ship, with the help of an armed gang. Marcian, who wrote this fragment after 217 CE, used the verbs *deiecere* (remove or throw away) and *expugnare* (assault, storm), only referring to the conduct of the assailants, but leaving aside the behaviour of the subjects who took advantage of the violence of the situation to steal. The latter is justified by the fact that Marcian was commenting on *vis publica*, which was labelled in legal terms as an active behaviour committed by armed subjects.[78] Indeed, in another fragment corresponding to the same book of Marcian but this time referring to the *Lex Iulia de vi privata*, the jurist refers to shipwrecks but focuses on robbery:

> D.48.7.1.1 (Marcian. 14 *Inst.*) *Eadem poena adficiuntur, qui ad poenam legis Iuliae de vi privata rediguntur, et si quis ex naufragio dolo malo quid rapuerit.* (The same penalty will be imposed on those who commit the behaviours assumed by the *Lex Iulia de vi privatae*, and on anyone who steals something from a shipwreck with evil intent).

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76 As happened in the cases described in Petron.*Sat.*114 and Macrob.*Sat.*3.6.11.

77 *Eadem lege tenetur, qui hominibus armatis possessorem domo agrove suo aut navi sua deiecerit expugnaverit.* (Individuals who will attack or expel someone with armed men from their home, farm or ship will be punished by this statute).

78 Vacca 1965, 557; Longo 1970, 453 (also following the scope of the *Lex Plautia*); Tarwacka 2009a, 103.

Therefore, here we need to establish a chronological differentiation to understand what *nave expugnata* means in each fragment. The § 3.1 from the *edictum de naufragio* belongs to the Republican period and refers to a private *delicta* targeting theft, even if it was committed by a group.[79] The sketch I have just given is based on the late Republican situation, but the facts change thereafter. The general trend of the Imperial period is that *vis publica* targeted acts against the state, such as riot and sedition, while *vis privata* involved non-political forms including gathering a mob or theft.[80] Therefore, *expugnare navis* following the original text of the *edictum de naufragio* mostly refers to theft, and in the high Empire, the *Lex Iulia de vi publica* and *privata* offered alternative solutions for the cases of violent attack or theft. However, in the following § 3.2, Ulpian quotes Labeo (late first century BCE to early first century CE), and refers to theft after the attack has happened:

> D.47.9.3.2 (Ulpian. 56 *ad Ed.*) *Labeo scribit aequum fuisse, ut, sive de domo sive in villa expugnatis aliquid rapiatur, huic edicto locus sit: nec enim minus in mari quam in villa per latrunculos inquietamur vel infestari possumus* (Labeo writes that it would be right that this edict should apply if something is seized from a town or country house which has been stormed; for both at sea and in a house, we can be disturbed or bothered by brigands).

Therefore, and echoing his *laudatio edicti* from § 1.1, the cases of theft related to the event of the storming of a ship were targeted by the *edictum de naufragio* in Labeo's context (end of first century BCE–start of first century CE) but were addressed by a *Lex de vi* shortly thereafter (17 CE).[81] More explicitly, § 6 from the title provides a direct definition of the matter of *nave expugnata* that concerns the damage committed to the ship, by saying:

> D.47.9.6 (Callistrat. 1 *Ed. Mon.*) *Expugnatur navis, cum spoliatur aut mergitur aut dissolvitur aut pertunditur aut funes eius praeciduntur aut vela conscinduntur aut ancorae involantur de mare* (A ship is stormed when it is despoiled, sunk, broken up, perforated or its ropes are cut through or its sails are slashed, or its anchors seized up from the sea).

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79 This is similar to the case of the *edictum de Lucullo* from the same context. See chapter one, section 1.3 and table three from the appendix.

80 Riggsby 2016, 317–318.

81 See chapter two, section 2.3.1. On the *Lex de vi*, see Cloud 1988, 579–595; 1989, 427–465.

The fragment corresponds to the first book of Callistratus on the *edictum monitorium*, which is dated to around the end of the second century CE[82] and consists of a summary of the provincial edict.[83] The latter could be an indication that shipwrecking was more common in the provinces, but also that the *edictum de naufragio* may have been a provincial disposition, given the number of provisions related to the provinces and dealing with shipwrecks.[84] The Callistratus fragment was commenting on *vadimonia* and according to Lenel, it refers to promises to appear in trials celebrated in front of *recuperatores*.[85] I have previously referred to this kind of judges, who during the Republic were in charge of trials involving citizens and foreigners.[86] The latter could obviously be one of the situations justifying Callistratus providing a definition of *nave expugnata*, since navigation generally involved people from different backgrounds, who could be unaware of the meaning of that term in Roman law.[87] However, I wonder if when commenting on oaths, Callistratus was not only referring to the cases when a ship has been attacked and witnesses must appear in court to testify,[88] but also to the cases when these witnesses could not appear in court because they suffered a shipwreck when their ship was stormed.[89]

In any case, Callistratus indicated that a ship was to be considered stormed when one or several of its elements were cut, perforated, broken up or seized. In his fragment, he specifically mentions parts without which navigation could not be performed (sail, ropes, anchors). It is uncertain if he was referring to these elements using the technical language employed by jurists such as Labeo,[90] Iavolenus[91] or Paul,[92] who differentiated between *partes, membra* and *instrumentum* from the ship. The first terms (*partes, membra*) refer to elements

82 Bonini 1964, 16–20, indicates that these books could not be exactly dated. However, following Honoré 1962a, 202 and his theory on the work methods of the Severan jurists, this book was written before his book of *quaestiones* (written under Caracalla).

83 Kotz-Dobrž 1918, 227; Schulz 1946, 193–201; Martini 1969, 265–267; Puliatti 1992, 27.

84 See chapter two, section 2.2.1 and 2.2.2.

85 Lenel.*Pal*.1.94 n. 6.

86 Chapter two, section 2.3.2.

87 On the character of Callistratus' definitions, see Martini 1966, 265–267 and Puliatti 1992, 27.

88 As happened with the inquiries concerning public supply and wrecks, see: CTh.13.9.1 (= C.11.6.2); CTh.13.9.4.1.

89 As mentioned in D.2.12.3pr. (Ulpian. 2 *ad Ed.*) and D.2.13.6.9 (Ulpian. 4 *ad Ed.*); see also chapter two, section 2.3.1.

90 D.33.7.29 (Lab. 1 *Pith.*).

91 D.50.16.242pr. (Iavolen. 2 *ex Post. Labeo*).

92 D.21.2.44 (Alfen. 2 *Dig a Paul. Epit.*).

identified as belonging to the ship because they constituted parts associated with the main structure (*coniuncta*), while the *instrumenta* are all of the elements serving a main object, in this case, the ship.[93] However, the way that Callistratus mentions the parts seems to correspond to the notion of *armamenta*, which relates to the whole of the ship's equipment, in a non-technical sense. This assertion is based on a reading of the fragment D.14.2.6 (Iulian. 86 *Dig.*), regarding the topic of jettison or general average.

> D.14.2.6 (Iulian. 86 *Dig.*) *Navis adversa tempestate depressa ictu fulminis deustis armamentis et arbore et antemna hipponem delata est ibique tumultuariis armamentis ad praesens comparatis ostiam navigavit et onus integrum pertulit: quaesitum est, an hi, quorum onus fuit, nautae pro damno conferre debeant. Respondit non debere: hic enim sumptus instruendae magis navis, quam conservandarum mercium gratia factus est.* (A ship being driven by an adverse storm, and the rigging, the mast, and the sail having been destroyed by lightning, was taken to Hippo and provisional rigging was bought there; it sailed to Ostia and carried the load intact. It was asked, should those to whom the cargo belonged contribute to the sailor for the damage? He replied that they should not, because this expense was made more to assemble the ship than to preserve the goods).

The fragment reports a case in which a ship was hit by lightning during a storm and lost *armamenta*, mast and sail. The vessel was repaired in Africa (Hippo), with temporary equipment (*tumultuariis armamentis*) and finally reached Ostia with the load intact. This text has led some authors to think that the term *armamenta*, even if could be combined with the notion of *instrumenta*, in a practical way, using common language,[94] to all of the elements of the ship that were necessary for navigation.[95] The practical approach from Callistratus is not surprising, because the fragments from Labeo, Iavolenus, and Paul are commenting on legacies or sale contracts, legal operations for which the inventory of the parts from a ship is quite important.[96] In contrast, Callistratus is describing an unfortunate event by which someone was prevented from performing a duty.

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93 Richichi 2001, 17–23.

94 Therefore, not referring to the technical juridical views about these elements. See Manara 1933, 385–392.

95 Dell'Oro 1963b, 134.

96 Grosso 1941, 374–383; Astolfi 1969, 60–75.

### 5.2.2 *Land and Sea Banditry: Legal Analogies and Their Significance*

When reading § 3.1 and § 3.2 from the title *de naufragio*, one should remark on the fact that these texts mention *praedones* and *latrunculi*. Both terms are used by the jurists to refer to groups that did not constitute proper enemies or *hostes*, and therefore it was impossible to officially declare a conflict against them according to wartime law.[97] The word *latro* means a common criminal or robber, whereas the term *praedo* was generally used to refer to bandits, but often also had a narrower meaning and referred to pirates.[98] The use of these concepts had legal connotations concerning the remedies that the Romans utilised to fight against piracy and banditry.

As has been indicated previously,[99] the pirates' abuses in the first century BCE led to Cicero's famous quote in which he classified them as 'enemies of all mankind',[100] and not enemies of only the Roman people.[101] The use of the term 'pirate' by Cicero in his assertion is key to indicating the latent crisis of the moment and the connotation of the word. For example, the term 'pirate' is mentioned in the *Lex Gabinia de piratis persequendis* (100 BCE), but that law was set in a Greek context. Indeed, De Souza[102] criticises Crawford's[103] translation of the Greek πειρατής to the Latin 'pirate', indicating that the word was first used in a Latin context by Cicero, and that the correct translation at that time would be *praedo*. Cicero's qualification legally justified that combating pirates was an obligation of all countries, who could take the actions that they considered appropriate, even crossing borders and jurisdictions.[104] The latter was especially needed because pirates did not limit themselves to brigandage on the seas.[105] That, together with the need to consider the legal context surrounding these practices, justified the need to clarify the definition of piracy as 'armed robbery involving the use of ships'.[106]

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97 D.49.15.24 (Ulpian. 1 *Inst.*); Ortu 2012, 58.

98 Tarwacka 2009a, 19–20, quoting Plaut. *Rud.*40. Indeed, several legal texts seem to treat the terms as interchangeable; see, for example: D.49.15.24 (Ulpian. 1 *Inst.*) or D.50.16.112 (Pompon. 2 *ad Q. Muc.*).

99 See chapter one, section 1.3.

100 Cic.*Off.*3.107 '*pirata non est ex perduellium numero definitus, sed communis hostis omnium*'.

101 Which would have implied a series of procedures in terms of declaring war according to the *ius fetialis*, such as the *iusiurandum* as indicated in Cic.*Off.*3.108. See also, Catalano 1964, 373–383; Loreto 2001, 69–73; Bederman 2001, 55–57.

102 De Souza 1999, 111 n. 79.

103 Crawford 1996, 231–270.

104 Tarwacka 2009b, 68–72; 2012, 70; 73; 2018, 302, 309.

105 Plut.*Pomp.*24.

106 De Souza 1995, 180.

As has been indicated previously, the danger of piracy was reduced to a local level during the Empire (see section 5.1.1), and as a result, Roman law from that period made no distinction between piracy and robbers on the land.[107] What does this change imply in terms of legal jurisdiction and the links established between violence and space? In the classical age, the whole world was Roman, so there was no point in maintaining the idea of the international prosecution of piracy.[108] Notwithstanding that, brigands or *praedones* still committed violent acts at sea as well as on land,[109] and the legal boundaries corresponding to the legal governance of the land via *ius civile*, in contrast with the sea as ruled by *ius gentium*, were supposedly still considered as such.[110] Therefore, the problem here was crossing not the borders and frontiers of non-Roman lands, but the borders that constituted the seas regarding the civil law of the Romans. An example of these legal boundaries can be seen in the fragment D.14.2.9 (Vol. Maec. *ex Lege Rhodia*),[111] in which Antoninus Pius restricted his jurisdiction over the sea, redirecting the matter to the governance of the *Lex Rhodia*.[112] However, as has been rightly pointed out by Tuori, Antoninus' Pius' answer to the poor Eudaimon was a self-imposed restriction, and not a real legal and spatial limitation.[113]

That said, how can we read the issues concerning the lack of legal distinction between pirates and land robbers regarding the spatial boundaries of Roman law? These questions need to be understood in terms of the *imperium* of the Roman emperor and the Roman magistrates who acted on his behalf. For the case of the emperor, *imperium*, or more concretely, *imperium maius*, was not conceptualised as a territorial power *per se*, but rather referred to the influence (power) that it carried.[114] As the Empire grew, Romanity and Roman rule ceased to be limited to Romans and their provinces and began to be replaced

107 Vlassopoulos 2015, 9; Tarwacka 2018, 296.

108 This principle was interpreted differently by Grotius to help his own interests. See Grotius 2009, 26–27; Straumann 2015, 130–165; Tuori 2018, 214.

109 Sen.*Cont*.1.2.8; Flor.1.41.

110 D.1.8.4pr.–1; 1.8.2pr.–1 (Marcian. 3 *Inst*.).

111 See chapter two, section 2.1.1.

112 See De Robertis 1952, 164–174 and Marotta 1988, 74–77, on the expression *κύριον εἶναι*, which has, in other contexts as well, a significance that can provide the idea of a juridical authority. See also, Minale 2022.

113 Tuori 2018, 215.

114 See Richardson 1991, 2–9; 2010, 22–23; Ando 2020a, 108, referring to the freedom enjoyed by the subjects holding that *imperium*. There is a different discourse for the magistracies, for which their *imperium* was confined to spatial borders (e.g. *Praefectus urbi* to Rome, *proconsul* to a province).

by ideas of a universal Empire, led by an all-powerful emperor.[115] The Empire and its extent were based on the power of Rome, rather than any defined physical limit. The latter was well exemplified in the administrative topography of the Empire, with the custom house as a key symbol of control over land and sea through an activity which has been labelled as 'taxing the sea'.[116] Therefore, the space of politics was suddenly enlarged, so that official decisions could be effectively made wheresoever crime, or strife, was carried out.[117]

Going back to the points made in the first section of this chapter, an important element of Imperial ideology was the notion that Roman power guaranteed *pax*, which represented freedom from war and violent crime.[118] As a consequence, it was commonly said that the *princeps* was responsible for the elimination of piracy and land-based brigandage,[119] thanks to his universal authority in both civil and military affairs. In matters such as the sea, this authority could have been considered limited, given the different legal nature of the sea and considering the answer of Pius to Eudaimon. Even if the decision of the emperor in this case was self-imposed, we can understand that these limitations regarding the sea may have affected the decisions of the magistrates who had *imperium* but acted on behalf of the emperor.

Given that plundering was an ongoing activity during the Empire and considering the importance of the sea for the Empire's functioning, these limitations were quite problematic. That being so, how could one provide a practical solution? One possible answer would be by removing legal boundaries through legal analogies. In that sense, when Ulpian referred to *praedones* and *latrunculos in* § 3.1 and § 3.2, he was extending the jurisdictional limits of the land to also encompass the sea. His could be understood as a very pragmatic (empirical)[120] reading of the edict, adapted to the needs of his time. Moreover, Ulpian was not the first to use that analogy in a text regarding shipwrecks, as Callistratus, in § 7 of the title *de naufragio*, includes a rescript from Hadrian which applies that analogy:

> D.47.9.7. (Callistrat. 2 *Quaest.*) *Ne quid ex naufragiis diripiatur vel quis extraneus interveniat colligendis eis, multifariam prospectum est. Nam et divus Hadrianus edicto praecepit, ut hi, qui iuxta litora maris possident,*

115 Tuori 2016, 133–134; 216–217; 2018, 204.
116 Purcell 2017a, 329–333.
117 Ando 2019b, 175–176; 187–188.
118 Yannakopulos 2003, 875–878.
119 Kelly 2007, 158.
120 Honoré 1982, 96.

> *scirent, si quando navis vel inficta vel fracta intra fines agri cuiusque fuerit, ne naufragia diripiant, in ipsos iudicia praesides his, qui res suas direptas queruntur, reddituros, ut quidquid probaverint ademptum sibi naufragio, id a possessoribus recipiant. De his autem, quos diripuisse probatum sit, praesidem ut de latronibus gravem sententiam dicere* [...] (A wide variety of provisions are brought so that nothing should be looted from wrecks or so that no third party should interfere with collecting them. For the deified Hadrian established in an edict that those holding property near the shore should know that if a ship is dashed against or broken up within the boundaries of their lands, they are not to despoil the wreck, or the governors will grant actions against them to those complaining that their property has been seized, so that if anything is proved to have been taken from the wreck, it may be recovered from the landholder. However, in the case of those proven to have looted, the governor is to inflict a grave penalty as on bandits) [...].

The rescript was directed at the owners of coastal terrains. On the basis of this, people who lost their belongings and later found them and were able to provide evidence that they were stolen from a shipwreck could recover them from the possessors. At the same time, the governors pronounced severe sentences against those who were proven guilty of this as if against bandits, to be understood here as pirates.[121] This rescript could be an example of the idealised conception of Hadrian as 'the legal emperor',[122] who in this case was not only protecting the victims of a shipwreck, but also providing legal remedies that could be handled by any provincial magistrate.

While either compiling earlier Imperial decisions or commenting on previous edicts,[123] Callistratus and Ulpian[124] were jurists working on topics that revolve around Imperial law. So, by extending the jurisdictional limitations stemming from the ancient dichotomy *ius gentium–ius civile*, they were probably basing this use of analogy on the concept of the Imperial legitimacy of the all-powerful emperor.[125] In that way, any magistrate, or even the emperor,

121 The punishment is also referred to in another text from Callistratus, see: D.48.19.28.15 (Callistrat. 6 *Cogn.*).

122 Tuori 2016, 239–240.

123 Generally, Roman jurists based their analogies on the use of precedents, see Ando 2015c, 114–115.

124 Honoré 1962a, 196.

125 On the extension of the limits of *ius gentium*, see Behrends 2006, 512–513.

could apply the solutions provided by civil legal remedies such as the *edictum de naufragio*, avoiding the alleged boundaries existing between land and sea. The latter does not imply, however, that all issues found their solution thanks to the use of that analogy; unfortunately, the punishment capacity of the Roman Imperial authorities was still imperfect and limited.[126] Notwithstanding that, these two fragments are good examples of the use of that analogy through Imperial adjudication and legal interpretation, but they are not the only ones. Another fragment from the same title *de naufragio*, to which the next section is dedicated, witnesses an earlier example of this practice.

### 5.2.3 *Shipwrecking and Its Parallelisms with the Activities of Bandits, Murderers and Poisoners* (*De Sicariis et Veneficiis*)

The title of this section is based on the second part of § 3.8 of the title *de naufragio*:

> D.47.9.3.8 (Ulpian. 56 *ad Ed.*) […] *Item alio senatus consulto cavetur eos, quorum fraude aut consilio naufragi suppressi per vim fuissent, ne navi vel ibi periclitantibus opitulentur, legis Corneliae, quae de sicariis lata est, poenis adficiendos: eos autem, qui quid ex miserrima naufragorum fortuna rapuissent lucrative fuissent dolo malo, in quantum edicto praetoris actio daretur, tantum et fisco dare debere.* ([…] Likewise, another *senatus consultum* provides that those by whose malice or advice a wreck is caused, so that no help may reach the ship or those in peril thereon, shall be subject to the penalties ordained in the *Lex Cornelia de sicariis*; but those who seize anything through the miserable plight of the shipwrecked and are designedly enriched will also have to give to the Imperial treasury as much as the amount for which an action under the praetor's edict will be taken against them).

The text refers to a *senatus consultum* (SC) of unknown date (probably from the Claudian era, like the previous SC quoted in the fragment),[127] by which whoever caused a wreck would be punished by the penalties from the *Lex Cornelia de sicariis*.[128] This *lex* was adopted at the request of Sulla in 81 BCE and established a *quaestio perpetua* to punish manslaughter in its different

126 See section 5.1.1.

127 Balzarini 1969a, 214 n. 85; Höbenreich 1988, 96 n. 74; Purpura 1995, 473; Giuffrè 1998, 57; Tarwacka 2009a, 107; Buongiorno 2010, 370, 422 n. 32.

128 See also D.48.6.3.5 and § 6 (Marcian. 14 *Inst.*).

forms.[129] Through legal interpretation,[130] this SC condemned those who concealed a shipwreck as well as those who used violence against the shipwrecked to the same punishment as their equivalent land-based murderers.[131] In addition, individuals that stole something from a shipwreck had to pay to the *fiscus* an amount based on the *edictum de naufragio* (during the first year a quarter of the value, and after that the whole value of the thing stolen).[132]

For his part, Manfredini questioned whether *naufragi suppressi per vim fuissent* in the fragment referred to the provocation of a wreck, or to the harm caused to the shipwrecked people.[133] One of the reasons for his doubt is the fact that Mommsen vacillated between both versions when working on the manuscripts for the Digest's *editio maior*, and therefore opted for abbreviating it to *naufragi*.[134] In addition, Manfredini proposes that *supprimere* could mean to hide, and could refer to attacking a ship and kidnapping the people on board, and then hiding them in a prison or *ergastula* for later sale as slaves.[135] However, this interpretation is not very convincing, since it seems to be based on the situation during the early Republic, when *ius naufragii* was still in use in several areas of the Mediterranean.[136] Instead, several texts evidence that the probable interpretation of *supprimere* in this context was 'to sink':

> D.48.8.3.4 (Marcian. 14 *Inst.*) *Item is, cuius familia sciente eo apiscendae reciperandae possessionis causa arma sumpserit: item qui auctor seditionis fuerit: et qui naufragium suppresserit: et qui falsa indicia confessus fuerit confitendave curaverit, quo quis innocens circumveniretur: et qui hominem libidinis vel promercii causa castraverit, ex senatus consulto poena legis Corneliae punitur*. (Again, he is liable whose *familia*, with his knowledge, takes up arms with the intention of acquiring or recovering possession; also, he who instigates a sedition; and he who conceals a shipwreck; and he who produces, or is responsible for the production of false evidence for the entrapment of an innocent person; again, anyone who castrates a man for lust or for gain is by *SC* subject to the penalty of the *Lex Cornelia*).

129 D.48.8.1pr. (Marc 14 *Inst.*); Coll.1.3.1; Rotondi 1966, 356–357; Cloud 1969, 264–265; Ferrary 1996, 749–753.

130 Santalucia 1994, 124–126. Other examples of this practice are D.47.13.2 (Macer. 1 *Publ. Iud.*); D.48.7.6 (Modest. 8 *Reg.*); *Coll.*8.7.1.

131 Being a capital penalty such as death or *deportatio*, see: D.48.8.3.5 (Marcian. 14 *Inst.*).

132 D.47.9.1pr. (Ulpian. 56 *ad Ed.*).

133 Manfredini 1984, 2209–2225.

134 Mommsen 1868–1870, *ad* D.47.9.3.8 (Ulpian. 56 *ad Ed.*).

135 Manfredini 1984, 2220–2224.

136 Purpura 1985a, 303; 1995, 474–475.

In this text, a SC governing issues related to shipwrecks is also quoted by Marcian, indicating that whoever sank a ship would be subject to the penalties of the *Lex Cornelia*. The *Lex Cornelia's* punishment for the provocation of shipwrecks was included in both the *libri basilicorum*,[137] and the *Collatio*.[138] The latter highlights that Mommsen's hesitations when working on the Digest were due to an error in the manuscript tradition, and that the original provision addressed the provocation of a shipwreck and not an attack on the shipwrecked. However, the possible result of causing a shipwreck and preventing help from reaching the vessel would have had an impact on both the ship and its passengers. Another argument would be that the fragment from the PS containing the text from the *edictum de naufragio* referred to *supprimere*.[139] That inclusion indicated that the *edictum de naufragio* originally referred to *supprimere naufragium* (and not *naufragos*), and Ulpian, who is the only jurist to have devoted a comment to that edict, introduced in his comment a SC which punished the causing of a wreck.

With the enactment of the *Lex Cornelia* in 81 BCE, all forms of homicide committed by armed gangs gained a public status, meaning that these acts were punishable both privately and publicly. The latter could be considered as part of a broader trend towards a more powerful and centralised state during the late Republic and early Empire.[140] Therefore, the extension of the penalties of the *Lex Cornelia* to cases involving wrecks reaffirmed that the behaviours included in the *edictum de naufragio* were punishable both privately and publicly.[141] In addition, the *Lex Cornelia*, and the *Leges Iuliae de vi*[142] were particularly directed at criminally organised gangs,[143] which also meant that while the *edictum de naufragio* focused more on individual actions, via this SC it was also possible to prosecute groups of wreckers. The latter witnesses a transformation in private law executed by the likes of Imperial bureaucrats such as Ulpian.[144]

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137 Bas.53.3.25; 60.39.3.

138 Coll.12.5.1 (*de naufragiis et incendiariis*) [*Incendiariis lex quidem cornelia aqua et igni interdici iussit, sed re varie sunt puniti. Nam qui data opera in civitate incendium fecerunt, si humillimo loco sunt, bestiis subici solent, si in aliquo gradu et Romae id fecerunt, si humillimo loco sunt, capite puniuntur: aut certe* [2] [*deportationis poena*] *adficiendi sunt qui haec comittunt. Sed eis qui non data opera incendium fecerint plerumque ignoscitur, nisi in lata et incauta neglegentia vel lascivia fuit*].

139 PS.5.3.2.

140 Riggsby 2016, 317.

141 As mentioned by Ulpian in D.47.9.1.1 (Ulpian. 56 *ad Ed.*) and Bas.53.3.25.

142 D.47.8.2.1 (Marcian. 14 *Inst.*).

143 Cloud 1969, 258–286.

144 Palazzolo 1996, 297.

Finally, the *Lex Cornelia*, which originally addressed land-based criminals, was extending its reach to groups acting at sea, but against a ship, which in turn legally constituted an extension of the land. By establishing that analogy between *sicariis, veneficiis* and the plunderers, who could be labelled as pirates or *praedones*, this civil law was also extending its land-based limits towards the uncivilised, mighty sea.

### 5.2.4 *Fraudulent Wreckage*

Claims of false wrecks can be found in all periods of history; the aim of this act of lying is essentially to obtain a profit from those who were subject to liability for the risk of the journey, that is, either insurance companies (in the modern period),[145] private customers, or the state. One essential element required for such a deception to be fruitful was to claim that the ship had sunk in the open sea, because that way there could be no witnesses others than the crew, who presumably were party to the deception. In addition, the depth of the sea would ensure that no diver would be able to rescue the lost cargo.[146]

The first case of such a fraud is reported by Demosthenes, who indicates that the screech of the saw used by the captain to sink the boat caused a violent reaction by the passengers with a fatal outcome for the shipwrecker.[147] It has not yet been possible to archaeologically identify an event of this kind, and it seems rather unlikely that experts would be able to distinguish between beams sawn before the shipwreck,[148] and ones subsequently removed from already shipwrecked hulls.

Another fraud case for which we have information took place during the Second Punic War. This event was facilitated by the fact that the government assumed responsibility for the cargo carried, including via the sea, to ease the supply of food to Rome. Taking advantage of this, a group of *publicani* (contractors) decided to put small quantities of goods on small worthless ships, then sink them on the open sea, pick up the crews in boats kept ready for them, and falsely report the cargoes to have been many times more valuable than they were.[149] In this case, the contractors benefitted from the complicated circum-

145 See for example, Cigna Property and Casualty Insurance Co. and Others v. Polaris Pictures Corp. and Others (9 CCA 1999); Eagle Star Insurance v. Games Video Co. [2004] 1 Lloyd's Rep. 238 or AC W Sweden 19 Nov. 2004 matter Ö 1081–1104 (Vanessa), (2004) Sw. Mar.Cas. 25.

146 Ath.3.93; Ashburner 1909, iii.47; 37–38; Frost 1968, 128–129.

147 Dem.32.5–6.

148 Like the shipwreck of Villasimius in Sardinia (first century CE); Purpura 1995, 465.

149 Livy.*Epit*.25.3.10–11.

stances associated with the war against Hannibal, which had made it so that the Senate could not really function without their support.[150]

Several centuries later, as Suetonius tells us, Emperor Claudius experienced hard times of famine, so he encouraged the maritime transport of grain to Rome, as well as granting privileges for sailors and shipowners, and taking charge of the costs and responsibilities.[151] Would that have been an opportunity for some to take advantage of the situation? Perhaps in relation to this event, one SC from Claudius' era, compiled in D.47.9.3.8 says:

> D.47.9.3.8 (Ulpian. 56 *ad Ed.*) *Senatus consultum Claudianis temporibus factum est, ut, si quis ex naufragio clavos vel unum ex his abstulerit, omnium rerum nomine teneatur*. (A *senatus consultum* was passed at the time of Claudius whereby, if someone should remove the nails from a wreck or, even only one of them, he would be liable with respect to all).

It seems to be excluded from the possible interpretations, if only due to the lack of supporting elements, that this resolution was connected to a judicial intervention from the Senate.[152] Instead, the resolution in question may have arisen following an appeal to the 'maximum extraordinary court' of the moment, promoted—against a particularly severe sentence—by the author of the theft.[153] This provision went so far as to foresee the prohibition of removing nails from the ship with fraudulent intent, perhaps to repress the practice of false shipwrecks. Probably the text was not referring to ordinary nails, but to the long-curved copper pins that held the keel together, and which are now well known through archaeological finds.[154] From the text, it can be understood that someone removing one of these nails would be liable for the whole ship. I have argued elsewhere that the reason for this consideration by Ulpian is that the ship was legally considered as a whole entity,[155] at least in relation to its essential parts (the hull, the sail, the kiln) and its fittings (rudders, mast, yard and sails).[156] This conceptualisation responds, on the one hand, to the need

150 Livy. 25.3. Rosillo López 2014, 140, thinks that even if it is not mentioned explicitly by Livy, many senators had family members involved in these frauds.

151 Suet.*Claud*.18.2–19.1; Sirks 1980, 283–294; Broekaert 2008, 212–213.

152 Arcaria 1992, 139 and n. 4.

153 De Marini Avonzo 1957, 45; Broggini 1958, 252–255.

154 Gianfrotta and Pomey 1981, 236–245.

155 Mataix Ferrándiz 2015, 525–540. As happened with other elements considered as a whole unit, such as a flock, or a pile of grain, see: D.47.2.21pr. (Ulpian. 40 *ad Sab.*).

156 As was described in §6 of the title *de naufragio*. These parts are differentiated from the complements, such as a small ship, see: D.21.2.44 (Alfen. 2 *Dig. a Paul. Epit.*).

to understand these objects formed by different elements as a single unit in order to enable legal solutions for the issues that may relate to them.[157] On the other hand, and concretely so for the case of the ship, it could not accomplish its essential function if it was not for these different elements. Finally, it seems quite probable that by removing one key nail from the construction, the ship would sink. Therefore, the practical element of the event adds up to the legal reasoning when considering the ship as a whole unit.

A text from Vivianus (compiled by Ulpianus) mentioned earlier, refers to 'people who deliberately sink merchant ships' by piercing them (*perforasset*).[158] In this case, it is difficult to say whether Ulpian was referring to the act of self-wrecking a ship, especially because the text seems to be paired with the previous § 23, which described the case of a mule that is overburdened, and so breaks one of its limbs.[159] Therefore, Ulpian's aim was to extend the penalties from the *Lex Aquilia* to cover situations that initially fell outside of its scope.[160] Thus Ulpian compared overburdening a mule with the intentional perforation of the ship, because both behaviours would break those 'bodies'. In sum, it is uncertain whether Ulpian when referring to this behaviour to establish a parallelism, was also thinking of a real event. However, it is true that he comments on the *edictum de naufragio* in book 56, as we have already seen, so perhaps there was some reference to reality in his text.

In the cases dealing with the public supply of food, or *annona*, an investigation (*quaestio de naufragii*) in the late Empire was meant to determine whether the loss was caused by weather conditions, by lack of diligence or expertise in navigation, or by fraud. The different particularities appear to be first described in title 13.9 of the Theodosian code, from which many texts were copied, modified, and adapted into title 11.6 of Iustinian's code.[161] These differences are partly because Theodosian's title addresses transport carried out on behalf of the Roman state, while Iustinian's title also refers to private individuals in some places.[162] In addition, several fragments of title 5 of the Theodosian code

157 Johnston 1999, 79–80, referring to the sale of generic goods, which also uses this principle of understanding them as a whole unit.

158 Chapter four, section 4.1.1, D.9.2.27.24 (Ulpian. 18 *ad Ed.*).

159 D.9.2.27.23 (Ulpian. 18 *ad Ed.*) *Et si mulum plus iusto oneraverit et aliquid membri ruperit, Aquiliae locum fore* (And he [Brutus] says that, if someone had loaded [oneraverit] a mule more than is right and broke [ruperit] one of its limbs, there will be place for the Aquilian [liability]) (trans. Spagnuolo 2020, 187, amended by author).

160 Spagnuolo 2020, 191–192.

161 CTh.13.9.3 (= C.11.6.3); CTh.13.9.3 (= C.11.6.3); CTh.13.9.4 (= C.11.6.4); CTh.13.9.6 (= C.11.6.5); CTh.13.5.32 (= C.11.6.6; C.11.2.4).

162 De Robertis 1937, 215; Solazzi 1939, 260; De Salvo 1992, 353. Therefore, § 2 and § 5 also refer to privateers, while § 3, § 4 and § 6 refer to state supply.

(*de navicularii*s) also refer to frauds committed while transporting cargoes on behalf of the *annona*.[163]

These texts describe the process of proving and demonstrating that the wreck was caused by natural forces. Corresponding to the historical context of the fragments, the procedure followed was the *cognitio extra ordinem*. Several scholars have remarked on incoherencies among the fragments as to the time available for presenting the evidence to a judge, which seems to have been settled at two years.[164] The investigation was led by the provincial governor from the area where the wreck took place, but the decision on the matter was then transferred, depending on the historical context, to the praetorian prefect,[165] or the prefect of the *annona*.[166] In the case that it was demonstrated that the shipwreck occurred due to natural causes, the carrier was to be exempt from compensating for the lost cargo, but the finding would not make up for the damage suffered by the ship.[167] However, it seems that quite frequently the carriers actually caused the wrecks,[168] taking advantage of the fact that the state was assuming the risk for the transport.[169]

From my point of view, these texts reflect the need to obtain a special rule for the cases of *stellionatus* (swindling), which did not have any specific penalty and therefore needed to be fixed *extra ordinem*.[170] Even if it was not Ulpian's aim to give an extensive list of the conducts targeted in this category (perhaps such a list was unnecessary and restrictive),[171] the jurist actually mentions 'in particular, a person who conceals merchandise can be charged with this offence', which is indeed quite illustrative and fits with other similar topics addressed by the Severan jurist in that book.[172] Concretely, the fragment D.47.11.6pr. addresses the problem of fraud committed by subjects working for

163 e.g. CTh.13.5.26; CTh.13.5.34.

164 Cuiacius 1840, at C.11.6.2, highlighted some incoherencies, later refuted by Manfredini 1986, 138–148 and Solazzi 1939, 258; De Salvo 1992, 356–357. It may have been one year to make the accusation from that date that the wreck happened, and one year more for the investigation.

165 CTh.13.9.1 (= C.11.6.2); CTh.13.9.4 (= C.11.6.4).

166 One fragment refers to the praefect of the *annona* of Africa in CTh.13.9.2 (372 CE); while later (397 CE), CTh. 13.9.5 mentions the *praefecti annonae* from Rome.

167 Solazzi 1939, 256; De Salvo 1992, 361–362.

168 CTh.13.9.1 (= C.11.6.2); CTh.13.9.3.1 (= C.11.6.3); CTh.13.5.32 (= C.11.6.6); CTh.13.9.4.1.

169 CTh.13.9.5.

170 D.47.20.3.2 (Ulpian. 8 *de Off.Proc.*); Mentxaka 1988, 306–313.

171 Harries 2007, 31–32.

172 D.47.20.3.3. (Ulpian. 8 *de Off.Proc.*) *Qui merces suppressit, specialiter hoc crimine postulari potest*. Mentxaka 1988, 312–313.

the corn supply and refers to *merces supprimunt*.[173] In his text, Ulpian indicates that this problem was addressed by Imperial constitutions and *mandata*; it seems to me that these may not have been efficient enough to control these behaviours, and that, therefore, later emperors needed to release further Imperial enactments to deal with these cases.

These texts highlight the importance of the documentation used for declaring what was actually loaded and unloaded, and in relation to that several texts talk about the corruption of provincial officers who committed fraud in these matters.[174] Some fragments prescribe that the carrier should provide proof about the circumstances that could have caused damage to the cargo, a serious reduction of the expected load, or the jettisoning of part of the goods to avoid wreckage.[175] The latter is justified because the carriers could say that they have jettisoned part of the load, and instead kept it somewhere in order to sell it at their expense. However, some fragments from an Imperial constitution compiled in 409 CE reflect the warranties provided by the Imperial constitutions for cases involving carriers working in the eastern part of the Empire and indicate that when their fault in a case of shipwreck was proven the negligence would be shared among the entire council of shipowners.[176] In that way, these subjects would not aim to commit fraud, so as to avoid confrontation with their peers in the council.

In any case, when looking at all the examples quoted, it seems that fraudulent wrecks proliferated during critical moments in history, when the state was forced to accept liability for transport in order to encourage shipping. The latter provision made sense at the time, because if we look at contexts of private transport the liability could easily fall to the carrier, since it was based on what the parties agreed upon in a contract. Therefore, unless a cargo owner indicated

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173 D.47.11.6pr. (Ulpian. 8 *de Off. Proc.*) *Annonam adtemptare et vexare vel maxime dardanarii solent: quorum avaritiae obviam itum est tam mandatis quam constitutionibus. mandatis denique ita cavetur: "Praeterea debebis custodire, ne dardanarii ullius mercis sint, ne aut ab his, qui coemptas merces supprimunt, aut a locupletioribus, qui fructus suos aequis pretiis vendere nollent, dum minus uberes proventus exspectant, annona oneretur" …* (In particular, forestallers and regraters, speculators generally, interfere with and disturb the corn supply, and their avarice is confronted both by Imperial instructions and by enactments. By Imperial instruction, it is provided: "You must further ensure that forestallers and regraters, speculators generally, indulge in no commerce and that the corn supply is not incommoded either by those who conceal what they have bought or by the wealthier who do not wish to sell their merchandise at a fair price because they anticipate that the next harvest will be less fruitful."). See also Pollera 1991, 406–418.

174 CTh.13.5.38; C.11.2.5; CTh.13.5.29. See also Sirks 1998, 331; 341.

175 CTh.13.9.4; CTh.13.9.5.

176 CTh.13.5.2 (= C.11.2.4; C.11.6.6).

that the liability would be completely his own, the carrier would be responsible for most of the risk during navigation. For example, the text of D.19.2.13.1 (Ulpian. 32 *ad Ed.*) indicates that cases of transhipping a cargo against the owner's will, at an improper time, or by using a less suitable ship would all imply the fault of the carrier.[177]

177 See also chapter four, section 4.1.2.

# Conclusion

Throughout history, people have always been drawn to the sea in a way or another. The colonisation of the coast by inland peoples drastically altered marine environments, but it also utterly transformed the nature of coastal communities. The Romans not only lived on coasts, but they thought with them, even if their way of manifesting these reflections was related less to the physical topography of the areas and more to how they engaged with them. They were part of their mythical as well as physical geography. Traditionally, the sea was deemed to be a space beyond human control and not subject to laws created by humans, while on the contrary land was governed by the civil law of the Romans. Nevertheless, because of the importance of the sea for ancient civilisations and states, numerous legal solutions were elaborated to facilitate the transport of goods and travel by sea, which interfered with the maritime realm. The declared aim of this book was to change our understanding of Roman conceptions about the sea by placing the focus on shipwrecks as events that act as bridges between the sea and land. The different chapters of this work explore the different Roman legal definitions of these spaces, and how individuals of divergent legal statuses interacted with them.

The enormity and wildness of the sea has always evoked an aura of mystery and uncertainty.[1] This has done much to influence literature, art, and legal interpretation; as a result the sea's actual effect on society can be overstated and a degree of artificiality introduced. Accumulated tradition, if not symbolism itself, exacerbates the problems of interpreting both the archaeological and legal records. If we look at archaeological evidence of wrecks and structures, we can see that some aspects of the maritime environment have little potential for change over the centuries, such as the need to combat tides, wind, and weather; these remain constant irrespective of technological advances. Faced with that immutable reality, human populations have taken different attitudes when faced with a difficult situation at sea, such as taking advantage of it, ignoring it, or trying to help. In the Roman world, where there was no such a thing as the moral imperative of saving lives from shipwrecks, the attitudes towards a sinking ship, its cargo, and the shipwrecked relied on social and political conceptions. Consequently, one of the sea's functions becomes apparent; it acts as a symbolic space, where violence takes place and needs to be targeted by the

1 See Nicolet 1991, 5, on the importance of these sort of mythological conceptions for Roman society.

law of the state, and onto which visions of power and unity are projected. The latter fits well with the Roman view which guided them through their Mediterranean expansion. This view about the sea established the limits of legality and considered who was and was not part of a given social group, what counted as necessity, and what constituted violence. In that sense, the perspectives on shipwrecks would not be based on principles of natural law, but rather on unilateral solutions for reacting in relation to specific situations, in the context of a politically organised community.[2]

This book has highlighted how the violent acts of wrecking ships and stealing from them changed from being accepted and even encouraged, to being prosecuted in both the public and private realm of the Roman world. The latter indicates a change, at least in the legal and political sphere of Rome, which had an impact on the interaction and management of space. After all that has been said in this book, what features of the Roman maritime cultural landscape can be identified? I have previously mentioned that the ethnic and legal diversity of the different areas of the Mediterranean would have had an impact on their landscapes, especially in areas with a long-lasting cultural background. However, when taking a bird's eye view of the different rulings related to shipwrecking (whether carried out by private actors or organised in gangs), it is possible to recognise that something was changing in people's minds, at least the minds of those in control of the Roman public image. First via treaties, and later by statutes, the Romans were imposing their attitude of avoiding violence at sea to create safe spaces to navigate, trade, and—especially—to govern. That mentality was not exclusive to the Romans but was also embraced by the Greeks and other maritime populations. However, it was the Romans who publicised this as their great achievement, claiming that they were the ones who brought peace to the Mediterranean.[3]

This book started by informing the reader on ancient perceptions about the sea; even if these views were a bit over-exaggerated by ancient poets and rhetors, they still had a strong influence on how Romans dealt with that space. The interaction of subjects with changes in the landscape has been considered in terms of reciprocal agency, to categorise and challenge maritime cultural landscapes as conceived in the legal literature. This in turn can help to redefine the sometimes-rigid distinction between the spheres of public and private, official and unofficial, legal and social. The sea was a savage realm beyond domination, a place of no return, but also a waterway that connected one land with the

2 Shaw 2000, 361–403, 2004, 326–374; Benton 2011, 239–240; Ando 2020d, 1–3.

3 One of the best examples comes from the Augustan *Res Gestae* (*CIL* III.2.769–772), where the emperor claims to have defeated piracy in the Mediterranean.

unknown people and cultures of another. In the Mediterranean before Roman hegemonic rule, foreigner and enemy were close categories in the mental conceptions of coastal inhabitants. It is in that context of confrontation among different social groups and powers that the primitive form of the right of shipwreck grew. This practice lived for a long time in the Mediterranean world, either directly through the acts of plundering committed by coastal communities, or indirectly through the right of reprisal (*sylan*). The latter gave birth to all the Greek legislation of *asylia*,[4] and other remedies enabled to provide solutions to the acts of private violence existing before the Roman domination of the Mediterranean basin.

The chapter has also described the origin, background, and possible chronological dating of the *edictum de naufragio*, which punished robberies and other violent conduct that took advantage of catastrophic situations such as fires, wrecks, or attacks on ships. Even if it might appear as if this change of perception about shipwrecking was not terribly significant, it involved deep social change. The possibility of establishing contacts, trading with others, and being protected in case of catastrophe lies behind the idea of a unified Mediterranean (even if this assertion needs to be taken with a grain of salt). This was the start of a beautiful story of Empire, and conveys the idea of a maritime cultural landscape of peace and safe navigation. However, this is far from the truth, in the sense that the safe maritime landscape promoted by the Romans was politically produced—but what about its social side?

The practical daily needs of many stressed the need for creating instruments to handle events taking place at sea. In that way, we can see how private legal texts sometimes use legal analogies, abstractions, or fictions to overcome legal loopholes and handle legal hazards. In a way, these remedies were artificial because they were constructed on the basis of the legal boundaries established to conceptualise sea and land in the Roman world. The jurists' responses to the needs and experiences of Rome's subjects provide a small insight into the official reactions to hazards suffered by citizens at sea. The use of legal tools such as fictions or analogies highlights that there was a practical need to overcome that legal divide between land and sea.

The Roman world operated on multiple concepts of dominion and law, concepts that influenced not only how they understood the acquisition of goods lost from a wreck, but also how Roman maritime landscapes came to be interpreted and can be connected to the Roman state's interests and ideology. Issues such as the acquisition and ownership of things considered as belonging to

4 Rigsby 1996.

no one (*nullius*) or to everyone (*communes omnium*) created legal problems that indeed mirror the multilegality and diversity of customs from the ancient Mediterranean. On the one hand, there was the official discourse from the Roman state indicating that the shipwreck's remains belonged to the original owner, while on the other hand, it is possible to find that in some areas and periods, the state had some right over the recovered goods. In any case, there is enough evidence to assume that plundering and piracy were practices that never disappeared in the Mediterranean, and that even during the high Empire, many populations found in these actions a sustainable way of living.

Perhaps it would not be unrealistic to say that probably many people who did not have much contact with the law of the Empire and needed to solve their issues at sea did not even conceive that there was a boundary, and found their own ways to cope with these threats. The study of these cases has underlined how Roman law was sometimes pragmatic, creating instruments to be used in very different settings and spaces, and sometimes narrative, focusing on the stories that jurists told, the verbal presentation of these cases, and the discourse through which the messages were conveyed to the reader. In sum, there is no such thing as a Roman 'law of the sea' created to govern the rights and duties of different populations in maritime environments. Instead, the stress was placed on growing a universal Empire, led by an all-powerful emperor, and keeping the peace when these acts were taking place mostly in the provinces.

Some of the elements that I would like to highlight in conclusion perhaps constitute the dark side of that propaganda, or perhaps only the social and cultural reality of the Mediterranean landscapes. It is true that political changes also cause developments in society, but it is necessary to remember that one does not simply fall asleep in the Middle Ages and wake up in the Renaissance. All cultural and historical processes take time, and the changes in the realm of maritime customs would not be an exception. In that sense, after imposing their hegemonic rule over the Mediterranean, did the Romans stop fearing the sea? Did they no longer consider it a savage wilderness that could not be dominated by the rule of law?[5] Did people stop committing violence against ships? The answer is obviously 'no'. By using the focus on violence reflected in legal sources targeting plundering, it is possible to appreciate how this guided the imperialistic efforts of Rome, first in constructing the Empire, and later in maintaining the imperialistic propaganda. However, did that idea permeate the minds of the people living on the coast? While it is true that we do not see legal statuses addressing piracy after the end of the Republic, and that the

5 Tuori 2018, 201–204.

number of wrecks decreased considerably, these developments indicate that wrecking and piracy were taking different shapes. Unfortunately, these activities would never have disappeared, but rather would have evolved from being carried out by organised gangs on a global scale to being smaller-scale events at a local level. The latter allowed the Roman jurisprudence to cope with the legal boundaries established by the dichotomy of the sea and the land, as well as demonstrating the force of the *imperium* of the emperor, or the magistrates representing him. For the Romans who debated the matter, the main issue was not the sovereignty of the sea, but rather its political implications, and with it, the unusual powers that such an extraordinary command would have.

This has book has sought to provide a contribution to the history of the seas, which have acted as bridges between cultures and people and which create their own legal history. A bridge is not a one-way route: it also connects peoples, and through this connection, affects the identities of the societies on both sides. Thus, by bringing the sea (as well as other waterways) and their different roles to the fore, as I do in this book, new perspectives can be revealed on the shape—and shaping—of the Roman world and the peoples who inhabited it, their ways of thinking about the world which they inhabited, and their identities. I propose to look at Rome as both defined and confined by the sea, but ultimately spreading beyond the sea.

# Translation of the Title D.47.9.: *De Incendio Ruina Naufragio Rate Nave Expugnata*

**D.47.9.1pr. (Ulpian. 56 *ad Ed.*)** *Praetor ait: 'In eum, qui ex incendio ruina naufragio rate nave expugnata quid rapuisse recepisse dolo malo damnive quid in his rebus dedisse dicetur: in quadruplum in anno, quo primum de ea re experiundi potestas fuerit, post annum in simplum iudicium dabo. Item in servum et in familiam iudicium dabo'.* (The praetor says: 'If a man be said to have looted or wrongfully received anything from a fire, a building that has collapsed, a wreck, a stormed raft or ship, or to have inflicted any loss on such things, I will give an action for fourfold against them in the year when proceedings could first be taken on the matter and, after the year, for the simple value of the things. I will likewise give an action against a slave or household of slaves').

**D.47.9.1.1 (Ulpian. 56 *ad Ed.*)** *Huius edicti utilitas evidens et iustissima severitas est, si quidem publice interest nihil rapi ex huiusmodi casibus. Et quamquam sint de his facinoribus etiam criminum executiones, attamen recte praetor fecit, qui forenses quoque actiones criminibus istis praeposuit* (The utility of this edict is evident and its severity fair, since it is of public interest that nothing should be looted from these cases. And although there be criminal prosecutions arising from these crimes, the praetor is nonetheless right in propounding civil actions for such offences).

**D.47.9.1.2 (Ulpian. 56 *ad Ed.*)** *'Ex incendio' quemadmodum accipimus, utrum ex ipso igne an vero ex eo loco, ubi incendium fit? Et melius sic accipietur propter incendium, hoc est propter tumultum incendii vel trepidationem incendii, rapit: quemadmodum solemus dicere in bello amissum, quod propter causam belli amittitur. Proinde si ex adiacentibus praediis, ubi incendium fiebat, raptum quid sit, dicendum sit edicto locum esse, quia verum est ex incendio rapi.* (How are we to understand 'from a fire'? Is it from the actual fire or from the place where the fire breaks out? The better interpretation is 'owing to a fire', that is, the looting takes place by reason of the confusion and alarm caused by a fire; in the same way, we speak of something lost in war, meaning lost by reason of the war. So also, if anything be pillaged from land adjacent to the scene of the fire, it must be said that the edict is operative; for it is true that the seizure arises out of the fire).

**D.47.9.1.3 (Ulpian. 56 *ad Ed.*)** *Item ruinae appellatio refertus ad id tempus, quo ruina fit, non tantum si ex his quae ruerunt tulerit quis, sed etiam si ex adiacentibus.* (Likewise, the term 'collapse of a building' refers to the moment when the breakdown occurs and includes when someone seizes something not only from the crashed building but also from adjacent premises).

**D.47.9.1.4 (Ulpian. 56 *ad Ed.*)** *Si suspicio fuit incendii vel ruinae, incendium vel ruina non fuit, videamus, an hoc edictum locum habeat. Et magis est, ne habeat, quia neque ex incendio neque ex ruina quid raptum est* (If there was a suspicion that there was going to be a fire or a collapse which does not actually happen, let us see whether this comes within the scope of the edict. And the better view is that it does not come, for nothing is seized from either a fire or a collapse).

**D.47.9.1.5 (Ulpian. 56 *ad Ed.*)** *Item ait praetor: 'Si quid ex naufragio'. Hic illud quaeritur, utrum, si quis eo tempore tulerit, quo naufragium fit, an vero et si alio tempore, hoc est post naufragiumque: nam res ex naufragio etiam hae dicuntur, quae in litore post naufragium iacent. Et magis est, ut de eo tempore.* (The praetor also says: 'if anything from a shipwreck'. Here one may ask whether this concerns someone who takes something when the wreck happened or also at another time, that is, after the wreck; for things are said to come from a wreck which lie on the shore after the wreck. And the better view is that the edict applies to that time).

**D.47.9.2 (Gaius 21 *ad Ed. Prov.*)** *Et loco* (And the place (...))

**D.47.9.3pr. (Ulpian. 56 *ad Ed.*)** *Quo naufragium fit vel factum est, si quis rapuerit, incidisse in hoc edictum videatur. Qui autem rem in litore iacentem, postea quam naufragium factum est, abstulit, in ea condicione est, ut magis fur sit quam hoc edicto teneatur, quemadmodum is, qui quod de vehiculo excidit tulit. Nec rapere videtur, qui in litore iacentem tollit.* (Where the wreck occurs or has occurred, if someone seizes something from it, this edict applies. A person who takes away something lying on the shore after the wreck, however, it might be the case that he is a thief rather than subject to this edict, as would be someone taking what falls from a vehicle. Nor is someone regarded as looting who picks up something lying on the shore).

**D.47.9.3.1 (Ulpian. 56 *ad Ed.*)** *Deinde ait praetor 'rate navi expugnata'. Expugnare videtur, qui in ipso quasi proelio et pugna adversus navem et ratem aliquid rapit, sive expugnet sive praedonibus expugnantibus rapiat.* (Then the praetor says: 'On a raft or ship taken by storm'. It would be regarded as storming if

someone seized something in the actual battle or fight with the raft or ship, whether they themselves are an attacker or seized the thing from the pirates.)

**D.47.9.3.2 (Ulpian. 56 *ad Ed.*)** *Labeo scribit aequum fuisse, ut, sive de domo sive in villa expugnatis aliquid rapiatur, huic edicto locus sit: nec enim minus in mari quam in villa per latrunculos inquietamur vel infestari possumus* (Labeo writes that it would be right that this edict should apply if something is seized from a town or country house which has been stormed; for both at sea and in a house, we can be disturbed or bothered by brigands).

**D.47.9.3.3 (Ulpian. 56 *ad Ed.*)** *Non tantum autem qui rapuit, verum is quoque, qui recepit ex causis supra scriptis, tenetur, quia receptores non minus delinquunt quam adgressores. Sed enim additum est 'dolo malo', quia non omnis qui recipit statim etiam delinquit, sed qui dolo malo recipit. Quid enim, si ignarus recipit? Aut quid, si ad hoc recepit, ut custodiret salvaque faceret ei qui amiserat? Utique non debet teneri.* (But not only one stealing something, but also one who receives goods seized in such circumstances is liable; for receivers are no less offenders than the aggressors. Although it is added, 'with wrongful intent'; since not every receiver is forthwith an offender but one who receives with wrongful intent. Because, what would be said if they receive ignoring the thing's provenance or if they received the thing to look after it and make it safe for the person who has lost it? In neither case should this person be liable).

**D.47.9.3.4 (Ulpian. 56 *ad Ed.*)** *Non solum autem qui rapuit, sed et qui abstulit vel amovit vel damnum dedit vel recepit, hac actione tenetur.* (Now this action lies not only against one who commits robbery but also against one who removes a thing or takes it away or receives it or inflicts damage on it).

**D.47.9.3.5 (Ulpian. 56 *ad Ed.*)** *Aliud esse autem rapi, aliud amoveri palam est, si quidem amoveri aliquid etiam sine vi possit: rapi autem sine vi non potest.* (Although there is an obvious distinction between seizure and taking away; for a thing can be taken away even without force, but it cannot be seized except by force).

**D.47.9.3.6 (Ulpian. 56 *ad Ed.*)** *Qui eiecta nave quid rapuit, hoc edicto tenetur. 'Eiecta' hoc est quod Graeci aiunt ἐξεβρασθη* (If someone seizes anything from a wrecked ship is liable under this edict. The Greek term for 'wrecked' is *ἐξεβρασθη*).

**D.47.9.3.7 (Ulpian. 56 *ad Ed.*)** *Quod ait praetor de damno dato, ita demum locum habet, si dolo damnum datum sit: nam si dolus malus absit, cessat edictum. Quemadmodum ergo procedit, quod Labeo scribit, si defendendi mei causa vicini aedificium orto incendio dissipaverim, et meo nomine et familiae iudicium in me dandum? Cum enim defendendarum mearum aedium causa fecerim, utique dolo careo. Puto igitur non esse verum, quod Labeo scribit. An tamen lege Aquilia agi cum hoc possit? Et non puto agendum: nec enim iniuria hoc fecit, qui se tueri voluit, cum alias non posset. Et ita Celsus scribit.* (What the praetor says about the infliction of damage is applicable only if the damage is deliberate. For if wrongful intent is absent, the edict does not apply. How then does what Labeo writes apply, that if when a fire arose therein, I demolished my neighbour's house in self-defence, an action should be granted both against me my slaves? Since I have done this to preserve my own premises, I am lacking evil intent. I think, therefore, that what Labeo writes is not true. But would it be possible to proceed under the *Lex Aquilia* in such circumstances? Again, I think not; for a person does not act wrongfully if they act to protect themselves when they had no other option; and so writes Celsus).

**D.47.9.3.8 (Ulpian. 56 *ad Ed.*)** *Senatus consultum Claudianis temporibus factum est, ut, si quis ex naufragio clavos vel unum ex his abstulerit, omnium rerum nomine teneatur. Item alio senatus consulto cavetur eos, quorum fraude aut consilio naufragi suppressi per vim fuissent, ne navi vel ibi periclitantibus opitulentur, legis Corneliae, quae de sicariis lata est, poenis adficiendos: eos autem, qui quid ex miserrima naufragorum fortuna rapuissent lucrative fuissent dolo malo, in quantum edicto praetoris actio daretur, tantum et fisco dare debere.* (A *senatus consultum* was passed at the time of Claudius whereby, if someone should remove the nails from a wreck or, even only one of them, he would be liable with respect to all. Likewise, another *senatus consultum* provides that those by whose malice or advice a wreck is caused, so that no help may reach the ship or those in peril thereon, shall be subject to the penalties ordained in the *Lex Cornelia de sicariis*; but those who seize anything through the miserable plight of the shipwrecked and are designedly enriched will also have to give to the Imperial treasury as much as the amount for which an action under the praetor's edict will be taken against them).

**D.47.9.4pr. (Paul. 54 *ad Ed.*)** *Pedius posse etiam dici ex naufragio rapere, qui, dum naufragium fiat, in illa trepidatione rapiat.* (Pedius writes that it can also be said that someone loots from a wreck if, while the wreck is happening, they seize anything during the confusion).

**D.47.9.4.1 (Paul. 54 *ad Ed.*)** *Divus Antoninus de his, qui praedam ex naufragio diripuissent, ita rescripsit: 'Quod de naufragiis navis et ratis scripsisti mihi, eo pertinet, ut explores, qua poena adficiendos eos putem, qui diripuisse aliqua ex illo probantur. Et facile, ut opinor, constitui potest: nam plurimum interest, peritura collegerint an quae servari possint flagitiose invaserint. Ideoque si gravior praeda vi adpetita videbitur, liberos quidem fustibus caesos in triennium relegabis aut, si sordidiores erunt, in opus publicum eiusdem temporis dabis: servos flagellis caesos in metallum damnabis. Si non magnae pecuniae res fuerint, liberos fustibus, servos flagellis caesos dimittere poteris'. Et omnino ut in ceteris, ita huiusmodi causis ex personarum condicione et rerum qualitate diligenter sunt aestimandae, ne quid aut durius aut remissius constituatur, quam causa postulabit*. (The deified Antoninus provided in a rescript on the subject of those who seize booty from a wreck, that: 'What you have written to me concerning the wreck of a ship or raft aims to know what penalty I think should be imposed upon those who are proved to have looted in such cases. This, in my opinion, could be easily settled. Now it is of the highest significance whether they take what would be lost either way or whether they flagrantly appropriate what could be saved. For that reason, if the booty appears to have been taken with force, you would relegate the free offenders for three years after beating them, or if they were of lower condition, condemn them to public works for the same period; you will flog slaves with a lash and condemn them to the mines. If the goods were of small value, you may release freedmen after a cudgeling and slaves after a flogging'. Generally, in such cases as in others, careful assessment is to be made in the light of the status of the offender and of the gravity of the offence, so that no sentence may be passed which is more severe or more lenient than the case requires).

**D.47.9.4.2 (Paul. 54 *ad Ed.*)** *Hae actiones heredibus dantur. In heredes eatenus dandae sunt, quatenus ad eos pervenit*. (These actions is granted to heirs; they are granted against heirs only to the extent that any benefit has come to them from the wrong).

**D.47.9.5 (Gaius 21 *ad Ed. Prov.*)** *Si quis ex naufragio vel ex incendio ruinave servatam rem et alio loco positam subtraxerit aut rapuerit, furti scilicet aut alias vi bonorum raptorum iudicio tenetur, maxime si non intellegebat ex naufragio vel incendio ruinave eam esse. Iacentem quoque rem ex naufragio, quae fluctibus expulsa sit, si quis abstulerit, plerique idem putant. Quod ita verum est, si aliquod tempus post naufragium intercesserit: alioquin si in ipso naufragii tempore id acciderit, nihil interest, utrum ex ipso mari quisque rapiat an ex naufragiis an ex litore. de eo quoque, quod ex rate nave expugnata raptum sit, eandem interpret-*

*ationem adhibere debemus* (If someone removes or seizes something salvaged from a wreck, fire, or collapse of a building and put it in another place, they will be liable on the action for theft or that for things taken by force, even though they were unaware that it comes from a wreck, fire, or collapse of building. Many are of the opinion that where someone appropriates from a wreck something which is lying washed up by the waves, the same applies. This is true if some time has elapsed since the wreck; but if what happens occurs at the very time of the wreck, it is irrelevant whether the seizure be made from the sea itself, the wreck or the shore. We must adopt the same interpretation in respect of what is seized from a raft or ship which has been stormed).

**D.47.9.6. (Callistrat. 1 *Ed. Mon.*)** *Expugnatur navis, cum spoliatur aut mergitur aut dissolvitur aut pertunditur aut funes eius praeciduntur aut vela conscinduntur aut ancorae involantur de mare* (A ship is stormed when it is despoiled, sunk, broken up, perforated or its ropes are cut through or its sails are slashed or its anchors seized up from the sea).

**D.47.9.7 (Callistrat. 2 *Quaest.*)** *Ne quid ex naufragiis diripiatur vel quis extraneus interveniat colligendis eis, multifariam prospectum est. Nam et divus Hadrianus edicto praecepit, ut hi, qui iuxta litora maris possident, scirent, si quando navis vel inficta vel fracta intra fines agri cuiusque fuerit, ne naufragia diripiant, in ipsos iudicia praesides his, qui res suas direptas queruntur, reddituros, ut quidquid probaverint ademptum sibi naufragio, id a possessoribus recipiant. De his autem, quos diripuisse probatum sit, praesidem ut de latronibus gravem sententiam dicere. Ut facilior sit probatio huiusmodi admissi, permisit his et quidquid passos se huiusmodi queruntur, adire praefectos et ad eum testari reosque petere, ut pro modo culpae vel vincti vel sub fideiussoribus ad praesidem remittantur. A domino quoque possessionis, in qua id admissum dicatur, satis accipi, ne cognitioni desit, praecipitur. Sed nec intervenire naufragiis colligendis aut militem aut privatum aut libertum servumve principis placere sibi ait senatus* (A wide variety of provisions are brought so that nothing should be looted from wrecks or so that no third party should interfere with collecting them. For the deified Hadrian established in an edict that those holding property near the shore should know that if a ship is dashed against or broken up within the boundaries of their lands, they are not to despoil the wreck, or the governors will grant actions against them to those complaining that their property has been seized, so that if anything is proved to have been taken from the wreck, it may be recovered from the landholder. However, in the case of those proven to have looted, the governor is to inflict a grave penalty as on bandits. To facilitate proof in such cases, the emperor allows those who complain that they have suffered in such ways

to approach the prefect and then to state their case and ask that the defendants, in proportion to their fault, either be bound or provide verbal guarantors and so be remitted to the governor. It is further provided that if the owner of the land where this is said to have happened shall give security that he will be present for the hearing. The Senate resolves that in the collection of what has been wrecked, there shall participate no soldier, private individual, or freedman or slave of the emperor).

**D.47.9.8 (Neratius 2 *Resp.*)** *Ratis vi fluminis in agrum meum delatae non aliter potestatem tibi faciendam, quam si de praeterito quoque damno mihi cavisses.* (If your raft be brought onto my land by the force of the river, you will not be able to exert control over it unless you first give me a *cautio* in respect of any prior damage to me).

**D.47.9.9 (Gaius 4 *ad Leg. Duod. Tab.*)** *Qui aedes acervumve frumenti iuxta domum positum conbusserit, vinctus verberatus igni necari iubetur, si modo sciens prudensque id commiserit. Si vero casu, id est neglegentia, aut noxiam sarcire iubetur aut, si minus idoneus sit, levius castigatur. Appellatione autem aedium omnes species aedificii continentur* (A person who sets a building on fire or a sheaf of wheat set beside a dwelling should be bound, flogged, and put to death by fire, if their act was deliberate and conscious. If, however, they did it by chance, that is, by negligence, they are to make good the wrong, or if their means be inadequate, be more lightly punished. The expression 'building' includes every kind of edifice).

**D.47.9.10 (Ulpian. 1 *Opin.*)** *Ne piscatores nocte lumine ostenso fallant navigantes, quasi in portum aliquem delaturi, eoque modo in periculum naves et qui in eis sunt deducant sibique execrandam praedam parent, praesidis provinciae religiosa constantia efficiat.* (The dutiful perseverance of the provincial governor shall ensure that fishermen do not deceive sailors at night, by displaying a light, as if they were being guided towards some port, thereby leading the ship and its passengers into danger, and obtaining for themselves a damnable prize).

**D.47.9.11 (Marcian. 14 *Inst.*)** *si fortuito incendium factum sit, venia indiget, nisi tam lata culpa fuit, ut luxuria aut dolo sit próxima.* (If a fire be caused by chance, it merits indulgence, unless the carelessness was so conspicuous as to be ranked as being close to deliberate intent).

**D.47.9.12pr. (Ulpian. 8 *de Off. Proc.*)** *Licere unicuique naufragium suum impune colligere constat: idque imperator Antoninus cum divo patre suo rescripsit.* (It is

established that it is lawful for anyone to collect with impunity his wrecked property; so ruled Emperor Antoninus and his deified father in a rescript).

**D.47.9.12.1 (Ulpian. 8 *de Off. Proc.*)** *Qui data opera in civitate incendium fecerint, si humiliore loco sint, bestiis obici solent: si in aliquo gradu id fecerint, capite puniuntur aut certe in insulam deportantur.* (Those who deliberately start a fire in a city, if they be of lower rank, are usually thrown to the beasts; but if they be of some status, they would be subject to capital punishment or certainly deported to an island).

# Appendix

TABLE 1 Texts that mention the behaviours *incendio ruina naufragio*

| Author, work, and fragment | Date | Text |
|---|---|---|
| Marcus Tullius Cicero, *Paradoxa Stoicorum* 6.51.8 | 46 BCE[1] | *Quanti est aestimanda virtus, quae nec eripi nec subripi potest* ***neque naufragio neque incendio*** *amittitur nec tempestatum nec temporum perturbatione mutatur!* (how great a value should be set on virtue, of which one can never be robbed or cheated, and which is not lost by shipwreck or fire, or affected by the violence of storms or by stormy periods in politics!). |
| Marcus Fabius Quintilianus, *Institutio Oratoria* 8.6.50.3 | First century CE | *Nam id quoque in primis est custodiendum, ut, quo ex genere coeperis tralationis, hoc desinas. Multi autem,* ***cum initium tempestatem sumpserunt, incendio aut ruina finiunt****, quae est inconsequentia rerum foedissima.* (Another very important rule to observe in Allegory is to finish with the same type of Metaphor with which you began. Many begin with a storm and end with a fire or the collapse of a house; this is a horrible incongruity). |
| Marcus Fabius Quintilianus, *Declamationes Maiores*, 9.16.23 | First century CE | *Concupivi quandam humanitatis civicam gloriam: periturum hominem,* ***sive ille naufragio eiectus, seu spoliatus incendio*** *sive exutus latrocinio erat, naturae patriaeque restitui.* (I aspired to a kind of citizen's glory for humanity—a man who would have perished when shipwrecked or ruined by fire or stripped by a brigand, I have given back to nature and homeland). |
| Lucius Annaeus Seneca senior, *Controversiae*; 5.1pr.2; 5.1pr.3 | First century CE | *Inscripti maleficii sit actio.* ***Quidam naufragio facto, amissis tribus liberis et uxore incendio domus, suspendit se.*** *Praecidit illi quidam ex praetereuntibus laqueum. A liberato reus fit maleficii* (An action may lie for an offence not specified in the law. A man who had been shipwrecked, and had lost three children and his wife in a fire at his house, hung himself. A passer-by cut the noose. He is accused of an offence by the man he saved). |
| Lucius Annaeus Seneca iunior, *De Beneficiis* 1.5.4.3; 1.5.4.4 | First century CE | *Amicum a piratis redemi, hunc alius hostis excepit et in carcerem condidit: non beneficium, sed usum beneficii mei sustulit.* ***Ex naufragio alicui raptos vel ex incendio liberos reddidi,*** *hos vel morbus vel aliqua fortuita iniuria eripuit: manet etiam sine illis, quod in illis datum est.* (If I have rescued a friend from pirates, and afterwards a different enemy seized him and shut him up in prison, he has been robbed, not of my benefit, but of the enjoyment of my benefit. If I have saved a man's children from shipwreck or a fire and restored them to him, and afterwards they were |

1 Mehl 2002, 39.

TABLE 1 Texts that mention the behaviours *incendio ruina naufragio* (*cont.*)

| Author, work, and fragment | Date | Text |
|---|---|---|
| | | snatched from him either by sickness or some injustice of fortune, yet, even when they are no more, the benefit that was manifested in their persons endures). |
| D. 44.7.1.4 (Gaius 2 *Aur.*) | Second century CE | *Et ille quidem qui mutuum accepit, si quolibet casu quod accepit amiserit, nihilo minus obligatus permanet: is vero qui utendum accepit, si maiore casu, cui humana infirmitas resistere non potest, veluti* ***incendio ruina naufragio****, rem quam accepit amiserit, securus est.* (…) (And, indeed, he who received a loan for consumption (*mutuum*) nonetheless will remain bound, even if through some accident he lost what he had received, whereas he who received an article for use will be protected if through inevitable accident which human weakness cannot prevent, such as fire, wreck or collapse of a building, the lost the property he had received). |
| D. 2.12.3pr. (Ulpian. 2 *ad Ed.*) | Third century CE | *Solet etiam messis vindemiarumque tempore ius dici de rebus quae tempore vel morte perituraе sunt. Morte: veluti furti: damni iniuriae: iniuriarum atrocium: qui* ***de incendio ruina naufragio rate nave expugnata rapuisse dicuntur****: et si quae similes sunt. Item si res tempore perituraе sunt aut actionis dies exiturus est.* (It is usual, during harvest and vintage time, that justice be administered with respect to matters in which rights are about to be destroyed through lapse of time or death. Examples in which rights are destroyed by death are theft, damage to property, serious injury, cases in which persons are said to have robbed, when there has been a fire, collapse of a house, shipwreck, or the capture of a boat or ship, and similar cases. The same applies if the subject matter of an action is about to be lost through lapse of time or the time within which the action is to be brought has nearly gone). |
| D. 2.13.6.9 (Ulpian. 4 *ad Ed.*) | Third century CE | *Prohibet argentario edi illa ratione, quod etiam ipse instructus esse potest instrumento suae professionis: et absurdum est, cum ipse in ea sit causa, ut edere debeat, ipsum petere ut edatur ei. An nec heredi argentarii edi ratio debeat, videndum: et si quidem instrumentum argentariae ad eum pervenit, non debet ei edi, si minus, edenda est ex causa. Nam et ipsi argentario ex causa ratio edenda est:* ***si naufragio vel ruina vel incendio vel alio*** *simili casu rationes perdidisse probet aut in longinquo habere, veluti trans mare.* (The praetor forbids that a banker be forced to exhibit documents because it is also possible for the latter to inform himself from the documents he has in virtue of his occupation. And it is absurd, seeing that he is himself in the legal position of being under a duty to exhibit, for him to ask that task to be given to him. It must be seen whether accounts should not be exhibited to the heir of a banker. And if, indeed, the documents of the banking business are in his possession, exhibition ought not to be made to him; if not, the exhibition should be made by indicating the cause. For an account is to be produced to the banker himself based on the cause being shown, that is, if he shows that accounts have |

TABLE 1 Texts that mention the behaviours *incendio ruina naufragio* (*cont.*)

| Author, work, and fragment | Date | Text |
|---|---|---|
| | | been lost through shipwreck or collapse of a house or fire or some similar chance or that they are in a far-away place, for example, across the sea). |
| D. 16.3.1.1 (Ulpian. 30 *ad Ed.*) | Third century CE | *Praetor ait: 'Quod neque tumultus* ***neque incendii neque ruinae neque naufragii*** *causa depositum sit, in simplum, earum autem rerum, quae supra comprehensae sunt, in ipsum in duplum, in heredem eius, quod dolo malo eius factum esse dicetur qui mortuus sit, in simplum, quod ipsius, in duplum iudicium dabo'* (The praetor says: 'Where property has not been deposited on account of tumult, fire, disaster, or shipwreck, I will give an action for simple damages; but for those cases mentioned above, against the depositee himself I will give an action for double damages, against his heir, where he who has died is alleged to have been guilty of fraud, an action for simple damages, and against the heir who is himself guilty of fraud, double damages'). |
| D. 24.1.32.14 (Ulpian. 33 *ad Sab.*) | Third century CE | *Oratio, si ante mors contigerit ei cui donatum est, nullius momenti donationem esse uoluit: ergo si ambo decesserint, quid dicemus,* ***naufragio forte uel ruina uel incendio?*** *et si quidem possit apparere, quis ante spiritum posuit, expedita est quaestio: sin uero non appareat,* ***difficilis quaestio est (...)*** (The oration meant a gift to have no effect if the recipient has died beforehand. So, what if both parties die in a shipwreck, the collapse of a building, or a fire? Where it can be established which of them died first, the question is easy to answer, but if this cannot be established, the question becomes a difficult one). |
| PS. 2.4.2 | Fourth century CE | *Si facto* ***incendio ruina naufragio*** *aut quo alio simili casu res commodata amissa sit, non tenebitur eo nomine is cui commodata est, nisi forte, cum posset rem commodatam salvam facere, suam praetulit* (If the property lent should be lost either through fire, the ruin of a house, shipwreck, or any other accident of this kind, the party to whom the property was lent will not be liable on this account, unless when he could have saved it he gave preference to his own). |
| PS. 5.3.2 | Fourth century CE | *Quidquid* ***ex incendio ruina naufragio navique expugnata raptum susceptum*** *suppressumve erit, eo anno in quadruplum eius rei, quam quis suppresserit celaverit rapuerit, convenitur, postea in simplum.* (Where any property obtained from a fire, the ruin of a building, shipwreck, or the plunder of a vessel, has been stolen or concealed, the party who concealed, stole, or took it by violence, can, within a year, be sued for fourfold damages, and, after the lapse of a year, for simple damages.) (transl. Scott). |
| C.6.2.18 | Fourth century CE | *Imperatores Diocletianus, Maximianus. In eum, qui ex* ***naufragio vel incendio*** *cepisse vel in his rebus damni quid dedisse dicitur, infra annum utilem ei cui res abest quadrupli, post in simplum actionem proditam* |

TABLE 1 Texts that mention the behaviours *incendio ruina naufragio* (*cont.*)

| Author, work, and fragment | Date | Text |
|---|---|---|
| | | *praeter poenam olim statutam edicti forma perpetui declarat. *DIOCL. ET MAXIM. AA. ET CC. DIONYSODORO. *⟨A 294 S. III K. IAN. NICOMEDIAE CC. CONSS.⟩* (Emperors Diocletianus, Maximianus. The rule of the perpetual edict declares that an action for fourfold damages is available for a year to him, whose property is lost and, against him, who is said to have taken or caused any loss to property from a shipwreck or fire, and after that time an action lies for the simple value, apart from the existing statutory penalty. Suscribed December 30th, at Nicomedia, in the Consulship of the Caesars (294 CE)) (Transl. Corcoran et al.). |
| Inst.3.14.2 | Sixth century CE | *Item is cui res aliqua utenda datur, id est commodatur, re obligatur et tenetur commodati actione. sed is ab eo qui mutuum accepit longe distat: namque non ita res datur, ut eius fiat, et ob id de ea re ipsa restituenda tenetur. et is quidem qui mutuum accepit, si quolibet fortuito casu quod accepit amiserit,* ***veluti incendio ruina naufragio*** *aut latronum hostiumve incursu, nihilo minus obligatus permanet. at is qui utendum accepit sane quidem exactam diligentiam custodiendae rei praestare iubetur nec sufficit ei tantam diligentiam adhibuisse, quantam suis rebus adhibere solitus est, si modo alius diligentior poterit eam rem custodire: sed propter maiorem vim maioresve casus non tenetur, si modo non huius culpa is casus intervenerit: alioquin si id quod tibi commodatum est peregre ferre tecum malueris et vel incursu hostium praedonumve vel naufragio amiseris, dubium non est, quin de restituenda ea re tenearis. commodata autem res tunc proprie intellegitur, si nulla mercede accepta vel constituta res tibi utenda data est. alioquin mercede interveniente locatus tibi usus rei videtur: gratuitum enim debet esse commodatum.* (So too a person to whom a thing is lent for use is laid under a real obligation, and is liable to the action on a loan for use. The difference between this case and a loan for consumption is considerable, for here the intention is not to make the object lent the property of the borrower, who accordingly is bound to restore the same identical thing. Again, if the receiver of a loan for consumption loses what he has received by some accident, such as fire, the fall of a building, shipwreck, or the attack of thieves or enemies, he still remains bound: but the borrower for use, though responsible for the greatest care in keeping what is lent him—and it is not enough that he has shown as much care as he usually bestows on his own affairs, if only some one else could have been more diligent in the charge of it—does not have to answer for loss occasioned by fire or accident beyond his control, provided it did not occur through any fault of his own. Otherwise, of course, it is different: for instance, if you choose to take with you on a journey a thing which has been lent to you for use and lose it by being attacked by enemies or thieves, or by a shipwreck, it is beyond question that you will be liable for its restoration. A thing is not properly said to be lent for use if any recompense is received or agreed upon |

TABLE 1 Texts that mention the behaviours *incendio ruina naufragio* (*cont.*)

| Author, work, and fragment | Date | Text |
|---|---|---|
| | | for the service; for where this is the case, the use of the thing is held to be hired, and the contract is of a different kind, for a loan for use ought always to be gratuitous.) (Trans. Moyle). |

TABLE 2 Key events on the development of the praetors' edict

| Date | Event | Source(s) |
|---|---|---|
| 367 BCE | Approval of the *leges Liciniae Sextiae*. Creation of the urban *praetura*; the praetor could approve edicts,[2] but the development of this source of creation of law as such was not yet fully developed. | Livy.*Epit*.6.30–42; D.1.2.2.27 (Pompon. 1 *Ench*.). |
| 242 BCE[3] | Creation of the magistracy of the *praetor peregrinus*. | D.1.2.2.28 (Pompon. 1 *Ench*). |
| 199–126 BCE | *Lex Aebutia de formulis*. Abolition of the *legis actionis*—except those concerning the *centumviri* and in the case of *damnum infectum*—and the introduction of the formulary procedure. The reform was completed with the *Leges Iuliae iudiciariae* (17 BCE). The reform served to generalise the formulary procedure, which was undoubtedly known before and practised in trials between foreigners. | G.4.30; Gell.*NA*.16.10. |
| c. 140 BCE | Changes in the substantive law are made not through edicts, but through individual actions. | Lenel.*EP*.115 (*actio de mandati*); EP$^3$.205 (*actio in factum adversus nautas, caupones, stabularios*); EP$^3$.219 (*actio si mensor falsum modum dixerit*); EP$^3$.117 (*actio Serviana*). |
| 140–100 BCE | They started to approve edicts which modify the *ius civile*, although it is likely that these would have been limited to restricting the rights of a plaintiff in a civil action. | D.13.6.5.3 (Ulpian. 28 *ad Ed.*) *edictum de commodatum*; D.46.3.81.1 (Pompon. 1 *Ench.*) *edictum de depositum*. |

2 Watson 1974, 111, indicates that both the urban and the *praetor peregrinus* probably had *ius edicendi* from the moment of creation of their magistracies. He gives the SC of Bacchanalibus (186 BCE) as an example of the consolidation of this right.

3 According to Brennan 2000, 86–87, the sources and the events of the time indicate that this magistrature was probably approved before the year 242 BCE.

TABLE 2 Key events on the development of the praetors' edict (*cont.*)

| Date | Event | Source(s) |
|---|---|---|
| 100–27 BCE | These were the years of highest edictal production,[4] although the highest peak of development had not reached its greatest development. | *Edictum de convicio* (*Rhet. Her.*4.25.35); edictal clauses providing *bonorum posessio* for several aims[5] (Cic.*Quinct.* 19.60); *edictum de hominibus armatis coactisve et vi bonorum raptorum* (Cic.*Tul.*4.8) *edictum de dolo* (Cic.*Nat.D.*3.30.74); *edictum de pactis* (Cic.*Att.* 2.9.1). |

TABLE 3 Legal dispositions approved in the republic that helped to establish the features of the development praetorian edict

| Legal disposition | Dating | Comments | Sources |
|---|---|---|---|
| *Edictum Nautae caupones et stabularius* | Second century BCE | It is not possible to date the edict with greater precision. By studying external factors and determining the development of the Roman maritime traffic, I can hypothesise that the disposition belongs to the second century BCE. It was necessary to develop the appropriate legal dispositions to address navigation, bearing in mind that these dispositions were not yet using the *locatio operis*. Servius Sulpicius Rufus died in 43 BCE, and knew of the *edictum ne quid infamandi causa*, and of the edict introduced by the *actio institoria*. If I understand that this *actio* was older than the *actio exercitoria*, which in turn is less ancient than the *receptum nautarum cauponum stabulariorum*,[6] I understand that the two edicts relating to these actions should also have existed. | [D.4.9] Gaius 5 *ad Ed. Prov.*; Paul. 13 *ad Ed.*; Paul. 22 *ad Ed.*; Ulpian. 14 *ad Ed.*; Ulpian. 18 *ad Ed.* |

4 To the sources included in the table, I must add the mentions of other edicts made by jurists of the Republican era, such as Servius Sulpicius Rufus, who died in 43 BCE (Kunkel 2001, 25); Trebatius Testa and Ofilius (both from the first century BCE.). See Watson 1974, 109.

5 Like *qui fraudationis causa latitarit; cui heres non existabit; qui exilii causa solum verterit*, all of them created around 81 BCE.

6 Aubert 1994, 72–73.

TABLE 3 Legal dispositions approved that helped to establish the development praetorian edict (*cont.*)

| Legal disposition | Dating | Comments | Sources |
|---|---|---|---|
| *Bonae fidei actiones* of *tutelae, empti, venditi, Locati, conducti, pro socio* and *mandati* | Second century BCE? | The order of the development of actions of good faith is still a controversial issue. However, it is admitted by most of the doctrine that the *Bonae fidei actiones of tutelae, empti, venditi, Locati, conducti, pro socio* and *mandati* belonged to the second century BCE. Even if unfortunately, the dispositions themselves are not preserved, the commercial developments that Rome experienced during this period serves as an indicator of the development of these provisions. | [D.19.2] Paul. 34 *ad Ed.*; Gaius lib. 2 *Cott.*; 10 *ad Ed.Prov.*; Pompon. 9 et 6 *ad Sab.*; Ulpian. *28 ad Ed.*; Paul. 32 *ad Ed.*; Tryph.9 *Disp.* |
| *Formula Octaviana* | 79–76 BCE[7] | A remedy that sought to protect citizens threatened with force or fear. It was a precedent for the *actio quod metus causa* (D.4.2.14.3). | Cic.*Verr.*2.3; 65; 152; Cic.*QFr.*1.1.21. |
| *Edictum de metus* | 78 BCE | Introduced by the praetor Octavius, consul in the year 75 BCE. This *actio* was focused on the restitution of property taken, with a penalty of four times its value (as with the *formula octaviana*). It was only approved in cases of real extortion, and at a later stage the *actio quod metus causa* covered the cases of third parties. | Cic.*Off.*3.29.103; 3.30.110; *QFr.*1.1.21; *Verr.*2.3; 65; 152; D.4.2.1 (Ulpian. 11 *ad Ed.*); D.4.2.5 (Ulpian. 11 *ad Ed.*). |
| *Edictum de turba* | ? | Its approach is inherited from the *Lex Aquilia* but focuses on a specific case of damage caused to the property of another in cases of turmoil. | D.47.8.4pr. D.47.8.4.9 (Ulpian. 56 *ad Ed.*); EP$^3$ § 188. |
| *Edictum de Luculo* | 76 BCE | Introduced as the *iudicium de vi coactis armatisque hominibus*, it is probably the origin of the *actio vi bonorum raptorum* (EP$^3$ § 187). | Asc.*Corn.*75; Cic. *Tul.* 3–12. |
| *Edictum de incendio, ruina naufragio rate nave expugnata* | ? | This civil action addresses the risk by attempting to punish theft using violence (*rapina*) committed during a catastrophe. | EP$^3$ § 189; [D. 47.9] Ulpian. 56 *ad Ed.*; Paul. 54 *ad Ed.*; Gaius 21 *ad Ed.Prov.*; Callistrat. 1 *Ed. Mon.*; Callistrat. 2 *Quaest*; Nerat. 2 *Resp*; Marcian. 14 *Inst.*; PS.5.3. 2; Cic.*Parad.*51. |

7 Galeotti 2016–2017, 18 provides the same date of enactment.

TABLE 3 Legal dispositions approved that helped to establish the development praetorian edict (*cont.*)

| Legal disposition | Dating | Comments | Sources |
|---|---|---|---|
| *Interdicto de vi armata* | 73–72 BCE | This was a provision that sought to regain possession in favour of those who had been violently dispossessed of their property by a group of armed men. | Cic.*Fam*.7.13.2; Cic.*Caecin*.69; Cic. *Tul*.46.[8] |
| *Edictum de dolo malo* | 66 BCE[9] | This penalised behaviours committed with bad intent (*dolo malo*) and introduced an *actio in factum* for the punishment of these. | D.4.3.1.1 (Ulpian. 11 *ad Ed.*); D.43.4.1 (Ulpian. 72 *ad Ed.*); Cic.*Off*.3.60; *Nat.D.* 3.30.74. |
| *Edictum vi bonorum raptorum et armatis coactisve* | 131 CE? | In my opinion, this extension of Lucullus' edict corresponds to the legislative tendency that is also noticeable in the edict concerning bad intent. It introduced penalties for criminal actions in situations that covered a broad perspective, including many situations that covered cases of robbery with violence. | EP$^3$ § 188; D.47.8.2pr. (Ulpian. 56 *ad Ed.*; Paul 54 *ad Ed.*). |

TABLE 4 Provisions from the first century BCE that either help dating the *edictum de naufragio* or focus on violence

| Legal disposition | Dating | Comments | Sources |
|---|---|---|---|
| *Lex de piratis persequendis* | 100 BCE | Also called *Lex de provinciis praetoris*, this law is known thanks to two inscriptions found in Delphos and Cnidos and deals with the problem of piracy by labelling these areas as praetorian provinces. | Crawford et al. 1996, 231–270. |
| *Lex Cornelia de sicariis et veneficiis* | 81 BCE | This provided sanctions for those individuals who caused the death of others through certain means | D.48.8.1pr. (Marcian. 14 *Inst.*); Inst.4.18; |

8 If Cicero mentions it in his speech as *actio vi bonorum raptorum*, this reveals that the interdict must be a little earlier.

9 Cicero indicates that Aquilius Gallus (*praetor* in 66 BCE) approved this edict, but I know that it dealt with the *quaestio de ambitu*, which was the reason why the edict should have been approved around that date. Watson 1974, 32 n. 2, says that Gallus had created this edict when he oversaw a *quaestio de ambitu*. However, Brennan 2000, 463, argues that he had prepared the formula during its charge, but that this edict should have been approved later.

TABLE 4 Provisions from first century BCE helping date *edictum de naufragio* or focus on violence (*cont.*)

| Legal disposition | Dating | Comments | Sources |
|---|---|---|---|
| | | such as the use of fire. It extended the typical case to other situations such as shipwreck, as can be seen in D.47.9.3.8. | PS.5.23.1; Cic.*Clu*.54; CTh.9.14; C.9.16.5; Coll.1.3.1–2. |
| *Lex Cornelia de iniuriis* | 81 BCE | This penalised three types of offences caused by violence: *pulsare* (hit), *verberare* (whip) and *domum introire* (forced entry into another person's house). | D.47.10.5pr. (Ulpian. 56 *ad Ed.*); D.48.12.3 (Papir. 1 de Const.); D.48.5.8 (*In lib. 2 de Adulteriis Papin. Marcian. notat*); PS.5.4.6–7. |
| *Lex Lutatia de vi* | 78–77 BCE[10] | Law established against the *crimen vis*, only referred to in a text by Cicero. The scholarship has long discussed the possibility that the *Lex Lutatia* and the *Lex Plautia* were the same.[11] | Cic.*Cael*.70.1 |
| *Lex Plautia de vi* | 78–63 BCE | Law established against the crime *vis* committed against the state or an individual subject. It penalised, for example, armed men who entered the Senate or violence committed against magistrates. | Sall.*Cat*. 31.4; Cic.*Cael*.29.70; 70.1; Cic.*Mil*.13.35; *har.Resp*.8.15; *Fam*.8.8; *QFr*.2.3; *Att*.2.24; Asc.*Corn*.55; G.2.45; Quint.*Inst*. 9.3.56; D.41.3.33.2 (Iulian. 33 *Digest*.). |
| *Lex Gabinia de bello piratico* | 67 BCE | Law approved in favour of Pompey the Great by which an *imperium infinitum* was conferred on him to initiate his fight against piracy. | Cic.*De Imp.Cn.Pomp*. 15–23; Asc.*Corn*.72; Livy.*Per*.99; Cass. Dio.36; Eutr.6.13; Val.Max.8.15; App. *Mith*.94. |
| *Lex Cornelia de Iurisdictione* | 67 BCE | It forbids the praetors from modifying their edict by means of *edicta repentina* approved during their year of office or acting against the principles established by their edict. | *FIRA*II. 1909.69; Cass. Dio.36.40.1–2; Asc.*Corn*.58. |

10 For the dating, see: Labruna 1976, 110; 1986, 1; Cavarzere 1988, 235–238.

11 Hough 1930, 142–143, thinks that the *Lex Lutatia* was approved for a particular event and that it dissappeared shortly after its enactment. On the possibility of a *Lex Lutatia–Plautia*, see Balzarini 1969b, 181–184.

TABLE 4 Provisions from first century BCE helping date *edictum de naufragio* or focus on violence (*cont.*)

| Legal disposition | Dating | Comments | Sources |
|---|---|---|---|
| *Lex Pompeia de vi* | 52 BCE | This is a special statute on *crimen vis*. The probable reason for its enactment was a great riot with fires and massacres at the via Appia. | Asc.*Corn*.33; Cic. *Mil*.6.15; 26.70; and 29.79; App.*B.Civ*.2.23. |
| *Lex Iulia de vi* (*publica et privata*) | 46–44 BCE | These are general laws addressing events involving *vis*. It is likely that there were two statutes on *vis publica* and *privata*, and it is debated whether their author was Augustus or Caesar. | Cic.*Phil*.1.19–24; Suet.*Iul*.41.2; 42.3; Cass.Dio.42.25.1. |

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