REI HEREDITARIAE FURTUM NON FIT

by

J. A. C. THOMAS (London)

In his valuable researches on furtum 1), Albanese observes that the question of furtum of res hereditariae is one deserving separate treatment 2) and intimates 3) his intention of dealing at some future time with the topic. However, so far as I have been able to ascertain, the distinguished scholar of Palermo has not as yet been able to return to the theme 4). I therefore presume to anticipate, in a modest way, his possible contribution.

1. — The title De Furtis, Digest XLVII.2, contains three passages which bear directly on the problem:

69 (Marcellus, 8 Dig.)

Hereditariae rei furtum fieri Julianus negabat, nisi forte pignori dederat defunctus aut commodaverat;

70 (Scaevola, 4 Quaest.)

aut in qua ususfructus alienus est.

71 (Marcellus, ibid.)

His enim casibus putabat hereditariarum rerum fieri furtum et usucapionem impediri; idcircoque heredi quoque actionem furti competere posse.

On the whole, these passages have escaped criticism. Alba-

* A shorter Italian version of this paper was delivered as a lecture at the Istituto di storia del diritto of the University of Perugia; I would again express my thanks to Professor De Dominici for the invitation to deliver a lecture in his Seminar.

1) 23 (1953) and 25 (1957) Annali sem. giur. Palermo = (and cited as) Furtum, I and II respectively.


4) Though penetrating observations appear already in Furtum I, 195ff, II, 65ff.
nese 5) has hinted — it is no more than that — that aut commodaverat in 69 may be a gloss and Beseler 6) attacked idcircoque . . . posse in 71. I hope to show 7) that aut commodaverat is in truth an incorrect addition to the former passage 8) while, so far as 71 is concerned, whatever the validity of Beseler's suspicions, the main substance of the fragment is sound. But for the moment this may be left aside in order to consider the general tenor of the texts.

D.47.2.69—71 tell us, on the authority of Julian, that there can be no theft of a res hereditaria unless the deceased had pledged [or lent (?)] it or unless someone has a usufruct in it. 71 itself says that, in such cases, if another take the thing, there will be fur-tum, the res is incapable of usucapio and the heir also (quoque) — scil. in addition to the pledgee, (borrower) and fructuary — may have actio furti against the appropriator.

A variety of points present themselves. Was it Julian who first denied the possibility of stealing res hereditariae? If so — and for that matter, even if not — was he also responsible for the modifications of the general principle? Why were res hereditariae regarded as incapable of furtum? In our texts, it would appear that, where the pledge (loan) and usufruct are already in existence, the heir can also sue for furtum — how soon was this right conceded? Does it matter whether the heres be suus, necessarius or extraneus and, in the last case, would it be enough to entitle him to bring a. furti that he has made aditio? Such are the questions with which these pages are concerned.

2. — In considering the possibility that Julian was responsible for the general principle and the qualifications upon it, we have, in D.41.3.25, a passage from Julian himself:

41.3.35 (Julian, 3 ad Urseium Ferocem)

5) Furtum II 42, n. 86.
6) 45 Z.S.S. 486; c.f. also Jolowicz, Digest XLVII: De Furtis at p. 108.
7) Post, p. 503 f.
8) For Albanese (loc. cit. in n. 5 above), it is a gloss designed to complete the proposition in the clause.