SECOND COMMENTARY.

(1) In the former Commentary we explained the law of persons; now let us consider the law of things, which either form part of our property or do not form part of it.

(2) The principal division of things is under two heads, namely, those that are subject to divine right, and those that are subject to human right.

(3) Things which are subject to divine right are such as are sacred and religious.

(4) Sacred things are those which are consecrated to the gods above; religious things are those which are dedicated to the spirits of the departed.

(5) That only is considered sacred which has been consecrated by the authority of the Roman people; that is to say, by a law or a Decree of the Senate enacted for that purpose.

(6) We, however, render things religious by our own will, when we bury a body in our own ground, provided we have a right to conduct the funeral of the deceased.

(7) Moreover, it has been held by the greater number of authorities that, in the provinces, ground does not become religious, as the ownership of the same belongs to the Roman people or to the Emperor, and we are only considered to have the possession or the usufruct of the same, and though it may not actually be religious, it is regarded as such.

Likewise, in the provinces, while property which has not been consecrated by the authority of the Roman people is, properly speaking, not sacred, it is still considered as such.

(8) Holy places are those which are, to a certain extent, subject to divine right, as for instance, the walls and gates of a city.

(9) Again, things which are subject to divine right are not included among the possessions of any individual; that is to say, things which are subject to human right are, for the most part, included in the property of someone, they may, however, belong to no one; for an estate before any heir appears is without an owner, as a rule.

(10) Things subject to human right are either public or private.

(11) Things which are public are considered to be the property of no individual, for they are held to belong to the people at large; things which are private are the property of individuals.

(12) Moreover, some things are corporeal and others are incorporeal.

(13) Corporeal things are those that can be touched, as, for instance, land, a slave, clothing, gold, silver, and innumerable other objects.

(14) Incorporeal things are such as are not tangible, and are those consisting merely of rights, as, for instance, inheritances, usufructs, and obligations, no matter in what way the latter may have been contracted. For while corporeal things are included in an estate, and the crops gathered from land are corporeal, and what is due to us under the terms of some obligation is, for the most part, of a corporeal character, for example, land, slaves, money; still, the right of succession, the right of use and enjoyment, and the right of obligation, are incorporeal. To the same class belong rights attaching to urban and rustic estates, which are also called servitudes. Among these are the right to raise a building higher and obstruct the lights of a neighbor; the right to prevent a building from being raised, so that the lights of a neighbor may not be obstructed; the right to the use of streams, and to have rainwater fall upon the premises of another. . . .

(14a) Things are either susceptible, or not susceptible of mancipation by sale. Those susceptible of sale by mancipation are lands and houses in Italy, slaves, domestic animals and rustic servitudes; but servitudes attached to urban estates are not thus subject to sale.

(15) Likewise, estates subject to taxation and tribute are not subject to sale. According to what we have stated, cattle, horses, mules, and asses are held by some authorities to be susceptible of sale as soon as they are born; but Nerva, Proculus, and other jurists of a different school think that such animals are not subject to sale unless they have been tamed; and if this cannot be done on account of their extreme wildness, then they are considered to be salable when they reach the age at which others of the same kind are usually tamed.

(16) In like manner, wild beasts, as for instance, bears, lions, and those animals which can almost be classed as wild beasts, for example, elephants and camels, are not subject to sale; and therefore it makes no difference whether these animals have been broken to harness or to carry burdens, for they were not even known at the time when some things were decided to be saleable and others were not.

(17) Again, almost all things which are incorporeal are not subject to sale, with the exception of servitudes attached to rustic estates; for it is established that these can be sold, although they are included in the number of incorporeal things.

(18) A great difference exists between things which are saleable by mancipation and things which are not.

(19) Things which are not saleable by mancipation become the property of others absolutely by mere delivery; if they are corporeal and on this account are capable of being delivered.

(20) Therefore, if I deliver to you a garment, or some gold or silver, either by way of sale or donation, or for any other reason, the property immediately becomes yours, provided I am the owner of the same.

(21) To the same class belong lands in the provinces, some of which we designate as taxable, and others as tributary. Those are taxable which are situated in the provinces and are understood to be the property of the Roman people; those are tributary which are situated in the provinces and are considered the property of the Emperor.

(22) On the other hand, things susceptible of sale are such as are transferred to another by mancipation, from whence they are styled mancipable, and this has the same validity as a transfer in court.

(23) We explained mancipation and the manner in which it takes place in the preceding Commentary.

(24) A transfer of property in court takes place as follows: He to whom the property is to be conveyed appears before a magistrate of the Roman people, for example, the Prætor, and holding the property in his hands, says: "I declare that this slave belongs to me by quiritarian right." Then, after he makes this claim, the Prætor interrogates the other party to the transfer as to whether he makes a counter-claim, and if he does not do so, or remains silent, he adjudges the property to the party who claimed it. This is called an act of legal procedure, and it can even take place in a province before the governor of the same.

(25) For the most part, however, indeed almost always, we make use of sales by mancipation; for while we ourselves can transact our business in the presence of our friends, there is no reason or necessity for us to do so with greater difficulty before the Prætor, or the Governor of the province.

(26) If the property susceptible of alienation is neither sold nor transferred in court . . . .

(26a) In the provinces, however, no private property in land exists, nor is there any free citizenship.

(27) Moreover, in this place we should note that where the property is merely attached to the soil of Italy, it is not attached to the soil of a province; for the term "attached" only applies where the property is mancipable, and land in a province is not saleable by mancipation. . . .

(28) It is clear that incorporeal property is not susceptible of delivery.

(29) The rights of urban estates can only be transferred in court; those attached to rustic estates can also be sold.

(30) Usufruct is only susceptible of transfer in court, for the the owner of property can transfer the usufruct of the same to another so that the latter may have the usufruct, and he himself retain the bare ownership.

The usufructuary, by transferring his right to the owner of the property in court, causes himself to be divested of it, and the usufruct to be merged in the ownership. Where, however, the right is transferred by him to another in court, it is, nevertheless, retained by the usufructuary, for such a transfer is held to be void.

(31) These proceedings only relate to lands in Italy, for only such lands can be transferred by mancipation, or surrendered in court. On the other hand, with reference to lands situated in the provinces, if anyone desires to create either the usufruct of the same, or the rights of way on foot, on horseback, and for vehicles; or of conducting water, or of raising houses to a greater height, or of preventing this from being done to avoid obstructing the lights of a neighbor, and other servitudes of this description, he can do so by means of agreements and stipulations, for the reason that the lands themselves are not susceptible of either mancipation or surrender in court.

(32) However, as an usufruct can be created in slaves and other animals, we must understand that the usufruct in them can also be created, even in the provinces, by a surrender of this right in court.

(33) But when we said that a usufruct could only be created by a surrender in court, this was not a rash statement, although it may be established by mancipation in such a way that in disposing of the property the usufruct of the same be reserved; for the usufruct itself is not sold but is reserved in the disposal of the property; and the result is that the usufruct is vested in one person and the ownership of the property in another.

(34) Estates also are only susceptible of alienation by a surrender in court.

(35) For if the party to whom an estate belongs as heir-at-law surrenders the same in court before it is entered upon, that is before any heir appears; the person to whom the surrender is made becomes the heir, just as if he himself had been called by law to the inheritance; but if he should surrender it after having incurred the obligation imposed by acceptance, he will, nevertheless, remain the heir, and for this reason will be responsible to the creditors. The debts will also be extinguished, and in this way the debtors of the estate will be benefited; and the corporeal property of the said estate will pass to him to whom the estate was surrendered, just as if separate portions of the same had been surrendered to him.

(36) A testamentary heir, by the surrender of an estate in court to another before it has been accepted, performs an act which is void; but if he should surrender it after he has entered upon it, what we recently stated with reference to one to whom the estate legally belongs by law as the heir of a person dying intestate will apply, if he surrenders the estate in court after assuming the obligations entailed by the acceptance of the same.

(37) The same opinion is held by the authorities of a different school with reference to necessary heirs, namely, that it appears to make no difference whether a party becomes an heir by entering on an estate, or whether he becomes heir-at-law without his own consent; which will be explained in its proper place. Our preceptors, however, hold that the act of a necessary heir is void when he surrenders the estate in court.

(38) Obligations, no matter how they may have been contracted, cannot be transferred in either of these ways; for if anything is due from someone to me, and I wish to transfer the claim to you, I cannot do this in any of the ways by which corporeal property is transferred to

a third party; but it will be necessary for you to stipulate with the debtor under my direction, with the result that he will be released by me and becomes liable to you, which is called the novation of an obligation.

(39) Without this novation, you cannot sue in your own name, but you must bring your action in my name, as my agent or attorney.

(40) In the next place, we should note that only one ownership exists for aliens, for any one of them is considered either to be the owner, or not the owner, of property. The Roman people, in former times, made use of this rule, for every one was either the owner under quiritarian right, or he was understood to have no ownership whatever; but subsequently, they established a division of ownership, so that one person could own property by quiritarian right and another could hold it by bonitarian right.

(41) But if I neither sell an article to you nor surrender it in court, but only deliver it to you, the said article becomes yours by bonitarian right, but still remains mine by quiritarian right, until you, through possession, acquire it by usucaption; for as soon as usucaption is completed, the article becomes absolutely yours, that is, the bonitarian and quiritarian rights vest in you, just as if it had been sold or surrendered in court.

(42) Usucaption of movable property, however, is completed within a year, that of lands and houses within two years; and this was provided by the Law of the Twelve Tables.

(43) Again, we are entitled to usucaption of property of this kind where it has been delivered to us by a party who is not its owner; and this rule applies whether the property is subject to sale or not, provided we received it in good faith, and believed that he who delivered it was the owner.

(44) This regulation seems to have been adopted to prevent the ownership of property from being uncertain for a long period of time, as the term of one or two years should be sufficient to enable the owner to inquire after his property, which time is granted to the possessor to acquire it by usucaption.

(45) Sometimes, however, a party who possesses property in the utmost good faith still cannot acquire the same by usucaption; for instance, where he has possession of an article which has been stolen or obtained by violence, for the Law of the Twelve Tables forbids stolen property to be acquired by usucaption, and the *Lex Julia et Plautia* makes the same provision with reference to property obtained by force.

(46) Likewise, lands situated in the provinces are not susceptible of usucaption.

(47) Again, in former times, property susceptible of mancipation which belonged to a woman under the guardianship of agnates could not be acquired by usucaption, unless it had been delivered by herself with the authority of her guardian; and this rule was established by the Law of the Twelve Tables.

(48) It is also clear that men who are free, as well as sacred and religious property, cannot be acquired by usucaption.

(49) The common saying that the usucaption of property which has been stolen or obtained by force is prohibited by law, does not mean that the thief himself, or the party who obtains possession by violence, cannot acquire it by usucaption (for he is not entitled to usucaption for another reason, namely, because he is a possessor in bad faith), but that no one else, even though he purchased the property in good faith, has the right to acquire it by usucaption.

(50) Wherefore, with reference to movable property, a possessor in good faith does not readily acquire it by usucaption, because a person who sells the property of another and delivers it, commits a theft; and the same thing happens if the property is delivered for any other reason. Sometimes, however, this is not the case, for if an heir believes that property which has been

loaned, hired, or deposited with the deceased, belonged to the estate, and he should sell or give it away, he is not guilty of theft; and also if one to whom the usufruct of a female slave belongs, believing that her child was his, should sell or give it away, he does not commit a theft, for theft cannot be committed without the intention of stealing. This may also happen in other ways, as where anyone transfers property belonging to another to a third party, without the defect of theft, and enables it to be acquired by usucaption by the possessor of the same.

(51) Anyone can obtain possession of land belonging to another without the exertion of violence, if it either becomes vacant through the neglect of the owner, or because he died without leaving any heir, or was absent for a long time; and if he should transfer the said land to another who received it in good faith, the possessor can acquire it by usucaption. And although the party who obtained the land when vacant may be aware that it belongs to another, still, this does not in any way prejudice the right of usucaption of the possessor in good faith, as the opinion of those who held that land could be the subject of theft is no longer accepted.

(52) Again, on the other hand, it happens that anyone who knows that the property which he possesses belongs to another can acquire it by usucaption; as, for instance where someone has possession of property belonging to an estate of which the heir who is not yet born has not obtained possession; for he is permitted to acquire it in this manner, provided the said property is of a nature which admits of usucaption, and this kind of possession and usucaption is styled that of a person representing an heir.

(53) Usucaption of this kind is so readily granted that real property may be acquired by usucaption within the space of a single year.

(54) The reason why, in this instance, land can be acquired by usucaption in a single year, is because that, in former times, through the possession of property belonging to an estate the estate itself was considered to be acquired by usucaption, that is to say, in a year; for, though the Law of the Twelve Tables establishes the term of two years for the usucaption of land and one year for that of other property, an estate "was considered to be included in the latter, as it is neither part of the soil nor corporeal; and although it was afterwards held that estates themselves were not capable of usucaption, still the right to usucaption with reference to all property belonging to an estate, even land, remained in force.

(55) The reason why such thoroughly dishonorable possession and usucaption was allowed was because the ancient authorities desired that estates should be entered upon more quickly, and that there should be persons to perform the sacred ceremonies to which, in those times, the greatest importance was attached; and also that the creditors might have someone from whom they might collect their claims.

(56) This species of possession and usucaption is called lucrative, for the party knows that he is profiting by the property of another.

(57) At the present time, however, it is not lucrative, for a Decree of the Senate, enacted at the instance of the Divine Hadrian, provided that usucaptions of this kind could be revoked; and therefore an heir can recover the property by bringing an action for the estate against him who acquired it by usucaption, just as if the usucaption had never taken place.

(58) Where there is a necessary heir, usucaption of this kind cannot take place under the law.

(59) A person can knowingly acquire the property of another by usucaption under other circumstances; for if anyone makes a fiduciary sale of the property of another or surrenders it in court to a third party, and the owner himself should obtain possession of the same, he can acquire it by usucaption, even in the case of land, after the expiration of a year. This species of usucaption is called a recovery by use, because property which we owned at a former time we recover in this way by usucaption.

(60) Fiduciary ownership, however, is contracted either where the creditor holds the property by way of pledge, or through a friend with whom our property is placed for safe-keeping; and, when the trust is contracted with a friend, recovery by use can, under all circumstances, take place; but where this is done with a creditor, the money must, by all means be paid, and when it has not yet been paid, the property can only be recovered in this way provided the debtor has not hired it from the creditor, or have obtained possession of it during pleasure; as in this instance lucrative usucaption will take place.

(61) Moreover, if the people should sell property pledged to satisfy a claim, and the owner should become possessed of it, recovery by use is permitted; but in this case land will be recovered after the lapse of two years. This is what is commonly called recovery of possession after public sale, for he who buys it from the people is called a purchaser of mortgaged land.

(62) It sometimes happens that an owner has not the power to alienate his property, and that one who is not the owner can do so.

(63) For, by the *Lex Julia*, a husband was forbidden to alienate dotal land against the consent of his wife, although the land may have become his own either by sale to him as dowry, or by surrender in court, or by usucaption. It is doubtful whether this rule is applicable only to lands in Italy, or also to those in the provinces.

(64) On the other hand, an agnate who is the curator of an insane person can, by the Law of the Twelve Tables, alienate the property of the latter; and an agent can also, as well as a creditor, alienate that of his principal, if authorized to do so under an agreement, although the property does not belong to him. This may perhaps be considered to be done for the reason that the pledge is understood to be alienated with the consent of the debtor, who previously agreed that the creditor might be permitted to sell the pledge, if the money was not paid.

(65) Therefore, from what we have stated, it appears that certain property can be alienated by Natural Law; as, for instance, that which is transferred by mere delivery, and that other property can be alienated by the Civil Law, as through sale, surrender in court, and usucaption, for these rights are peculiar to Roman citizens.

(66) Property which becomes ours by delivery can be acquired by us not only by natural law but also by occupancy, and hence we become the owners of the same because it previously belonged to no one else; and in this class are included all animals which are taken on land, or in the water, or in the air.

(67) Therefore, if we should take captive any wild animal, bird, or fish, it is understood to be ours only as long as it is in our custody; for when it escapes from our control and recovers its natural liberty, it again becomes the property of the first occupant, because it ceases to be ours. It is considered to recover its natural liberty when it escapes from our vision, or, although it may be in our sight, its pursuit is difficult.

(68) In the case of those animals, however, which are accustomed to go away and return, as for instance pigeons, and bees, and also deer which are accustomed to go into the forests and return, we have adopted the rule which has come down to us from former times, namely, that if these animals should not have the intention to return, they also cease to be ours and become the property of the first occupant; and they are considered to have ceased to have the intention to return when they abandon their habit of returning.

(69) Property taken from the enemy also becomes ours by Natural Law.

(70) Land acquired by us through alluvion also becomes ours under the same law. This is held to take place when a river, by degrees, makes additions of soil to our land in such a way that we cannot estimate the amount added at any one moment of time; and this is what is commonly stated to be an addition made by alluvion, which is added so gradually as to escape our sight.

(71) Therefore, if the river should carry away a part of your land and bring it to mine, that part will still continue to be yours.

(72) But, if an island rises in the middle of a river, it is the common property of those who possess land on both sides of the stream; but if it is not in the middle of the river, it will belong to those who have land on the nearest bank of the stream.

(73) Moreover, any building erected on our land by another, even though the latter may have erected it in his own name, is ours by Natural Law, for the reason that the surface is part of the soil.

(74) This rule applies with still greater force to trees planted on our soil by another, provided, however, they have taken root in the earth.

(75) The same rule also applies to grain which has been sowed by another upon our land.

(76) But if we bring an action against him to recover the land or the building, and we refuse to pay him the expenses he has incurred in constructing the building or in sowing the crop, we can be barred by an exception on the ground of fraud, that is to say, if he was a possessor in good faith.

(77) It is settled by the same rule that whatever anyone has written on my paper or parchment, even in letters of gold, is mine, because the letters are merely accessory to the paper or parchment; but if I should bring an action to recover the books or parchments, and do not reimburse the party for the expense incurred in writing, I can be barred by an exception on the ground of fraud.

(78) If, however, anyone paints anything on a tablet belonging to me, as for instance, a portrait, the contrary rule is adopted, for it is said that the tablet is accessory to the painting; but a good reason for this difference hardly exists. According to this rule it is certain that if you bring an action for the portrait as yours, while I am in possession of the same, and you do not pay me the value of the tablet, you can be barred by an exception on the ground of fraud. But, if, you are in possession, the result will be that I should be granted an equitable action against you, in which instance unless I pay the expenses of the painting, you can bar me by an exception on the ground of fraud, just as if you were a possessor in good faith. It is clear that if either you, or anyone else should steal the tablet, I will be entitled to an action of theft.

(79) Where the nature of the article is changed recourse to natural law is also required. Hence, if you make wine, oil, or grain, out of my grapes, olives, or heads of wheat, the question arises whether the said wine, oil, or grain is mine or yours. Likewise, if you manufacture a vase out of my gold or silver, or build a ship, a chest, or a bench with my lumber, or you make a garment out of my wool, or mead out of my wine and honey; or a plaster or eye-wash out of drugs belonging to me, the question arises whether what you have made out of my property is yours or mine. Certain authorities hold that the material or substance should be taken into consideration, that is to say, that the article manufactured should be deemed to be the property of him to whom the material belongs, and this opinion was adopted by Sabinus and Cassius. Others, however, hold that the article belongs to him who manufactured it, and this doctrine was approved by authorities of the opposite school, who also agreed that the owner of the material and substance was entitled to an action of theft against the party who had appropriated the property; and also that a personal action would not lie against him because property which has been destroyed cannot be recovered; but, notwithstanding this, personal actions can be brought against thieves and certain other possessors.

V. Whether or not wards can alienate property.

(80) We must next call attention to the fact that neither a woman nor a ward can alienate property by mancipation without the authority of their guardians, but a woman can alienate property not subject to mancipation without such authority, which a ward cannot do.

(81) Hence, if a woman lends money to anyone without the authority of her guardian, for the reason that she transfers it to him, and as money is not subject to sale, the borrower contracts an obligation.

(82) If, however, a ward should do this, as he does not transfer the money to the borrower, the latter does not contract an obligation; and therefore the ward can recover his money, provided it is in existence; that is to say he can claim it as his under quiritarian right, but a woman can only recover the money by an action for debt. Hence the question arises whether the ward who lent the money can, in any action whatever recover it from the person who borrowed it if it has been expended, as recovery must be had for a party in possession.

(83) On the other hand, all property, whether subject to sale or not, can be transferred to women and to wards without the authority of their guardians; and this is granted them because their condition is improved by the transaction.

(84) Hence if a debtor pays any money to a ward, he transfers the ownership of the same to him, but he himself is not released from liability, for the reason that a ward cannot release a debtor from an obligation without the authority of his guardian, as he is not permitted to alienate any property without his guardian's consent; still, if he receives any benefit from the money, and continues to demand payment of the debt, he can be barred by an exception on the ground of fraud.

(85) A woman, however, may be legally paid without the authority of her guardian; and he who makes payment is released from liability, because, as we have previously stated, women can, even without the authority of their guardians, alienate property not mancipable. Although this rule only applies where she actually received the money, still if she did not receive it, but merely says that she has, and wishes to discharge her debtor by giving him a formal release without the authority of her guardian, she cannot do so.

(86) Again, we acquire property not only by ourselves but through those whom we have under our control, in our hand, or in *mancipium*. We can also acquire it through slaves in whom we have the usufruct, as well as through freemen, and slaves belonging to others whom we have possessed in good faith. Let us now carefully examine these different cases.

(87) Anything which our children, who are under our control, as well as anything which our slaves acquire by sale, delivery, or stipulation, or in any other manner whatsoever, is acquired for us; for he who is subject to our authority can have nothing of his own. Hence if such a person should be appointed an heir he cannot enter on the estate without our order, and if he should do so under our direction the estate will be acquired for us, just as if we ourselves had been appointed heirs; and in accordance with this rule a legacy is acquired by such parties for us in the same manner.

(88) We should, however, note that where a slave belongs to one person by bonitarian right, to another by quiritarian right, in every instance whatever is acquired by him belongs to the party in whom the bonitarian right is vested.

(89) Not only is the ownership of property acquired for us by those whom we have under our control, but possession is also; for if they obtain possession of property we are considered to have possession of the same, hence property can even be acquired through them by usucaption.

(90) Ownership is indeed acquired for us, in every instance, through those persons whom we have in our hand or in *mancipium*, just as it is by those who are under our control; but whether possession is also acquired is a question, for the reason that we do not have possession of the said persons.

(91) Moreover, it has been decided with reference to slaves in whom we only have an usufruct that anything which they acquire by the employment of our own property, or by their labor, is

acquired for our benefit; but what they acquire by any other means belongs to the owner of the property. Therefore, if a slave of this kind is appointed an heir, or a legacy should be left to him, it would not be acquired for my benefit, but for that of the owner of the property.

(92) The same rule applies to anyone who is possessed by us in good faith, whether he is free or the slave of another; for what has been decided with reference to an usufructuary also holds good with reference to a *bona fide* possessor; and hence any property which is acquired in any other way than the two above mentioned will belong to the party himself, if he is free, or to the owner, if he is a slave.

(93) But after a *bona fide* possessor has obtained a slave by usucaption, for the reason that he becomes his owner in this way, anything which the slave may acquire will be for his benefit. An usufructuary, however, cannot acquire a slave by usucaption; first, because he does not have possession, but only the right of use and enjoyment; and second, because he knows that the slave belongs to another.

(94) It is a matter of doubt whether we can hold possession of property and acquire it by usucaption through a slave in whom we have the usufruct, because we are not in possession of the slave. There is no question, however, that we can both hold possession of property and acquire it by usucaption, through a slave of whom we have possession in good faith. But in both these cases we have reference to the distinction which we explained above; that is to say, where the slave acquires anything by means of our property, or by his own labor, it is acquired for our benefit.

(95) From this it is apparent that under no circumstances can property be acquired for our benefit through freemen who are not subject to our authority, and of whom we do not have possession in good faith, nor by slaves belonging to others in whom we neither have the usufruct, nor of whom we have legal possession. This is what is meant by the common saying that property cannot be acquired for us through a stranger; and the only question relating to possession is whether it can be acquired for our benefit through a person who is free.

(96) In conclusion, it should be remembered that nothing can be surrendered in court by persons who are under the control, or in the hand or mancipation of another, as nothing can belong to persons of this description; and the result is that they cannot claim anything as their own in court.

(97) Up to this point it is sufficient to have stated how separate property can be acquired by us; for we shall hereafter, and in a more suitable place discuss the law of legacies, by which also we acquire individual property. Now let us see in what ways property can be acquired by us in the aggregate.

(98) If we become the heirs of any person, or demand prætorian possession of an estate, or purchase the inheritance of anyone, or adopt anyone, or receive a wife in our hand; the entire property of any of said persons passes to us.

(99) And, first, let us discuss inheritances, the condition of which is twofold; for an inheritance either comes to us by will, or on account of intestacy.

(100) And first we shall examine what comes to us by will.

(101) Originally there were two kinds of wills; for parties either made a will at the *Comitia Calata*, which were assembled twice a year for that purpose; or in the face of the enemy, that is to say when the testator took up arms for the purpose of making war; for the term has reference to an army ready and armed for service. Hence, persons made one kind of a will in time of peace and tranquillity, and another when about to go into battle.

(102) Afterwards, a third kind of will was introduced, which was executed by bronze and balance. Where a man who had not made a will at the *Comitia Calata* or in the face of the enemy was apprehensive of sudden death, he usually transferred his estate by sale to a friend,

and requested him to distribute it to whomever he desired to have it after his death. This kind of testamentary disposition is styled a will by bronze and balance, because it is effected by the ceremony of mancipation.

(103) The two kinds of wills above mentioned have, however, fallen into disuse; and only the one effected by bronze and balance has been retained, but it is now changed from what it was in ancient times. For formerly the purchaser of the estate, that is to say the party who received it by a sale from the testator, occupied the place of the heir, and for this reason the testator directed him with reference to what he desired to be given to anyone after his death. Now, however, another person is appointed heir under the will who is charged with the distribution of legacies, and differs from the one who, as a matter of form and in imitation of the ancient law, represents the purchaser of the estate.

(104) This transaction takes place as follows: The party who executes the will having, as in the case of other sales, called together five Roman citizens of the age of puberty as witnesses, and a balance holder, and having reduced his will to writing, sells his estate as a matter of form to a certain person, and the said purchaser makes use of the following words: "Let your family and money pass into my charge and custody, and, in order that you may make your will properly in accordance with the public law, let them be purchased by me with this bronze" (or as some authorities add) "with this brazen balance." Then he strikes the balance with the piece of bronze, and delivers the latter to the testator as purchase money. Next the testator, holding the will in his hands, says, "I do give and bequeath, and declare that I do so, everything written in these tablets and this wax, and do you, Roman citizens bear witness to my act." This ceremony is called nuncupation, for this term means to declare publicly; and indeed what the testator specially stated in writing in his will is considered to have been declared and confirmed by this general affirmation.

(105) Anyone who is under the control of, or belongs to the family of the purchaser or to that of the testator himself, should not be one of the witnesses; because, in imitation of the ancient law, the entire transaction which takes place for the purpose of establishing the will is considered to be carried on between the purchaser of the estate and the testator; and in former times, as we stated above, anyone who purchased the estate of the testator occupied the position of an heir, and therefore the testimony of persons belonging to the family taken in a proceeding of this kind was rejected.

(106) Wherefore, if the purchaser of the estate is under the control of his father, neither his father, nor anyone in the power of the latter, for instance his brother, can be a witness. If, however, a son under parental control, after his discharge from the army, should make a will disposing of his *castrense peculium*, neither his father, nor anyone who is subject to the authority of the latter, can be a witness.

(107) We understand that the same rules which have been established with reference to witnesses, also apply to the balance-holder, for he is included in the number of witnesses.

(108) Not only can he who is under the control of the heir or legatee, or who is also under the control of the same person as the heir or the legatee be a witness and a balance-holder, but the heir, or the legatee himself, has a right to act in this capacity. Still, so far as the heir is concerned, as well as with reference to him who is in his power, and the party under whose control he himself is, we should not, by any means, make use of this right.

Concerning military wills.

(109) The rigid observation of these rules in the making of wills is not required of soldiers, by the Imperial Constitutions on account of their extreme want of legal knowledge. For, even if they should not summon the lawful number of witnesses, or sell the property, or declare the will to be theirs, they nevertheless have the right of testamentary disposition.

(110) Moreover, they are permitted to appoint even aliens and Latins as their heirs or legatees; while under other circumstances aliens are forbidden by the Civil Law from receiving estates and legacies, and Latins are forbidden to do so by the *Lex Junta*.

(111) Unmarried persons who are prohibited by the *Lex Julia* from receiving estates or legacies, and likewise bereaved persons, that is to say those who have no children and upon whom the *Lex Papia* forbids to take more than half an estate or legacy, are not disqualified from taking all of it under a military will.

(112) A Decree of the Senate was enacted at the instance of the Divine Hadrian, by which women were permitted to make a will even without the ceremony of coemption; provided, however, they were not under twelve years of age; and if they were not released from guardianship, they were required to execute their wills with the consent of their guardians.

(113) Females therefore appear to be in a better position than males, but a male under the age of fourteen cannot make a will, even with the authority of his guardian; but a female obtains the right of testamentary disposition with the consent of her guardian, after she has reached her twelfth year.

(114) Hence, if we wish to know whether or not a will is valid, we must ascertain in the first place whether the party who executed it had testamentary capacity, and next, if he had it, we must learn whether he made the will in accordance with the requirements of the Civil Law; with the exception of soldiers, who, as we have stated, are, on account of their want of legal knowledge, permitted to make a will in any way that they may desire, and in any way that they can.

(115) In order that a will may be valid under the Civil Law, it is not sufficient that the rule which we have laid down above with reference to the sale of an estate, the qualification of witnesses, and the declaration of the testator should be observed.

(116) But, above all things, it should be ascertained whether the appointment of the heir was made in regular form; for, where the appointment was made otherwise, it makes no difference whether the estate of the testator was sold, the witnesses assembled, and the declaration published in a proper manner, as we stated above.

(117) The regular appointment of an heir is as follows: "Let Titius be my heir." The following form at present seems to be approved, namely: "I order that Titius be my heir." This one, however, "I desire Titius to be my heir" is not recognized as correct; and the following expressions, "I appoint Titius my heir," and "I make Titius my heir," are not admitted as valid by the greater number of authorities.

(118) Moreover, it should be observed that if a woman, who is under guardianship, makes a will, she must do so with the consent of her guardian; otherwise her will is void by the Civil Law.

(119) The prætor, however, promises the heirs mentioned in the will to place them in possession of the estate in accordance with the provisions of the same, if the will is attested by the seals of seven witnesses, and if there is no one to whom the estate will belong as heir-at-law under the rule of intestacy; as, for example, a brother by the same father, or a paternal uncle, or the son of a brother, the heirs mentioned, in the will can retain the estate; "for the same rule of law applies as in the case where a will is not valid for some other reason, for instance because the estate was not sold, or the testator did not utter the words required for the declaration.

(120) But let us consider, even if there should be a brother or a paternal uncle, whether the heirs mentioned in the will should be preferred to them; for it is stated in a rescript of the Emperor Antoninus that parties who have obtained prætorian possession of an estate in accordance with the terms of a will not properly executed, can, by means of an exception

based on fraud defend themselves against parties claiming the estate on the ground of intestacy.

(121) It is certain that this rule applies to the wills of males as well as to those of females which were not properly executed, as, for example, where they did not make use of the mere formality of selling the estate, or of speaking the words required for the declaration; and we shall see whether this constitution also applies to the wills of women which have been executed without the authority of their guardians.

(122) We are not speaking, however, of those women who are under the legal guardianship of their parents or patrons, but of those who have guardians of another kind that are compelled, even if unwilling, to grant their consent; otherwise it is evident that a parent or a patron cannot be removed by a will made without his sanction.

(123) Again, anyone who has a son under his control must take care either to appoint him as his heir or to disinherit him by name; otherwise, if he passes him over in silence this renders his will void. To such an extent is this true, that our preceptors hold that even if the son should die during the lifetime of his father, no one can be an heir under the will, for the reason that the appointment was not valid in the beginning. Authorities of the other school, however, are of the opinion that although the son, if he is living at the time of his father's death, becomes his father's heir on the ground of intestacy, without being barred by the mention of the heirs in the will; still, if he should die before his father, they hold that the said heirs can enter on the estate under the will, without the son being any longer an impediment; for the reason that they think that the will was not valid from the beginning, on account of the son having been passed over.

(124) If, however, the testator should pass over others of her children, the testament is valid, but the persons who have been passed over will have a right, with the heirs mentioned therein, to equal shares of the estate, if they are proper heirs; and to half of it if they are strangers. For example, if anyone should appoint his three sons his heirs, but should pass over his daughter, the daughter will become a co-heir to a fourth part of the estate; and for this reason will obtain the same share that she would have been entitled to if her father had died intestate; but if he should appoint foreign heirs, and pass over his daughter, the latter will be entitled to half of his estate. What we have mentioned with reference to a daughter we understand to apply to a grandson and to all the children of a son, of both sexes.

(125) What course then should be pursued? Although according to what we have stated the heirs mentioned in the will are only deprived of half the estate by the children of the testator, still, as the prætor promises to give the latter possession contrary to the provisions of the will, and according to this rule, foreign heirs arc excluded from the entire estate, and merely become heirs without obtaining any of the property,

(126) We formerly made use of this law as no difference between females and males existed; but the Emperor Antoninus recently stated in a rescript that women who were proper heirs could not obtain more by acquiring prætorian possession of an estate than they would by the right of accrual. This rule should also be observed in the case of daughters who have been emancipated; that is, they will obtain the same amount through prætorian possession of the property as they would have obtained by the right of accrual, if they had remained under the control of their father.

(127) A son, however, must be expressly disinherited by his father, otherwise he is not considered to have been disinherited. A son is held to be expressly disinherited when the following expressions are used, "Let my son Titius be disinherited"; or "Let my son be disinherited"; without mentioning his name.

(128) Other children of both sexes may be properly disinherited, among others, by the use of the following words: "Let all those remaining be disinherited"; which words are usually added

after the appointment of the heirs. This, however, is only prescribed by the Civil Law.

(129) For the prætor requires all descendants of the male sex that is to say sons, grandsons, and great-grandsons, to be disinherited by name; but he considers it sufficient if descendants of the female sex, that is to say, daughters, granddaughters, and great-granddaughters, are either disinherited by name, or among others.

(130) Posthumous children must be either appointed heirs, or disinherited.

(131) In this respect the condition of all is the same, so that if a posthumous son, or any other child of either sex is passed over, the will is indeed valid; but after the birth of the posthumous child it will be broken, and for this reason will be absolutely void. Therefore, if a woman who is expected to give birth to a posthumous child should have an abortion, there will be nothing to prevent the heirs mentioned in the will from entering on the estate.

(132) Persons of the female sex are either expressly, or generally disinherited, but if they are disinherited with others, something must be bequeathed to them in order that they may not appear to have been passed over through forgetfulness. It has been decided, however, that persons of the male sex cannot legally be disinherited unless this is done expressly, for instance as follows: "Let any son who may be born to me be disinherited." . . . .

(133) In the same category with posthumous children are placed those who, by succeeding as proper heirs, become such to their relatives, just as posthumous children are by birth. For example, if I have a son, and by him a grandson, or a granddaughter in his power, because the son precedes by a degree, he alone enjoys the rights of a proper heir; although the grandson and granddaughter by him are both under the same authority. If, however, my son should die during my lifetime, or should, for any reason whatsoever, be released from my control, the grandson and granddaughter will succeed to his place, and in this way acquire the rights of proper heirs just as if they were posthumous children.

(134) Therefore, to avoid my will being broken in this way, just as I must appoint either my son my heir, or expressly disinherit him, otherwise my will will not be valid; so it is necessary for me to appoint my grandson or granddaughter my heir, or disinherit them; lest, if my son should die during my lifetime, my said grandson or granddaughter, by succeeding to his place, may break my will in the same way as if they had been posthumous children. This is provided by the *Lex Junia Vellæa*, in which the method of disinheritance is prescribed, that is to say, posthumous children of the male sex shall be expressly disinherited, and those of the female sex shall be disinherited expressly, or generally with others; provided, however, that something is bequeathed to those who are disinherited with others.

(135) It is not necessary for children emancipated by the Civil Law to either be appointed heirs, or disinherited, for the reason that they are not proper heirs. The prætor, however, orders all children of both sexes to be disinherited if they are not appointed heirs; if they are of the male sex they must be expressly mentioned, and if of the female sex they must either be expressly mentioned, or disinherited among others; and if they are neither appointed heirs nor disinherited the prætor, as we have stated above, promises to grant them possession of the estate in opposition to the terms of the will.

(135a) Children who have been granted Roman citizenship along with their father, are not subject to his authority, if at the time citizenship was granted or afterwards, the father did not petition to retain them under his control — and the rule is the same if he did petition but did not succeed — for children who are placed under the control of their father by the Emperor differ in no respect from those who are subject to his authority from their birth.

(136) Again, adopted children, as long as they remain in this condition, occupy the place of natural children; but when they have been emancipated by their adoptive father, they are not included among his children, either by the Civil Law, or by the Edict of the Prætor.

(137) On the other hand, for this reason it happens that as long as they remain in the adoptive family, they are considered as strangers so far as their natural father is concerned; but if they should be emancipated by their adoptive father, they will then be in the same condition as they would have been had they been emancipated by their natural father.

(138) If anyone, after having made a will, should either adopt a son, who is his own master, in an assembly of the people, or one who is under the control of his parent through the intervention of the Prætor, his testament will undoubtedly be broken, just as it would have been by the subsequent birth of a proper heir.

(139) The same rule applies where, after having made a will, a wife comes into the hand of the testator, or he marries a woman who is in his hand; for in this way she takes the place of a daughter, and becomes a proper heir.

(140) It makes no difference whether either of the parties adopted was appointed an heir by the will, for, so far as their disinheritance is concerned, the question would seem to be superfluous; as, at the time the will was made, they were not included in the number of proper heirs.

(141) Likewise, a son who has been manumitted after the first or second sale, breaks a will previously executed; for the reason that he is restored to the authority of his father, and it makes no difference whether he was appointed an heir, or disinherited by the said will.

(142) The same rule formerly applied to one for whose benefit proof of error is permitted by the Decree of the Senate, for the reason that he was born of an alien, or of a Latin woman who was married with the understanding that she was a Roman citizen; for, whether he was appointed heir, or disinherited by his father, or whether, during the lifetime of the latter, the error was proved, or this was done after his death; the will was absolutely broken, as by the birth of a posthumous child.

(143) Now, however, by a late Decree of the Senate enacted at the instance of the Divine Hadrian, if the error is proved during the lifetime of the father, the will is in every instance broken, as in former times; but where it is proved after the death of the father, if the son was passed over in silence, the will is broken. But if he was mentioned in it as the heir, or disinherited, the will is not broken, in order that carefully executed wills may not be rescinded at a time when they cannot be renewed.

(144) A former will is revoked by one subsequently executed; nor does it make any difference whether an heir ever appears or not, for it only is considered whether he might take under it if he did appear. Therefore, if the heir appointed by the last will, which was legally executed, is unwilling to take under the same; or if he should die during the lifetime of the testator, or after the death of the latter, and before he had entered upon the estate; or if he should be excluded for not having accepted the estate within the prescribed time, or on account of the condition under which he was appointed not having been complied with; or by the *Lex Julia* on account of celibacy; in all these cases the testator dies intestate; for the first will having been revoked by the subsequent one is not valid, and the last will also has no effect, as there is no heir under it.

(145) Wills legally executed may become void in another way, as for instance, when he who executed the will loses his civil rights, and how this may happen was stated in the First Commentary.

(146) Moreover, in a case of this kind we say that a will may become inoperative; for although wills which are revoked, and those which in the beginning are not legally executed are alike invalid, and those which have been properly executed become invalid on account of loss of civil rights, they, nevertheless, may be said to be rescinded; still, for the reason that it is more convenient for the different cases to be designated by different names, some of these wills are said not to have been legally executed, and others which have been legally executed are either

broken or become void.

(147) However, wills which in the beginning were not legally executed, or if they were legally executed afterwards became void, or were revoked, are still not absolutely inoperative; for if they have been sealed with the signets of seven witnesses, the appointed heir can demand possession of the estate in accordance with the provisions of the will, provided the deceased testator was a Roman citizen and his own master at the time of his death; but if the will became inoperative, for example, because the testator lost his citizenship or his freedom, or gave himself in adoption, and he dies under the control of his adoptive father, he cannot demand possession of the estate in accordance with the provisions of the will.

(148) Therefore, those who obtain prætorian possession of an estate in accordance with the provisions of a will which was not properly executed in the first place, or which if it was properly executed, was subsequently broken, or became void; provided they can establish their right to the estate can obtain actual possession of the same. If, however, they can be deprived of the estate by some one having a better claim they will be entitled only to nominal possession.

(149) For, if anyone has been appointed heir under the Civil Law by either a former or a subsequent will; or is the heir-at-law to an intestate estate, he can deprive the nominal possessor of the same; but, if no one else is an heir under the Civil Law, the possessor can retain the estate, nor will cognates, who have no legal title, have any right to deprive him of it.

(149a) Sometimes, however, as we have mentioned above, heirs who were appointed by will are preferred to heirs-at-law; for instance if the will was not legally executed either because the estate was not sold, or because the testator did not utter the formula of declaration; for if the agnates of the deceased should claim the estate they can be barred on the ground of fraud in accordance with the Constitution of the Divine Antoninus.

(150) Prætorian possessors of an estate are not excluded under the provisions of the *Lex Julia*, by which estates which have no heirs are ordered to escheat to the government, if the deceased left no successor of any kind.

(151) A will legally executed may be rendered void by the expression of a contrary intention, but it is evident that it cannot be rendered inoperative by such an intention alone; because after the testator was unwilling that it should stand, and even if he went so far as to cut the cord with which it was tied, it will, nevertheless, continue to be valid under the Civil Law. Moreover, if he should erase or burn the will, what he wrote will still be valid, although the proof of it may be difficult.

What then should be done? If anyone demands prætorian possession of an estate on the ground of intestacy, and he who is appointed by the will claims it, the latter may, in this instance, be excluded by an exception on the ground of fraud, provided it is proved to have been the intention of the testator that the estate should go to those entitled to the same as heirs-at-law; and this rule is set forth in a rescript of the Emperor Antoninus.

(152) Again, heirs are either designated necessary, or necessary and proper, or foreign heirs.

(153) A necessary heir is a slave appointed with the grant of his freedom; and he is so called because at the death of the testator, whether he is willing or unwilling, he at once becomes free and his heir.

(154) For this reason anyone who suspects that he is insolvent, usually appoints his slave his heir with the grant of his freedom as a substitute in the second or any inferior degree; so that, if his creditors are not satisfied in full, the property of his estate may be sold rather as belonging to the heir than to the testator himself, and the disgrace which results from the sale of the property of an insolvent estate may attach rather to the heir than to the testator; although as was held by Sabinus, according to Fufidius, that he ought not to suffer ignominy because

the sale of the property of the estate was not caused by his fault but through the requirements of the law. We, however, adopt a different view.

(155) As a recompense for this inconvenience, the benefit is conferred upon the slave of acquiring for himself everything which 'he obtains after the death of his patron, whether it was reserved for him before or after the sale of the property; and although only a part of the claim may have been paid by the proceeds of the sale, his subsequently acquired property cannot again be sold on account of the debts of the estate, unless he should have acquired something on account of his being the heir, for example, the estate of a Latin freedman, and thereby have become more wealthy; while if the property of other persons when sold only pays a portion of the indebtedness, and they afterwards acquire any other property, the latter may be sold time and again.

(156) Proper and necessary heirs are, for instance, a son or a daughter, a grandson or a granddaughter by a son, and their descendants, provided they were under the control of the testator at the time of his death. In order, however, that a grandson or a granddaughter may become a proper heir, it is not sufficient for him or her to have been under the control of their grandfather at the time of his death, but it is necessary that their father should, during the lifetime of his father, have ceased to be a proper heir, either on account of death, or because of having been released from parental control in any other way whatsoever, for then the grandson or granddaughter will succeed to the place of his or her father.

(157) They are called proper heirs because they are family heirs, and even during the lifetime of their parent are to a certain extent considered to be joint owners of the estate, and therefore where anyone dies intestate, the first right to the succession belongs to his children. They are called necessary heirs for the reason that, under all circumstances, whether they are willing or unwilling, they become heirs in case of intestacy, as well as under the will.

(158) The prætor, however, permits them to relinquish the succession, in order that the estate of their father may be sold for the payment of debts.

(159) The same rule applies to the case of a wife who is in the hand of her husband, because she occupies the place of a daughter; as well as to a daughter-in-law who is in the hand of a son of the testator; for the reason that she occupies the place of a granddaughter.

(160) Moreover, the prætor gives the same power to reject an estate to one *in mancipium*, who has been appointed heir with the grant of freedom, although he is merely a necessary heir, and not a proper one, as is the case with a slave.

(161) Others who are not subject to the control of the testator are designated foreign heirs. Therefore, children who are not under our control when appointed heirs by us, are considered as strangers, for which reason children who are appointed heirs by their mother are also included in this class because women cannot have children subject to their authority. In like manner, slaves who are appointed heirs with the grant of their freedom, and are afterwards manumitted by their owner, are included in the same class.

(162) Moreover, power is granted to foreign heirs to deliberate whether they will, or will not, accept an estate.

(163) If, however, one who has the power to reject an estate should interfere with the property of the same, or one who is permitted to deliberate as to whether he will enter on an estate or not, should accept it, he has no power to reject it afterwards, unless he is a minor under twenty-five years of age; for the prætor comes to the relief of persons of this age when they rashly accept an estate which is injurious to them; as in all other cases where they are deceived. I remember that the Divine Hadrian even excused a person over the age of twenty-five years, where, after he had entered on an estate, a great debt was discovered, which at the time of the acceptance of the estate was not known to exist.

(164) Time to make up their minds, that is to say, a certain term for deliberation, is usually granted to foreign heirs in order that they may enter upon an estate within the prescribed period, and if they do not do so, they are barred from accepting it. Hence this is called "*cretio*," for the reason that the word "*cernere*" means, in one sense, to decide and to determine.

(165) Therefore, after the following clause: "Titius, be my heir," we should add: "and within a hundred days after you learn of your appointment, and are able to do so, you must state whether you accept or not; and if you do not do so, you shall be disinherited."

(166) And if an heir appointed in this manner desires to accept, he should do so within the prescribed time, that is to say he should utter the following words: "As Publius Mævius appointed me his heir by his will, I decide to accept the estate"; but if he should not make such a declaration, after the time has elapsed he shall be excluded; nor will it be of any benefit to him to act as the heir, that is to say, for him to make use of the property of the estate just as if he were the heir.

(167) But if an heir should be appointed without giving him time for deliberation, or be called to the succession as heir-at-law on the ground of intestacy, he can, either by deliberating or as acting as the heir, or by the mere intention of accepting the estate, become the heir, and he will be free to accept at any time, when he may desire to do so; but the Prætor, on the demand of the creditors of the estate, usually fixes a time within which if the party may enter on it if he wishes; and if he does not, the creditors may be permitted to sell the property of the deceased.

(168) But, just as one who has been appointed heir with time for deliberation does not actually become the heir unless he formally accepts the estate, so he will not be excluded unless he fails to make the declaration to that effect within the prescribed time; and, therefore, although before the time has expired he may have decided not to accept the estate, still, by having changed his mind and declared that he will accept, before the time for deliberation has elapsed, he can become the heir.

(169) But just as he who was appointed heir without time for deliberation, or who was called to the succession as heir-at-law on the ground of intestacy, becomes heir by the mere expression of his will; so, by a contrary statement he is immediately excluded from the inheritance,

(170) Moreover, every period granted for deliberation has a prescribed limit, and in such cases a reasonable time is considered to be a hundred days. Still, by the Civil Law, a longer or a shorter period can be granted, though the Prætor sometimes shortens a longer one.

(171) Although the time for deliberation is limited to certain days, still, one kind of limitation is designated common and the other certain; common, being that which we have described above, that is, where the following words: "When he has learned of it, and is able," are added; certain, is that in which other words are written instead of those above mentioned.

(172) A great difference exists between these two grants of time, for in the common one no days are computed except those during which the party knows that he has been appointed heir, and is able to decide; but where a certain time has been granted, notwithstanding the party may not know that he has been appointed heir, the days are reckoned continuously; and, likewise, if for any reason he is prevented from stating his decision, or, further, if he has been appointed heir under some condition, the time will still continue to be reckoned, and hence it is better and more convenient to make use of the common method.

(173) This certain period of computation is called continuous for the reason that the days are reckoned without cessation; but, still, on account of the harshness of this method, the other is ordinarily employed, and hence is styled common.

Concerning substitutions.

(174) Sometimes, we appoint two or more degrees of heirs in the following manner: "Lucius Titius, be my heir, and make your declaration within the next hundred days after you know of your appointment, and are able to do so; and if you should not announce your decision in this manner, you shall be disinherited. Then you, Mævius, be my heir, and announce your decision within a hundred days, etc." And afterwards we can make as many substitutions as we desire.

(175) We are permitted to substitute one or several persons in the place of one; and, on the other hand, to substitute one or several in the place of several.

(176) Therefore, where the heir is appointed in the first degree he becomes such by acceptance and the substitute is excluded; if he does not declare his acceptance, he will be excluded, even if he acts as heir, and the substitute will succeed in his stead; and if there are several degrees in succession, the same thing takes place under this rule in every instance.

(177) Where, however, the time for acceptance is fixed without mentioning disinheritance, that is to say as follows: "If you do not announce your acceptance of the estate, then let Publius Mævius be my heir," a different rule will apply; for if the party first appointed — even though he does not announce his acceptance — acts as heir, the substitute is only admitted to share in the estate, and both parties become heirs to equal portions of the same; and if he neither announces his acceptance, nor acts as heir, he will then be excluded from the entire estate, and the substitute will succeed to the whole of it.

(178) It was held by Sabinus that a substitute is not admitted as long as the heir first in degree has the right to announce his decision, even though he should have acted as heir, and in that way have become the heir; but that when the time prescribed for making a decision has expired, the substitute could be admitted, instead of the party who had been acting as heir. It was held by others, however, that even while the term prescribed for making the decision was pending the heir, by the exertion of authority as such, would admit the substitute to share in the estate, and that the former could not again revert to his right to decide.

(179) As we have stated above, we can not only appoint a substitute for our children under the age of puberty, who are subject to our authority, that is, if we have another heir and they should fail to inherit; but also even if they should become our heirs and die before reaching the age of puberty, another may be their heir; as for example, "Let my son Titius be my heir; and if my son does not become my heir, or if he should do so and die before he becomes his own guardian, then let Seius be my heir."

(180) In this instance, if the son does not become the heir, the substitute will be the heir to the father; but if the son should become the heir and die before reaching puberty, the substitute will become the heir to the son himself. On this account there are, as it were, two wills, one that of the father, the other that of the son, just as if the son himself had appointed an heir; or, in fact, there is one will disposing of two estates.

(181) However, in order that the minor may not be subjected to the risk of treachery after the death of his parent, it is the usual practice to make the substitution publicly, that is to say, in the same part of the will in which we appoint the minor our heir; for as ordinary substitution only calls a substitute to the succession if the minor should not become the heir, which takes place where he dies while his parent is still living; in which instance we cannot suspect the substitute of being guilty of foul play, as during the lifetime of the testator everything which is contained in the will is unknown.

A substitution like the one above mentioned by which, even if the minor should become an heir but should die before attaining the age of puberty, we call the substitute to the succession, is one which we. write separately on tablets subsequently executed, and seal up by our own cord and wax after having provided in the first tablets that those written afterwards shall not be opened before he reaches the age of puberty.

It is much safer, however, for both kinds of substitution to be sealed up in different tablets subsequently executed, for if this should be done, or separate substitutions be made, as we have stated, it can be understood from the first that the same substitution is made in the second.

(182) Not only where children under the age of puberty are appointed heirs, can we make a substitution for them, so that, if they should die before attaining puberty, the person whom we designated shall be our heir, but this will even be the case if they are disinherited; therefore, in this instance, if anything should be acquired by the minor from the estates of relatives either by inheritance, legacies, or donations, it will all belong to the substitute.

(183) What we have stated with reference to the substitution for children under the age of puberty, whether they have been appointed heirs or disinherited, we understand also to apply to posthumous children.

(184) We cannot, however, appoint a substitute for a stranger who is appointed an heir in such a way that if the stranger should become the heir and die within a certain time, another shall be his heir; but we are only permitted to bind him by means of a trust to transfer our estate, either wholly or in part, and what this rule is we shall explain in its proper place.

(185) Freemen as well as slaves, whether they belong to us or to others, may be appointed heirs.

(186) A slave belonging to us must, however, be appointed heir and declared to be free at the same time, that is to say, in the following manner: "Let Stichus, my slave, be free and my heir," or "Let him be my heir and be free."

(187) For if he is appointed heir without the grant of his freedom, even if he should subsequently be manumitted by his owner, he cannot be the heir, because his appointment, in the first place, is not valid, and therefore although he may have been alienated, he cannot declare his acceptance of the estate, even by the order of his new master.

(188) When a slave is appointed with the grant of his freedom, and remains in the same condition he becomes free by the terms of the will, and hence is a necessary heir. If, however, he should be manumitted by the testator himself, he can use his own discretion as to entering on the estate. If he is alienated, he should enter on the estate by the order of his new master, for which reason the latter becomes the heir through him, as he himself cannot be either the heir, or free.

(189) When a slave belonging to another is appointed heir and he remains in the same condition, he should enter on the estate by the order of his master. If, however, he has been alienated by him, either during the lifetime of the testator, or after the death of the latter, before he makes up his mind whether he will accept the estate or not, he must act by the order of his new master; but if he has been manumitted, he can use his own judgment as to the acceptance of the estate.

(190) If, however, a slave belonging to another is appointed heir with the period usually allowed for acceptance, it is understood only to date from the time when the slave himself knew that he had been appointed heir, and no obstacle existed to prevent him from notifying his master, in order that he might accept the estate by his order.

(191) Let us next consider legacies, a part of the law which does not seem to have any reference to the subject under consideration, for we are discussing these legal titles by which rights are acquired by us in the aggregate; but we have, at all events, to discuss wills and testamentary heirs, and it is not without reason that this legal subject should, in the next place be examined.

Concerning legacies.

(192) There are four kinds of legacies, for we either make bequests by asserting a claim, by condemnation, by permission, or by way of preference.

(193) We bequeath legacies by way of claim as follows: "I give and bequeath my slave Stichus to Lucius Titius"; or if only one of the expressions, "I give" or "I bequeath" be employed, the legacy is properly bequeathed by way of claim, and the prevailing opinion is that if the bequest was made in the following language: "Let him take," or "Let him have for himself," or "Let him seize"; the legacy will also be bequeathed as a claim.

(194) .A legacy bequeathed in this manner is so called because after the estate has been entered upon, the property immediately vests in the legatee by quiritarian right; and if the legatee claims the property from the heir, or from anyone else who has it in his possession, he should bring an action to recover it, that is to say, claim that the property is his by quiritarian right.

(195) Jurists differ only upon one point, namely, Sabinus, Cassius, and our other preceptors hold that what has been bequeathed in this manner becomes the property of the legatee as soon as the estate has been accepted, even if he is ignorant that the legacy was left to him; but that after he does know it, and has rejected it, the legacy will no longer be valid. Nerva, Proculus, and the authorities of the other

school, however, do not think that the bequest becomes the property of the legatee if he should refuse to accept it. But at present, in accordance with the terms of a Constitution of the Divine Pius Antoninus, the opinion of Proculus seems to be the one which has been adopted; for when a Latin was bequeathed to a colony in this manner, the Emperor said: "Let the decurions deliberate whether they wish him to be their property, just as if he had been bequeathed to an individual."

(196) Only those things can be legally bequeathed, subject to be claimed, which belonged to the testator himself by quiritarian right. It has been decided however, that those, which are estimated by weight, number, or measure are required to only belong to the testator by quiritarian right at the time of his death; as for instance, wine, oil, grain, and coin. It has also been held that other property must have belonged to the testator by quiritarian right at both times; that is to say, when he made the will, and when he died, otherwise the legacy will be void.

(197) This, however, is the rule only under the Civil Law. Subsequently a Decree of the Senate was enacted at the instance of the Emperor Nero, by which it was provided that if a testator bequeathed anything which had never belonged to him, the legacy would be valid just as if it had been left in the most approved manner, "the most approved manner" meaning where it is left by condemnation, m which way property belonging to another can be bequeathed, as will appear hereafter.

(198) If anyone should bequeath property belonging to him, and, after having made his will, should alienate it. the greater number of authorities hold that the legacy is not only void under the Civil Law, but that it does not become valid by the Decree of the Senate.

This opinion was promulgated for the reason that even if anyone should bequeath his property by condemnation, and afterwards should alienate it, many authorities think that although, by strict law, the legacy is still due, if the legatee demands it, he can be barred by an exception on the ground of fraud as claiming something contrary to the intention of the deceased.

(199) It has been established that if the same property is bequeathed by way of claim to two or more persons, whether jointly or severally, and all of them demand the legacy, each of them is only entitled to a certain portion of the same; and if any share is rejected it will vest in the co-legatee. A legacy bequeathed jointly as follows: "I do give and bequeath my slave Stichus to

Titius and Seius"; severally, as follows: "I do give and bequeath my slave Stichus to Titius," "I do give and bequeath the same slave to Seius."

(200) Where a legacy is bequeathed as a claim, conditionally, the question arises to whom does it belong while the condition is pending? Our preceptors hold that it belongs to the heirs, as in the case of a slave to be conditionally free, that is to say, a slave who has been ordered to be free by a will under a certain condition, and who, it is established, in the meantime belongs to the heir. The authorities of the other school however, think, that the property does not belong to anyone in the meantime; and they assert that this rule applies even more forcibly in the case where a legacy has been bequeathed absolutely, before the legatee has accepted it.

(201) We bequeath a legacy by condemnation, as follows: "Let my heir be condemned to give my slave Stichus"; or if it is only written, "Let him give my slave Stichus"; this is a legacy by condemnation.

(202) By this same form of a bequest property belonging to another can also be bequeathed, so that the heir will be obliged to purchase either the article referred to and deliver it, or pay its estimated value.

(203) Any property which is not yet in existence may be bequeathed by condemnation provided it comes into existence hereafter; as for instance, any crops which may be produced on such-and-such land, or any child which may be born from such-and-such a female slave.

(204) Any bequest made in this way, after an estate has been entered on, even though it has been made unconditionally, unlike a bequest left to be claimed, is not immediately acquired by the legatee, but still belongs to the heir, and therefore the legatee must bring an action to recover it, that is to say, he must allege that the heir is required to transfer it to him; and then if the property is subject to mancipation, the heir should either transfer it to him in this way, or surrender it in court, and give him possession. If, however, it is not subject to mancipation, it will be sufficient if he merely delivers it, for if he should only deliver but not sell anything susceptible of mancipation, the legatee will obtain complete ownership only by usucaption; and as we have mentioned in another place, usucaption of movable property is acquired after a year's possession, and real property after possession for the term of two years.

(205) Another distinction exists between a bequest by claim and one by condemnation; for where property is left to two or more persons by condemnation, and this is done jointly, each is entitled to a certain share, as in the case where a legacy is bequeathed by claim; but if the bequest is made severally the entire amount is due to each legatee, and the result is that the heir must deliver the article itself to one and pay its value to another. In a joint bequest, a share which has lapsed does not belong to the co-legatee, but remains a part of the estate.

(206) What we have stated with reference to the lapsed share of a legacy bequeathed by condemnation remaining as a part of the estate, and where it is left as a claim, accruing to the co-legatee, we should observe was established by the Civil Law before the enactment of the *Lex Papia*; but after the *Lex Papia* a lapsed share of the legacy is considered to have no owner, and belongs to those who are mentioned in the will as having children.

(207) And although heirs who have children have the best right to a legacy which is considered to have no owner, and heirs who have no children have the next best right to the same; still, it is stated by the *Lex Papia* itself that a co-legatee who has children shall be preferred to heirs, even though they also may have them.

(208) It is held by the greater number of authorities with reference to the rights conferred upon joint legatees by the *Lex Papia*, that it makes no difference whether the legacy is bequeathed by claim or by condemnation.

(209) We make a bequest by permission as follows: "Let my heir be condemned to permit Lucius Titius to take and to have my slave as his own."

(210) This kind of a legacy has a broader application than one bequeathed by claim, but a narrower one than a bequest by condemnation, for in this way a testator can legally bequeath not only his own property, as well as that of his heirs; while by claim he can only bequeath his own property, and by condemnation he can bequeath any property belonging to any stranger whomsoever.

(211) If the property bequeathed belonged either to the testator himself or to his heirs at the time of his death, it is clear that the legacy is valid, even if at the time of making the will the property belonged to neither of them.

(212) If, after the death of the testator, the property vests in the heir, the question arises whether the legacy is valid; and most authorities hold that it is not. What then is the law? Although anyone can bequeath property which never belonged to the testator, and never after his death belonged to his heir, by the Decree of the Senate promulgated during the reign of Nero, all bequests are considered as having been left by condemnation.

(213) Just as property left by condemnation does not immediately belong to the legatee as soon as the estate has been entered upon, but remains the property of the heir until he transfers it to the legatee, either by delivery, sale, or surrender in court; so, in the form of bequest by permission the same rule applies; and therefore a personal action is also brought in the name of a legatee of this kind to recover or enforce, "Whatever the heir is required by the will to give or to perform."

(214) Nevertheless, some authorities are of the opinion that an heir is not bound by this kind of a legacy, either to sell the property, surrender it in court, or deliver it; but that it will be sufficient for him to permit the legatee to take the property, because the testator did not order him to do anything else than to grant him permission, that is to say, to allow the legatee to have it for himself.

(215) A more important distinction arises with reference to a legacy of this description, where the same property is left separately to two or more persons; for some authorities hold that each one is entitled to the whole, as where a bequest is left by claim; and others think that the condition of the first occupant is the better one, because in this kind of a legacy the heir is condemned to permit the legatee to have the property, and the consequence is, that if he allows the first one to take it, and he does so, he will be secure against anyone who afterwards demands the legacy from him; for the reason that he neither has the property so as to permit it to be taken by the second claimant, nor was he guilty of fraud in order to avoid having possession of the same.

(216) We bequeath property by a preferred legacy as follows: "Let Lucius Titius have my slave Stichus as a preferred legacy."

(217) Our preceptors, however, hold that property cannot be bequeathed in this way to anyone except to a person who has been appointed heir to a certain share of an estate, for to take as a preferred legatee is to receive something more than what he is entitled to as heir; and he only can do so who has been appointed heir to a certain part of the estate, and is entitled to it as a preferred legacy over and above his share of the said estate.

(218) Therefore, if a legacy of this kind is bequeathed to a stranger, it will be void, and to such an extent is this true that Sabinus was of the opinion that the defect could not even be remedied by the Decree of the Senate of Nero; for he says that by this decree only those faults are corrected which render a bequest invalid under the Civil Law, and not such as have reference to the person of the legatee. It was, however, held by Julian and Sextus that, even in this instance, the legacy was rendered valid by the Decree of the Senate, for it might happen, in a case of this kind, that by the words employed a legacy would be void at civil law; and hence it is clear that a proper bequest could be made to the same person by other words, for example, by claim, by condemnation, or by permission, for then the legacy is not valid on

account of the defect in the person of the legatee, as when it is bequeathed to one to whom it can, under no circumstances, be left, as for instance, to an alien who cannot receive anything by a will; in which case it is evident that the Decree of the Senate does not apply.

(219) Likewise, our preceptors are of the opinion that a bequest made in this manner can be recovered by the party to whom it was bequeathed, in no other way than by the action for partition of the estate, that is to say, for the purpose of dividing the same; for it is part of the duty of the judge to decide with reference to the bequest of a preferred legacy.

(220) From this we understand that, according to the opinion of our preceptors, nothing can be left as a preferred legacy except what belongs to the testator; for no other property than that forming part of an estate can become the subject of this action. Hence, if a testator should, in this manner, bequeath property which is not his own, the bequest will be void by the Civil Law, but will be rendered valid by the Decree of the Senate. In one instance, however, they admit that property belonging to another may be left as a preferred legacy, as, for instance, where anyone bequeaths property which he has transferred to his creditors by a fiduciary sale; for they hold that it is the duty of the judge to compel the co-heirs to release the property from liability by payment of the debt, so that he to whom it has been bequeathed may be able to obtain it as a preferred legacy.

(221) Authorities of the other school are of the opinion that a preferred legacy may be bequeathed even to a stranger, just as if it were written in the will as follows: "Let Titius take my slave Stichus," and that the addition "as a preferred legacy" is superfluous; and therefore that the legacy would appear to be left by claim; and this opinion is said to be confirmed by a Constitution of the Divine Hadrian.

(222) Therefore, in accordance with this opinion, if the property belonged to the deceased by quiritarian right, it can be recovered by the legatee, whether he be an heir or a stranger; but if it only belonged to the testator by bonitarian right, the legacy will be valid under the Decree of the Senate even if left to a stranger, and must be delivered by the heir under an order of court in an action for partition of the estate. If, however, it did not belong to the testator by any title, it would be valid under the Decree of the Senate, whether it was left to the heir or to a stranger.

(223) Where the same property is left, either jointly or severally, to two or more legatees, each will be entitled to only proportionate shares, whether they are heirs, in accordance with the opinion of our preceptors, or whether they are strangers, in accordance with that of authorities belonging to the other school.

On the falcidian law.

(224) Formerly, anyone was permitted to exhaust his entire estate by legacies and the enfranchisement of slaves, thus leaving nothing to his heir but an empty name; and the Law of the Twelve Tables, by which it is provided that a person may dispose of his property absolutely by will, seems to permit this to be done in the following words: "In whatever way a man may bequeath his property it shall have legal effect"; and for this reason, those who were appointed heirs rejected the inheritance and therefore the majority of persons died intestate.

(225) Hence the *Lex Furia* was enacted, by the terms of which (except in the case of certain persons) it was not permitted to accept more than a thousand asses either as a legacy or as a donation in anticipation of death. This law, however, did not accomplish what was intended; for example, anyone who had an estate of five thousand asses, could leave to five men a thousand asses each, and, by doing so, exhaust the entire estate.

(226) In consequence of this, the *Lex Voconia* was subsequently passed, by which it was provided that no one could, as a legatee, *mortis causa*, take more than the heirs received. It is clear that by this law the heirs appeared to receive a part of the estate, but it still contained almost the same defect, for the testator could, in distributing his estate among many legatees,

manage to leave so little to the heir that it would be of no advantage to him, for the sake of the profit, to assume the burdens of the entire estate.

(227) Then the *Lex Falcidia* was enacted, by which it was provided that no more than three-fourths of an estate could be bequeathed; and therefore it was necessary for the heir to have a fourth part of the same, and this is the law at the present time.

(228) The *Lex Fufia Caninia* also repressed inordinate license in the bestowal of grants of freedom to slaves, as we have stated in the First Commentary.

Concerning inoperative legacies.

(229) A bequest made before the appointment of an heir is void, for the reason that wills derive their force and effect from the appointment of an heir, and on this account the appointment of the heir is considered to be the beginning and foundation of the entire will.

(230) A grant of freedom cannot be made before the appointment of an heir, for the same reason.

(231) Our preceptors do not think that a guardian can be appointed under such circumstances, but Labeo and Proculus hold that a guardian can be appointed, because by such an appointment nothing is taken from the estate.

(232) A bequest made after the death of an heir is void, that is to say, if it is made as follows: "After my heir dies, I do give and bequeath," or "Let my heir give"; the following provision, however, is legal: "When my heir dies"; because it is not made after the death of the heir, but will become operative at the last instant of his life. Again, a bequest cannot be made as follows: "On the day before my heir dies," as this is not considered to be founded on any good reason.

(233) We understand that these rules also apply to the enfranchisement of slaves.

(234) Whether a guardian can be appointed after the death of an heir may perhaps give rise to the same doubt which arose with reference to his appointment before the institution of the heir.

(235) Legacies bequeathed by way of penalty are void. A legacy is considered to have been bequeathed by way of penalty, where it is left for the purpose of compelling the heir either to perform some act, or to refrain from doing so; as, for instance, where the bequest is made: "If my heir gives his daughter in marriage to Titius let him pay ten thousand sesterces to Seius"; or as follows: "If you do not give your daughter in marriage to Titius, you shall pay him ten thousand sesterces"; and again, for example, where the testator orders that if his heir did not build him a monument within the term of two years he should pay ten thousand sesterces to Titius, this bequest being by way of penalty; and finally, in accordance with this definition, we can suggest many similar cases of this kind.

(236) Freedom cannot be granted by way of penal bequest, although a question has arisen on this point.

(237) We cannot, however, raise any dispute with reference to the appointment of a guardian, because by such an appointment an heir cannot be compelled either to perform some act, or to refrain from performing it; and therefore, if a guardian is appointed by way of penalty, the appointment will appear rather to have been made under a condition, than by way of penalty.

(238) A legacy left to an uncertain person is void. An uncertain person is considered to be one of whom the testator has only an indistinct idea in his mind; as for example, where a bequest is made in the following terms: "Let my heir pay ten thousand sesterces to the first person who comes to my funeral." The same rule of law applies if he makes a bequest in general terms to all, as: "Whoever comes to my funeral"; or where the bequest is left as follows: "Let my heir pay ten thousand sesterces to whoever gives his daughter in marriage to my son." It also

applies where the bequest is in the following terms: "Whoever shall be the first consuls nominated after the execution of my will," for all these bequests are deemed to have been made to uncertain persons; and, finally, many other instances of this kind might be adduced. The bequest of a legacy is legal where the designation of the class to which the person belongs is described with certainty, but the individual to whom it is left is uncertain; as, for instance: "Let my heir pay ten thousand sesterces to that one of my relatives now living who comes first to my funeral."

(239) A testamentary grant of freedom, however, cannot be made to an uncertain person, because the *Lex Fufia Caninia* directs that slaves be enfranchised by name.

(240) A certain person must also be appointed a guardian.

(241) A legacy bequeathed to a posthumous stranger is void. A posthumous stranger is one, who, after his birth, will not be included among the proper heirs of the testator; and therefore a grandson born to an emancipated son is a posthumous stranger to his grandfather, and likewise the unborn child of a woman who is not considered a wife at Civil Law, is a posthumous stranger to his father.

(242) A posthumous stranger cannot even be appointed an heir, for he is an uncertain person.

(243) What we stated above properly has reference to legacies, although it was not unreasonably held by certain authorities that the appointment of an heir by way of penalty could not be made; as it makes no difference whether the heir is ordered to pay the legacy in case he should either perform or not perform some act, or whether a co-heir is appointed with him; for he is just as much compelled by the addition of a co-heir as by the payment of a legacy either to do, or not to do something contrary to his intention.

(244) It is a question whether we can legally bequeath a legacy to one who is in the power of him whom we have appointed the heir. Servius thinks that the legacy can be legally bequeathed, but that it will lapse if the legatee continues to be under control when the time arrives for the legacy to vest; and therefore, whether the bequest is absolute, and the party ceases to be under the control of the heir during the lifetime of the testator, or whether it is left under a condition, and this takes place before the condition is complied with; the legacy will be due.

Sabinus and Cassius think that a legacy can be legally bequeathed under a condition, but not absolutely; for, although the legatee may cease to be subject to the authority of the heir during the lifetime of the testator, still, the legacy must be understood to be void; because it would be considered as of no effect if the testator should die immediately after making his will, but that it would be valid if he should live longer would be absurd. The authorities of the other school, however, are of the opinion that a legacy left under a condition is inoperative, for the reason that we cannot be indebted any more conditionally than absolutely to those whom we have under our control.

(245) On the other hand, it is settled that if anyone under your control is appointed an heir, he can be charged with the payment of a legacy to you, but if you should become an heir through him the legacy will be extinguished, because you cannot owe yourself a legacy. If, however, your son should be emancipated, or your slave manumitted or transferred to another party, and he himself should become the heir, or make the other party his heir, the legacy will be due.

(246) Let us now pass to the consideration of trusts.

(247) And first let us examine trusts connected with estates.

(248) In the first place, it should be ascertained that the heir has been duly appointed according to law, and that he has been entrusted to transfer the estate to another; as otherwise, a will is void by which no one has legally been appointed an heir.

(249) The proper forms of words creating a trust, and employed are: "I beg, I ask, I wish, I entrust"; and these are just as binding when used separately as when they are united in a single phrase.

(250) Therefore, when we have written: "Let Lucius Titius be my heir," we can add: "I ask you, Lucius Titius, and I beg you, that as soon as you can enter on my estate you deliver and transfer it to Gaius Seius"; and we can also ask him to transfer a part of the same. It is likewise permitted to leave the trust under a condition, or absolutely, or after a certain day.

(251) After the estate has been transferred, he who transferred it will, nevertheless, continue to be the heir; and he who received the estate sometimes occupies the position of an heir, and sometimes that of a legatee.

(252) Formerly, however, he did not occupy the position of either heir or legatee, but rather that of a purchaser; for in those days it was customary for the party to whom the estate was transferred to give a coin as an evidence of the purchase of the same; and the stipulations usually entered into between the vendor and the purchaser of an estate were accustomed to take place between the heir and the party to whom the estate was conveyed, that is to say, as follows: The heir stipulated with the party to whom the estate was transferred that he would be indemnified for anything which he might be compelled to pay on account of the estate, or might otherwise pay in good faith; and if anyone were to bring an action against him on account of the estate, that it would be properly defended; and, on the other hand, the party who received the estate stipulated that if anything should come into the hands of the heir which belonged to the estate it should be delivered to him, and also that he should be permitted, either as the agent or attorney of the heir, to bring any actions which the latter was entitled to bring in his own name.

(253) In subsequent times, however, during the Consulate of Trebellius Maximus and Annseus Seneca, a decree of the Senate was enacted, by which it was provided that where an estate was transferred under a trust, the actions to which the heir was entitled, and also those which could be brought against him under the Civil Law, should be granted for and against the beneficiary of the trust. Under this Decree of the Senate, the judicial securities formerly in use were abandoned, and the Prætor was accustomed to grant equitable actions both in favor of, and against the party who received the estate as heir, and these are set forth in the Edict.

(254) But again, for the reason that the appointed heirs when requested to transfer either all the estate, or nearly all of it, refused to accept it on account of the little or no advantage received, and hence the trusts were extinguished, it was afterwards decreed by the Senate during the Consulate of Pegasus and Pusio, that the heir who was requested to transfer an estate should be permitted to retain a fourth part of the same, just as he is permitted to do under the *Lex Falcidia*, in the case of legacies; and the same permission was granted where separate things were left under the terms of a trust. By the provisions of this Decree of the Senate, the heir himself sustains all the burdens of the estate, and he who receives the remainder of the estate as the beneficiary of the trust, occupies the position of a partial legatee; that is to say, of one to whom a portion of the property has been left; which species of legacy is called partition, because the legatee divides the estate with the heir. Hence, the result is that the stipulations usually entered into by the heir and the partial legatee also take place between the person who receives the estate as the beneficiary of the trust, and the heir; that is to say, that the profit and loss arising from the estate shall be divided among them *pro rata*.

(255) Therefore, if the appointed heir is asked to transfer no more than three-fourths of the estate, it will then be transferred under the Trebellian Decree of the Senate, and rights of action will be granted *pro rata* on both sides against the heir under the Civil Law, and against the beneficiary of the trust under the Decree of the Senate; for, although the heir continues to be such even with reference to that part of the estate which he has transferred, and actions for the entire indebtedness of the estate can be brought against him; still, he cannot be made liable

for anything more, nor can actions be granted against him for any further claims beyond the amount of interest which he has in the estate.

(256) If anyone is requested to transfer more than three-fourths of the estate, or all of it, there is ground for the application of the Pegasian Decree of the Senate.

(257) When, however, the heir has once entered upon the estate, provided he does so voluntarily — whether he retains a fourth of the same, or refuses to do so — he will be liable to the entire indebtedness of the estate; but if he retains a fourth, stipulations should be entered into between the partial legatee and the heir with reference to their respective shares; but if he transfers the entire estate, a stipulation should be entered into just as if the estate had been purchased and sold.

(258) But where the appointed heir refuses to enter on an estate for the reason that he says that he suspects it of being insolvent, it is provided by the Pegasian Decree of the Senate that, on the request of the party to whom he is asked to transfer it he may be compelled to accept and convey it, by order of the Prætor, and actions shall be granted both for and against him who received the estate as beneficiary of the trust, just as under the Trebellian Decree of the Senate. In this instance, no stipulations are required, because at the same time security is given to the party who transferred the estate, and rights of action with reference to the estate are transferred for and against the party who obtained it as beneficiary.

(259) It makes no difference, however, whether anyone who is appointed heir to the entire estate is asked to transfer all, or a portion of the same; or whether he who was appointed heir to a share is asked to transfer the entire share, or only a portion of it, for, in this instance also, the rule of the Pegasian Decree of the Senate is understood to apply to the fourth part of the share.

(260) Anyone can also leave single articles under a trust, as for instance, a tract of land, a slave, a garment, silver plate, money; and he may either charge the heir himself, or a legatee to deliver it, although a legatee cannot be charged with a legacy.

(261) Likewise, not only the property of the testator can be left under the terms of a trust, but also that of an heir, a legatee, or any other person whomsoever. Hence, a legatee may not only be charged to deliver the legacy bequeathed to him to another, but he may also be charged with the delivery of anything else belonging either to himself or to another; only it must be observed that no one can be asked to deliver to others more than he himself received under the will, for any bequest in excess of this would be void.

(262) Moreover, when property belonging to another is left under the terms of a trust, it is necessary for the party who is asked to deliver it either to purchase and transfer the said property, or to pay its value; just as in the case where property belonging to another is bequeathed by condemnation. Still, there are some authorities who hold that if the owner refuses to sell property left under the terms of a trust, the trust will be extinguished; though the rule is different where a legacy is bequeathed by condemnation.

(263) Freedom can also be conferred upon a slave under the terms of a trust, and either the heir or the legatee may be charged to manumit him.

(264) Nor does it make any difference whether the testator makes the request with reference to one of his own slaves, or to one belonging to the heir himself, or to the legatee, or even to a stranger.

(265) Therefore, a slave belonging to another must be purchased and manumitted; but if his owner is unwilling to sell him, the grant of freedom is extinguished; because in this instance no computation of value can be made.

(266) When a slave is manumitted under the terms of a trust, he does not become the freedman of the testator, even though he may have been his slave, but of the person who

manumitted him.

(267) Where a slave is ordered to be free by a direct provision of a will, for instance, as follows: "Let my slave Stichus be free," or "I order my slave Stichus to be free," he becomes the freedman of the testator himself. No other slave can obtain his freedom by a direct provision of the will but one who belonged to the testator by quiritarian right at both times, that is to say, the time when he executed the will, and when he died.

(268) A great difference exists between bequests made under the terms of a trust and those left directly.

(269) Hence a bequest may be left under a trust, to be discharged by the heir of the heir, while a bequest of this kind made in any other way in the beginning of a will is inoperative.

(270) Likewise, a person about to die intestate can charge his heir to deliver his estate to a third party under the terms of a trust, but on the other hand, he cannot charge him with the payment of a legacy.

(270a) Moreover, a legacy left by a codicil is not valid unless it has been confirmed by the testator, that is, unless the testator provided in his will that whatever he might insert in a codicil would be ratified; a trust, however, may be left without any confirmation of a codicil.

(271) Again, a legatee cannot be charged with a legacy, but the beneficiary of a trust can himself be charged with the execution of a trust in favor of another.

(272) Likewise, freedom cannot be left directly to a slave belonging to another, but this can be done under the terms of a trust.

(273) No one can be appointed an heir or disinherited by a codicil, even though it may have been confirmed by the will; but the testamentary heir may be asked by a codicil to transfer the estate either wholly or in part, to another, although the codicil may not have been confirmed by the will.

(274) Moreover, a woman appointed an heir by anyone who is registered in the census as possessing a hundred thousand sesterces, cannot take under the *Lex Voconia*; but she can still receive an estate left to her under a trust.

(275) Latins who are forbidden by the *Lex Junia* to receive estates or legacies directly under a will, can do so under the terms of a trust.

(276) Moreover, while the slave of a testator under the age of thirty years is prohibited by a decree of the Senate from being appointed an heir, and declared free; still, it is held by many authorities that we can direct him to become free when he reaches the age of thirty years, and that then the estate may be transferred to him.

(277) In like manner, although we cannot, after the death of a person who was our heir, appoint another in his stead, still, we can request him to transfer the entire estate, or a portion of the same, to another party when he dies; and for the reason that a trust may be created to take effect after the death of an heir, we may bring about the same result by inserting in the will: "When my heir Titius is dead, I desire my estate to belong to Publius Mævius"; and, whichever method is employed, Titius will leave his heir bound to transfer the estate under the terms of the trust.

(278) Moreover, we can sue for legacies under the Formulary System, but we enforce the performance of trusts, at Rome, either before the Consul or the Prætor, who is especially charged by the law with this duty; in the provinces, however, it is done by the Governor.

(279) Again, legal questions arising from trusts are decided in the City of Rome at all times, but those having reference to legacies only during the regular sessions of the tribunals.

(280) The interest and profits of property left in trust are payable, provided the party charged with the trust is in default, but the interest of legacies is not payable; and this is stated in a rescript of the Divine Hadrian. I am aware, however, that it was held by Julianus that, where a legacy was left under the form of permission, the same rule applies as in the case of trusts, and this opinion is the one accepted at the present time.

(281) Legacies bequeathed in the Greek language are not valid; trusts bequeathed in this way are valid.

(282) Moreover, where an heir disputes a legacy left by way of condemnation, an action can be brought against him for double the amount of the claim; but he can only be sued for simple damages where he acts as trustee.

(283) Likewise, where anyone, through mistake, pays more than was due under the terms of a trust, he can recover the excess; but where, in the case of a legacy by condemnation, payment is made for more than was due, through mistake, the excess cannot be recovered. The same rule of law applies where nothing at all was due, and through some mistake or other, payment has been made.

(284) There were formerly other differences which at present no longer exist.

(285) For instance, aliens could take as beneficiaries of a trust, and which was, generally speaking, the original cause of trusts, but this was subsequently prohibited, and now a Decree of the Senate, enacted at the instance of the Divine Hadrian, provides that trusts left for the benefit of aliens shall be claimed by the Treasury.

(286) Persons who are unmarried are, by the *Lex Julia*, relating to wills, prohibited from receiving estates and legacies, and formerly were considered capable of being the beneficiaries of a trust.

(286a) Likewise, persons who have no children, and who for this reason under the terms of the *Lex Papia* lose half of their estates and legacies, were formerly considered capable of receiving the full benefit of trusts. Afterwards, however, they were forbidden by the Pegasian Decree of the Senate to enjoy the benefit of trusts, just as in the case of legacies and estates; and the property passed to those named in the will who have children, and, if none of them have any, to the people; as in the law with reference to legacies and estates which, for this or a similar reason, are deemed to have no owners.

(287) Again, in former times, property could be left under the terms of a trust to an uncertain person, or to a posthumous stranger, although he could neither be appointed an heir nor a legatee; but, by a Decree of the Senate, enacted at the instance of the Divine Hadrian, the same rule which applied to legacies and estates was adopted with reference to trusts.

(288) Likewise, there is no doubt that property cannot be left under a trust by way of penalty.

(289) Although in many branches of the law a much broader application to trusts exists than in the case of direct bequests, in other respects they are equally valid; still, a guardian cannot be appointed by will unless this is done directly, for instance, as follows: "Let Titius be the guardian of my child"; or "I appoint Titius guardian of my children"; but he cannot be appointed under a trust.