THE DIGEST OR PANDECTS.

BOOK XXXVI.

TITLE I.

ON THE TREBELLIAN DECREE OF THE SENATE.

1. *Ulpianus, Trusts, Book III.*

After having discussed matters relating to trusts of different kinds of property, let us now pass to the interpretation of the Trebellian Decree of the Senate.

(1) This Decree of the Senate was enacted in the time of Nero, on the eighth of the *Kalends* of September, during the Consulate of An-nseus Seneca and Trebellius Maximus.

(2) The words of the Decree are as follows: "As it is perfectly just that, with reference to all trusts involving estates where anything is to be paid out of property, recourse should be had to those to whom the rights and profits of the estate are transferred, rather than that the heirs should incur any risk on account of the faith reposed in them, it is hereby decreed that actions which are usually granted for and against the heirs shall not be allowed where the latter have transferred the property under the terms of a trust, as they were charged to do; but that in these instances actions shall be granted for and against those to wliom the property has been transferred under the trust created by the will, in order that the last wishes of deceased persons may be more thoroughly executed, so far as the remainder of the estate is concerned."

(3) By this Decree of the Senate, the doubts of those who have determined to refuse to accept the estate, either through apprehension of litigation or on account of fear are removed.

(4) But, although the Senate intended to come to the relief of heirs, it also comes to the relief of the beneficiary of the trust. For it is granted to the heirs, since they can avail themselves of an exception if suit is brought against them; and if the heirs bring suit they can be barred by an exception which the beneficiaries of the trust have a right to avail themselves of, hence there is no doubt that their interests have likewise been consulted.

(5) This Decree of the Senate applies whether anyone who is either a testamentary heir, or the heir-at-law, was charged to transfer the estate.

(6) It also applies to the case of the will of a soldier who is under paternal control, and who has the right to dispose of his *castrense peculium* or his *quasi castrense peculium.*

(7) The possessors of property under the Praetorian Law, or any other successors, can transfer an estate by virtue of the Trebellian Decree of the Senate.

(8) The question arises whether he to whom an estate has been transferred by the terms of a trust under the Trebellian Decree of the Senate can himself assign his rights of action by the same Decree of the Senate, where he has been charged to transfer the estate. Julianus says that he also can assign his rights of action. This opinion Marcianus also approves, and we ourselves adopt it.

(9) Where, however, anyone has been charged to transfer an estate to two persons, to one of them absolutely or within a certain time, and to the other under a condition, and he alleges that the estate is probably insolvent, the Senate decreed that the entire estate should be transferred to the party to whom the heir was asked to transfer it absolutely, or within a certain time.

If, however, the condition should be fulfilled, and the other beneficiary should desire to accept his share, the rights of action will pass to him by operation of law.

(10) Where a son or a slave is appointed an heir, and is charged to transfer the estate, and the master or father should transfer it, the rights of action will pass to the beneficiary of the trust,

by virtue of the Trebellian Decree of the Senate. This will be the case even if the parties are charged to transfer the property in their own names.

(11) The same rule applies where a father is charged to transfer the estate by the son himself.

(12) Where the guardian or curator of a minor or an insane person is charged to transfer an estate, the Trebellian Decree of the Senate will undoubtedly apply.

(13) Where a minor was charged to transfer the estate to the guardian himself, the question arose whether he could do so by the authority of his guardian. It was decided by the Divine Severus that he could not transfer the estate to his guardian by the authority of the latter, because no one can act as judge in his own case.

(14) Still, the estate of a minor can be transferred by him to his curator, as the authority of the latter is not necessary to render the transfer legal.

(15) Moreover, where an association or a corporate body is charged to transfer an estate, the transfer will be valid where it is made to each of the different members individually, by the vote of those who belong to said association or corporate body; for, in this instance, each one of them is considered to have made the transfer to himself.

(16) Where the heir is asked to transfer the estate, after having reserved a tract of land for himself, he can do so under the Trebellian Decree of the Senate; nor does it make much difference if the land given to him has been pledged, as a personal action for the recovery of the money loaned will not follow the land; but he will be liable to whom the estate has been transferred under the Trebellian Decree of the Senate. Security must be furnished by the beneficiary of the trust to the heir so that the heir will be indemnified if the land should happen to be evicted by the creditor.

Julianus, however, does not think that security should be given, but that an estimate ought to be made of the value of the land without the security, that is to say, how much it will sell for if security were not furnished; and il, where no bond had been given, it will sell for as much as the fourth part of the property would amount to, the rights of action will pass by the terms of the Trebellian Decree of the Senate; but if it would bring less, then, the deficiency having been reserved, a transfer of the remainder should likewise be made, in accordance with the Trebellian Decree of the Senate.

This opinion disposes of many questions.

(17) Where a man who had an estate of four hundred *aurei* bequeathed three hundred, and, having deducted two hundred, charged his heir to transfer the estate to Seius, will the beneficiary of the trust be liable for the three hundred *aurei,* or will he only be liable in proportion to the amount of the estate which came into his hands? Julianus says that a demand for three hundred *aurei* can be made upon him, but that an action will not be granted against the beneficiary of the trust for more than two hundred, and for a hundred against the heir.

This opinion of Julianus seems to me to be correct, in order that the beneficiary may not be liable for any more than the amount which he received from the estate. For no one is obliged to pay more of a legacy than the amount which came into his hands from the estate, even though the Falcidian Law may not apply, as is stated in a Rescript of the Divine Pius.

(18) Finally, no more shall be paid as legacies under the will of a soldier than his estate amounts to, after deducting the indebtedness; and still the beneficiary of the trust will not be permitted to reserve the fourth.

(19) Hence Neratius says that if the heir is charged to transfer the entire estate without deducting the Falcidian portion, and he who is entitled to receive it is charged to transfer it to a third party, the heir cannot deduct the fourth from what the second beneficiary receives, as the testator only intended that the first beneficiary of the trust should enjoy his liberality.

(20) Where a testator, having property worth four hundred *aurei,* left two hundred to Titius, and charged his heir to transfer half the estate to Sempronius, Julianus says that the transfer should be made according to the terms of the Trebellian Decree of the Senate, and that the action of the legatee should be divided so that he can bring one suit against the heir for a hundred *aurei,* and one against the beneficiary of the trust for the other hundred. Therefore, Julianus holds that in this way the heir will obtain his fourth unimpaired, that is, the hundred *aurei* without deduction.

(21) Julianus also says that if anyone who has an estate of four hundred *aurei* should bequeath three hundred, and, having deducted a hundred, should charge his heir to transfer the estate to Sempronius, it must be said that if the estate is transferred after the deduction of the hundred *aurei,* an action to recover the legacy will be granted against the beneficiary of the trust.

2. *Celsus, Digest, Book XXI.*

Where a man who left four hundred *aurei* bequeathed three hundred to Titius, and charged his heir to transfer the estate to you, and the heir, who suspected the estate of being insolvent, entered upon it by order of the Praetor and transferred it, the question arose, what do you owe to the legatee? It must be held that, as the presumption is that the testator intended the trust to be transferred burdened with the legacies, you ought to pay the entire three hundred *aurei* to Titius; for the heir should be understood to have been requested to appoint you in his stead and to pay you the balance, and, after having performed all his duties with reference to the estate, that is to say, after he had paid the legacies, he would have been entitled to what was left if he had not been charged to transfer the estate to you. How much then would he have left? A hundred *aurei,* certainly. These are what he was charged to pay you, and therefore, in order to calculate the portion due under the Falcidian Law, as the heir was charged to pay three hundred *aurei* to Titius, and a hundred to you, the result will be that if he should enter upon the estate voluntarily, he must pay two hundred and twenty-five to Titius and seventy-five to you. Hence Titius will not be entitled to any more than if the heir had entered upon the estate without having been compelled to do so by the Praetor.

3. *Ulpianus, Trusts, Book III.*

Moreover, Marcellus, on Julianus, states with reference to this case that, if the testator had said that the heir should be charged with the legacies, and the latter voluntarily entered upon the estate, the calculation of the Falcidian portion must be made just as if four hundred *aurei* had been bequeathed under the trust, and three hundred had been left as a legacy; so that the three hundred ought to be divided into seven parts, to four of which the beneficiary of the trust would be entitled, and the other three would go to the legatee.

If, however, the estate should be alleged to be insolvent, and the heir did not voluntarily accept and transfer it, a hundred *aurei* out of the four hundred to which the latter would have been entitled can be retained by the beneficiary of the trust, and the same distribution should be made of the remaining three hundred, so that the beneficiary may receive four-sevenths and the legatee the remaining three; for it would be extremely unjust for the legatee, merely because the estate was suspected of being insolvent, to have more than he would have obtained if the heir had voluntarily entered upon it.

(1) Again, what has been said with reference to an estate suspected of being insolvent is also applicable to wills to which the Falcidian Law does not apply. I refer to military wills and others of the same description.

(2) Pomponius also says that where anyone is charged to transfer an estate after the legacies have been deducted, the question arises whether the legacies should be paid in full, and whether the heir can deduct his fourth from what is left under the trust alone, or can deduct it from the legacies as well as the trust. He asserts that Aristo was of the opinion that it should be deducted from everything bequeathed by the testator, that is to say, from both the legacies

and the trust.

(3) Any property forming part of an estate which has been alienated by the heir shall be included in his fourth.

(4) A certain man, having appointed his children his heirs to unequal portions of his estate, and having left them preferred legacies in such a way as to divide the larger part of his property among them, charged any one of them who might die without issue to leave his share to his brothers. Our Emperor stated in a Rescript that the preferred legacies were included in the trust, because the testator did not mention his share of the estate, but merely his share, and the preferred legacies were held to have been included in his share.

(5) If anyone should be asked to deliver an estate before he has put the slaves to the torture, or opened the will, or entered on the estate, or done any of those things which are forbidden by the Decree of the Senate, and for this reason the estate should be confiscated, the Treasury will acquire it with all its burdens. Therefore, the benefit of the fourth to which the appointed heir was entitled will be transferred to the Treasury, and all rights of action belonging to the estate will pass to it under the Trebellian Decree of the Senate. If, however, the heir should have prevented anyone from drawing up the will, or should not have permitted the witnesses to assemble, or should have neglected to avenge the death of the testator, or if the estate had been claimed by the Treasury for any other reason, the benefit of the fourth will also belong to the Treasury, and the remaining three-fourths of the estate will be transferred to the beneficiary of the trust.

4. *The Same, Trusts, Book IV.*

For the reason that the appointed heir may refuse to enter upon the estate, apprehending that he might be prejudiced by so doing, provision must be made for the beneficiary of the trust; so that if he should say that he wishes the heir to enter upon the estate at his risk, and transfer it to him, the appointed heir can be compelled to appear before the Praetor and deliver the estate. *If* this should be done, the rights of action will pass by the Trebellian Decree of the Senate, and the heir cannot avail himself of the benefit of the fourth, when he transfers the property; for as he enters upon the estate at the risk of another, it is but reasonable that he should be deprived of any advantage to which he would have been entitled. Nor does it make any difference whether the estate is solvent or not, for it is sufficient for it to have been rejected by the appointed heir. No investigation shall be made as to whether the estate is solvent or not, but only the opinion, or the fear, or the pretext of the party who refused to accept it ought to be considered, and not the assets of the estate itself.

This is not unreasonable, for the appointed heir should not be required to state why he fears to enter upon the estate, or why he is unwilling to do so. For men are actuated by different motives: some of them fear to attend to business, others dread the annoyance of it; and still others are apprehensive that the indebtedness may amount to a larger sum, even though the estate may appear to be solvent; and again, some fear the anger or envy of others; and some desire to favor those to whom the estate was bequeathed without, however, wishing to sustain any of the burdens of the same.

5. *Msecianus, Trusts, Book VI.*

Where a man of exalted rank or authority is charged to transfer an estate by a gladiator, or by a woman who lives by prostitution, he will be compelled to do so.

6. *Ulpianus, Trusts, Book IV.*

Anyone can refuse to accept an estate not only when he is present, but also where he is absent, and he can do this even by means of a letter. For a decree can be asked with reference to parties who are absent, whether it is certain that they do not wish to enter upon the estate and transfer it, or whether this is not known; to such an extent is their presence not necessary.

(1) It must be remembered that the Senate speaks with reference to an appointed heir. And, therefore, Julianus discusses the question as to whether this decree applies in cases of intestacy. The better opinion, however, is the one which we adopt, namely, that this decree also applies to heirs by intestate succession, whether they are heirs-at-law or praetorian successors.

(2) This Decree of the Senate also applies to a son under paternal control, and to all other necessary heirs, so that they may be compelled by the Praetor to take charge of the estate and afterwards transfer it. If they should do so, the rights of action are considered to have been transferred.

(3) Where an estate without an owner is forfeited to the Treasury, and the latter is unwilling to accept it and transfer it to the beneficiary of the trust, it will be perfectly proper for the Treasury to return the property, just as if the beneficiary of the trust had recovered it.

(4) Likewise, if the citizens of a town, after having been appointed heirs, should say that the estate is probably insolvent, and decline to accept it, it must be held that they can be compelled to do so, and to transfer the estate. The same rule applies with reference to an association.

(5) Titius, having been appointed heir, and Sempronius substituted for him, he was charged to transfer the estate to Sempronius himself; but, after his appointment, Titius said that the estate was probably insolvent, and refused to accept it. The question arose whether he could be compelled to enter upon the estate, and transfer it, a point which is susceptible of argument. The better opinion, however, is that he can be compelled to do so, because it is more advantageous for Sempronius to obtain the estate by the appointment than by the substitution; for example, if the substitution is charged with legacies to be paid, or with freedom to be granted.

The same rule will apply if the estate should be left in trust to the heir-at-law.

(6) Where anyone is directed to transfer an estate in some other place than where he lives, and alleges that he suspects it of being insolvent, Julianus says that he can be compelled to accept it, just as a person who is asked to deliver an estate within a certain time.

7. *Mseeianus, Trusts, Book IV.*

It should be noted that, in a case of this kind, an account of the necessary travelling expenses must be required. For if the heir was appointed under the condition of paying ten *aurei* to Titius, he cannot be compelled to accept the estate unless the money is tendered to the person entitled to it. Moreover, the condition of health and the rank of the heir must be taken into consideration. But what if, while he was suffering from illness, he would be ordered to go to Alexandria, or take the name of the testator, a man of inferior rank?

8. *Paulus, Trusts, Book II.*

The age and the rights of the party (that is to say, whether it would be lawful for him to go to the place designated, or not), must also be considered.

9. *Ulpianus, Trusts, Book IV.*

When, however, the heir is directed to go to some other place, and he is absent on business for the State, Julianus says he can likewise be compelled to accept the estate, and to transfer it, wherever he may be.

(1) It-is clear that if anyone requests time for deliberation, and obtains it, and after the time has elapsed enters upon the estate, and transfers it, he will not be considered to have been compelled to do so. For he is not obliged to enter upon the estate, even if he suspects it of being insolvent, but he does so voluntarily after deliberation.

(2) If the heir should allege that he considers the estate to be insolvent, he should declare that it is not expedient for him to accept it.

It is not necessary for him to say that it is insolvent, but he must state that he does not think it is expedient for him to enter upon the estate.

(3) If anyone should be appointed heir under a condition, no act that he performs while the condition is pending will be lawful, even though he is ready to transfer the estate.

10. *Gaius, Trusts, Book II.*

If the estate should be delivered before the prescribed time has elapsed, or the condition has been complied with, the rights of action will not pass with it, because it was not delivered as the testator desired that it should be. It is evident that if the transfer of the estate should be ratified after the condition has been fulfilled, or the prescribed period has passed, it would be more equitable to consider that the rights of action were transferred at the same time.

11. *Ulpianus, Trusts, Book IV.*

It is stated by Julianus that where a legacy is left to an appointed heir, "in case he should not be the heir of the testator," and on this account the heir says that he suspects the estate of being insolvent, in order not to lose the legacy, the amount of the same must be tendered him by the beneficiary of the trust, and he can then be compelled to accept. Julianus does not admit that, in this instance, the heir can demand the legacy from the beneficiary of the trust as from his coheir, just as if he had not accepted the estate, for in fact he did accept it. It is, however, considered preferable for the legacy to be tendered him by the beneficiary of the trust. But when the heir, for some other reason, says that it is not his interest to accept the estate, he cannot be compelled to do so, unless the loss which he may sustain, or the profit which he may acquire, is made up to him by the beneficiary of the trust, or the charge, on account of which he refused the estate, is remitted by the Praetor.

(1) Julianus also says that where two heirs are appointed by a father, along with his minor son, and they are also substituted for the son, it will be sufficient for him who accepted the trust under the pupillary substitution to compel one of the appointed heirs to enter upon the estate of the father. For, by doing this, the will of the father will be confirmed, and both of them can, by virtue of the substitution, be compelled to enter upon the estate.

(2) After application has been made to the Praetor, let us see whether the heir can transfer the estate to a present or an absent person through the intervention of an agent. I think that an appointed heir can be compelled to accept and transfer an estate to an absent beneficiary of the trust, and that the heir should not apprehend that he will be prejudiced by doing so. For relief can be granted him by the Praetor, whether he has been given security or not, even if the beneficiary of the trust should die before the estate had been delivered to him.

A case of this kind appears in a Rescript of the Divine Pius, where a certain Antistia, at the time of her death, appointed Titius her heir, granted freedom directly to her slave Albina, and left her her own daughter in trust, charging her to manumit the latter. She also asked Titius to transfer the estate to the daughter of Albina, after she had been manumitted. Therefore, when Titius said that he considered the estate to be insolvent, it was set forth in a Rescript of the Divine Pius that he should be compelled to accept it, and, having done so, that Albina must receive her freedom, that her daughter should be delivered to her, and manumitted by her, and that, after her manumission, a guardian should also be appointed for the daughter by whose agency the estate must be immediately transferred to her, although Titius had been charged to deliver it as soon as she reached the marriageable age.

The Emperor says that as it was possible that she to whom freedom and the estate were left in trust might die before the prescribed time, it would not be necessary to subject him to loss who, having been appointed, accepted the estate; and he afforded a remedy, so that if any of

these things should take place, the property of Antistia would be sold, just as if she had had no heir. Hence, as the Divine Pius decided that relief might be granted an appointed heir who accepted the estate under compulsion, it could also be held that this precedent ought to be followed in other cases where an estate left in trust was transferred to the beneficiary who compelled the heir to enter upon it and deliver it to him.

12. *Papinianus, Questions, Book XX.*

Where an heir appointed to a portion of an estate is conditionally charged with a trust having reference to the same, the Emperor Titius Antoninus stated in a Rescript that his Constitution did not apply, and that the minor was not entitled to extraordinary relief, especially if the relief requested would cause injury to another.

13. *Ulpianus, Trusts, Book IV.*

An heir who has been charged with a trust, under a condition, cannot defend himself in court by alleging that if the condition should fail to be fulfilled he will be liable to actions at law; for, according to what we have just stated, he cannot sustain any damage.

(1) Therefore, the presence of the heir is no longer required.

(2) Where the heir has any complaint to make on account of the will, he should not be heard if he alleges that he suspects the estate of being insolvent. For even if he should absolutely declare it to be insolvent, he should not be heard, if he says that the testator had no right to make a will, or if he impugns the validity of the instrument, or calls his own condition in question.

(3) But what if the heir disputes the validity of the trust? This allegation must not be passed by. What if the beneficiary of the trust asserts his claim; can the heir enter upon the estate, and then raise this point? I think that the beneficiary of the trust should in the meantime be heard, if the inquiry is liable to be prolonged; for suppose that the terms of the trust cannot be explained without a protraded investigation, and that a reasonable doubt may arise with reference to the amount left under the trust. In this instance it must be said that the heir ought to be compelled to enter upon the estate, lest, if he should die before the controversy is terminated, the beneficiary of the trust may be defrauded.

(4) It is proper to examine by whom a person can be compelled to enter upon and transfer an estate, so that, if a Praetor or a Consul should be appointed heir, and allege that he suspects the estate of being insolvent, it may be determined whether he can be compelled to accept and transfer it. It must be held that one Praetor has no jurisdiction over another, or one Consul over another, but if they are willing to subject themselves to his authority the Prsetor can ordinarily decide the case. If, however, the Praetor himself, having been appointed heir, says that he suspects the estate of being insolvent, he cannot compel himself to accept it, because he cannot perform the duties of three persons; that is, of the one who declares the estate to be insolvent, the one who is compelled to accept it, and the one who forces him to do so.

In all these cases, and in others like them, recourse should be had to the aid of the Emperor.

(5) Where a son under paternal control becomes a magistrate, he can compel his father, to whose authority he is subject, to accept and transfer an estate, even if he may say that he suspects it of being insolvent.

14. *Hermogenianus, Trusts, Book XIV.*

For the right of paternal control does not apply to the duties of public office.

(1) Where anyone has rejected an estate, he can be compelled to enter upon and transfer it, if good reasons are shown why he should do so.

(2) It is clear that if the property should have been sold, restitution ought not to be granted the

beneficiary of the trust, even though he be a minor, unless good reason is shown, as the Divine Pius stated in a Rescript.

(3) Where anyone, through compulsion, enters upon an estate under the terms of the will, and a pupillary substitution has been made, the question arises whether the pupillary substitution is confirmed by the acceptance of the estate, as it would be considered extinguished if the estate of the father had not been entered upon. Julianus, in the Fifteenth Book, says that in a case of this kind the pupillary substitution is confirmed. This opinion is perfectly correct, for no one doubts that where legacies are paid and freedom granted, they, as well as anything else mentioned in the will, are just as valid as if the heir had voluntarily accepted the estate.

(4) Where anyone accepts an estate under compulsion, he is, in this instance, deprived of all the advantages which he would otherwise have enjoyed, to such an extent that he cannot retain his fourth, even if he should change his mind.

I find that there is a Rescript to this effect which was issued by Our Emperor and his Divine Father.

(5) Everyone cannot compel an estate suspected of being insolvent, and therefore rejected, to be entered upon and transferred to himself, but he only can do so to whom the rights of action belonging to the estate may pass, for it is not just to force an heir to accept an estate in such a way that he must relinquish every benefit attaching to it, and himself be left to sustain its burdens.

(6) Hence, where a sum of money is left to anyone in trust, the right of compulsion does not apply, even though a bond of indemnity may be offered.

(7) Therefore, where anyone is charged to surrender an estate, he alone can be compelled to transfer it,

(8) But if anyone is asked to transfer all the property of the testator, his slaves, his money, or all his personal effects;

15. *Paulus, Trusts, Book II.*

Or everything belonging to him:

16. *Ulpianus, Trusts, Book IV.*

He can be compelled to accept the estate. This same rule will apply if he should be charged to transfer his "patrimony," his "property," his "fortune," his "substance," or his *"peculium,"* for the reason that many authorities hold that his *peculium* means his patrimony. In the above-mentioned instances the testator seems to have referred to his estate. I am not ignorant that Maecianus entertains doubt with reference to some of these cases, and says that there is a question as to the intention of the testator, and whether he had in his mind only a certain sum of money, or his entire estate. Still, where there is an ambiguity, I hold that the testator had the whole of his estate in his mind in order that the trust might not be extinguished.

(1) But if anyone should make the following request, "I ask you to transfer to So-and-So everything which conies into your hands from my estate, or my property," the heir can be compelled to enter upon and transfer the estate, under the terms of the Trebellian Decree of the Senate; although the expression, "comes into your hands," may properly be said to mean what anyone receives after all claims have been deducted.

(2) Moreover, it may generally be said that an heir cannot be compelled to accept and transfer an estate where he is only requested to do so with reference to a certain piece of property, or a certain sum of money. If, however, it appears that the testator had reference to his entire estate, there is no doubt that he can be compelled to enter upon it, whether he rejects it because he suspects it of being insolvent, or accepts it voluntarily, as the rights of action will pass under the Trebellian Decree of the Senate.

(3) Hence, the question arises, where anyone is asked to transfer an estate after having deducted the debts or the legacies, and the heir alleges that he suspects the estate to be insolvent, can he be compelled to accept and transfer the estate, because he is charged to transfer rather what remains of the estate than the estate itself?

Some authorities, and among them Msecianus, think that this deduction is void, for a sum of money cannot be deducted from a right, any more than if the heir were requested to transfer a tract of land after deducting the debts or the legacies, as land is not susceptible of diminution on account of debts or legacies. He states, however, that Julianus holds that the Trebellian Decree of the Senate will apply in this instance, in order that the beneficiary of the trust may not be liable to a double burden; that is to say, when the heir deducts the indebtedness or the legacies, and when suit is brought by the creditors and the legatees. For where the estate is delivered to him under the Trebellian Decree of the Senate, the beneficiary of the trust either ought not to suffer the loss of the deduction made by the heir, or the heir should furnish security to defend him against the legatees and other creditors.

(4) Where anyone, who is appointed heir, is asked not to transfer the entire estate but only a portion of the same, or where he is asked to transfer it to two persons, and one of them wishes to accept it, and the other does not, the Senate decreed that the one who said that he suspected the estate of being insolvent should be released from liability, and that the entire estate should pass to him who compelled the heir to enter upon it.

(5) If, however, a testator charges his heir to transfer, not his portion of the estate, but as much of it as came to him through Seia, and the appointed heir says that he believes the estate to be wholly or partly insolvent, the opinion of Papinianus, namely, that the rights of action pass under the Trebellian Decree of the Senate, will prevail; and it may be held that if the estate is alleged to be insolvent, the appointed heir can be compelled to enter upon and transfer it, and the entire estate will belong to him to whom it is transferred.

(6) But where a soldier asks anyone to deliver his property which was situated in Italy, or some property situated in a province, it must be held that if the heir should say that he suspects the estate of being insolvent, he will be compelled to enter upon and transfer it. For, as Msecianus very properly says in the Sixth Book on Trusts, it is for this reason that a soldier can appoint an heir with reference to certain property, and the rights of action will be granted to him; likewise, for the same reason, rights of action will pass under the Trebellian Decree of the Senate. And, although it is well established that actions do not pass under the Trebellian Decree where the testator asks that property which came to him from anyone, or which he has in some country, shall be transferred, still, he says that the contrary opinion prevails with reference to military wills. For he remarks, as soldiers, when they appoint heirs, are permitted to separate their different kinds of property, so also the Trebellian Decree of the Senate allows this to be done where heirs are charged with the execution of a trust.

(7) If a certain man should appoint two heirs, and substitute them for one another, and charge them that if either became his heir, half of his estate should be transferred to a certain person after the lapse of five years, and the appointed heirs should say that they suspect the estate of being insolvent, and the beneficiary of the trust should wish them to accept it at his risk, the Senate decreed that both heirs, or one of them, could be compelled to enter upon the estate and transfer it to the beneficiary of the trust; so that the rights of action for and against the said beneficiary might pass just as where an estate is transferred under the Trebellian Decree of the Senate.

(8) Msecianus says that when some of the beneficiaries of a trust are absent, and one who is present wishes the heir to enter upon the estate at his risk, and consequently the rights of action pass entirely to him who compelled the heir to accept, if the beneficiaries who are absent desire to share in the trust, they can make the demand upon him who was present.

Msecianus states that the result will be that a beneficiary of the trust who was present cannot retain the fourth against his fellow beneficiaries, because the heir himself could not do so.

(9) Msecianus also asks, where anyone is asked to transfer an estate to two or more beneficiaries, whether he can be compelled by one of them to enter upon it, and can avail himself of the benefit of the Falcidian portion, to which those who did not wish this to be done would have been entitled, whether they themselves wish the transfer to be made to them, or whether some other person, who has succeeded them, makes the demand. The rule which we make use of at present is that the entire estate shall pass to him who compelled its acceptance by the heir; and, in consequence, it must be said that the heir who was forced to accept it will lose the right to retain the fourth, because the rights of action pass unimpaired to him who compelled the acceptance of the estate.

It is clear that if you suggest that the first beneficiary should not compel the entire estate to be transferred to him, when the others demand that it shall be transferred to them, it must be said that the heir will be entitled to the benefit of the Falcidian Law. Therefore, Msecianus very properly holds that it makes a great deal of difference whether the beneficiary asks that the entire estate shall be transferred to him, or whether he asks only for his share of the same. For if only his share is transferred, the Falcidian Law will apply to the remainder; but if the entire estate is transferred, the heir will not enjoy the benefit of the law.

(10) Where anyone is asked to transfer an estate to a slave belonging to two masters, and one of them wishes to compel the heir, who alleges that the estate is probably insolvent, to transfer it, and the other master refuses to accept it, it must be held that the case is the same as that where the heir is charged to transfer the estate to two persons, one of whom desires to accept it, while the other does not.

(11) Where a father is charged to transfer an estate to his son, who is under his control, can the son compel his father to make the transfer, if the latter says that he thinks the estate is insolvent ? There is no doubt that the father can be compelled to do so by the intervention of the Prsetor.

(12) Even when such a trust has reference to the *castrense peculium* of the son, who is in the military service, or holds some other office, it may more positively be said that the latter can demand that his father be compelled to enter upon the estate and transfer it to him, although in desiring this to be done he may appear to violate the filial respect due to his father.

(13) If, however, anyone should be asked to transfer an estate to his slave with the grant of his freedom, whether freedom is directly granted to the slave, or this is done under the terms of a trust, it may be said that he cannot be compelled, by his own slave, to accept the estate; although if he should do so voluntarily, he will be forced to grant him his freedom, and transfer the estate to him under the terms of the trust. This Marcellus says in the Seventh Book on Trusts.

(14) He also asks, when anyone is ready to give security to indemnify the master, whether the latter can be compelled to enter upon the estate, and especially if he should be tendered the price of the slave. He very properly holds that under the uncertain offer of the bond he is not required to venture to enter upon the estate.

(15) Where heirs are appointed to an entire estate who are incapable of taking it under the will, and are asked to transfer the whole of it, they can be compelled to accept or transfer it, as they will be subject to no liability on this account.

(16) If I should be appointed an heir and asked to manumit Stichus, or any other legatee should be asked to do so, and I should be charged to transfer the estate to Titius, and Titius should afterwards be charged to transfer the entire estate to Stichus, Stichus can compel me to enter upon and transfer the estate.

(17) The following matter was settled by a decision of the Divine Pius. A slave having been bequeathed to one of the heirs of a testator, the said heir was charged to grant the slave his freedom, and another was charged to transfer the estate to the same slave. The Divine Pius addressed a Rescript to Cassius Dexter in the following words: "If the slave Hermias was bequeathed by the testator Pamphilus, to Mos-cus Theodotus, whom he appointed heir to a portion of his estate, and Theodotus should afterwards enter upon the same before it was accepted by his co-heir appointed by the said Pamphilus, and he should have granted the slave his freedom, on account of this, he who bequeathed the legacy could not be considered as intestate; and Hermias, having petitioned me, the co-heir, Evarestatus must, under such circumstances, be compelled to accept the estate at the risk of Hermias, and to transfer it to him under the terms of the trust."

17. *The Same, Trusts, Book II.*

In a matter which was under discussion, the question arose whether anyone could, under the terms of a trust, be charged to appoint another his heir. The Senate decreed that anyone could not be charged to appoint another his heir, but if he did so it was held that it would be the same as if he had been asked to transfer his estate to him; that is to say, to transfer to him anything which he may have received from his estate.

(1) Julianus also, in the Fortieth Book of the Digest, says that a trust in the following terms will be valid, "I charge you to transfer the estate of Titius," when he who was asked to do this was appointed an heir by Titius.

(2) If I should appoint someone my heir, I can not only ask him to appoint another person his heir, but also if I should bequeath to him a legacy, or anything else, I can do so; for persons of this kind are liable to the amount of any property which may come into their hands.

(3) If anyone should insert the following into his will, "I ask you to give such-and-such an article to So-and-So," or "leave him something under a trust," or "bequeath him his freedom," such legacies are valid; for, as the Senate decreed that a trust is valid with reference to the appointment of heirs, so the same rule must be understood to apply to other testamentary dispositions.

(4) If anyone should be asked to transfer an estate provided he died without issue, Papinianus, in the Eighth Book of Opinions, says that the condition will fail to be fulfilled if the person should leave even a natural child; and he asserts that the same rule will apply to a freedman, where a child of this kind is manumitted with him. For my part, however, I think that this question, so far as natural children are concerned, seems to depend upon the intention of the testator, and what kind of children he had in his mind; for when he charged anyone with a trust of this description, his rank, wishes, and condition must all be taken into account.

(5) I remember that the following point was discussed. A certain woman requested her son to transfer the estate to his brother, if he should die without issue, and the son, after having been banished, had children in the island to which he was sent. Hence, the question arose whether the condition upon which the trust was dependent had failed to be complied with. We are of the opinion that where children are conceived before the banishment, even though they may be born afterwards, this causes the condition to fail; but where they are both conceived and born after the banishment, the case is different, because they are, as it were, born to a stranger, and especially should this be considered where all the property of the person is subject to confiscation by the Treasury.

(6) Where a man is asked to transfer an estate to his children, or to anyone of them whom he may select, Papinianus, in the Eighth Book of Opinions, concedes the right of selection even to a person who has been banished; if, having become free, he desires the restoration of the trust. Where, however, he was condemned to penal servitude, without any child having previously been conceived, he will be unable to comply with the condition, for he is

considered to have died without issue. But he cannot be granted the privilege of selection which Papinianus accords to a person who is under sentence of banishment at the time of his death.

(7) If, however, he should have a child, but should lose it during his lifetime, he will be considered to have died without issue. But let us see if the child should die at the same time as its father, through a shipwreck, or the fall of a house, or an attack, or any other occurrence, whether the condition would fail to be fulfilled. I think that the condition would not fail, because, in this instance, it is not certain that the child survived its father, therefore it either survived its father and this extinguished the condition of the trust, or it did not survive him, and the condition was fulfilled. Moreover, as it is not apparent which one died before, and which one after the other, the better opinion is to hold that the condition of the trust was fulfilled.

(8) If anyone should leave a trust as follows, "My son, if you should die after having appointed a foreign heir, I charge you to transfer my estate to Seius," the Divine Pius stated in a Rescript that the testator seems to have had reference to the heir's children; therefore, where anyone dies without issue, leaving a maternal uncle entitled to praetorian possession, on the ground of intestacy, the Emperor declared in a Rescript that the condition of the trust had been fulfilled.

18. *The Same, On Sabinus, Book XV.*

In the transfer of an estate under the terms of a trust, it is settled that the profits are not included unless the heir is in default, or was especially charged to transfer them.

(1) It is clear that the profits should be included in the fourth, as was stated in the Rescript.

(2) Whenever anyone is asked to transfer an estate, he is considered to have been asked to transfer everything belonging to it; the profits, however, are not considered to have been derived from the estate itself, but from the property belonging to the same.

(3) Where a legacy is left to an heir, and he is asked to transfer his share of the estate, he must not only transfer any legacy which he has received from his co-heir, but whatever he himself is charged with is included in the trust. This was established by a Decree of the Divine Marcus.

19. *Paulus, On Sabinus, Book HI.*

Where a trust is bequeathed absolutely, and the following words are added, "I charge you to deliver my estate to your son, and cause it to come into his hands," it is stated in a Rescript that the bequest is made to take effect at the time when the son can receive it, that is to say, when he becomes his own master.

(1) "I ask you, Lucius Titius, to divide my estate with Attius." Aristo says that, under the Trebellian Decree of the Senate, the rights of action affecting the estate pass to him to whom the estate is transferred ; because the words are understood to mean, "I ask you to transfer that estate." The terms of the Decree of the Senate are not to be considered, but the intention of the testator must be, no matter how it was expressed, provided he intended that his estate should be transferred.

(2) Where any expense has been incurred by the sale, or through measures taken for the preservation of property forming part of an estate, it should be charged to the heir.

20. *Paulus, On Sabinus, Book XIX.*

Where, however, a legacy is left to someone to vest at the time when he shall have children, and he dies leaving his wife pregnant, he will transmit the legacy to his heir.

21. *Pomponius, On Sabinus, Book XXII.*

Where an heir, who had a right to retain a fourth, transferred the entire estate, and did not provide for himself by a stipulation, Aristo says his case is similar to that of those who fail to reserve property to which they have no other right; but that he can recover or obtain possession of the assets of the estate, and can make use of an exception on the ground of bad faith against the party claiming the property, and can notify the debtors of the estate that payment should not be made.

22. *Ulpianus, Disputations, Book V.*

A woman who left two children under the control of their father married another man after a divorce, appointed her second husband her heir, and charged him to transfer her estate to her children, or to the survivor of them, after the death of their father. The said children having been emancipated by their father, the stepfather was said to have transferred the estate to them, and afterwards one of the children died during the lifetime of his father. The question arose whether the surviving child could demand that the share of his brother should be given to him, because it was prematurely transferred. Scse-vola relates that the Divine Marcus decided a case of this kind in his audience room. A certain Erasidas, a Lacedemonian, and a man of Pratorian rank, emancipated his children who had remained with him after his wife had been divorced, and to whom an estate had been left in trust in case they should become their own masters by the death of their father. After their emancipation they demanded the execution of the trust. Scsevola says that the Divine Marcus decided that they were entitled to the trust in accordance with the intention of their mother, who deferred its execution until the death of her husband, because she did not think that their father would emancipate them, and she would not have deferred it until his death if she had expected him to emancipate them.

In accordance with this, I held that the Decree of the Divine Marcus applied to the present case, and that the trust had been legally executed with reference to the two children.

(1) There is no doubt that an appointed heir can be compelled to enter upon an estate and transfer it to slaves, where their freedom has been bequeathed to them either directly or under the terms of a trust, as the heir should not treat with contempt whoever compels him to accept the estate. For, although a slave cannot demand that the heir shall enter upon the estate, or claim his freedom directly under the trust, he has a right to appear before the Praetor in person, on account of the expectation which he has of obtaining his freedom and the estate.

(2) Where an heir transfers an estate after a long period of time, when he was required to do so at once under a trust, he can still transfer the estate after having deducted his fourth; and any profits which he may have collected on account of the neglect of the claimant are considered not to have been obtained under the will of the deceased.

The case, however, is different if he was asked to transfer the estate under a condition, or within a certain time; for then anything which he has collected will take the place of the Falcidian portion, if it amounts to as much as his fourth and the profits of the same. Any profits which have been obtained in the meantime are considered to have been collected in accordance with the will of the testator.

(3) If a person is asked to transfer an estate, and before he does so any of the slaves belonging to it should die, or any of the property be lost, it is decided that he cannot be compelled to transfer anything which he does not have; but it is evident that he must account for his negligence, but only in case it resembles fraud. This was stated by Neratius in the First Book of Opinions. If he did not sell the property at a time when he should have done so, he is guilty of gross, and not of slight negligence, such as he would have avoided in the transaction of his own business, and he must, under such circumstances, be held responsible.

Moreover, if a house should be burned through his negligence, he must account for it. Again, he will be accountable for the children of slaves, and even the children of those children if they should die, because these are not included in the profits of the estate. He himself can

deduct any expense which he has incurred on account of property belonging to the estate. But if, through no act of his, a house is acquired by use through lapse "of time, it is perfectly just that he should not be considered liable, as he is free from blame.

(4) The following was proposed: "A certain man appointed his daughter his heir, and charged her, if she died without issue, to transfer her estate to Titius. She had given a dowry of a certain sum of money to her husband, and afterwards, having died without issue, she appointed her husband her heir." The question arose whether the dowry could be deducted. I said that it could not be held that the daughter intended to annul the trust, which was in accordance with both the duty of the woman and the wishes of her father; hence it must be said that the dowry has disappeared, just as if she had asked what remained of it to be transferred. If the woman collected enough income from the estate to be able to pay the amount of her dowry, it should be said that this expense ought to be charged to the profits rather than to the trust.

(5) In order that the Trebellian Decree of the Senate may apply, it is not sufficient for a bequest to be made merely with reference to the estate, but the heir must be charged to execute the trust in his capacity as heir. Hence, if a portion of an estate is bequeathed to anyone (for we are of the opinion that a portion of an estate can be bequeathed), and the legatee is asked to transfer this portion to another, there is no doubt that a transfer cannot be made under the Decree of the Senate, and therefore the fourth should not be reserved.

23. *Julianus, Digest, Book XXXIX.*

Whenever a testator orders one or two heirs to transfer his estate to their co-heirs, he is understood to have made the same division with reference to the trust which he made in the distribution of the estate. If, however, those who are charged with the execution of the trust are directed to pay a certain sum of money to the person from whom they are to receive the benefit of the trust, the intention of the testator must be ascertained from the amount of money which the parties are ordered to pay. For where heirs are appointed to unequal shares of an estate, and are directed to pay equal sums, the better opinion is, that they should receive equal amounts under the trust. But if the sum of money to be paid corresponds with the shares to which they are entitled, they shall receive proportional amounts under the trust.

24. *Papinianus, Questions, Book XV.*

Sometimes, however, this point has been stated differently in rescripts and the decisions of courts; for instance, where a trust is left not under the general term of heirs, but under the individual names of the parties interested.

25. *Julianus, Digest, Book IX.*

A certain person made the following provision in his will: "My heir, I ask and charge you to transfer to my son whatever comes into your hands out of my estate, upon the first day; or if anything should happen to him before that time, I request you to deliver it to his mother." The question arises if the boy should die before the estate is entered upon, whether his mother would be entitled to the benefit of the trust. I answered that if the boy should die before the time arrived for the execution of the trust, it would be transferred to his mother; but if he should die after the day for its execution arrived, the heir of the boy would be entitled to the benefit of the trust. But, in order to ascertain the intention of the testator, namely, whether if the boy should die before the delivery of the property under the trust, it would be transferred to the mother rather than to the heirs, the Praetor must take into consideration the person of the mother as well as that of the heir of the boy.

Marcellus: It is, however, more in conformity with the will of the testator to hold that whenever the boy dies, whether he dies before the day for the execution of the trust, or afterwards, the trust will be transferred to his mother, if he should not already have received

it. This is the rule which we now make use of.

(1) Where a slave is appointed heir, and his master is charged to deliver the estate to the slave when he shall become free, the trust is valid.

(2) When anyone appoints his son heir to his entire estate, and, by a codicil which he directed to be opened after the death of his son, he charges him to transfer his estate to his sister if he should die without issue, and the son, being aware of the contents of the codicil, directed by his will that the slave Stichus, who belonged to the estate of his father, should be free, the heirs of the son must pay the value of the slave to the sister of the deceased, for his freedom cannot be lost by means of a favor.

Moreover, even if the son should not be aware that his father had made a codicil, his heirs will, nevertheless, be obliged to pay the value of the slave, in order that the act of one may not injure another.

(3) If, however, this slave was appointed an heir by Sempronius, and after he had obtained his freedom, entered upon the same estate by the will of the brother, the heirs of the latter must also pay his sister the appraised value of the estate; because if the slave had not been manumitted, he could enter upon the estate by order of the woman. But if Sempronius should die during the lifetime of the son, deduction of the estate on account of the trust shall be made, since the slave, having been ordered to accept the estate by the son himself, will acquire it.

26. *Paulus, On Decrees of the Senate.*

The Apronian Decree of the Senate directs that every estate left under a trust can and should be transferred to all cities subject to the authority of the Roman people. It was also decided that rights of action against such estates should be transferred under the Tre-bellian Decree of the Senate. The residents of the cities, however, are permitted to bring actions against the estates.

27. *Julianus, Digest, Book XL.*

The cities, in order that the estates may be transferred to them, should select an agent who can sue and be sued.

(1) Where an heir who was compelled to accept an estate orders a slave forming part of the same to enter upon another left to the said slave by a stranger, and then transfers the former estate which he says he suspects of being insolvent, the question arises whether he ought also to transfer the one which had been acquired by the slave. I held that this estate should not be included in the transfer, any more than if the slave belonging to the first estate had, after having accepted it, entered into a stipulation and received it by delivery, or had collected the income from the property of the estate without being in default in the execution of the trust.

If, however, the slave, before accepting the estate, entered into any stipulation, or accepted it by delivery, he must restore the subject of the stipulation, as the income collected before the estate was accepted will be included in the transfer.

(2) When an heir says that he suspects the estate of being insolvent, he will obtain no benefit under the will which he would not have obtained if he had not been appointed heir, or had not entered upon the estate. Therefore, if he was substituted for a minor as follows, "Let whoever shall be my heir also be my son's heir," he should be compelled to transfer the estate which came into his hands by virtue of the stipulation. If, however, the clause, "Whoever shall be my heir," is omitted, and he should be substituted as follows, namely, "Let Titius be my son's heir," then, if the heir alone should survive the father he can, nevertheless, be compelled to transfer the estate of the minor. But if he should have a co-heir, he can retain the estate of the minor, because if his co-heir enters upon the estate, he can also enter by virtue of the substitution, even though he may have rejected the estate of the father.

(3) Where a father appoints his son, whom he has under his control, his heir, and charges him to transfer his estate to Sempronius, and says that he suspects the estate of being insolvent, the son can be compelled to transfer it under the Trebellian Decree of the Senate. Wherefore, even if he should not have concerned himself with the affairs of the estate, still, any rights of action for or against him will pass to Sempronius.

(4) When an heir, appointed by a father and substituted for his disinherited son, is charged to transfer to Titius the estate which may come to him by virtue of the substitution, he cannot be compelled to accept the estate of his father during the lifetime of the minor; in the first place, because the trust was established under a condition, and second, for the reason that an action with reference to the estate cannot legally be brought during the lifetime of the boy. When the minor dies, however, he should be compelled to enter upon the father's estate.

(5) Where two heirs have been appointed by a father, and both of them have been charged to transfer his estate to a disinherited son, it will be sufficient for only one of them to be compelled to enter upon the same; for by this act he who did not enter upon the estate of the father can be compelled to enter upon and transfer the estate of the son.

(6) Whenever an emancipated son acquires possession of the estate contrary to the provisions of the will, there is no reason to compel the heir to transfer the estate; and, as he is not compelled to pay either legacies or trusts, so he can not be forced to transfer any portion of the estate.

Marcellus: It is clear that he should not be compelled to enter upon the estate, where the son has already obtained possession of the same to prevent the trust from being extinguished, if the appointed heir should die, and praetorian possession of the property should be refused by the son.

(7) A person who has transferred an estate under the Trebellian Decree of the Senate can either be relieved or barred by an exception on the ground that the estate has been transferred, whether he is sued by the creditors of the estate, or sues the debtors. Moreover, the same actions can be brought by the beneficiary which the heir could have brought at the time when he transferred the property left under the trust.

Marcellus: It is also established that those actions which were subject to a condition, the time for the fulfillment of which had not yet arrived, will lie in favor of the beneficiary of the trust. The heir, however, cannot have recourse to any exception before the estate has been transferred, as otherwise he would transfer so much less under the trust.

(8) The Trebellian Decree of the Senate is applicable whenever anyone charges his heir with the distribution of either the whole or a part of the estate, at a time.

(9) Hence, if Maevius should appoint you his heir, and ask you to deliver the estate of Titius, and you should enter upon the estate of Maevius just as if you had been charged with the trust, and had been asked to transfer land which had been devised to you by Titius, and you should say that you had reason to think that the estate of Maevius was insolvent, you cannot be compelled to enter upon the same.

(10) If Maevius should ask you to transfer to someone both his estate and that of Titius, and you voluntarily accept the estate, you can avail yourself of the benefit of the Falcidian Law, and retain the fourth part of the estate of Maevius, and transfer the other three-fourths in compliance with the terms of the trust. Nor will it make any difference whether you are asked to transfer both estates to the same individual, or the Msevian estate to one person, and the Titian estate to another. If you should say that the estate of Maevius is probably insolvent, you can be compelled to accept it and transfer it to the person to whom you are asked to deliver it; but he to whom you are charged to transfer the estate of Titius cannot compel you to enter upon it.

(11) If the heir should transfer the estate under the Trebellian Decree of the Senate, and should retain the income of the land, or the land itself, or should even be the debtor of the person who made the will, it will be necessary for an action to be granted to the beneficiary against him.

Marcellus: It will also be necessary for this to be done where, only a portion of the estate having been transferred, an action in partition is brought between the person who delivered the estate and the one who received it.

(12) Where anyone is asked to transfer an estate after a son has been emancipated, he should be compelled to accept and transfer it, even though the son can obtain praetorian possession of the same in opposition to the provisions of the will.

(13) When a patron is appointed heir to that portion of the estate of his freedman to which he is entitled by law, and, having been asked to transfer the estate, says that he has reason to think that it is insolvent, I hold that the Praetor will act more justly if he compels him to enter upon and transfer the estate; although, notwithstanding this change of mind, he can retain that part of the same to which he is legally entitled.

(14) Where, after the reservation of certain property as a preferred legacy, the heir is requested to transfer an estate, and is compelled to accept it, ought he to retain the preferred legacy? I answered that anyone who enters upon an estate by order of the Praetor should be prevented from enjoying any advantage.

(15) But if a bequest is left to the same person under the condition that he does not become the heir, and he alleges that he has reason to think the estate to be insolvent, he cannot be compelled to accept it unless he surrenders the legacies which were bequeathed dependent upon the condition of his not becoming the heir; and this should not be done by the co-heirs to avoid liability, but by him to whom the estate was transferred. For, as the heir is obliged to accept the estate in order that the wishes of the testator may be complied with, so he should not be subjected to loss on this account.

(16) My cousin was appointed sole heir to an estate, and charged to transfer half of it immediately to Publius Maevius, and the other half after her death to the said Publius Msevius. Other legacies were also bequeathed to other persons. Maevius at once received his half of the estate, and gave security to return anything which he might have obtained over and above what was permitted by the Falcidian Law, and the others were paid their legacies in full, and likewise gave security to return any excess which they might have received. My cousin having died, Publius Maevius demanded that the other half of the estate, along with its income, should be delivered to him. Therefore, I ask how much I ought to transfer to him, and whether it should be what remained in the hands of my cousin in excess of the fourth part of the property, and nothing more; or whether I could recover something from the others to whom legacies had been paid, and if so, how much?

I also ask if what I may receive from them under the stipulations, and what remained in the hands of my cousin in excess of the fourth of the estate should not amount to half of the same, whether I shall be compelled to make up the deficiency from the increase and the income of the property which remained in the hands of my cousin over and above the fourth, in order that the amount which should be transferred may not exceed the fourth part of the estate. Or, as Publius Maevius demands, after the fourth of the estate had been excepted, must whatever has been obtained from the profits of the said fourth be delivered to him?

I answered that, if, with the addition of the income, whatever above the fourth remained in the hands of your cousin does not amount to less than half of the estate as it was at the time of her death, it must all be transferred to Publius Msevius; and nothing can be recovered under the stipulation from those to whom legacies have been paid. If, however, the income exceeds the value of half the estate, it must be added to your fourth and the income of the same. But if the

income of your share which remained in the hands of your cousin in excess of the fourth does not amount to half of the estate, an action can be brought under the stipulation.

In short, the calculation should be made in such a way that the income will actually be in excess of a fourth, and if it increased to such an extent as to amount to more than half of the estate, you can retain whatever is in excess.

(17) When anyone is asked to manumit his slaves, and transfer the estate to them, he should do so after having deducted the price of the slaves.

28. *Africanus, Questions, Book VI.*

A person appointed sole heir to an estate, having been charged to transfer half of it to me absolutely, and half to you conditionally, alleged that he had reason to believe it to be insolvent, and upon my application entered upon the estate, and transferred the whole of it to me under the Decree of the Senate. When the condition was fulfilled, a doubt (which was not without foundation) arose, as to whether I should transfer to you the income of your share. It is held by several authorities that this should not be transferred, because it would not be paid by the heir if he had voluntarily accepted the estate, and it is sufficient for your right to be preserved unimpaired without your condition being improved.

(1) Still, the same authorities hold that where a person is appointed sole heir to an estate, and is asked to transfer a fourth of the same to me absolutely, and a fourth to you under a condition, and alleges that he has reason to think the estate to be insolvent, and is compelled by me to enter upon it, half of the estate must be delivered to you when the condition has been fulfilled.

(2) I do not think that in the proposed case I can avail myself of the Falcidian Law, although the appointed heir can do so, if he should have entered upon the estate voluntarily.

29. *Marcianus, Institutes, Book IV.*

If anyone, after having made a will, should afterwards make a second one, the first is annulled, even though by the last will he appointed heirs to certain property, as the Divine Severus and Antoninus stated in a Rescript, the words of which Constitution I quote, along with other matters included therein. "The Emperors Severus and Antoninus to Cocceius Campanus, Greeting. There is no doubt that a second will, although the heir may only have been appointed by it to receive certain property, is valid, just as if no mention of the property had been made; but the said appointed heir will be obliged to be content with whatever is left to him, or with enough to make up his fourth under the Falcidian Law; and he must transfer the estate to those mentioned in the former will, on account of the words creating the trust which were inserted, by which the testator stated that he intended the first will to be valid. This, however, must be understood to apply only where nothing especially contradictory was included in the second will."

30. *The Same, Institutes, Book Vill.*

Where an envoy says that he has reason to think that an estate is insolvent, he should be compelled to accept it during the time of his employment with the embassy, because he is not constantly occupied with the duties of his office. And he can be compelled to enter upon the estate, even though he may say that he will take the matter under consideration; but he shall not be compelled to make the transfer at once, but must do so as soon as he returns home and he can avail himself of the benefit of the Falcidian Law, or of his right under the will, if he thinks it is expedient; or, if he does not think so, he can transfer the entire estate to avoid being subjected to any burdens on account of the same.

(1) If anyone charges his heir to transfer "his property," or "all his property," this is understood to indicate a transfer by virtue of a trust; for under the terms "mine" and "yours," rights of action are also considered to be included.

(2) Where an estate is transferred to a son under paternal control, or to a slave, and the father or the master subsequently ratifies the act, the rights of action will also be transferred under the Trebellian Decree of the Senate.

(3) It makes a great deal of difference whether the fourth part is retained by hereditary right, or where the party can only reserve a specified article, or a certain sum of money. For, in the first instance, the rights of action are divided between the heir and the beneficiary of the trust, but in the last, the rights of action pass entirely to the beneficiary.

(4) If an appointed heir, having been charged to transfer an estate after retaining for himself a certain sum of money or some article, although what is to be reserved is less than his fourth, he cannot claim more than that, even if he should be the Emperor.

(5) But if he should be asked to transfer an estate without reserving anything for himself, he is authorized by the Emperors to retain a fourth. This the Divine Hadrian, Trajan, and Antoninus stated in Rescripts.

31. *The Same, Institutes, Book IX.*

Where freedom is absolutely granted to a slave, and an estate is left to him conditionally under a trust, the heir will be compelled to accept the estate and transfer it, even if he alleges that he has reason to believe that it is insolvent; and the slave cannot be deprived of his freedom even if the condition should not be complied with.

(1) If an estate should be left under a trust to a slave who is to receive his freedom within a certain period, the Divine Pius stated in a Rescript addressed to Cassius Hadrian that the heir cannot, in the meantime, be compelled to enter upon the estate if he should consider it to be insolvent, as freedom cannot yet be granted to the slave; nor, on the other hand, can freedom be bestowed upon him in opposition to the will of the deceased.

(2) Where an heir is appointed under a condition, and is asked to transfer the estate, but is unwilling to comply with the condition and enter upon the estate, if the condition consists of an act he must perform it, and transfer the estate; or, if it consists of giving something, and the beneficiary of the trust should tender it, but the heir should refuse to discharge his obligation, permission will be given to the beneficiary to act instead of the heir, and then the necessity to enter upon the estate will be imposed upon him.

Other conditions, which are not in the power of the heir, do not come within the jurisdiction of the Praetor.

32. *Celsus, Digest, Book XX.*

Ballista appointed a son under paternal control his heir, as follows, "Let Rebellianus be my heir, if he gives security to the colony of the Philippians that, if he should die without issue, all the money which may come into his hands from my estate will be given to the said colony of the Philippians." I gave it as my opinion that although the testator made use of the word "money," the heir must also surrender any other property which he may have received from the estate, just as if the testator has expressly designated it.

33. *Marcianus, Institutes, Book Vill.*

Celsus, in the Twentieth Book of the Digest, says that if anyone, having an estate of four hundred *aurei,* charges his heir, if he should die without issue, to transfer to Msevius all the money which may come into his hands from his estate, and if, in the meantime, he should obtain four hundred *aurei* out of the income of said estate, and should die without leaving any children, his heir will owe four hundred *aurei* to Msevius. He treats this question at great length, both as to whether the heir shall profit by the increase and take the risk of any loss, or *vice versa;* and says in conclusion that it would be unjust for the beneficiary of the trust to sustain the losses when he is not entitled to the profits. And, where some deficiency of the

four hundred *aurei* must be made good, he asks whether any increase will also belong to the beneficiary, that is to say, whether an account of the losses and profits must be taken, up to the sum of four hundred *aurei?* I think this opinion to be correct.

34. *The Same, Rules, Book II.*

Where a father desired that, in case his only surviving son should die,' his share of the estate should be delivered to a relative, and the brothers died upon the same day, the said relative will not be entitled to a share in the estate if he cannot prove which one of the brothers died last; but it has been decided that their mother will be entitled to the estates of both of them under the Tertullian Decree of the Senate.

35. *Ulpianus, On the Duties of Proconsul, Book VI.*

The Divine Pius decreed that, where an insane woman was appointed heir and charged to transfer an estate, her curator could assign all rights of action after having obtained possession of the estate in accordance with the provisions of the will.

36. *Paulus, On the Edict, Book XIII.*

Where an estate is transferred on account of a trust before an agreement for arbitration has been made with the heir, I think that the beneficiary of the trust should give the heir security, just as where the latter had charge of the property of the estate before transferring it, since the common saying that he can retain certain property does not universally apply; for what if there should be nothing in the estate which he is able to retain; as, for instance, where it all consists of notes, or articles of which he has not possession? It is clear that he to whom the estate is transferred will obtain everything, and the heir will be bound by the judgments in cases where he has been sued, or by the stipulations which he was required to enter into and could not avoid. Therefore he cannot be compelled to transfer the estate unless security is given him.

37. *Ulpianus, On the Edict, Book VI.*

An estate is considered to have been transferred where either the iproperty itself is delivered, or the heir is permitted to acquire possession of the property belonging to the estate, either wholly or in part, in such a.way that one of the parties is willing to transfer it and the other to receive it, but not if the heir should think that you have obtained possession for any other reason. The same rule must be held to apply where the possession is afterwards ratified.

If, however, the heir should state that he transferred the property himself, or did so by a letter, or a messenger, he shall be heard. If he should deliver it to someone else, with your consent, the rights of action against you will also be transferred. Likewise, if another than the heir should transfer the estate by my order, or the heir should ratify the transfer, the rights of action will be considered to have passed.

(1) Moreover, a ward should himself make a transfer of an estate with the authority of his guardian, but the guardian cannot do so without the consent of his ward, unless the latter is an infant; because a guardian cannot assign the rights of action belonging to his ward.

The Divine Severus, in the case of a ward named Arrius Honoratus, decreed that a ward could not transfer an estate merely by the authority of his guardian, where the said Arrius Honoratus made a transfer of this kind to his uncle and guardian Arrius Antoninus.

(2) When an estate is to be transferred to a ward, it is established that this cannot be done by the latter without the authority of his guardian.

38. *Paulus, On the Edict, Book XX.*

For the transfer of an estate is not merely a payment but a succession, as the beneficiary is liable.

39. *Ulpianus, On the Edict, Book XVI.*

Moreover, an estate cannot be indiscriminately transferred to the guardian himself.

40. *Paulus, On the Edict, Book XX.*

Although the Senate referred to the transfer of these rights of action which, by the Civil Law, lie in favor as well as against the heir, still, praetorian rights of action are also assignable, for there is no difference between the two. Again cases involving natural obligations are likewise susceptible of transfer.

(1) An appointed heir is specifically referred to in the Trebellian Decree of the Senate; still, we have adopted the rule that the successor of an heir can lawfully make the transfer under the Trebellian Decree of the Senate, just as an heir, the prsetorian possessor of the property of an estate, a father, or a master by whom the estate is acquired, can do. For all should assign any rights which they may have under the Trebellian Decree of the Senate, and it makes no difference whether the appointed heir, the father, or the master, is asked to transfer the estate.

(2) It is also immaterial to whom the transfer is made in our name, whether it be the head of a household, or someone who is under the control of another;

41. *Gaius, Trusts, Book II.*

A male or a female. Therefore, an estate can be transferred to a slaye with our consent, or without it if we should afterwards ratify the act.

42. *Paulus, On the Edict, Book XX.*

Because it is just the same as if the estate had been transferred to me.

(1) Where an estate is transferred, the rights of sepulture remain with the heir.

43. *Ulpianus, On the Edict, Book XXII.*

Papinianus discusses the following point. A person having been appointed heir to half of an estate was asked to deliver it to another, and, alleging that he considered it insolvent, was compelled to accept it. The beneficiary of the trust was not aware that a part of the estate had accrued to the appointed heir after it had been transferred, and the question arose whether another action would be required. Papinianus says that the beneficiary would be secure. He also says that, in a case of this kind, it should be determined whether a new transfer will be necessary after the increase of the above-mentioned share.

44. *Marcellus, Digest, Book XV.*

An heir, at the request of Stichus, who had received his freedom and the estate in trust under the same will, entered upon the said estate, which he suspected of being insolvent, and Stichus afterwards died before he was in default in accepting the estate, and left Titius his heir. I ask whether, under the Decree of the Senate, actions will lie against Titius if he refuses to accept the estate left in trust. I answered that, while ordinarily, he who is compelled to accept an estate can immediately transfer it to the beneficiary of the trust, the Decree of the Senate, in this instance, only appears to have reference to the manumitted slave, and no mention is made of the heir.

Still, it may happen that the heir will postpone the transfer; for example, where the deceased owed him money, and he preferred to retain it rather than to bring an action for its recovery. I think, however, that the same rule should apply to his heir which applies to him; for why should the former have the right to reject an estate which he from whom he inherits could not have rejected? If the freedman should die without leaving an heir, before the estate was transferred, the creditors of his estate would be permitted to sell his property, just as if he had died after the estate had been delivered.

(1) I ask you to give me your opinion as to whether I am right in my decision of the following question. A daughter who had been appointed heir to the entire estate of her father was charged to transfer half of the same after having deducted all the legacies and the debts, none of which were very large, in order to avoid the application of the Falcidian Law. The heir was not in default in executing the trust. I ask her to transfer the estate to me verbally, just as if I had brought suit under the Trebellian Decree of the Senate, and I hold that, on this account, interest due from the day of the death of the testator to the time when the estate was transferred can be recovered by means of the proper actions. I also make a claim with reference to the rents of the estate, because the obligation growing out of the leases forms a part of it, but I do not demand any profits from the heir; still, she desires that I refund to her the amount of the rents, or assign to her my rights of action to collect the interest and the rents, and I cannot persuade her that, under the term "estate" which she was asked to transfer to me, I am also entitled to this stipulation for interest.

I gave it as my opinion that all these things are included in the term "estate," and that in the case you refer to there is no difference between these obligations and others which are contracted under a condition, or are payable annually, or monthly. It is clear that these things are considered as the income of property included in the estate, and that, if there has been no default, the income does not belong to the beneficiary of the trust. But as the beneficiary does not, as it were, demand that the heir shall add anything to the trust, but only asks that the estate shall be transferred to him in its present condition, the heir should not, by any means, refuse to do this; for the Senate intended that the beneficiary should receive half of the estate, and be considered as occupying the place of the heir with reference to that portion of it which might be transferred to him.

But if the heir should lend money of the estate at interest, or collect the income of the land, she will not be required to pay anything on this account to the person to whom the estate was left in trust, if she was not in default; for the reason that she lent the money at her own risk, and by cultivating the soil, or by gathering the crops she incurred expense, and it is not just that she should, so to speak, act as the agent of another. But when the heir receives an income from the estate in the manner which is the subject of the inquiry, no expense incurred or labor performed by the heir is involved.

45. *Modestinus, On Inventions.*

Where an heir was asked to transfer an entire estate, and declines to retain the fourth because he desires to carry out the wishes of the deceased with greater exactitude, he should voluntarily enter upon the estate as intending to transfer it under the Trebellian Decree of the Senate. I would also advise him, if he regards the estate as insolvent to reject it, in order that he may be compelled by the Praetor to transfer it; for in this instance he is considered to transfer it under the Trebellian Decree of the Senate; and where the heir has manifested fear of being liable to the indebtedness of the estate, all the rights of action will pass to the person who receives it.

46. *Javolenus, Epistles, Book XI.*

Seius Saturninus, Admiral of the Britannic Fleet, by his will appointed Valerius Maximus, captain of a trireme, his fiduciary heir, and charged him to transfer his estate to his son Seius Oceanus, when the latter arrived at the age of sixteen years. Seius Oceanus died before reaching that age. Then Malleus Seneca, who alleged that he was the uncle of Seius Oceanus, claimed his property on the ground of his being the-next of kin. Maximus, the captain of the trireme, also claimed the estate, because the person to whom he had been ordered to transfer it was dead. I ask to which of these persons the estate belongs, to Valerius Maximus, the captain of the trireme, the fiduciary heir, or to Mallius Seneca, who asserts that he is the uncle of the deceased boy?

I answered that, if Seius Oceanus, to whom the estate was bequeathed in trust by the will of Seius Saterninus, when he attained the age of sixteen years, was to be transferred by Valerius Maximus, the fiduciary heir, should have died before reaching the prescribed age, the estate left in trust would pass to him who was entitled to the other property of Oceanus, because the time for the execution of the trust arrived during the lifetime of Oceanus; that is to say, provided that, by prolonging the time of delivery, the testator was considered to have intended to commit the guardianship of his son to the fiduciary heir, rather than to have appointed an uncertain time for the execution of the trust.

47. *Pomponius, Various Passages, Book I.*

If anyone, bound to a person only by a natural obligation, should discharge a debt to his heir, the money must be paid over to him to whom the estate was left in trust.

48. *Paulus, Opinions, Book XIV.*

Paulus gave it as his opinion that, in a case where a certain portion of an estate was left to someone, and the latter had stolen property belonging to the estate, it may very properly be held that he can be refused an action having reference to what he had appropriated.

49. *Papinianus, Questions, Book HI.*

Where an estate is to be transferred under the Trebellian Decree of the Senate, and the matter is urgent, and it is feared that the time for bringing an action may expire on account of the absence of the beneficiary of the trust, the heir can be compelled to defend the action brought against the estate.

(1) In like manner, where a son is deliberating as to whether he will demand possession of the estate in opposition to the terms of the will, the appointed heir can be sued by the creditors of the estate.

50. *The Same, Questions, Book XL*

When Vivius Cerealis had been appointed heir, and directed to transfer the estate to his son Vivius Simonides, when he should be free from his control, and it was proved that many fraudulent acts had been committed for the purpose of avoiding the trust, the Emperor Hadrian ordered the estate to be delivered to the son, so that the father would have no right to the money as long as his son should live. For, as security cannot be given as long as paternal control exists, the Emperor inflicted this loss upon the father because of the fraud perpetrated by him. After a decree of this kind has been authorized, the son should, under such circumstances, be compared to the son of a soldier, where property is to be recovered from possessors, or where it is necessary to bring suit against the debtors of the estate. It is, however, in conformity for the reverence due to a father, in case the latter should be reduced to want, for the judge, in his discretion, to order some of the income of the estate to be given to him.

51. *The Same, Questions, Book XVII.*

Where an heir is charged to deliver an estate left in trust, after having deducted the legacies, it is not held that those should be deducted which cannot be recovered by an action.

Where a dowry is bequeathed as a preferred legacy to a wife, who is appointed heir to a part of the estate of a testator, and she is charged to transfer the estate after having deducted the legacies, she can still deduct her share of the estate in proportion to the dowry, even if the fourth which she is entitled to retain by the Falcidian Law amounts to as much as her dowry. For, as she is entitled to both of these, there is no difference between this woman and any other creditor who may be appointed heir, and charged to transfer the estate.

The same principle also applies where she is charged with a trust without the deduction of the legacies.

52. *The Same, Questions, Book XIX.*

Where property belonging to a third party is bequeathed to Titius, and the latter charges his master, whom he has appointed his heir, to transfer the estate to Maevius, Maevius cannot legally claim the legacy, for he cannot acquire what has never come into the hands of the appointed heir, that is to say, the ownership of the property.

(1) A slave obtained his freedom from one of two heirs who had been appointed, and from the other received an estate left in trust. If neither of the said heirs was willing to accept the estate, the Praetor would have no jurisdiction, because he cannot compel an heir to enter upon an estate for the sole purpose of securing the freedom of the slave, nor can he compel him by whom freedom has not been granted to accept the estate on behalf of a slave who has not yet been liberated, as the Decree of the Senate applies only where all the heirs are charged directly with a grant of freedom, or one is charged with it as well as with the delivery of the estate under the terms of a trust. If the heir who is charged with the grant of freedom should reject his share of the estate, or should be excluded because of the non-fulfillment of the condition upon which his appointment depends, as his share will pass to the other heir, it can be maintained that he should be forced to accept the estate. For what difference does it make under what rule the same person should owe the slave both freedom and the estate?

53. *The Same, Questions, Book XX.*

An heir should not be compelled to accept an estate, which he considers to be insolvent, by a slave on whom the said heir is charged to bestow freedom and the estate, as the condition of the slave depends upon the legacy, and no one can compel another to become liable to actions brought against an estate merely in order to secure the payment of a legacy. For what if the slave should die during the delay caused by the legatee in not manumitting him ? If, however the legatee should die during the lifetime of the testator, the more equitable opinion would be that he should be compelled to accept the estate, as he has the power to transfer it to the slave after his manumission.

54. *The Same, Questions, Book XIX.*

Titius was charged to transfer to Maevius the residue of an estate. The beneficiary can not recover anything which the heir may have in the meantime alienated or wasted, if it should be proved that he has not done this fraudulently and for the purpose of interfering with the trust; for it is established that good faith is an essential characteristic of a fiduciary bequest. The Divine Marcus, however, when he was deciding a matter involving an estate left in trust, which was contained in the following words, "I charge you to transfer anything which remains of my estate," held that this should be left to the judgment of a good citizen, and decided that any expenses which were said to have been incurred with reference to the estate should not only cause a diminution of the property included in the trust, but should also be distributed *pro rata* with reference to the patrimonial estate, to which the heir was entitled as his own. This seems to me to not only be based on equity, but also to be confirmed by example; for if a question should arise concerning the contribution of property by an emancipated son in favor of his brothers, it has been definitely settled that whatever was acquired by the son in the army he is entitled to retain; and the Emperor, having been consulted, decided that the expenses incurred by the soldier should not only be apportioned among the funds due from the estate, but ought also to be deducted *pro rata* from the money forming part of the *peculium.*

According to what has just been stated, Msevius should require a bond to be given for the execution of the trust, not in order that he may, under the stipulation, make a claim for what he could not recover under the trust, but that he may have sureties for the amount which he could have recovered under the terms of the trust.

55. *The Same, Questions, Book XX.*

If the son of a patron should transfer an estate to a stranger under the Trebellian Decree of the Senate, an action to recover the value of services which cannot be transferred will lie in favor of the heir, and he will not be prejudiced by an exception, as this cannot be of any advantage to the person entitled to the benefit of the trust. Generally speaking, it must be said that the heir can neither be barred from proceeding, nor released by obligations which have no reference to the delivery of the estate.

(1) The Emperor Titus Antoninus stated in a Rescript, that where freedom has been bequeathed directly, to take effect within a certain time, transfer of the estate need not be made when there is no person to whom it can be delivered.

(2) Where anyone has received an entire estate under the Trebellian Decree of the Senate, after alleging that he has reason to think that it is insolvent, if he was charged to transfer it to another, he will be obliged to deliver all of it, and, in this instance, there will also be ground for the application of the Trebellian Decree of the Senate, for the beneficiary of the trust cannot retain the fourth under the Falcidian Law. Nor does it make any difference, if the first beneficiary should not have demanded that the estate be entered upon, whether the trust created in the second place would not have taken effect, for when an estate has once been accepted, all the wishes of the deceased are considered to have been complied with. Nor is this opinion refuted because the beneficiary of the trust is not obliged to pay other legacies which amount to more than three-fourths of the estate. For it is one thing for suit to be brought against him in the name of the heir, and another for him to be sued in his own name through being bound by the wishes of the deceased.

According to what has already been stated, the appointed heir should not be compelled to accept the estate merely on the demand of the first beneficiary of the trust, where the latter is not entitled to any portion of the same, just as if he was charged to transfer the estate, together with its income, immediately, or after a certain time. If, however, he should be charged to transfer it without its income, it may be inferred that the amount will not be sufficient to compel him to accept the estate, nor is it material if the first beneficiary should have also received his freedom, for neither the acceptance of the money, nor of the grant of freedom will be sufficient to compel the appointed heir to enter upon the estate.

But when the first beneficiary of the trust refuses to compel the heir to accept the estate, it has been decided that the second can legally demand that this shall be done, in order that the heir may enter upon it and transfer it to him.

(3) But what if the first beneficiary should be charged not to deliver the estate to a third party, but to transfer it to the heir himself ? For the reason that he ought not to transfer to him the fourth which he has lost, he should be heard with reference to the retention of this part of the estate. Yet the fact that the appointed heir who was compelled to accept the estate is refused the right to claim anything under the trust should not be dismissed without consideration. For why should he not be thought unworthy to obtain anything under the will of the deceased, who refused to comply with his wishes? This will be more thoroughly established, if the heir was forced to enter upon the estate after a condition had been fulfilled, for if he was compelled to do so while the condition was pending, it will be hard to prove this, as he, by merely changing his mind, will be able to claim the Falcidian fourth. And I am well aware that it may be said that, under no circumstances, the benefit of a trust should be denied to those who are asserting their claim to the right of sepulture. To such an extent was the Senate convinced that the heir should not obtain anything out of the share of the estate which he had rejected, that he could not even avail himself of the Falcidian Law, or reserve any preferred legacy, or acquire any advantage under a second will, where the substitution is made as follows, "Let whoever becomes my heir, be the heir of my son."

(4) The person to whom the estate of Titius was transferred under the Trebellian Decree of the Senate can transfer to Sempronius the estate of Msevius which the deceased Titius was

charged to transfer to him, just as any other successor whosoever could do.

(5) The actions which pass under the Trebellian Decree of the Senate are only temporary ones, where the estate is evicted from the party who lost the case after he had transferred the estate under the trust, if, of course, issue was joined with him before the delivery; for the force of the eviction renders the transfer null, because that the trust which was established was not due. It is clear that where the same person who gained the case was also charged with the trust, for the reason that the possessor, in transferring the estate, accounted to the heir for the same share which should have been delivered to the beneficiary; it can be maintained that the actions which pass under the Trebellian Decree of the Senate will not be barred by lapse of time.

56. *The Same, Opinions, Book VII.*

A father wished that his daughter, after having reserved certain articles, should deliver his estate to her brothers. It was decided that the daughter ought to be placed in possession of the estate, before she made the transfer to her brothers. If, in the meantime, the brothers should have sold or encumbered all the property of the estate, and it was afterwards transferred to them, it is established that, on account of their act only, the sales or pledges of that portion of the estate which was not reserved, should be confirmed.

57. *The Same, Opinions, Book Vill.*

"Let my heirs, at their death, transfer to the City of Beneventum, my birthplace, all of my estate or property which may come into their hands." It was decided that none of the income collected by the heirs while a condition was pending was included in the trust.

(1) The following provision was inserted into a will, "I charge the first one of my sons who may die without issue to leave his share of my estate to his surviving brother. If both of them should die without issue, I wish my entire estate to go to my granddaughter Claudia."

If one of the heirs should die leaving a son, and the last one should die without issue, it would seem, at the first glance, that the granddaughter could not be admitted to the succession under the terms of the condition; but as, in the interpretation of trusts, it is proper to consider the intention of the testator, it would be absurd to hold that, because the first substitution did not take effect, the claim of the granddaughter to half of the estate should be refused, as the grandfather had intended that she should have all of it, if the last of the sons who died should receive the share of his brother.

(2) "When I die, I charge you, my dear wife, to transfer my estate to my children, or to one of them, or to my grandchildren, or to any one of them whom you may select, or to my relatives, or to any one of all of my relatives whom you may select." I gave it as my opinion that a substitution of the trust was made with reference to the children, and, with reference to the grandchildren and the other relatives, the wife was given the right of selection, but that she could not legally make a choice of the other relatives if any of the grandchildren should be living, on account of the different degrees established by the terms of the trust; but where the degree of grandchildren had ceased to exist, the woman could select any one of the relatives whom she pleased.

58. *The Same, Opinions, Book IX.*

An heir who was charged to transfer an estate after deducting the fourth of the same became the heir of a debtor of the estate before he transferred it. As, on this account, the right of action was merged and could not be restored under the Trebellian Decree of the Senate, three-fourths of the indebtedness might be claimed by virtue of the trust; but the interest for the past time which was due on the obligation, or on a judgment which had been obtained, must be calculated up to the time when the right of action was extinguished, and interest cannot be calculated for the ensuing time, unless the heir was in default in executing the trust.

(1) Where an estate should be transferred within a certain time under the terms of a trust, no liability will attach to the heir on account of claims due to the estate, merely because he may have collected money from some of the debtors.

(2) Where anyone is charged to transfer an estate after a certain time, he is not compelled to pay over any interest received from debtors of the estate, which was due after the death of the creditor, and if this is not collected, a right of action to recover all the interest (for the stipulation is a part of the estate) will pass under the Trebellian Decree of the Senate, and therefore will not be a claim for money which is not due.

And, in like manner, if the interest which has accrued during the intermediate time is not paid to a creditor of the estate, the beneficiary of the trust will also be liable for this under the Trebellian Decree of the Senate, and therefore there will be no ground for complaint that the heir did not pay the interest out of the income which he had a right to collect. Still, if the heir should pay the interest for the intermediate time, he will not be entitled to retain anything on this account, because he was transacting his own business, for as he was obliged to pay the principal to the creditor, he cannot be charged by the beneficiary of the trust with any interest paid during the intermediate time.

(3) Where an heir is charged to transfer an estate worth a hundred *aurei,* after having reserved an equal amount, he is considered to have received the entire sum of money under the Falcidian Law, and the Rescript of the Divine Hadrian should be interpreted as if he had a right to reserve a certain sum out of the estate.

This opinion should also be given where an heir is charged to transfer a part of the estate to his co-heir. The case is different where a port-ion of the land belonging to an estate is to be retained, as money can always be retained, but a portion of the land cannot be, unless with the consent of his co-heir who has the ownership of the same. Moreover, if the land is of greater value than his share of the estate, it is held that the Falcidian Law will apply to the excess, where the beneficiary of the trust petitions this to be done; for it has been established that the money which is paid must be set off against the land.

(4) Where an heir was charged to transfer an estate at the time of his death after reserving the income of the same, he cannot retain the offspring of female slaves, nor the increase of flocks which have replaced those that died.

(5) The profits and the interest which debtors to an estate have paid before the day when the trust was to be executed, as well as those which have been paid afterwards, and also the rents of the fields collected by the heir, shall be included in the fourth to which he is entitled.

(6) Moreover, where an heir is asked to transfer an estate at his death, he cannot be compelled to sell the property of the estate, and the interest on the principal obtained from the price of the said property cannot legally be claimed, and is not considered to have been received instead of the use of the said property during the intermediate time.

Again, though the heir is not compelled to assume the risk of the death of slaves, or of the destruction of houses in the city, still, the use of the said property and any losses incurred on account of it will, to that extent, diminish his fourth under the Falcidian Law.

(7) Where an heir is charged to deliver anything remaining from the estate at the time of his death, he is not considered to have been charged with the transfer of any profits which he may have collected, as these words of the testator refer to a diminution of the estate, and do not mean that the beneficiary of the trust shall profit by the addition of the income.

(8) Where anyone is asked to transfer anything remaining from his estate at the time of his death, his heir will not be compelled to release any of the property which the deceased had pledged, provided this has not been done fraudulently.

59. *Paulus, Questions, Book IV.*

A debtor appointed his creditor, to whom he had given property in pledge, and his heir charged him to transfer his estate to his daughter, that is the daughter of the testator. The creditor, having refused to accept the estate because he suspected it of being insolvent, was compelled to do so by order of the Praetor, and transferred it. As he could not find a purchaser for the pledge, he asked that permission be granted him to retain it by the right of ownership. I gave it as my opinion that the obligation was extinguished by his acceptance of the estate.

However, let us see whether the pledge was not released as the natural obligation was disposed of. And let us also consider what the result will be, and whether the creditor who brings an action possesses the property, or whether the heir is, or is not, in possession of the same. If the creditor is in possession of it, suit cannot be brought against him by the beneficiary of the trust, nor can he be sued in an action on pledge, as the right to proceed belongs to the estate; nor can an action under the trust be properly brought on the ground that the heir has transferred less property than he should have done, which would be the case even if there had been no pledge: for the creditor, in this capacity, has possession of the property.

And even though the beneficiary of the trust may hold the property, he will be liable to the Servian Action, for it is certain that the money has not been paid; just as we hold when an action is lost on account of an exception. Therefore, not only the property can be retained but suit can be brought on the ground of the pledge, and what has already been paid cannot be recovered. Hence the natural obligation based on the pledge continues to exist. If matters remain in their original condition, I do not think that the creditor could be compelled to accept the estate, unless security was first given to indemnify him, or his claim was satisfied. For where an appointed heir proceeds against the beneficiary of the trust for his own advantage, for example, where he has received a legacy in case he should not become the heir, it has been decided that he ought not to be compelled to enter upon the estate, unless the legacy is paid; for indeed it may be said that the heir cannot be compelled to accept the estate contrary to the will of the deceased, who, by making a bequest to him provided he did not enter upon it, left the acceptance of the estate to his own choice. Where, however, the testator bequeathed his heir one of two things, we give him one or the other of them.

(1) A woman, who gave a dowry, agreed with her husband that, if she died during the marriage, half of her dowry should be returned to her mother, but no stipulation to that effect was entered into by her mother. The woman afterwards, at the time of her death, appointed her mother and her husband her heirs, and charged her mother to transfer her estate to Titius. The court, in rendering a decision with reference to the division of the estate, adjudged half of the dowry to the mother in compliance with the terms of the agreement. The question arose whether this portion of the dowry should be paid in accordance with the provisions of the trust. I think that it should not be paid, because the mother did not receive it as an heir, but as the mother under a contract, and she was entitled to it, not on account of the estate, but through an error in the construction of the agreement.

60. *The Same, Questions, Book XL*

A patron who had been appointed heir to that portion of an estate to which he was legally entitled, having been charged to transfer the sixth part of the same, did so. In this instance the rights of action do not pass under the Trebellian Decree of the Senate, as the property which was transferred was not due, and therefore if this was done through mistake, it can be recovered.

61. *The Same, Opinions, Book XIV.*

Paulus formulated an opinion in the following words, "Sempronius, I have not appointed you my heir, because I made my will hurriedly on account of my illness, and therefore I wish you to receive an amount equal to a twelfth of my estate." By this it appears that the testator left to Sempronius a certain sum of money rather than a share of his estate, but this must be

understood to mean that the testator intended to leave him in trust an amount equal to a twelfth of his property.

62. *Scsevola, Opinions, Book IV.*

A father charged his daughter, if she left any children at her death, to transfer to her brother half of what she obtained from the paternal estate, but if she should die without issue, he directed that she should transfer the whole of it to him. As the daughter died during the marriage, leaving a daughter, the question arose whether her heir should transfer to the brother half of the estate together with half of the dowry which had been given to her husband.

The answer was that what had been given by way of dowry was not included in that part of the estate which should be transferred; and that even if something was due by virtue of a promise made with reference to the dowry, it should be classed among the debts of the estate.

(1) A testator left a certain sum of money to a boy whom he had brought up, and directed it to be paid to Sempronius, and that a certain amount of interest on said sum should be paid to the boy until he reached his twentieth year; and it was then provided that, if he should die without issue, he should pay half of the said sum to Sempronius, and half to Septitia. The boy, having died before reaching his twentieth year, the question arose whether those who had been substituted for him could claim the benefit of the trust at the time of his death, or whether the trust would continue to exist for that period of time which would have been required for the boy to reach his twentieth year, if he had lived. I answered that, according to the facts stated, the execution of the trust could be demanded at the time of the boy's death.

63. *Gaius, Trusts, Book II.*

As soon as delivery is made to the beneficiary of a trust, everything belonging to the estate becomes the property of the person to whom it is transferred, even though he may not yet have obtained possession of the same.

(1) When anyone has stipulated that an estate shall be returned to him by the heir, and it has been transferred to him, after an action under the stipulation has been brought, it is established that the rights of action also pass, that is to say, if the person against whom suit was brought transfers the estate. If, however, the heir should lose the case because he did not transfer the estate, and should have judgment rendered against him for the amount of its appraisement in court, he will be entitled to retain the rights of action belonging to the estate, for the plaintiff has recovered the entire amount which he claimed.

' (2) If the appointed heir should transfer the estate, and should afterwards be sued and lose his case, or abandon it, it has been decided that the rights of action will always belong to the beneficiary of the trust, after they have been once transferred to him.

(3) If anyone who was asked to transfer a portion of an estate should transfer a larger portion than he was charged to do, the rights of action will not be transferred. Where, however, the heir was charged to transfer an estate after having reserved for himself a certain article, or a sum of money, and he transfers the entire estate, without retaining what he was entitled to, it is very properly held that the rights of action are, nevertheless, transferred.

(4) If an heir, before transferring the estate, should order a slave belonging to the same to accept another estate, to which he had been appointed heir by someone, Julianus denies that the latter estate should be transferred, because the heir was not charged to transfer it; and it must be confessed that this opinion is correct. Nevertheless, it must be ascertained whether the heir was charged to transfer the estate with any increase which might have accrued. For if this was the case, he can also be compelled to transfer the latter estate, unless the heir should prove by the clearest evidence that it was with reference to himself that the slave was appointed an heir.

(5) It is stated in a Rescript of the Divine Antoninus that where anyone has received from Titius a certain sum of money which amounts to a fourth of the estate, and is charged to deliver the entire estate to him, although the money may not be paid immediately, it must be paid without interest, because the later anyone makes payment the later he will receive the benefit of the trust, and, in the meantime, he will lose the profits. Wherefore, if the beneficiary of the trust has had possession of the estate before having paid the money, he must deliver to the heir any profits of the same which he may have collected.

(6) The same rule of law applies where anyone charges his heir with a trust, as follows, "I ask you to transfer my estate to Titius, if he pays you a hundred *aurei."*

(7) Where an heir is appointed under a condition, and says that he has reason to believe that the estate is insolvent, he can be ordered to comply with the condition, and to enter upon and transfer the estate, if the condition is not difficult, nor involves turpitude, nor presents any serious obstacle. If, however, the condition should be disgraceful or difficult of performance, it is clearly unjust to compel the heir to comply with it for the benefit of another. It has been held that he should be released in the beginning from compliance with such a condition, as it is absurd for more to be granted to the person claiming the benefit of the trust than the testator intended he should receive. Still, the testator did not call the appointed heir to the succession, unless the condition was complied with, nor did he intend that the estate should be transferred by him unless it was fulfilled.

(8) Where the condition of the payment of a sum of money to the heir is imposed, he who claims the benefit of the trust should tender him the amount, so that the condition having been complied with, the heir can enter upon and transfer the estate.

(9) If, however, the condition imposed is one of those remitted by the. Praetor, the authority of the Edict will be sufficient, so Julianus says. The heir can be compelled to accept by having recourse to the praetorian action, or he can demand possession of the property in accordance with the terms of the will; so that, having acquired the rights of action, he can then assign them in accordance with the Decree of the Senate, after having transferred the estate.

(10) If, however, the condition is that of assuming the name of the testator, which is one that the Praetor requires to be fulfilled, the heir will be considered to have acted properly if he complies with it, as there is nothing reprehensible in assuming the name of an honorable man; for the Praetor does not require this condition to be observed in the case of names which are notorious and disgraceful.

If, however, the individual in question should refuse to take the name, Julianus says he ought to be excused from complying with the condition and should be granted praetorian actions, or he should be given possession of the property of the estate in accordance with the terms of the will, so that, having acquired the rights of action, he can assign them in accordance with the Decree of the Senate.

(11) If you should suspect the estate to be insolvent, and, on my application, you are forced to enter upon it **by* order of the Praetor, and to transfer it to me, I can avail myself of the benefit of the Falcidian Law, as against the legatees, just as you can also obtain the benefit of that law, and to the same extent that you can do so; for if anything is left to me in trust for the benefit of another, as I am only charged with it as legatee, it is not included in making the calculation under the Falcidian Law, but must be computed separately.

(12) Where Titius is charged to transfer an estate to Maevius, and Maevius is charged to pay a certain sum of money to Seius, and Titius avails himself of the privilege of retaining a fourth of the estate as against Maevius, Maevius, as Neratius says, will be this much less liable to Seius, in order to avoid sustaining any loss of his own property.

(13) Julianus holds that if an appointed heir is charged to transfer an estate to Titius, who is

substituted for Maevius, and the appointed heir alleges that he considers the estate insolvent, on the application of Titius, he can be ordered to enter upon and transfer it.

(14) If anyone should charge a person entitled to the possession of an estate under the Praetorian Law, to transfer the same, and the latter suffers the time for obtaining possession under that law to elapse, or he to whom the estate is to be transferred, for some reason or other, is not able to appear before the Praator and assert his claim during the prescribed time; in order that the estate may be delivered to him who is entitled to possession of the same under the Praetorian Law, relief should be granted him, that is to say, he may be given sufficient time to obtain possession of the property for the purpose of executing the trust.

(15) We should also note that if a person who is not solvent, after having appointed Titius his heir, orders one of his slaves to be free, and charges Titius to transfer the estate to him, if Titius refuses to accept the estate, he can hardly be compelled to do so; for although Titius may enter upon the estate on the application of the slave, still the latter cannot obtain his freedom, if it has been granted for the purpose of defrauding creditors, even though Titius may be wealthy, 'for which reason the estate cannot be transferred to him. But taking into consideration the spirit of the law, it must be said that the case is the same as if the slave was free and appointed the sole heir, and that Titius was not the heir at all.

64. *Mascianus, Trusts, Book IV.*

If the estate of a ward, to whom money was lent without the authority of his guardian, is transferred to me under the Decree of the Senate, and I pay the creditor, I cannot recover the money. But if the heir should pay the debt after the property has been transferred, he can recover the amount, for no other reason than that the natural obligation was understood to have been transferred from him to me. On the other hand, if the estate of the person who made the loan to the ward without the authority of his guardian should be transferred to me and the ward should pay me, he cannot recover the money. If, however, he should pay the heir of the creditor, he can recover it, but he cannot do so if he paid him before the transfer of the estate had been made.

(1) If necessary heirs are appointed under some condition which it is easy to comply with, and which is usually observed, it must be said that they can be compelled to transfer the estate upon the application of those to whom they are charged to transfer it; because even necessary heirs are compelled to comply with the condition for the purpose of executing a trust.

(2) Where anyone is charged to transfer an estate, and dies before doing so, his heir can transfer it, and the rights of action pass to the beneficiary of the trust under the Trebellian Decree of the Senate. If, however, there are two heirs, and each of them is chargd to transfer the estate, the rights of action will pass to the beneficiary in proportion to the share of each of the said heirs; for if each one should transfer his share, it is certain that the rights of action will pass in proportion to the said share. If the person who is asked to transfer the estate should leave several heirs, and some of them should transfer their shares before the others, or where he to whom the estate is to be transferred leaves several heirs, and a transfer is made to one of them, he will be entitled to the rights of action in proportion to his share, under this Decree of the Senate.

(3) Where a patron is appointed heir to that portion of an estate to which he is legally entitled, and is asked to transfer it to the disinherited children of his deceased freedman, and he voluntarily accepts the estate, the Falcidian Law will apply; if he is compelled to accept it, the rights of action will pass entirely to the said children under this Decree of the Senate.

65. *The Same, Trusts, Book V.*

An estate cannot legally be transferred to a slave, if his master is unwilling or not informed of the fact, but if he afterwards ratifies the transfer, it will be confirmed, and the rights of action

will be acquired by the master himself, not for the reason that this transfer resembles the acquisition of the estate, and that the order of the master must precede it, but, as has already been stated, the subsequent ratification can be made just as in the case of the possession of property under the Praetorian Law.

Nor does it make any difference, in the present instance, whether the master himself or his slave is charged to transfer his estate, nor is the consent nor the agency of the slave required but his consent is necessary where praetorian possession of the property is demanded, or an estate is to be accepted. Therefore, where heirs allege that they think an estate is insolvent, on the application of the master they can be compelled to enter upon and transfer it.

(1) Where a testator charges his heir to transfer his estate to a woman, if she does not marry, it must be held that if the heir alleges that he suspects the estate of being insolvent, he can be compelled to accept and transfer it to the woman, even if she should marry. Our Julianus adopts this view with reference to other conditions which, in like manner, cannot be fulfilled except at the termination of life.

In accordance with this opinion, a bond should be furnished by those to whom the heir has been charged to transfer the estate under similar conditions, to deliver it to the persons to whom it will belong if the condition should not be complied with.

(2) If the Praetor, after proper investigation, should, either through mistake or partiality, order an estate to be transferred as due under a trust, it is to the interest of the community that it should be transferred, on account of the authority which invests judicial decisions.

(3) Where anyone is charged to transfer an estate to a ward who is not old enough to talk, and he voluntarily enters.upon said estate, it can be transferred either to the slave of the ward, or to the ward himself, with the authority of his guardian; and the incapacity of the child to speak is no more an impediment to the transaction than exists in the case where a mute, who has reached the age of puberty, desires an estate to be delivered to him. If, however, the heir refuses to enter upon the estate, it is difficult to decide how the matter can be settled, because there will be no ground for the application of the Trebellian Decree of the Senate if the guardian should ask that the estate be accepted at the risk of his ward; nor can the ward ask that this be done, as he does not possess the faculty of speech.

This question may be more easily solved in the case of persons who are dumb, for if they are interrogated and can hear, they can indicate by a nod that they are willing to accept the estate at their own risk, just as persons who are absent can give their consent by a messenger. However, I have no doubt that relief ought to be granted the child, and that this rule should be established on account of the resemblance between the Civil and the Praetorian Law. But if the said ward should be appointed heir, there is no doubt that he can act as such under the authority of his guardian; or, where a question arises with reference to obtaining possession of an estate under the Praetorian Law, he can claim it by his guardian; hence if appointed heir, he can be compelled by his guardian to enter upon and transfer the estate. In the same manner, a person who is dumb and destitute of understanding can be assisted by his curator.

(4) Where property is delivered by the heir, on my order, to the person to whom I have sold it, there is no doubt that the transfer should be considered to have been made to me as the beneficiary of the trust.

The same rule will apply if, by my order, the property is delivered to anyone to whom I would be obliged to deliver it under the terms of a trust, or for any other reason; or to one to whom I intended to lend it, or give it.

66. *Paulus, Trusts, Book II.*

Where anyone is appointed an heir under the condition that his coheir will enter upon the estate, he can avail himself of the benefit of the Falcidian Law, even if his co-heir should

enter upon the estate under compulsion; provided that he himself is not compelled to do so.

(1) Julianus says that under this Decree of the Senate an estate can be transferred to the agent of an absent beneficiary of the trust, if he should desire this to be done; provided, however, that he gives security to ratify the act, if the wishes of the absent party were not known. But it must be said that, if the heir alleges that he suspects the estate of being insolvent, he should not be compelled to accept it, if it is uncertain whether the beneficiary directed this to be done; even though a bond should be furnished, on account of the weakness of the security. If, however, he should enter upon the estate voluntarily, no great injury can result, but, if the beneficiary did not authorize it, the rights of action will not pass to him until he has ratified the transfer of the estate.

(2) If some wrong has been committed against a slave belonging to the estate, although an action will lie in favor of the heir on account of the said slave, still, the right of action under the Aquilian Law will not pass to the beneficiary of the trust, for only those rights pass which were included in the property of the deceased.

(3) If a deputy is compelled to enter upon and transfer an estate at Rome, the beneficiary of the trust will be compelled to defend actions at Rome, although the heir is not compelled to do so.

(4) It is well to consider whether the beneficiary of the trust should be sued in the same place where the deceased ought to have been sued, and if the heir entered upon the estate voluntarily and transferred it, whether the beneficiary of the trust can make his defence in any one of three different places, namely, where the deceased was domiciled, or where the heir, or he himself, resides. Therefore, it must be held that the beneficiary of the trust should be sued either where he has his domicile, or where the greater part of the estate which was transferred is situated.

67. *Valens, Trusts, Book III.*

If, upon my application, and, under the decree of the Praetor, you accept an estate suspected of being insolvent, and I should afterwards be unwilling to have it transferred to me, or to concern myself with it, the following course (which is not improperly approved by Octavenus) should be pursued, namely, the Praetor should grant actions against me just as if I had received the estate; which opinion is perfectly correct.

(1) At the same time when you have formed a design to defraud your creditors, you can enter upon an estate suspected of being insolvent, and transfer it to me, without running the risk of an interdict on the ground of fraud; because, even though you were not charged with the trust in my favor, you are at liberty to refuse to accept the estate, and by doing so can defraud your creditors; and I will not act dishonorably in accepting the said estate which your creditors could not have compelled you to enter upon if I had not required you to do so.

(2) Where a son, who is his own master, becomes the heir of his father, and is charged by him to transfer his estate to me; and, having formed the design of defrauding his creditors, transfers the estate to me under the decree of the Praetor, after having pretended that he believes it to be insolvent, there will hardly be ground for the application of an interdict based on fraud; because if the property of his father had been sold, his creditors could not have obtained anything belonging to him out of the estate; unless the creditors of the son himself should be heard, if they ask to be permitted to sell the property of the son without including that of the father.

(3) If the heir, for the purpose of making a donation, should say that he suspects the estate of being insolvent, and should transfer it to someone who has no right to take it, the beneficiary of the trust shall be deprived of that to which he is not legally entitled.

The same rule will apply where the fiduciary heir does this without the intention of making a

donation.

68. *The Same, Trusts, Book IV.*

Where an heir, who was asked to transfer an estate by a person who was bankrupt at the time of his death, alleges that he thinks that it is insolvent, there is no doubt that, under the present interpretation of the Trebellian Decree of the Senate, he can be compelled to transfer the estate, and, even though he should accept it voluntarily, it must be: transferred under the said Decree, although, if a certain sum of money,, or a specified article of property should be given in trust by one who is insolvent, it is considered not to be due, just as if it had been directly bequeathed; for, in this instance, the person to whom the property is left in trust takes the place of a legatee, while, in the former one, he takes the place of the heir.

(1) If, having been charged to transfer an estate, you accept it voluntarily, and deliver it without deducting the fourth, it will be difficult to believe that you have done this rather through ignorance, than for the purpose of more completely executing the trust. If, however, you can prove that you did not reserve the fourth through mistake, you can recover it.

69. *Maecianus, Trusts, Book Vill.*

When the heir transfers an estate, he is not obliged to furnish security against the eviction of the land, slaves, or any other property belonging to the same; but, on the other hand, the beneficiary of the trust must give security to indemnify the heir, if he should be evicted of any of the property which was sold by the latter.

70. *Pomponius, Trusts, Book II.*

If an appointed heir is asked to transfer the estate to Titius, and Titius is asked to return it to the heir after a certain time, direct actions will be sufficient to establish the rights of the heir.

(1) If the heir, before he transfers the estate left in trust, alienates any portion of the same, or manumits a slave belonging to the estate, or destroys, breaks, or burns any of the property, no civil action can be brought against him, if he transfers the estate afterwards under the Trebellian Decree of the Senate, but suit can be brought against him under the trust, on account of the property which has been destroyed.

If, however, the heir has committed any of these offences after the estate has been delivered, it must be held that he can be sued under the Aquilian Law; for instance, if he has either wounded or killed a slave belonging to the estate.

(2) If a temporary right of action is bequeathed to the estate, the time in which the heir could have brought it before transferring the estate will be charged against the person to whom the estate was transferred.

71. *Msecianus, Trusts, Book X.*

All the heirs who deliberate with reference to an estate can be compelled to accept it, but not to transfer it immediately, on the application of anyone who desires it to be accepted at his risk; but in such a way that if, after the time of deliberation has passed, they should deem it expedient for them to accept it, they can enjoy the benefit of the will, just as if they had voluntarily entered upon the estate. But, on the other hand, if they should consider its acceptance unprofitable, they shall be released from liability by delivering it.

72. *Pomponius, Trusts, Book IV.*

When an heir was charged to transfer an estate, after reserving a certain tract of land which belonged to someone else, Aristo says that it should be ascertained whether the testator intended that the said land should belong absolutely to the heir, or only in case it was ascertained to belong to himself. He holds that the former opinion should be adopted, and therefore that the estimated value of the land should be reserved from the estate.

73. *Msecianus, Trusts, Book XXXII.*

If an heir lends property belonging to an estate, and takes pledges to secure the loan, the rights of action will not pass to the person to whom the estate is transferred, as against the property which has been pledged. There is some doubt, however, in a case where the heir, before he transferred the estate, had received a pledge under a contract made by the deceased. Still, the beneficiary of the trust will not be permitted to bring suit to recover the pledge, but he can proceed against the heir, to compel him to assign to him his right of action for its recovery.

(1) Where an estate is transferred under the Trebellian Decree of the Senate, the servitudes with which the lands of both the heir and the testator are mutually charged will still remain valid.

74. *Paulus, Decrees, Book II.*

A man who had a son and a daughter made a will, and provided as follows for his daughter, "I charge you not to make a will until you have children," the Emperor decided that a trust was created by this clause, and in this way the testator, by forbidding his daughter to make a will, manifested his desire that she should render her brother her heir, and that the said clause should be understood just as if the testator had charged her to transfer the estate to her brother.

(1) Fabius Antoninus left a son Antoninus, who had not reached puberty, and a daughter Onorata, and, after having disinherited them, appointed their mother Junia Valeriana, his heir, charging her with a legacy of three hundred *aurei* and other property for the benefit of his daughter, and then desired all the remainder of his estate to be delivered to his son Antoninus, when he attained the twentieth year of his age. He also directed that the said estate should be transferred to Onorata, if his son should die before reaching his twentieth year.

The mother died intestate, leaving her two children her heirs-at-law. Afterwards, the son, having passed his nineteenth year and entered his twentieth, which he had not 'yet completed, died, leaving his daughter Favia Valeriana his heir. Her paternal aunt brought suit under the trust, as well as for a share of the estate under the will of the father, and gained her case before the Governor of the province.

The guardians of Valeriana, the daughter of Antoninus, alleging her poverty, cited a Constitution of the Divine Hadrian by which he had ordered that where a certain age was required for the discharge of municipal duties, the year in which the person had entered should be considered to have expired. Our Emperor also, being influenced by the justice of the case, as well as by the words of the will, "When he reaches the twentieth year of his age," although he said that he knew that a man who had entered his seventieth year was not excused from guardianship by the Divine Marcus, and although we cited the arguments of the law of *Mlia Sentia,* decided against the aunt who made the claim.

75. *Scsevola, Digest, Book XVIII.*

Titius wrote a letter to his heir as follows: "Titius to Cornelius, his heir, Greeting. As the share left to my mother has come to you, as well as that of Sempronius, my former curator, who has met with a misfortune, on account of which it may be expected that you will obtain my entire estate, I charge you, Cornelius, to give and transfer one-third of the same to Gaius Seius."

As Sempronius had been granted complete restitution by the Emperor who banished him, and had accepted the estate, the question arose whether he also was charged to transfer his share of it. The answer was that Sempronius was not charged in any way, but that the heir, Cornelius, must deliver to Seius, *pro rata,* that portion of the estate of the mother of the testator which had come into his hands.

(1) A woman asked her appointed heir, after he had reserved a fourth of the estate, to transfer the remainder to her daughter-in-law, the widow of her deceased son whom she also charged with a trust, as follows, "I ask you to deliver to your son all of my estate which may come into

your hands." The question arose when the daughter-in-law should execute this trust, whether at her death, or immediately. The answer was that it should be executed at the time of the daughter-in-law's death.

76. *The Same, Digest, Book XIX.*

Scsevola gave it as his opinion that, if a father should appoint his son heir to his entire estate, and substitute another for him by a codicil, and the son should die before reaching puberty, although the substitution would be void because an estate cannot either be bequeathed or taken away by a codicil, still, by an equitable interpretation, it should be held that the mother who succeeded the intestate minor will be liable to the substitute under the terms of the trust. Where several persons are substituted for one another the substitution will be valid under the trust, and if one of them should die, the survivors will be entitled to the entire estate.

77. *The Same, Book XX.*

A testator charged each one of his children of both sexes, whom he had appointed his heirs, if any of them should die without issue, to leave his or her share of the estate to his or her brother or sister, and if there should be no brother or sister, to leave it to his or her mother, and added the following words, "I charge you, my dear children, with this trust until you have brought up two children."

If anyone of the said heirs should have two children, although they might not survive, the question arose whether his or her heirs would be compelled to execute the trust. The answer was that, according to the facts stated, they would be considered to have been released from the obligation of the trust.

(1) Titius appointed his grandsons by his daughter, and his daughter, who was insane, his heirs, and charged the said daughter with the trust that if she should die without issue, the share of his estate which had been given to her should pass to her co-heirs. Titius gave his insane daughter in marriage, and she brought forth a daughter after the death of her father. The said insane daughter, having died leaving a daughter as the issue of this union, the question arose whether the co-heirs were entitled to the benefit of the trust. The answer was that as, according to the facts stated, the heir had left a daughter, the trust was not due.

Claudius: For though the marriage with the insane woman was not legally valid, still it was sufficient to enable the condition to be complied with.

78. *The Same, Digest, Book XXI.*

Lucius Titius, expecting to die intestate, and having a wife and a daughter by her whom he had emancipated, inserted the following provision into a codicil, "This codicil has reference to my wife and my daughter. Therefore I ask that anything that I may leave you, or that you yourself have, will belong to you in common; and whatever I do not ask you to do, I am sure that you will do, through your affection for me."

The daughter acquired possession of the estate of her intestate father under the Praetorian Law. The question arose whether any part of the estate of Lucius Titius was due from the daughter to her mother, on account of the trust. The answer was that, in accordance with the facts stated, a part of it was due, if the wife was ready to place her own property in a common fund with that of her daughter.

(1) Maevia left two daughters her heirs, and in the same will she inserted the following provision: "I charge my heirs to leave all my property on deposit, without interest, with Gaius Seius and Lucius Titius, whom, if it should be lawful, I have appointed the curators of my estate, excluding all others, in order that they may transfer it to my grandchildren *pro rata,* when each one of them arrives at the age of twenty-five years; or if only one of them should reach that age, to transfer all my estate to him." The question arose whether the trust should be executed by the appointed heirs for the benefit of Lucius Titius and Seius. The answer was

that, in accordance with the facts stated, Lucius Titius and Gaius Seius could not claim the trust.

(2) A woman appointed three heirs, her brother Maevius to three-fourths of her estate, Seius to a sixth, and Stichus, the slave of the said Seius and the natural son of Maevius, to a twelfth; and she charged Seius to manumit Stichus, as follows, "I charge you, Seius, to manumit Stichus, and I have given you the means to do so." She also made the following provision in a codicil: "If Seius should originate any controversy with reference to the twelfth of my estate, to which I have appointed Stichus the heir, I desire it to revert to my brother Maevius; and my brother, as I rely upon your good faith and recollection, I ask to deliver everything which may come into your hands from my estate to your son Stichus, and I charge you to do this under a trust."

As Seius entered upon the estate and on this account was compelled to manumit Stichus, the question arose whether he was obliged to transfer to Stichus, after his manumission, the twelfth of the estate to which the latter had been appointed heir. The answer was, that there was nothing stated to show that Seius was charged to transfer to him the twelfth part of the estate.

(3) Inquiry was also made, if Seius wished to raise any question with reference to the twelfth to which Stichus had been appointed heir, and Maevius should obtain the said twelfth from Seius under the terms of the trust, whether he must also transfer to Stichus the three-fourths of the estate to which Maevius himself had been appointed heir. The answer was that it was the intention of the testatrix that all of the estate which had come into the hands of Maevius in any way whatsoever should be transferred to Stichus.

(4) A father appointed his son and daughter his heirs, and substituted them for one another, and then substituted several heirs for them, in case neither of them should become an heir, and substituted the substitutes themselves for one another, by the following words, "I substitute the substituted heirs for one another."

He also charged any one of his children who might survive the others and die without issue before reaching the age of thirty years to transfer his estate to those whom he had substituted as the heirs of the said child. His son survived his sister, and died without issue before reaching his thirtieth year. One of the substitutes having died before the son, as his share would belong to the other substitutes who survived, the question arose whether ft would pass to them equally, or in proportion to the shares of the estate for which they had been substituted. The answer was that the substitutes were entitled to the benefit of the trust in proportion to their respective shares.

(5) Msevius appointed her son heir to five-twelfths of her estate, her daughter, Titia, to a fourth, and her other son, Septitius, to a third; and she charged the latter with a trust in the following words, "My son, Septitius, I ask you to transfer to your brothers all of my estate which may come into your hands, if, before reaching your twentieth year, you should die without leaving any children." Septitius, having died without issue before reaching his twentieth year, the question arose whether the estate would belong to the brother and sister in proportion to their respective shares of the same, or whether it would belong to them equally. The answer was that it would belong to them in proportion to their respective shares.

(6) Titia, having been appointed sole heir to an entire estate and charged to transfer half of the same to Maevia, did so; she, however, refused to pay the amount for which a tract of land had been encumbered by the testator, but as the creditor sold the property she directed Seia to redeem it. The question arose whether Titia would be liable to Msevia under the terms of the trust. The answer was that, as the heir was charged to transfer the estate, there was nothing in what was stated to show that she should not be liable.

Claudius: For she is obliged to pay Maevia half the value of the land, and as much more as

had been necessary to satisfy the creditor.

(7) A certain man, having appointed Gaius Seius heir to half of his estate, Titia heir to a quarter of the same, and other persons heirs to the remainder, inserted the following provision into his will, "I charge you, Gaius Seius, at your death to give and deliver to Titius and Sempronius half of my estate, that is to say, the portion which I have given to you." Both of the above-mentioned persons having accepted the estate, and Gaius Seius having subsequently died after appointing Lucia Titia his heir, the question arose whether the said Lucia Titia was obliged to transfer immediately half of the estate which Gaius Seius had been charged to deliver, or whether she should, at the time of her death, transfer the entire trust, not only that with which she was charged, but also that of Gaius Seius. The answer was that Lucia Titia was bound to immediately transfer half of the estate which Seius had received.

(8) A testator appointed his daughter his heir, together with his grandson, who was her son, and after making a pupillary substitution to the latter, inserted the following provision into his will: "I bequeath to Lucius Titius, my nephew, and my son-in-law, two hundred *aurei,* and I know that he will be content with this legacy, as I have left all my estate to my daughter and my grandson, whom I have appointed my heirs, so that the entire estate will belong to them in common, and I commend them to one another."

The daughter, having entered upon her father's estate, separated from her husband. The question arose whether Titius, her former husband, could, under the terms of the trust, in his own name or in that of his son, acquire the property held in common, either while his said former wife was living or after her death. The answer was that, according to the facts stated, there was nothing given to the son-in-law under the trust except two hundred *aurei.*

(9) The same wife appointed her husband her heir, and charged him at the time of his death to transfer to their common son everything which he had received from her estate; it was also asked whether the property and effects which he had given by way of dowry, and which had been returned to the woman after the divorce, should be included in the trust. The answer was that all the property which the woman left was included therein.

Claudius: Advice having been taken at another time with reference to the same question, the conclusion was that either the property should be transferred in accordance with the opinion above given, and should be computed as part of the estate of the woman; or, if this was not done because of a stipulation entered into with reference to the restoration of the dowry, the estate should be considered to have increased on this account.

(10) A woman who had a son and by him a grandson, both of whom were under the control of her husband, appointed the latter her sole heir, and charged him with a trust as follows, "If my husband, Titius, should be my heir, I ask and charge him, at the time of his death, to give and transfer everything which may come into his hands from my estate, in such a way that our son Gaius may have ten-twelfths of the same, and our grandson Seius two-twelfths; and I charge my heir Titius to see that this is done." The father emancipated his son, lost his grandson, and then died, being survived by his son.

The question arose whether the son, under the terms of the trust, by the first part of the will, was entitled to the entire estate of his father, and whether the following words, "In such a way that my son may have ten-twelfths of the same, and my grandson two-twelfths," should, in compliance with the intention of the deceased, only be applicable where both the son and grandson were living at the time the trust became due; or, as the grandson was not living at that time, whether the following clause of the will would be of no force or effect.

The answer was that, in accordance with the facts stated, it was evident that only ten-twelfths of the estate should be given to the son.

(11) An appointed heir, having been asked to transfer three entire estates to the wife of the

testator, did so, after having deducted a fourth of the same. The question arose, if the wife had been asked by the testator to transfer the fourth part to his estate immediately, and the remainder after a certain time had elapsed, whether that portion which the heir had deducted from it as a fourth should be accounted for when the property was transferred under the trust? The answer was that the woman was only liable for the amount which she had received under the trust.

(12) A testator charged his heirs to transfer all of the third part of his estate, which might come into their hands, to Gaius Maevius, whom he had brought up, when the latter should reach the age of fifteen years, and added the following words: "In the meantime, you will employ the income of the amount which may come into your hands to keep him from poverty which amount should be lent at interest. In addition to this, I give to my said foster-child a certain slave, his foster-brother, born in my house, and another slave, a shoemaker, who can assist in supporting him with the proceeds of their labor."

As the heirs had provided the child with maintenance at a cost much below the amount of the interest of the sum which had been bequeathed for that purpose, the question arose whether they could be compelled to pay the balance for the entire time during which support was due, or only after he had attained his fifteenth year. And, as the slaves who had been specially bequeathed to him in order to contribute to his support with the proceeds of their labor had been immediately sold by their heirs, it was also asked whether their wages, with interest, could be claimed by the child. The answer was that, according to the facts stated, the intention of the testator seemed to have been that the entire income of the estate, as well as the wages of the slaves, should be delivered.

(13) A certain man having appointed several persons, including three freedmen, heirs to three-fourths of his estate, left them also some lands as a preferred legacy, and charged them "Not to alienate the said lands, so that whichever of them survived might acquire all for himself." He afterwards charged one of the said freedmen to transfer to Titius everything that came into his hands from his estate, or his property, after having deducted the debts and legacies, and reserved twenty *aurei* for himself.

The question arose whether he should also have deducted the third of the lands which had been devised to him and his fellow freedmen as a preferred legacy. The answer was that, according to the facts stated, the lands should not be transferred, as the testator himself had desired the legacies to be excepted.

(14) A husband, having appointed his wife heir to a third part of his estate, and charged her with several trusts, also bequeathed to her her dowry as a preferred legacy, in the following terms, "I wish the amount of her dowry which she brought me to be paid by my son to my wife, Seia," and he charged his wife, at the time of her death, to leave to their common son, Titius, her share of the estate, and anything else which he had bequeathed to her.

The question arose whether she would also be obliged to transfer to her son the amount of her dowry, together with the other legacies which she had received by virtue of the trust. The answer was that the testator did not intend that her dowry should also be transferred, unless it was otherwise established; and even if it was proved that he had intended this to be done, it could not be demanded, unless the amount which could be retained under the Falcidian Law was less than that of the dowry.

(15) An heir who was charged to transfer an estate to Septitius, when he reached the age of twenty years, in the meantime sold certain lands which the deceased had received by way of pledge; and having been sued by the debtor on account of the pledge, died, leaving Sempronius his heir, who transferred the estate to Titius before the case was decided.

The question arose whether Sempronius himself should, nevertheless, have judgment rendered against him; for he could have retained the property in his hands, or could have

exacted security for what he might be compelled to pay if he was defeated in court. The answer was that the judgment against the heir could still be executed after the delivery of the estate.

(16) The heir of a testator, who was charged to transfer the entire estate after his death, transferred only a small sum of money, which he alleged was all the property that belonged to the estate, to the beneficiaries of the trust who were entitled to it; and documents having subsequently been found, it appeared that there was four times as much in the estate as had been paid. The question arose whether suit could be brought against the heir for the remainder under the terms of the trust. The answer was that, in accordance with the facts stated, an action could be brought if no compromise had been made with him.

79. *The Same, Questions Discussed in Public.*

If a minor child becomes the heir of his father, and transfers part of the estate which was left in trust, and afterwards rejects the estate, the beneficiary of the trust has the right to decide whether he will keep the part delivered to him by the minor, as well as the share of the latter; or reject all; or permit the entire property of the estate to be sold, in order that any amount over and above the indebtedness may be preserved for the minor. If the property cannot be disposed of as a whole, all actions at law should be refused the beneficiary of the trust; for it was in his power to take the entire estate, and to keep for the minor anything remaining after payment of the indebtedness.

80. *The Same, Digest, Book V.*

Lucius Titius appointed his mother and his uncle, who were at the same time his creditors, his heirs, and charged them to transfer to Septitius any of his estate which might remain at the time of their death. The said heirs consumed a considerable part of the estate of the testator, and left several representatives who knew that Septitius had possession of many effects left from the estate of Lucius Titius. The question arose whether the heirs of the mother and the uncle could recover from Septitius anything which Lucius Titius owed them. The answer was that they could not do so.

Claudius: The reason for this is that the obligations of the estate, having been merged, were extinguished; but that there could be a recovery on the ground of a trust, for those persons were destitute of justice who were alleged to have consumed much of the property belonging to the estate.

81. *Paulus, The Six Books of Imperial Opinions rendered in Judicial Proceedings, Book I, Otherwise, Decrees, Book XI.*

Julius Phoebus, having made a will, appointed his three children heirs (that is to say, Phoebus and Heraclia by his first wife, and Polycrates by his second) to equal shares of his estate, and asked Polycrates, the younger brother, to give up the estate to his brothers, in consideration of receiving a certain tract of land; and he substituted the two other brothers, born of the same mother, for one another, if one of them should not become his heir.

By a second will he made a pupillary substitution for Polycrates, if the latter should die before reaching puberty, and provided that this will should be opened by the mother, if the boy should die under that age. He then charged the two older brothers, if either of them should die without issue, to transfer his share to the survivor, or survivors, after deducting the property derived from the estates of their mother, and grandfather.

The sister Heraclia died without leaving any children, and appointed her brother Phoebus, her heir. Polycrates brought an action to compel the execution of the trust, and gained his case before Aurelius Proculus, Proconsul of Achaia. An appeal having been taken by Phoebus alone, the other party to the suit being absent, he was defeated, because the words "The survivor or the survivors" included both brothers. Although reciprocal substitution was made

only of the two oldest children, the intention of the father was held to be that he had excepted the property of the mother of the said children, because Polycrates had a different mother who was still living, and who had been charged to transfer to her son Polycrates the same legacies which had passed to her husband through his first wife having died intestate.

TITLE II.

AT WHAT TIME LEGACIES OR TRUSTS TAKE EFFECT.

1. *Paulus, On Sabinus, Book II.*

Legacies, with which a substitute is charged, take effect from the death of the father, even though the minor be living.

2. *Ulpianus, On Sabinus, Book XV.*

Where the legacy of an usufruct, or use, or the right of habitation is bequeathed, it does not take effect until the estate is entered upon, and an action for its recovery does not pass to the heir. The same rule applies where an usufruct is bequeathed to begin at a certain time.

3. *The Same, Disputations, Book V.*

For, as these rights cannot be transferred to the heir, it will be in vain to fix a day before that, when they will begin to take effect.

4. *The Same, On Sabinus, Book XIX.*

If a bequest is made to anyone to take effect at the time of the death of the heir, the legacy is conditional, so that if the legatee should die during the lifetime of the heir, he will not transmit his right to his own heir.

(1) If, however, the bequest should be made to the legatee to take effect at the time of his own death, it is certain that the legacy will pass to his heir.

5. *The Same, On Sabinus, Book XX.*

If a legatee should die after the time when the legacy begins to take effect, he will transmit it to his own heir.

(1) Therefore, if a legacy is bequeathed absolutely, it begins to become operative from the day of the death of the person who bequeathed it. Where, however, legacies are bequeathed to take effect after a certain date, they begin to vest just as other absolute legacies do; unless something has been bequeathed which does not pass to the heir, for one of this kind will not become operative before the time prescribed; as for instance, where an usufruct is left to take effect after a year. We approve this opinion.

(2) But where a legacy is bequeathed under a condition, it does not begin to vest before the condition is complied with, provided it is in the power of the legatee to comply with it.

(3) Where, however, the condition is of such a nature that compliance with it is generally excused by the Praetor, it takes effect at once.

(4) The same rule applies to a condition which is impossible, because a legacy of this kind is considered to be bequeathed absolutely.

(5) Likewise, where the condition is such that the legatee is not responsible for non-compliance with it, but it is the fault of the heir, or of some other person who has been ordered to comply with the condition, the legacy will take effect, as the condition is considered to have been fulfilled; as, for instance, if I should be ordered to pay the heir ten *OMrei,* and he refuses to accept them.

Where, however, a legacy is bequeathed to me if I marry Seia, and she is unwilling to marry me, it must be said that the legacy commences to vest, because it is not my fault that I do not

comply with the condition, but another is to blame for its not being fulfilled.

(6) A legacy shall be paid to the heir of the legatee at the same times, that is to say, in the same instalments as it is paid to the legatee himself.

(7) If, when a legacy commences to be due, the legatee is under the control of someone else, it will be payable to those to whose authority he is subject. Hence, if the legacy is left absolutely to a slave, and he becomes free after the day when it is payable, the legacy will belong to his master. If, however, an usufruct is bequeathed, the slave will acquire the legacy for himself, even though he should become free after the death of the testator, and before the estate has been entered upon.

6. *Paulus, On Sabinus, Book III.*

Where a legacy is bequeathed absolutely, and is taken away under a condition, it is held to have been bequeathed conditionally.

(1) If the effect of a legacy should be suspended for some reason which has no reference to the will, we hold that it will be transmitted to the heir, even though the legatee should die before it becomes operative. For instance, if a husband should bequeath dotal property to a stranger, and a certain sum of money to his wife in lieu of the said dotal property, and the legatee should die while the wife is deliberating as to the election of her dowry, and should choose the legacy, it has been decided that the legacy will pass to the heir.

Julianus adopted this opinion, for delay rather than a condition seems to be attached to the legacy.

(2) Legacies which are bequeathed by codicils take effect at the same time as those left by will.

7. *Ulpianus, On Sabinus, Book XX.*

The acceptance of the estate by the heir causes the claim for the legacy to be deferred, but does not prevent it from taking effect.

(1) Hence, whether an heir who was appointed absolutely defers his acceptance of the estate, or, whether, if he was appointed conditionally, he is prevented from accepting it by the condition, the rights of the legatee will be protected.

(2) If, however, an unborn heir, or a person who is in the hands of the enemy is appointed, in like manner, the rights of the legatee will not be prejudiced, because his legacy has begun to take effect.

(3) For this reason we say that where a substitute has been charged with a legacy, the legacy will not be affected, if, while the appointed heir is deliberating, the legatee should die; for his rights will not be prejudiced even if the appointed heir should afterwards reject the estate, since the legatee will transmit his claim to his own heir.

(4) The case is the same where a substitute for a minor is charged with a legacy, for he also will transmit the legacy to his heir.

(5) If the substitute of a minor is charged to pay a hundred *aurei* to Seius, and the son should die before reaching the age of puberty; it might be a subject of discussion whether, if Seius should die during the lifetime of the minor, he would transmit the legacy to his heir, just

as if the condition upon which the legacy depended had been expressed. The better opinion is that the legacy will pass to the heir.

(6) Sometimes the acceptance of the estate having been postponed by the heir, it causes the vesting of the legacies also to be postponed; as, for instance, where a slave is manumitted, or is left to someone, and a bequest is made to the slave on this account; for where a legacy is

bequeathed to a slave, it never takes effect until the estate has been entered upon.

8. *The Same, On Sabinus, Book XXIV.*

For as the slave is not entitled to his freedom before the estate has been accepted, it seems to be perfectly just that the legacy should not take effect before that time, otherwise, it would be void if it should become operative before the slave obtained his freedom, and this would be the case where a bequest was made absolutely to the slave, and he was ordered to be free under a certain condition, and the condition is ascertained to be pending after the estate has been entered upon.

9. *The Same, On Sabinus, Book XXL*

Where a right of habitation is bequeathed to a son under paternal control, or to a slave, I do not think that the legacy will be acquired by the master or the father, if the son of the slave should die before the estate is accepted; for, as the legacy attaches to the person, it is very properly held that it does not take effect before the estate has been entered upon.

10. *The Same, On Sabinus, Book XXIII.*

Where a legacy is bequeathed to be paid annually, it is evident that this is not one legacy, but several.

11. *Julianus, Digest, Book XXXVII.*

It makes no difference whether so many *aurei* are payable every year, or the sum of a thousand *aurei* is to be paid at the end of the first year, and a slave is to be delivered at the end of the second, and grain at the end of the third.

12. *Ulpianus, On Sabinus, Book XXIII.*

Legacies of this kind are not merely payable once, but are payable annually.

(1) The question arose whether such legacies were payable at the beginning, or at the end of every year. Labeo, Sabinus, Celsus, Cassius, and Julianus all were of the opinion that a legacy of this kind was payable at the beginning of every year.

(2) Hence Julianus says that where a legacy of this kind is bequeathed to a slave, and he becomes free after the first or second year, he will acquire the legacy.

(3) Celsus also says, and Julianus agrees with him, that such a legacy takes effect from the day of the death of the testator, and not from that on which the estate was accepted, and that if the estate should be entered upon after the lapse of several years, the legatee will be entitled to the legacy for all those years.

(4) Where, however, a legacy payable annually is bequeathed, it seems to me that the beginning of every year should be understood also in this instance; unless it is clear that the intention of the testator, in dividing the legacy into annual payments, was rather to benefit the heir than the legatee, in order that he might not be compelled to pay the entire amount at once.

(5) Where a sum payable annually or every year was bequeathed to provide a lodging, or instruction, the conjecture of the will of the testator in making the bequest is that it will be payable at the time when the rent of the lodging, or the price of the instruction, is due.

(6) In conclusion, Pomponius stated that it made no difference whether the legacy was payable every year, or annually; or every month, or monthly; or every day, or daily. I myself also adopt this opinion. Hence the same rule will apply where a certain sum of *aurei* payable annually is bequeathed.

(7) Where a slave is bequeathed in general terms, and the legatee dies before claiming the slave, he transmits the legacy to his heir.

(8) If a legacy is bequeathed to Titius as follows, "The slave whom Seius may select," and Seius should die after making his choice, there is ground for the recovery of the slave who has once been acquired by the legatee.

13. *Pomponius, On Sabinus, Book VI.*

Where a legacy is bequeathed in the following terms, "I give and bequeath to So-and-So such-and-such an article, whether it has been made or not," the legacy does not pass to the heir, unless one or the other of the conditions has been fulfilled during the lifetime of the legatee; as the reason for which a legacy is due must always precede it, and not because it is certain that one or the other of two things will take place, and that the legacy will be due under all circumstances; for where a legacy is bequeathed as follows, "Let my heir give such-and-such property when he dies," it is certain that the legacy will be due, and still it does not pass to the successor of the legatee, if the latter should die during the lifetime of the heir.

14. *Ulpianus, On Sabinus, Book XXIV.*

Where "The usufruct of certain property, or the sum of ten *aurei,* whichever the legatee may select," is bequeathed, both the time of the death of the testator and that of the acceptance of the estate must be taken into consideration; the date of the death on account of the payment of the ten *aurei,* and that of the acceptance of the estate because of the usufruct. For, although the legatee has the right of choice, still, the selection cannot at once take effect, as it is supposed that the testator has not yet died, or if he has died, that his estate has not yet been entered upon.

(1) Therefore, Julianus asks, if the legatee should die after the death of the testator, whether the legacy of the ten *aurei* will pass to

the heir. He says, in the Thirty-seventh Book of the Digest, that the ten *aurei* may be considered to have been transmitted to him, because the legacy begins to vest at the time of the death of the legatee. Julianus gives the following example in support of his opinion, "Let my heir pay ten *aurei* to Seia; if she has a child let him convey to her such-and-such a tract of land," for he holds that if she should die before having a child, she will transmit the ten *aurei* to her heir.

(2) If anyone should make a bequest to a son under paternal control and charge him to pay himself, the legacy will stand, and the heir will not be to blame for paying it to the son, rather than to the father; for suppose, for instance, that he had been especially directed to pay the son. It is certain that if the father brings suit to recover the legacy, he should be barred by an exception.

(3) If, after the legacy takes effect, the legatee should be subjected to the control of another, the legacy will be due to the person under whose authority he has passed, for everything to which he is entitled is transferred with him. If, however, the legacy was bequeathed under a condition, it will not pass, but its delivery will be deferred until the condition has been fulfilled; and it will be acquired by the person under whose control the legatee was at the time when the condition was complied with. If the legatee should be his own master at that time, he himself will acquire the legacy.

15. *The Same, Disputations, Book V.*

Where a trust is left to children, "If they should become their own masters by the death of their father," and they become independent, not through his death, but through emancipation by him, no one can doubt that they will be entitled to the benefit of the trust, and that the legacy which would have taken effect at the death of their father will vest from the time of their emancipation.

16. *Julianus, Digest, Book XXXV.*

Where a legacy is bequeathed in the following terms, "Let my heir give Stichus, or any children born to Pamphila," the legacy will not be payable before the day when Pamphila has a child, or at a time when it will be certain that a child will not be born to her.

(1) Where an usufruct is bequeathed by anyone to a slave, who was himself bequeathed by his master before the estate of the latter has been entered upon, and also before the estate of him who left the usufruct has been accepted, we think that there is no reason why the legacy should begin to take effect before the estate to which the slave who was bequeathed belonged is entered upon, as no advantage will at present accrue to the estate, and if in the meantime the slave should die, the legacy will be extinguished. Therefore, it must be held that as soon as the estate has been entered upon, the usufruct must be considered to belong to the person whose slave was bequeathed.

(2) If the slave to whom the usufruct was left should not himself have been bequeathed, it must be said that the usufruct will belong to the estate, because the time for it to take effect did not arrive before the estate was accepted.

17. *The Same, Digest, Book XXXVI.*

Where a legacy is left to a slave who is himself bequeathed, the legacy does not take effect at the time of the death of the testator, but at the time when the estate is entered upon; and hence the rule of law under which a legacy is not permitted to be given to a slave, even if he is manumitted, cannot be cited in opposition; for even if the testator should die immediately, the benefit of the legacy and the obligation of the law to pay the same are not concurrent in the person of the same individual. Therefore, the question under discussion is exactly the same as if a bequest had been made to a father, after his son had been appointed the heir of the testator; because it is understood that even if the father should die immediately, his son, having been emancipated, could enter upon the estate just as if he owed the legacy to his father.

18. *The Same, Digest, Book XXXVII.*

Where a legacy is bequeathed to any one as follows, "When he shall have children," and he dies leaving his wife pregnant, it is understood that the condition was complied with at the time of his death, and the legacy will be valid, provided a posthumous child should be born.

19. *The Same, Digest, Book LXX.*

Where a legacy is bequeathed without prescribing any time, as follows, "Let my heir provide my wife with provisions for her support, and if he does not do so, let him pay her a hundred *aurei,"* the legacy is understood to be only one of a hundred *aurei,* and it can be claimed at once. The statement relative to provisions has no other effect than to release the heir from liability, if they are delivered before issue has been joined in the case.

(1) Where the following provision was inserted into a will, namely, "If he should not furnish my wife with provisions before the *Kalends* of such-and-such a month, let him pay her a hundred *aurei,"* it is held that the result is not that there have been two legacies created, but that a hundred *aurei* were bequeathed to her under a condition. Hence if the wife should die before the *Kalends* of the month designated, she will not leave the provisions to her heir, because they have not been bequeathed; nor will she leave him a hundred *aurei,* because the day for the payment of the legacy has not arrived.

(2) Where a legacy is bequeathed under a condition to someone who is charged with a trust for my benefit, it is just as if the legacy was bequeathed to me absolutely, and the heir was appointed under a condition.

(3) Where a legacy of the amount which he owes is bequeathed to a debtor it is payable immediately, and an action can at once be brought under the will to obtain a release; and if the debtor should die after the death of the testator, he will transmit his right of action to his heir.

(4) The same rule will apply where a legacy is left in the same manner, not to the debtor himself, but to someone else.

20. *Marcianus, Institutes, Book VI.*

Where a legacy is bequeathed for a prescribed number of years, for instance, the sum of ten *aurei* is left to Titius payable annually for ten years, Julianus, in the Thirteenth Book of the Digest, says that a distinction must be made; for if the legacy is bequeathed for the purpose of support, there are several distinct legacies, and if the legatee should die he will not transmit to his heir those which are payable in years to come.

If, however, the testator did not bequeath the legacy in order to provide support, but divided it into several payments for the convenience of the heir, in this instance, he says that the sums payable in future years will constitute but a single bequest, and if the legatee should die within ten years, he will transmit to his heir the amounts due for the ensuing time. This opinion is correct.

21. *Paulus, On Vitellius, Book II.*

If a day is not fixed for the payment of a legacy, it will be payable at once, or it belongs immediately to the person to whom it was given. Where a term is prescribed, even though it may be a long one, provided it is certain (as, for instance, after a hundred *Kalends* of January), the legacy vests immediately on the death of the testator, but it cannot be collected before the time which was fixed arrives. If, however, the time is uncertain (for example, when the boy arrives at puberty, or when he marries into my family, or when he obtains the office of magistrate, or finally, when he does something which it suited the testator to insert into his will), if the time does not arrive, or the condition take place, the property will not belong to the legatee, nor can the legacy take effect.

(1) Where a bequest is made to Titius subject to the same condition under which I have appointed you my heir, Pomponius thinks that the legacy will begin to take effect just as if it had been left absolutely, as it is certain that it will be payable whenever there is an heir; for a legacy does not become uncertain on account of a condition that there shall be an heir, since a bequest of this kind does not differ greatly from one dependent upon the following condition, "Let payment be made to him, if he should become my heir."

22. *Pomponius, On Quintus Mucius, Book V.*

If a legacy should be made to Titius, payable when he reaches the age of fourteen years, and he dies before attaining his fourteenth year, it is true that the legacy will not pass to his heir, as it includes not only the time but also the condition under which it will take effect; that is to say, when the legatee reaches the age of fourteen years.

Moreover, anyone who is not in existence cannot be understood to be fourteen years old. Nor does it make any difference whether the following clause, "If he should reach the age of fourteen years," is inserted; as, in the first instance, the time is indicated by the condition, and in the second, the condition is indicated by the time, since the same condition applies to both.

(1) Again, some conditions are superfluous, as for example, if a testator should say, "Let Titius be my heir, and if he enters upon my estate, let him pay ten aurei to Msevius." This condition is considered not to have been written, as the legacy will pass to the heir of Maevius, even if the latter should die before the estate was accepted. The rule will be the same where it is written, "If Titius enters upon my estate, let him pay Maevius ten *aurei* within a hundred days." For this legacy was payable within a certain time, and not under a condition, and the rule of Labeo, who says that a legacy will pass to the heir of the legatee when it is certain that it will be payable if the estate is entered upon, should be adopted.

(2) Still, if I appoint two heirs, and charge both of them with a trust for the benefit of someone, if either should accept the estate, this condition will not be considered superfluous,

but will be valid so far as the share of the co-heir is concerned; but it will be void with reference to the person to whom the condition relates, just as if the legacy had been bequeathed in the same way after the appointment of a single heir.

23. *Ulpianus, On the Lex Julia et Papia, Book IV.*

Where a legacy is bequeathed payable every year, it is said that there is no doubt that the condition of the legatee should be investigated every year, to determine whether he is capable of receiving it; and if he is a slave belonging to several masters, the condition of the different masters must be investigated.

24. *Paulus, On the Lex Julia et Papia, Book VI.*

Where an heir is charged with the delivery of provisions or land, and, if he should not deliver them, is required to pay ten *aurei;* and I have ascertained that the provisions which were the subject of the legacy have been changed into the sum of ten *aurei,* and if the heir refuses to deliver the provisions, the money will then be payable; and if, when notified to deliver the land, the heir does not do so, and, in the meantime he should die, his heir will not be entitled to anything but the land. For when anyone says, "Let my heir Publicius transfer such-and-such a tract of land," the legacy is complete, and if he should add, "If he does not transfer it, let him pay a hundred *aurei,"* the legatee seems to have been deprived of the devise of the land on condition that the hundred *aurei* will begin to be due; and if the condition should not be fulfilled during the lifetime of the legatee, for instance, because no demand was made upon the heir, the result will be that the deprivation of the legacy will be of no force or effect, and the devise of the land will remain.

(1) When a bequest is made as follows, "If my heir should not furnish the provisions, let him pay ten *aurei,"* we hold that it is clear that no provisions have been bequeathed.

25. *Papinianus, Questions, Book XVIII.*

Where such-and-such an article, or such-and-such a piece of property is bequeathed, the enumeration of the different articles included in a disjunctive clause does not constitute several legacies.

Nor can a different opinion be held if the testator should devise one tract of land absolutely, and another conditionally; for while the condition is pending, no choice can be made, and if the devisee should die, the devise will not be considered to have passed to his heir.

(1) "Let my heir pay Titius what Seius owes me." ..If the ward, Seius, had borrowed a sum of money without the authority of his guardian, and did not become more wealthy on this account, and the testator had reference to this debt, as the ward did not owe him anything, the legacy will have no force or effect.

If, however, the testator by the term "debt" had reference to the natural obligation incurred and to future payment, Titius can claim nothing; as the condition was tacitly imposed, and it is just the same as if the testator had said, "Let my heir pay Titius whatever the ward may pay," or, if he should bequeath any children who may be born to the slave Arathusa, or any crops which may be obtained from the said tract of land. If, in the meantime, the legatee should die, and the female slave should afterwards have a child, or crops should be gathered, or the ward should pay the money which was due, the heir of the legatee will be entitled to assert his claim; and this is not contrary to what has been already stated, for a legacy vests where a condition is not imposed, even though this is due to some external cause.

26. *The Same, Opinions, Book IX.*

"I desire fifty *aurei* out of the income of my lands collected during the year after my death to be paid to my brother, Firmius Heliodbrus." It was my opinion that the legacy was subject to no condition, but that the time of the payment of the money seemed to have been prolonged ;

and if the income of the land for the present year should be insufficient to make up the sum bequeathed, recourse must be had to the income of the following year.

(1) A testator desired a hundred *aurei* to be paid by his heirs to his foster-child, and that the said sum of money should be paid to a third party, so that the foster-child might receive the interest on the same at the rate of four per cent per annum, until he reached his twenty-fifth year; and then that he should be paid the principal. The said child having died before reaching his twenty-fifth year, I gave it as my opinion that the benefit of the trust was transmitted to his heir. For no condition seemed to be attached to the payment of the principal, except that it should be made when the beneficiary reached a certain age; and as the heir could not demand the execution of the trust from the third party aforesaid, with whom the testator desired the money to be deposited, because, on account of the following provision, "You will, without fail, pay the said sum of money to my foster-child, after he reaches the age above mentioned," the execution of the trust must be demanded of the heirs of the testator, who ought

to stipulate for the payment of the money; as a person in whom the deceased reposed confidence cannot be required to furnish sureties by the heir of the beneficiary.

(2) A father charged his wife,.to whom he had bequeathed certain property, to pay to his son until he reached the age of twenty-five years a certain sum of money annually out of the income of said property, which was to form part of the estate of his son, in addition to the support of the latter which has been provided for.

It appeared that there were not several trusts in this case, but one trust divided into several payments, and therefore the son, having died before reaching the aforesaid age, transmitted the trust for the remaining time to his heir; but the latter could not demand the payment of the money at the beginning of every year, because the father intended it should be paid to the son out of the income of the property given to the wife. Moreover, if the father intended the money, which was payable annually, to be used for the support of the son, there is no doubt that, after the death of the latter, the reason for paying it no longer existed.

27. *Scsevola, Opinions, Book III.*

A testator appointed a son under paternal authority the unconditional heir to a portion of his estate, charged him with a trust, and inserted the following provision into his will, "For the reason that I have appointed Lucius Titius my heir, I wish him to enter upon my estate, if he should be released from the control of his father."

After the estate had been accepted by his co-heirs, the question arose whether the legacy left to the son would take effect. The answer was that if it was left without any condition, the execution of the trust could be demanded of the co-heirs of the son, in proportion to their respective shares in the estate.

(1) A testator left ten *denarii* payable monthly to certain slaves whom he manumitted. As the heirs were absent, and the slaves obtained their freedom under the Decree of the Senate, the question arose from what time the payment of legacies for their support should be made. The answer was that, according to the facts stated, these legacies should be paid to them from the time when they began to be free.

28. *The Same, Opinions, Book IV.*

When a tract of land, with all its equipment, is devised, the question arises in what way it should be delivered, whether in the condition it was at the time of the death of the testator, or at the time when the codicil was made, or at the time when it was claimed. The answer was that the land with its equipment should be delivered at the time when the legacy vested.

29. *Valens, Trusts, Book I.*

"I charge my heir to pay to Titius ten *aurei* at some time or other." There is no doubt that the

heir owes ten *aurei,* but it is uncertain when he owes them. It seems that the legacy will take effect, and can be demanded of the heir as soon as he is able to pay it.

30. *Labeo, Epitomes of the Last Works of Javolenus, Book III.*

Where a legacy is bequeathed to a female ward, to take effect when she marries, and she should marry before being nubile, she will not be entitled to the legacy before she reaches the marriageable age; because a girl cannot be considered to be married when she is incapable of cohabitation.

31. *Scsevola, Digest, Book XIV.*

A certain man having appointed his wife heir to a sixth part of his estate appointed a substitute for her, and charged his heirs by a trust, if his wife should not be his heir, to give her her dowry and certain other property; and the husband having died, the wife died also before the condition was complied with, and before she had entered upon the estate. The question arose whether the trust took effect at the time of her death, and whether her heirs were entitled to the benefit of it. I answered that if the wife died before entering upon the estate, they were entitled to the benefit of the trust from the time of her death.

TITLE III.

CONCERNING SECURITY GIVEN FOR THE PAYMENT OF LEGACIES OR THE EXECUTION OF TRUSTS.

1. *Ulpianus, On the Edict, Book LXXIX.*

The Praetor has decided that security must be furnished for the payment of legacies, so that the heir may be responsible for any fraud committed against those to whom the testator desired the payment of money to be made, or some act performed for their benefit; in order that the money may be paid, or the act performed at the time prescribed.

(1) The heir is always compelled to give security, no matter what his rank or fortune may be.

(2) This rule was not established by the Praetor without good reason. For, as the heir has possession of the estate, the legatees should not be deprived of the property of the deceased, and they must either be given security, or, if this is not done, the Praetor shall authorize them to take possession of the property bequeathed.

(3) Security must not only be given to all the legatees, but also to their successors, as has been already decided, although the latter are admitted to take possession of the property, not on account of the will of the deceased, but because of the requirements of the succession, just as occurs in the case of a debt.

(4) Security must also be given to the agents of the legatees, which is our practice at present.

(5) It is clear that if a legacy is bequeathed to anyone who is under the control of another, security must be given to him to whose authority he is subject.

(6) Moreover, not only the heirs must furnish security for the payment of legacies, but their successors must do so likewise.

(7) He also to whom an estate has been transferred under the Decree of the Senate is compelled to give security.

(8) Those who become heirs through the agency of other persons, as well as praetorian heirs, are obliged to furnish security.

(9) It is clear that if the terms of the stipulation are not complied with, and suit is brought to recover the legacy, it must be said that the stipulation ceases to exist.

(10) The same rule also applies in the case of trusts,

(11) Where a legacy or a trust is bequeathed to anyone, with the understanding that it shall be renewed if the property is lost, let us see whether security can be required for the payment or execution of the second legacy, or trust. The question arises whether this trust or legacy is due, and how many times it is due, and whether the legatee himself should give security that he will not lose the property. There is extant a Rescript of the Divine Pius, addressed to Junius Mauritius, with reference to all these matters, which is as follows, "In accordance with the contracts of your letter, legacies or trusts should be paid or delivered to Clodius Fructulus under the will of Clodius Felix, without requiring a bond that none of said legacies or trusts will be lost by him. For, as the heir is charged by said testator that, if Fructulus should lose any of the property left to him by said will, the heir must make it up to him, this does not have the effect of requiring Fructulus to give security against the loss of the first legacies, or that the heir should be rendered liable indefinitely; so that, as often as the legatee may lose any property the former will be required to restore it, but as, by the terms of the trust, it would seem that after the legacy has been paid a second time, the heir will no longer be liable if the legatee afterwards loses any of the property, the trust having been fully executed by the last payment." It therefore appears by this Rescript that the legatee is not required to give security to the heir against the loss of the property.

On the other hand, the question arises whether the heir should give security with reference to the second legacy, or trust. I think that it is not necessary for him to do so, as it is in the power of the legatee to avoid losing what has been left to him. However, if anyone should ascertain that the second legacy was left under some condition, it must be said that security should be required.

(12) It is evident that where anyone is charged with the payment of a legacy, either wholly or in part, he must furnish security, whether he is an appointed or a substituted heir.

(13) The question is very seriously asked whether this stipulation involves the increase derived from profits or interest. It has been decided, and very properly, that the stipulation has reference to any increase which has taken place after the heir has been in default, as it includes whatever should be paid.

(14) Where anyone has stipulated for the payment of a legacy under a condition, and, while the condition is pending, he dies, the stipulation becomes of no effect, because the legacy is not transmitted to the heir. It must also be noted that the same circumstances and conditions are embraced in this stipulation that are involved in the legacy. Hence, if there is an exception which can be filed in opposition to the person claiming the legacy, it is established that the same exception can be pleaded against anyone bringing an action based on the stipulation.

(15) Ofilius says that if the heir is asked to give security with reference to the legacy by the agent of the legatee, who is alleged to be absent, he should furnish it on condition that the person for whose benefit he does so is living, so that he will not be held liable if the legatee should have previously died.

(16) The question also arises whether the property itself, which is bequeathed, is included in this stipulation, or whether it has reference merely to its value. The better opinion is that either the property itself, or its value, comes within the terms of the stipulation.

(17) If ten *aurei,* which were in a certain chest, are bequeathed to me, and the usufruct of the same is bequeathed to you, and each bequest is absolute, he to whom the ownership is left can claim the ten *aurei* by law. Still, it is settled that the usufructuary can bring an action under the Decree of the Senate and demand the usufruct of five *aurei.* However, if the owner should claim the entire ten, he can be barred by an exception on the ground of bad faith, after the usufructuary, having received five *aurei,* has given security for their return.

Marcellus says it is clear that if the legatee should obtain possession of the ten *aurei,* an equitable action should be granted to the heir or the usufructuary, against the legatee,

provided security is given to him. Where, however, the ten *aurei* were left under a condition, the usufructuary can, in the meantime, hold them if a bond is furnished; and the legatee to whom the ownership was bequeathed can stipulate for the payment of his legacy. But if he should fail to demand the stipulation, and the condition should be fulfilled, Marcellus says that he can bring an action for the production of the property.

If, however, the heir has paid the ten *aurei* to the usufructuary through mistake, it is evident that he will not be required to produce the property in court, and Marcellus holds that relief should be granted to the legatee against the usufructuary.

(18) If a part of the estate should come into possession of the Treasury, the stipulation above mentioned will be of no force or effect, because it is not customary for the Treasury to give security.

(19) Where anyone is in possession of a small portion of the estate, although he may be heir to a larger share of the same, if a part of the estate is diminished by operation of law, the heir will become more secure, nor will he be liable under the stipulation for any more of the estate than that to which he is the heir.

If, however, the capacity of the heir with reference to the interest of the legatees should remain unimpaired, still, in fact, he will be entitled to less of the estate and he will appear to be burdened if he has given security to indemnify the legatees, because, by operation of law, the legacies are due in proportion to the share of the estate to which he is the heir. It is perfectly just that he should not pay the legatees any more than is in proportion to the share of the estate from which he derives an income. This is also the case where an estate is proportionally transferred under the Trebellian Decree of the Senate, for the heir is released from liability to pay the legacy, so far as his share, the profit of which has been lost, is concerned.

(20) If a bequest should be made payable at an indefinite time to someone who is under the control of another, security shall be given to him who has control of the legatee, not absolutely but conditionally; that is, provided he is subject to his authority when the time for the payment of the legacy arrives.

If, however, the legatee should be ascertained to be his own master, it would seem to be unjust that security should be given to the father, when the legacy is payable to another. And even if security has been furnished without this addition, we can, nevertheless, bar the father or the master by an exception, if they have neither the son nor the slave under their control at the time when the condition is complied with. Still, according to this, the result will be that there is an instance in which security given with reference to a legacy does not take effect, for it will be void if the person in question is his own master at the time when the condition is fulfilled.

2. *Papinianus, Questions, Book XXVIII.*

Even if the father should be willing to give security that no one will afterwards claim the legacy, the heir cannot be compelled to pay it to anyone else than to the son who it is entitled to, and can demand the same.

3. *Ulpianus, On the Edict, Book LXXIX.*

Security must also be given to those who are under the control of another, just as it is customary for this to be done where the same property is left to two persons under different conditions, for security is given to two legatees, but in both instances the same persons become sureties.

4. *The Same, On the Edict, Book XV.*

Where an estate is in the hands of anyone under the terms of a trust, and he does not give

security for the payment of the legacies, the legatee is placed in possession of the property as against him.

5. *Papinianus, Questions, Book XXVIII.*

The condition of a legacy for the payment of which security had been furnished was fulfilled after the heir had been captured by the enemy. I denied that the sureties could be held liable during the meantime, for there was neither a right nor a person to whom the terms of the stipulation could be applied.

(1) The Emperor Marcus Antoninus stated in a Rescript addressed to Julius Balbus that a person by whom property left under a trust was claimed should give security when he took an appeal; or, if his adversary furnished security, he should be given possession of the property in dispute. It was very properly decided by the Emperor that security should be furnished, even after the appeal of the case brought under the trust. This should be done before the decision is rendered if the claimant is in default, for he should not lose his victory because of his delay. But why should the appellant not give security on account of the trust, if his adversary did so in order that he might be given possession, when the requirements of the Edict are different, was asked in a rescript? For security is not exacted of the legatee, as in the case of a loan, but vicarious possession is granted on account of safekeeping, and he who obtains the property is placed in possession of the same, either by the Praetor or the Governor. The Pra?tor permits possession to be taken of all the property belonging to the estate, for the sole purpose of observing the condition of the trust; the Emperor, however, does so on account of the property which is the subject of litigation, and requires securities from both parties; just as where a son, having obtained possession, cannot give security to place all his property in the bulk of the estate, and, for the reason that we refuse him any action, the condition of his furnishing security to his brothers is deferred in accordance with the rule of the Pra?torian Court, as his brothers must restore anything which they may have obtained from the share of their brother, when he does bring his own property into the bulk of the estate.

If, however, none of them can give security, it is established, for the purpose of convenience, that a good man shall be chosen by both sides with whom the income shall be deposited, and, as it were, sequestrated, and who can bring the equitable actions granted by the Praetor. Moreover, possession under the terms of the Rescript previously cited is only transferred to the person who claims the benefit of the trust, where he gives security; even though his adversary may refuse to give it, not through inability to do so, but through obstinacy. But when the person who is successful cannot furnish security, the property itself must be deposited, or possession be given by a decree of the Praetor.

(2) Where the term or the condition of a legacy or a trust is said to postpone the demand, or the action for the same, and therefore security is demanded, and the heir alleges that this is done for the purpose of annoyance, and denies that anything has been left to the parties who make the application, he who asked that security should be furnished shall not be heard, unless he produces the will by which he can prove that the legacy was bequeathed to him.

(3) When the question was asked where security must be given for the purpose of preserving a trust, the Emperor, Titus Antoninus, stated in a Rescript that if the heir did not have his domicile at Rome, and all the property of the estate was situated in a province, the beneficiary of the trust who demanded that security be given should be sent back to the province. Hence, if the heir should ask to be sent .back to his home for the purpose of giving security, and the legatee asks that security be given where the estate is situated, the heir should not be sent back.

This was also stated by the Emperor Titus Antoninus in a Rescript.

(4) It was added in this Rescript that, where property belonging to the estate had already been

sold, either by the will of the testator or with the consent of the legatee, the price of said property should be placed upon deposit for the purpose of carrying out the provisions of the trust.

6. *Ulpianus, Trusts, Book VI.*

Where an indefinite amount is mentioned in a trust, sureties shall be demanded, after the amount has been established by the decision of the magistrate who has jurisdiction of the case.

(1) We must also remember that in matters relating to property in which the public is interested, it is not customary for security to be required for the execution of trusts, even if sometimes a necessity should arise for giving it. It is clear, however, that a promise can be exacted that the will of the deceased shall be executed.

7. *Paulus, Manuals, Book II.*

Where, after a father or a master had been appointed an heir, and charged with a legacy payable to a son or a slave of the former, under a condition, neither can demand security for the preservation of the legacy. If, however, the son or the slave should be emancipated or manumitted while the condition is pending, and demands security, the question arises whether he should be heard, lest the benefit which he has received from his father or his master may be to his disadvantage, or whether the father and the master should blame themselves for having given them the power to make such a demand.

The better opinion is to dispose of this point by adopting a middle course, and say that they can only be held liable for the hypothecation of their property.

8. *Ulpianus, On Sabinus, Book XLV11I.*

Where security is given to pay legacies, the day of payment arrives under this stipulation as soon as the legacies begin to be due:

9. *Paulus, On Sabinus, Book XII.*

Not, however, to the extent that the legacies can be claimed at once, for we hold that payment should be made on a certain day, even though the time has not yet arrived.

10. *Pomponius, On Sabinus, Book XXVI.*

If you have been appointed an heir, and have been charged with a legacy to me under a condition, and you should afterwards accept the estate and give security for the payment of the legacy, and, after your death, but before your estate has been entered upon, the condition of the legacy should be fulfilled, Sabinus says that the sureties will be liable to me, because the legacy must, by all means, be paid, even if the stipulation was general in character.

11. *Gaius, On the Provincial Edict, Book XIII.*

Where the legatees have been placed in possession of the property of an estate against me, on account of having given bond for the payment of the legacies, and my agent or anyone else has furnished security in my name, the Praetor can grant me an interdict on this ground, by which the legatees will be ordered to relinquish possession, just as if I myself had given security.

12. *Marcianus, Institutes, Book VII.*

Even though the condition that no security shall be required may have been inserted into the will, such a condition will not be considered valid, and therefore, if any legatee should ask that security be given him, the condition will not be considered to have failed, because, after it has been established by public law that security of this kind can be remitted, the burden of a bond is not exacted, and no condition is understood to have been imposed.

13. *Neratius, Parchments, Book VII.*

Security may also be given for the payment of legacies to him to whom an action is granted on account of said legacies as against one who, having rejected his appointment as heir, has acquired the estate on the ground of intestacy; and, unless security is furnished, he will be placed in possession of it for the purpose of preserving the legacies, as the Praetor desires them to be secure, just as in the case of those due under the Civil Law. Aristo holds the same opinion.

14. *Ulpianus, On the Edict, Book LXXIX.*

This stipulation also applies to trusts, where the trust is left either absolutely or to take effect after a certain day, or under a condition, or where certain property, or the entire estate, or any right dependent thereon, is bequeathed.

(1) The Divine Pius also stated in a Rescript that, whenever it is clear and certain that there is no ground for the execution of the trust under any circumstances, it would be unjust for the heir to be required to furnish a bond when there is no necessity for it.

15. *Paulus, On the Edict, Book LXXV.*

This bond also applies to a legacy which is payable immediately, as judicial proceedings give rise to some delay.

(1) If the legatee has received security from the appointed heir for the payment of his legacy, and has been charged with a trust under the Trebellian Decree of the Senate, both stipulations will take effect; but the heir can protect himself by an exception, because he is not obliged to give security. If, however, a portion of the estate has been transferred, security must be given by each of the parties.

(2) This stipulation is also applicable where a trust is to be executed *ab intestato.*

16. *Gaius, On the Provincial Edict, Book XXVII.*

Where two persons of the same name claim a legacy, security must be given to both of them, but the heir will not be unnecessarily burdened on this account, as he can make the same sureties responsible under both stipulations; and the said sureties are not unnecessarily burdened, since the result will be that they will only be liable under one obligation.

17. *Paulus, On the Edict, Book XLVHL*

If we take security from only one heir for the payment to us of a legacy which all the heirs are charged with, and the share of the said co-heir accrues to the promisor, the securities will be liable in full, if the heir should owe the entire legacy.

18. *Scievola, Digest, Book XXIX.*

A woman who left a legitimate son appointed her father heir to her entire estate, he having been manumitted at the same time as herself, and charged him, at the time of his death, to transfer to his grandson, a son of the testatrix, all of her estate which might come into her hands, and added the following words, "I forbid any security to be required of my father Seius." As the said Seius had squandered all his property, and the father of the beneficiary of the trust was apprehensive that it would become of no effect, the question arose whether he could compel the father of the deceased to furnish security for the execution of the trust. The answer was that, according to the facts stated, he could not be compelled to give security.

(1) The testatrix having deposited certain property with her husband, the father of the boy to whom she made the bequest, without requiring from him a bond for the deposit, it was also asked whether the said property should be delivered to the heir who was the father of the testatrix; or whether, as the entire estate must eventually revert to the son of the deceased, the property in question should remain in the hands of the husband, who had a right to the

possession of the dowry. The answer was that all the property belonging to the woman which remained and was not included in her dowry must be delivered to the heir.

(2) A guardian, who was also the co-heir of his ward, during the absence of the latter, and after having been notified by the legatees, himself gave security on account of the trust for the entire amount left under the same. The question arose whether a praetorian action should be granted against the ward when he grew up. The answer was that it should be granted.

TITLE IV.

WHEN THE LEGATEES OF THE BENEFICIARIES OF A TRUST CAN BE PLACED IN POSSESSION OF THE PROPERTY OF THE ESTATE FOR THE PURPOSE OF PRESERVING THE SAME.

1. *Ulpianus, On the Edict, Book LII.*

If anyone should take security after he has been forbidden to do so, can the bond be recovered by the heir, so that he may be released? If, indeed, the heir knowingly gave security when it was not necessary he cannot be released. But what if he was not aware that he was excused from giving security? He can then recover. If, being ignorant of law, he thought that he could not be excused from giving security, can he recover the bond ? In this instance, anyone may still very properly say that he can do so. But what if a stipulation had been entered into, shall we hold that the sureties can avail themselves of an exception, or not? The better opinion is that they can avail themselves of an exception, because security has been given in a case where none was required.

(1) The Praetor does not demand that the furnishing of security should be opposed by the heir, but he will be satisfied if the failure to give it was not caused by either the legatee or the beneficiary of the trust. Therefore, if there is no one who can be called upon to give bond (that is to say, some person who has been charged to the payment of a legacy, or the execution of a trust), the legatee and the beneficiary can be placed in absolute possession of the property by the terms of this Edict, because it is true that the person to whom security should be given is not to blame for it not being furnished. Security, however, should not be offered to the legatee, but it will be sufficient if he demanded it, and it was not given, or if there was no one of whom he could ask it.

(2) Where the release of a claim is bequeathed to a debtor, no bond should be required, because he himself has the legacy in his hands; since, if an action is brought against him, he can interpose an exception on the ground of fraud.

(3) The Divine Pius stated in a Rescript, directed to Emilius of the Equestrian Order, that the Prsetor should not permit a legatee, to whom his legacy has been paid, to ask security of the heir when it is established that the legacy is not due.

(4) Security must be furnished for the payment of a legacy before the estate has been entered upon, when it is still doubtful whether it will be accepted. Moreover, where it is certain that it will be rejected or relinquished, or where the necessary heirs will not accept it, recourse will be had in vain to this Edict, as it is clear that the legacy will not be payable, or the trust executed.

2. *The Same, On the Edict, Book LXXIX.*

Moreover, if it is certain that the estate has not yet been accepted, there will be no ground for demanding security, or praetorian possession of the property.

3. *The Same, On the Edict, Book LII.*

Where the heir, of whom security is demanded, suggests a judicial investigation of the legality of the bequest, and says, "Institute proceedings immediately with reference to the trust, let us go into court at once," it must be said that the bond is no longer in force, as the validity of the

trust must be established before that of the security is determined.

(1) This judicial investigation can the more readily be solicited by the heir, if he alleges that a bond is demanded for the purpose of annoyance; for this is the ordinary rule in all cases where security is asked. The Divine Pius stated in a Rescript that the judge before whom a bond is demanded should ascertain whether this is done maliciously, or not. He should make this inquiry summarily.

(2) Where the agent of a legatee demands security, if, indeed, he has been specially directed to do so, he himself will not be required to give bond that his act will be ratified, but security must be furnished him. If, however, it should be doubtful whether he has been appointed agent, or not, a bond for the ratification of his act shall be exacted of him.

(3) Where security has once been given, the question arises whether it should be given a second time, when it is alleged that the sureties are poor. The better opinion is that security should not be given a second time; for the Divine Pius stated in a Rescript addressed to Pacuvia Liciniana that she herself must bear the loss caused by her acceptance of sureties who were insolvent. Nor is it necessary for the person of whom security may be demanded to be annoyed every moment.

4. *Papinianus, Questions, Book XXV1IL*

It is evident that it is but just that another bond should be given where some new reason is alleged for doing so; as, for instance, if the surety should die, or should lose his property by some unexpected misfortune.

5. *Ulpianus, On the Edict, Book LII.*

A person to whom security is not given for the payment of a legacy or the execution of a trust, even if he is placed in possession, does not begin to acquire the ownership of the same; for it is not so much the actual possession of the property as the safe-keeping of it which is granted him. He has no right to drive the heir away, but he is ordered to take possession of the property with him, so that by the annoyance of perpetual custody he may compel the heir to furnish security.

(1) Where one person is placed in possession of property to avoid threatened injury to the same, and another is placed in possession for the purpose of preserving the legacies, he who has possession for the purpose of preserving the legacies can also give security against the damage which is apprehended, and, if he should do so, he need not relinquish possession, unless security is given to him to the amount for which he has bound himself in providing against threatened injury.

(2) Where several legatees desire to be placed in possession of property, they must all go and take possession, for he who obtains it for the purpose of preserving legacies holds possession solely for himself, and not for anyone else.

The case, however, is different where creditors are placed in possession in order to preserve the property, for in this instance, the one who obtains possession does so not merely for himself but for all the other creditors as well.

(3) A legatee who has been given possession first is not preferred to one to whom it is given afterwards; for we observe no order of precedence among legatees, but protect all of them equally at the same time.

(4) After creditors have obtained possession for the purpose of preserving property, a legatee who has been placed in possession to secure the payment of his legacy will not have preference over the creditors.

(5) Where a person who has been placed in possession of property for the purpose of preserving his legacy comes into possession of the entire estate, that is to say, if the property

in question still forms part of the estate, he will not acquire possession of property which does not belong to it, unless the said property has ceased to form part of the same through fraud, and his possession will not be perpetual, but will be dependent upon the result of the judicial inquiry.

(6) Moreover, all those things are understood to be included in the term "property," whose ownership belongs to the heir.

(7) Where there are lands which constitute part of the estate merely because they are subject to certain claims, and where articles have been given in pledge to the testator, the legatee will also be placed in possession of them.

(8) The legatee and the beneficiary of the trust will also be given possession of the offspring of slaves, and the increase of flocks, as well as of all the crops.

(9) If, however, the deceased, in good faith, purchased property belonging to another, it has been settled that the legatee should be placed in possession of this also, for it forms part of the estate.

(ID) Where property has been deposited with, or loaned to the deceased, the legatee cannot be placed in the possession of the same, for such property is not included in the estate.

(11) Where one of two heirs is ready to furnish security, and the other is not, the legatee can be placed in possession of the share of the estate belonging to the latter. Hence, the legatees who are placed in possession will also take precedence of the heir who gave security to the administration of the estate; therefore the heir should be induced to give security for the estire estate, in order to prevent his administration of the same from being interfered with.

(12) Where the substitute of a minor under the age of puberty is charged with the payment of legacies, and the minor dies, possession will be granted, not only of the property which belonged to the testator, but also of that which the minor himself acquired, for it likewise forms part of the estate. During the lifetime of the minor, however, possession cannot be granted, nor can security be required.

(13) If the person who is charged with the trust is not an heir, but a successor for some other reason, it must be said that the Edict will apply, and the bad faith of the trustee taken into consideration.

(14) Moreover, where the heir of the heir is the one who is guilty of fraud, he also should suffer for it.

(15) We should understand fraud in this instance to mean gross negligence, and not every kind of bad faith, but only such as is committed to the prejudice of legatees and beneficiaries of trusts.

(16) The Emperor Antoninus Augustus stated in a Rescript that, in certain cases, legatees and beneficiaries should be placed in possession of property belonging to the heir himself, and if, within six months from the time when the legatees first appeared in the court of a magistrate invested with jurisdiction, their claims were not satisfied, they could collect the income of said property until the will of the deceased had been complied with. This remedy also is available against those who are in default in the execution of trusts with which they have been charged.

(17) Although the term "satisfaction" has a usually broader signification, in this instance it refers to the payment of legacies.

(18) Hence, even where the heir has been excused from giving security by the testator, the Rescript will apply, because the heir may be in default of payment.

(19) Again, I think that the term of six months should be calculated continuously, and not

with the sessions of the court.

(20) We do not consider that a failure to pay the legacies takes place where a ward has no guardian, and an insane person, or a minor, has no curator. For failure to act should not prejudice persons of this kind who cannot defend themselves. It is certain that if the estate should be without an heir for a certain time, this should be deducted from the term of six months above mentioned.

(21) It may be asked whether the crops which are due under the terms of the trust should take the place of interest, and, as we follow the example of pledges, whatever is collected by way of income should first be considered as interest, and anything in excess of this should be credited on the principal. And, indeed, if the legatee should collect more than he is entitled to, an equitable action, as in the case of an action on pledge, should be granted to compel him to refund the surplus. Anyone, however, can sell the pledges, and in this case the constitution only permits the legatee to collect the income in order to hasten the decision of the case.

(22) Where anyone is placed in possession of property in order to provide for the payment of legacies, he must keep the income and all the other effects, and permit the heir to cultivate the fields and harvest the crops; but the legatee must take charge of the latter to prevent them from being consumed by the heir. If the heir should refuse to gather the crops, the legatee should be permitted to do so, and to keep possession of them. But where the crops are of such a nature that it is expedient to sell them immediately, the legatee should be permitted also to sell them, and to retain the price.

When anyone is placed in possession of other property belonging to the estate, it will be his duty to collect everything of this kind, and take care of it, wherever the deceased had his residence; and if there is no house there suitable for this purpose, he can hire one, or a warehouse in which the property which has been collected can safely be kept. I think also that the legatee should exercise such supervision over the property of the estate that the heir cannot be deprived of it, or it cannot be lost, or become deteriorated.

(23) Where anyone has been placed in possession of property under the terms of the constitution, care must be taken to employ no force against any other legatee who has the use and enjoyment of the same.

(24) The wishes of the deceased is understood to be complied with where this is done with reference to the income of the estate, or in any other way.

(25) Moreover, the said Constitution of the Divine Antoninus also has reference to those who are legally charged with a trust, even if they are not heirs, for the obligation is the same.

(26) Where a person is placed in possession of property in order to provide for the safety of legacies, and judicial proceedings are instituted against him on account of said property, he should not relinquish possession of the same, unless security is furnished him for the expense of litigation.

(27) Where anyone is placed in possession, and is not permitted to take it, he will be entitled to the interdict provided for this purpose, and must be placed in possession either by a court attendant, by an officer of the Pra?tor, or by a magistrate.

(28) A legatee can be placed in possession, not only where anyone is charged to transfer the very property which is bequeathed, but also where he is charged to transfer a portion of the same, or something else instead of it.

(29) Where a legacy is bequeathed absolutely to Titius, and he is charged under a condition to transfer it to Sempronius, Julianus says that the Prsetor will not render an unjust decision if, before the legatee obtains the bequest, he refuses to give security for the execution of the conditional trust; and that he should then permit Sempronius himself to claim the legacy, in order that he may give security, and agree to pay ten *aurei* if the condition should not be

fulfilled.

If, however, Titius should receive the ten *aurei* from the heir, Julianus says that it will be only just to compel him to give bond or to pay the ten *aurei,* and for Sempronius to furnish security to Titius. This is our present rule, which is adopted by Marcellus.

(30) But what if the legacy is left under a condition, as well as the trust, and no security is furnished for the execution of the trust? It will be perfectly equitable for the beneficiary to take security from the heir for the payment of the legacy, if the legatee should not secure him; that is to say, in order that he himself may give bond to the legatee. Where, however, the legatee has already received security from the heir, it must be held that an action should be granted, on account of the security, to the beneficiary of the trust, rather than to the legatee; that is to say, in the event that the condition of the trust is fulfilled. The right to demand the legacy itself should be granted to the beneficiary of the trust, if it has not yet been paid, and the condition upon which it was dependent has been complied with, provided that the beneficiary was ready to furnish security to the legatee.

6. *Julianus, Digest, Book XXXVIII.*

Where the usufruct of a sum of money is bequeathed, and it is provided by the will that security shall not be given on account of the same, the ownership of the money is not bequeathed, but the legatee should be permitted to give security and enjoy the usufruct of the money. In a case of this kind, the intervention of the Praetor is really not necessary, because, unless security is furnished, the legatee cannot bring an action against the heir.

(1) Where a person is placed in possession of property for the purpose of executing a trust, he should not be compelled to relinquish it before the trust has been executed, or security furnished that it will be. For if this is done while the property remains intact, the legatee should not be placed in possession, and when the offer to do this is made, he should relinquish possession.

7. *Modestinus, Rules, Book III.*

Where an unborn child is placed in possession of an estate, no legatee can be given possession of it to provide for the payment of the legacy.

8. *Papinianus, Questions, Book VI.*

If security is not given for the payment of a legacy, and the estate is transferred, the legatee shall be placed in possession of such property as has ceased to form part of the estate through the fraud of him to whom it was transferred.

9. *The Same, Questions, Book XIX.*

Even if the heir should be ordered by the court to pay the legacy, and does not do so, the legatee can apply to be placed in possession.

(1) Where the same property is bequeathed to two persons, under different conditions, and security is not furnished, both of them can be placed in possession of said property.

10. *Paulus, Sentences, Book HI.*

Where there is no property belonging to an estate of which the legatees or beneficiaries of a trust can be placed in possession, they shall not, for this reason, be given possession of property belonging

to the heir; but they can bring any actions with reference to the estate, and such actions will be denied to the heir by the Praetor.

11. *Hermogenianus, Epitomes of Law, Book IV.*

If, after having been placed in possession of the property of an estate, in order to provide for

the payment of legacies, or the execution of trusts, you should hold some article which has been bequeathed to me in trust, it is more equitable that I should have the said article which has been bequeathed to me than that you should have it, for the reason that you are only in possession of the same in order to insure the execution of another trust. Where, however, a legacy is bequeathed to me under a condition, and, in the meantime, you are placed in possession of the property for the purpose of securing the payment of legacies, and the condition should subsequently be complied with, I will not be refused permission to demand the property.

In like manner, if anyone should obtain possession of a slave who is to be free under a condition, and the condition should be fulfilled, the legatee cannot prevent the slave from obtaining the freedom to which he is entitled.

(1) If a creditor of the heir is placed in possession of property for the purpose of securing the payment of his claim, and he acquires possession of some article which has been left to me in trust, it is established that I will not be prejudiced on this account any more than if the creditor had received the said article in pledge from the heir himself.

12. *Msscianus, Trusts, Book XII.*

There is no doubt that property can be left in trust to a municipality. If security should not be provided, we have no hesitation in saying that, according to the Edict, the citizens of the town can be placed in possession of the estate; but they themselves, if security should not be given them, cannot be placed in possession, but an extraordinary remedy will be required; that is to say, an agent who represents them can be placed in possession of the property by a decree of the Praetor.

13. *Callistratus, On the Monitory Edict, Book III.*

Even though the property which has been bequeathed or left in trust may be only of trifling value, still, if it is not delivered by the heir, or security furnished by him to do so, when it is necessary to give security, the Prsetor will place the legatee or the beneficiary of the trust in possession of the entire estate, for the purpose of securing the payment of the legacy.

14. *Labeo, Epitomes of the Last Works of Javolenus, Book II.*

Where the daughter, granddaughter, great-granddaughter, or wife of the deceased, is not married, and has no property of her own, and has been placed in possession of the estate to insure the payment of legacies, she can use the property of said estate for her support.

15. *Valens, Actions, Book VII.*

Sometimes, although the heir may have acted fraudulently and caused the property of the estate to be diminished, the legatee can not be placed in possession of it; as, for example, where he has rendered some of the land religious, or has publicly consecrated a part of the same, for instance, with the consent of the Emperor; or where he has manumitted a slave without the intention of defrauding creditors.

THE DIGEST OR PANDECTS.

SIXTH PART.

BOOK XXXVII.

TITLE I.

CONCERNING THE PRAETORIAN POSSESSION OF PROPERTY.

1. *Ulpianus, On the Edict, Book XXXIX.*

Praetorian possession transfers both the benefits and inconveniences attached to an estate, as well as the ownership of the property belonging to the same; for all these things are associated with it.

2. *The Same, On the Edict, Book XIV.*

Praetorian possessors, in every respect, take the place of heirs.

3. *The Same, On the Edict, Book XXXIX.*

The term "property" in this instance (as we generally accept the term), must be understood to mean everything belonging to an estate to which succession is granted under the rights of the deceased, all benefits and disadvantages connected with it being included. For the estate is either solvent or insolvent, and is liable to loss or gain, or the assets consist of things which are corporeal, or of rights of action ; and, under these circumstances, they are very properly designated property.

(1) The possession of an estate, or praetorian possession (as Labeo says), should not be understood to be the actual possession of the property, for it is rather legal than real. Hence, where nothing corporeal belongs to the estate, Labeo holds that, nevertheless, praetorian possession may be acquired.

(2) Therefore, we define praetorian possession to be the right of recovering or retaining an estate, or the effects which belonged to someone at the time of his death.

(3) Praetorian possession of property is not acquired by anyone against his will.

(4) Praetorian possession can be acquired by municipalities, associations, *decurite,* and corporate bodies. Hence an agent of any of the said corporations can obtain it, or anyone else can do so in their name; and even if no one should demand or receive such possession in the name of a municipality, it still can acquire it under the Edict of the Praetor.

(5) Praetorian possession of property can be granted to the head of a household, as well as to a son under paternal control, provided the latter has the right of disposing of his *peculium castrense* or *quasi castrense,* by will.

(6) There is no doubt that praetorian possession of the estate of a person who has died in the hands of the enemy can be acquired, even though he may have died in a condition of slavery.

(7) Any person can obtain praetorian possession either himself or through the agency of another. If, however, someone should demand possession for me, when I have not directed this to be done, his act will not be legal until I have ratified it. Moreover, there is no doubt that if I should die before ratifying his act, I will not be entitled to the possession of the property, because I have not consented to what he has done, and my heir cannot do so, as the right to claim praetorian possession does not pass to him.

(8) Where praetorian possession is granted after proper cause has been shown, it shall not be granted anywhere else than in court, because the Praetor cannot render such a decree without ceremony; nor, after an investigation, can praetorian possession be granted anywhere else than in his tribunal.

(9) It should be remembered that the right of accrual applies to the Praetorian possession of property. Hence, if there are several persons entitled to such possession, and one of them obtains it, the others are not included:

4. *Gaius, On the Lex Julia et Papia, Book Vill.*

(For instance, where they have relinquished their right, or have been excluded from praetorian possession by lapse of time, or have died before demanding possession) :

5. *Ulpianus, On the Edict, Book XXXIX.*

For the shares to which the others would have been entitled, if they had claimed possession of the estate, will accrue to the one who did obtain possession.

6. *Paulus, On the Edict, Book XLI.*

But where the Praetor promises possession of a certain part of an estate to a patron, contrary to the provisions of the will, and promises possession of the remainder to the appointed heir, in accordance with the terms of the will, it is held that the right of accrual does not apply. Therefore, he promises possession of his share expressly to the patron, when the appointed heir does not claim his share under the will; as those entitled to the right of accrual must, at least once, demand possession of the estate.

(1) There are various advantages attaching to praetorian possession, for some kinds of possession are obtained contrary to the provisions of the will of the testator, and others in accordance with them; and sometimes the parties have a lawful right to it on the ground of intestacy, or they are not entitled to it because of having changed their civil status. For although, under the Civil Law, children are excluded from being direct heirs on account of their change of condition, still, the Praetor can, for equitable reasons, rescind this forfeiture of citizenship. He therefore grants possession of the property for the purpose of observing certain laws.

(2) Testamentary notes are not considered by the Edict as wills; for Pedius in the Twenty-fifth Book on the Edict says that notes are not letters.

7. *Ulpianus, On Sabinus, Book I.*

A slave can legally be granted possession of an estate if the Praetor is certain of his civil condition. Possession can also be granted to a person who is absent and does not demand it, if the Praetor is not aware that this is the case. A woman, also, can apply for praetorian possession in behalf of another.

(1) A minor under the age of puberty cannot be granted possession of an estate by the Praetor, nor can he join issue in the case, without the authority of his guardian, because a guardian can demand possession for his ward, and a father can do so for his son.

(2) It has been decided that the time when possession must be demanded for a minor begins when the guardian or father became aware that the minor was entitled to it.

8. *Paulus, On Plautius, Book Vill.*

Moreover, a guardian cannot reject the praetorian possession of an estate to which his ward is entitled, because a guardian is permitted to claim it, but not to reject it.

9. *Pomponius, On Sabinus, Book HI.*

Where there are several persons of different degrees of relationship entitled to praetorian possession, as long as it is uncertain whether one of them has the right to demand possession, or not, it has been settled that the time does not run against one of the last degree.

10. *Paulus, On Sabinus, Book II.*

Ignorance of the law is of no advantage in preventing the claim from being barred by lapse of time, in the case of praetorian possession of property. Hence, the time begins to run, so far as the appointed heir is concerned, even before the will has been opened; for it is enough for him to know that the testator is dead, and that he is his next of kin, and had access to persons of whom he could ask advice. For, in this instance, knowledge is not understood to be such as is possessed by persons learned in the law, but such as anyone whosoever may possess, or can acquire by applying to others who are more learned than himself.

11. *Gaius, On the Provincial Edict, Book XIV.*

Where a guardian claims praetorian possession in behalf of his ward, and it is found to be of greater disadvantage than benefit to him, the guardian will be liable to an action on guardianship.

12. *Ulpianus, On the Edict, Book XLVI1I.*

There is no reason to doubt that persons can, very frequently, obtain praetorian possession against the Treasury, and against a municipality; as, for example, where an unborn child, a lunatic, or one who is a captive in the hands of the enemy, claims praetorian possession of property. Whenever a law, a Decree of the Senate, or an Imperial Constitution forbids an estate to be taken, praetorian possession of it will not apply.

13. *Africanus, Questions, Book XV.*

The possession of property by the Edict of the Praetor is refused to those who have been condemned for a capital crime, unless complete restitution has been granted them. A person is understood to have been condemned for a capital crime upon whom the penalty of death, or the interdiction of water and fire has been imposed. Anyone, however, who has been exiled, can be admitted to the praetorian possession of property.

14. *Papinianus, Questions, Book XIII.*

Where a near relative of the deceased alleges that his will was forged, and proves it after a long period of time, although the time for demanding possession is held to have elapsed, and the plaintiff, being certain of proving his allegations, may have claimed it, still, for the reason that he asserted his claim in order to preserve his rights, it is not unreasonable that he should be considered to have accepted the succession.

15. *Paulus, Opinions, Book XL*

Paulus gave it as his opinion that the application of a mother, alone, could not acquire praetorian possession of an estate for her daughter, who was under the age of puberty, unless he who granted it evidently intended to give it to the minor child.

16. *The Same, Sentences, Book HI.*

When the person for whom praetorian possession is demanded subsequently becomes insane, the better opinion is that he will be held to have ratified the act, for a ratification only means the confirmation of a former demand.

TITLE II.

CONCERNING PRAETORIAN POSSESSION WHERE THERE IS A WILL.

1. *Paulus, On Sabinus, Book III.*

Praetorian possession of property can, under no circumstances, be granted to an heir whose name has been erased from the will so that it can hardly be read, even though this has been done unintentionally; because the presumption is that it was not properly inserted, although such possession may be granted if the name has been defaced after the will has been produced. For if the will was in existence at the time of death, even though it may have been

subsequently destroyed, praetorian possession of the estate can be granted, because it is true that there once was a will.

TITLE III.

CONCERNING THE PRAETORIAN POSSESSION OF PROPERTY GRANTED TO AN INSANE PERSON, AN INFANT, OR ONE WHO IS DUMB, DEAF, OR BLIND.

1. *Papinianus, Questions, Book XV.*

Titius was substituted as the heir of an insane person. The time prescribed for demanding praetorian possession does not run either against the appointed heir, or the substitute, as long as the insane person remains in the same condition, and if the curator of one who is insane acquires possession in his name, the time fixed for making the claim by those who are aware of the facts will not run against him. For a father can demand possession in behalf of his infant child, but if he fails to do so, the child will not, for that reason, be excluded. But what must be done if the curator refuses to make the application? Will it not be more just and proper to give possession to the next of kin to prevent the property from being without an owner ? If this is admitted, the substitute can be compelled to give security to all those to whom the property should be transferred, if the appointed heir should die while insane, or if, having recovered his senses, he should afterwards die before accepting the estate; for the substitute himself might die during the lifetime of the insane person, and still he would not interfere with the claims of the others, if he himself should die before acquiring the estate.

2. *Ulpianus, On the Edict, Book XXXIX.*

A person who is dumb, deaf, or blind, can obtain praetorian possession of property, if he understands what is taking place.

TITLE IV.

CONCERNING THE PRAETORIAN POSSESSION OF PROPERTY CONTRARY TO THE PROVISIONS OF THE WILL.

1. *Ulpianus, On the Edict, Book XXXIX.*

We must understand the term "children" when used with reference to the praetorian possession of an estate contrary to the provisions of the will, to mean either natural or adopted children, where they have either been appointed heirs, nor disinherited.

(1) Moreover, children are called to the praetorian possession of an estate contrary to the provisions of the will by the same right, and in the same order, in which they are called to the succession under the Civil Law.

(2) This general principle is also held to apply to posthumous children.

(3) Pomponius thinks that where children return from captivity by the enemy, and enjoy the right of *postliminium,* they can be admitted to praetorian possession contrary to the provisions of the will.

(4) Where one of three sons has been taken prisoner by the enemy, the two remaining ones who are at home will be entitled to praetorian possession of two-thirds of the estate.

(5) The same rule applies to a posthumous child, for as long as his birth is expected, he will be entitled to a share of the estate.

(6) The Praetor gives possession of property to children who are their own masters. For if they have been emancipated, or released from parental control in some other manner, they are allowed to acquire possession of the estate; but this is not the case with an adopted child, since, in order for it to be admitted to praetorian possession, it must be included in the number of children.

(7) A certain man had a son, and a grandson by the latter. He emancipated his son, and adopted him instead of his grandson, and then emancipated him a second time. The question arose whether he prejudiced the rights of the grandson. The better opinion seems to me to be that the grandson was not excluded, as his father either remained adopted as a grandson, or was emancipated. For I think that the father, having once been emancipated, the grandson, together with his father, should, under the terms of the Edict, be entitled to possession of the estate.

(8) A man had a son, and by him a grandson; the son was emancipated, or, having remained under his father's control, was banished. The question arose whether this would prejudice the rights of the grandson. The better opinion is that, in either instance, the grandson should be permitted to have praetorian possession of the estate, for persons who are banished are considered to be dead.

(9) Where a father and his son were both banished, and both regained their rights, we say that the son ought to be admitted to praetorian possession of the estate. Where, however, the son was sentenced to the mines, or to any other punishment equivalent to servitude, and was afterwards restored to his rights, he will, nevertheless, be admitted to praetorian possession of the estate; but this will not be the case if he should not be restored to his former condition.

2. *Hermogenianus, Epitomes of Law, Book III.* The same rule will apply if the father should be condemned to penal servitude, and should afterwards regain his rights.

3. *Ulpianus, On the Edict, Book XXXIX.*

Not only are emancipated children themselves admitted to the praetorian possession of property, but also their children as well.

(1) Where a man has two grandsons, and after emancipating one of them adopts him instead of his son, let us see whether he alone will be entitled to praetorian possession as a son. This is based upon the presumption that the deceased adopted the said grandson as his son, and as the father of the other grandson whom he retained under his control.

In this case it is better to hold that he alone will be entitled to possession of the estate under the Praetorian Law.

(2) But if the said grandson should be emancipated, it is preferable to conclude that he will not be entitled to possession in the capacity of a son. For this so called son is not included in the number of children, as his right acquired by adoption has been lost by emancipation.

(3) If I have a son, and by him a grandson, and adopt the grandson instead of the son, both will be entitled to praetorian possession; but it is clear that if the grandson should be emancipated he will not be permitted to have possession because his father takes precedence of him.

(4) If anyone, after having been emancipated, should give his son to his father to be adopted as his own son, it is perfectly just that all rights to which any other arrogated child is entitled should be conceded to him, and therefore he ought to be joined with his father, when praetorian possession of an estate is granted.

If the said grandson should be emancipated after his adoption, it will be perfectly just for him to be excluded, for then he resumes his proper place, and should not be joined with his father.

(5) If an emancipated son marries a woman without the consent of his father, and a child is born to him, and his father having died, the said grandson applies to be placed in possession of the estate of his grandfather, his application should be granted. For, by setting aside the emancipation by the Praetor, a legitimate son does not lose his rights as such; for a rescission of the emancipation is made in order that the children may, the more readily, obtain praetorian possession of the estate, and not be excluded from it.

And even if the son should marry a woman of such bad character that marriage to her would be dishonorable to himself, as well as to his father, still, we say that a child born of the said woman should be permitted to obtain possession of the property of the estate, as his grandfather could have availed himself of his right to disinherit him. In the decision of a case where the will has been attacked as inofficious, the magistrate who has jurisdiction, in rendering judgment must weigh the merits of the grandson as well as the offences of the father.

(6) Where an emancipated son, who was passed over, gives himself to be arrogated before an application for praetorian possession of the estate is made, he loses his right to demand possession contrary to the provisions of the will.

(7) Where anyone gives his grandson, whom he has under his control, in adoption to his emancipated son, the father of said grandson will be permitted to take possession of the estate of the grandfather, contrary to the provisions of the will, if his father is already dead, because he belongs to his family; and he himself can be permitted to take possession of the estate contrary to the provisions of the will.

(8) The same rule applies where an emancipated son gives his own son, who was born after his emancipation, to his father, in adoption, and then dies; for, in this instance, the said grandson should be permitted to acquire possession of the estate of his father, just as if he did not belong to another family.

(9) Where a father enters a family by adoption, and his son does not, can the son acquire possession of the estate of his father who died while a member of the adoptive family ? I think that the more equitable opinion is, that the son, although he may not belong to the same family as his father, should still be permitted to take possession of the property of his estate under the Praetorian Law.

(10) Children who cannot legally be appointed heirs are not entitled to demand possession of an estate contrary to the provisions of the will. The words, "Cannot be appointed," refer to the time of the death of their father.

(11) Where one of several children is appointed heir, he should not be permitted to take possession of the estate in opposition to the provisions of the will. For if he was entitled to possession under the will, what good would it do to give him possession in opposition to it? It is clear that, if another child should have recourse to the Edict, he would be entitled to possession contrary to the provisions of the will.

(12) Where, however, anyone is appointed heir under a condition, he cannot obtain possession of the estate in opposition to the will; and this was stated by Julianus in the Twenty-third Book of the Digest. But what if the condition should not be complied with? It is true that then he could obtain possession contrary to the provisions of the will.

(13) If an emancipated son should be appointed heir under a condition which it is not in his power to comply with, he can receive praetorian possession of the estate contrary to the provisions of the will; and he ought to receive it, because he was appointed heir, but he cannot obtain it contrary to the provisions of the will. If, however, the condition should not be fulfilled, he must be protected by the Praetor to the same extent as if he had obtained possession contrary to the provisions of the will.

(14) Even if a grandson is appointed heir under a condition of this kind, the same rule will apply.

(15) Where one of several children is not appointed heir, but his slave is appointed, and he orders him to accept the estate, possession contrary to the provisions of the will should be denied him.

(16) The same rule applies if the child should prefer to take what was left to him, or to his

slave; for, in this instance, the possession of the estate contrary to the provisions of the will should be refused him.

4. *Paulus, On the Edict, Book XLI.*

It should be noted that the possession of property contrary to the provisions of the will is promised to children whether there is an heir, or not. And this is the reason why we say that the children have a right to the possession of the estate in opposition to the will itself.

The contrary rule applies to the case of a patron.

(1) Where anyone appoints an heir whom he has under his control, or disinherits him, and passes over a grandson by him, there is no ground for the application of the Praetorian Law, because the grandson will not be his legal heir.

This rule is also applicable to more distant degrees of relationship.

(2) The Edict granting possession contrary to the provisions of a will does not apply to the wills of women because they have no heirs-at-law.

(3) Where an unborn child is passed over, another child, who has been appointed heir to his father, can be permitted to take possession of the property of the estate, even before the birth of the child first mentioned; because it would be unjust for an heir, who was not appointed, to claim possession of the estate, so long as such possession can be demanded contrary to the provisions of the will, and possession cannot be granted contrary to the provisions of the will, as long as the child who has been passed over is not yet born; and even if he should die before birth he will, nevertheless, transmit the right of possession of the estate to his heir. This is especially necessary where an emancipated child has been appointed heir, as, in the meantime, he cannot enter upon the estate.

5. *Julianus, Digest, Book XXIV.*

If, however, the children should die before demanding praetorian possession of the estate, it will not be unjust for the Praetor to decide that their heirs shall have the advantage of possession, either in compliance with the provisions of the will, or in opposition to the same.

6. *Paulus, On the Edict, Book XL.*

Where an emancipated son has a son and then dies, and the grandfather dies afterwards, the grandson will be entitled to praetorian possession of the estate of his grandfather.

(1) Where the grandfather has emancipated his son and grandson, the grandson will not be entitled to his estate during the lifetime of the son, but after the death of his father he will be entitled to praetorian possession of the estate of his grandfather.

(2) If the grandson alone should be emancipated, and the grandfather, and then his father, should die, the grandson, who has been emancipated, will be entitled to the estate of his father, under the Praetorian Edict, because he would be the heir of his father if he had not been freed from the control of his grandfather.

(3) Where a son has been emancipated, and the grandson retained under the control of the grandfather, and both of them have been passed over, both will be entitled to possession of the estate under the Praetorian Law.

(4) If the son who has been emancipated belonged to an adoptive family, and has *a* son, the grandson will not be entitled to the possession of the estate of the natural grandfather under the Praetorian Edict. And even if the emancipated son, after having had sons born to him, should give himself in adoption, the same rule will apply.

It is clear that if a child born in the family of the adoptive grandfather should be emancipated, he will be entitled to praetorian possession of the estate of his natural grandfather. Adoption

does not prejudice the rights of a child, so long as he remains in a strange family. Moreover, if he is emancipated, he can obtain possession of the estate of his parents under the Praetorian Edict; provided that he is emancipated during their lifetime, and not after their death; for it is certain that he cannot be emancipated after their decease.

7. *Gaius, On the Provincial Edict, Book XIV.*

If a son should be emancipated, and his son retained under the control of his grandfather, the grandson, during the lifetime of his grandfather, will be permitted to obtain praetorian possession of the estate of his father.

8. *Ulpianus, On the Edict, Book XL.*

The Praetor does not think that children who have been disgraced by disinheritance, and excluded from the succession, should be permitted to obtain praetorian possession, in opposition to the terms of the will, just as by the Civil Law, they do not prevent the execution of the will of their parents; for, under these circumstances, they have the right to attack the will as inofficious, if they desire to do so.

(1) It is not sufficient for an heir to be disinherited by this being stated in any part of the will, but he must be specifically mentioned as belonging to that degree against which the possession of an estate is claimed under the Praetorian Law. Hence, if the son should be disinherited in the first degree, and passed over in the second, and the heirs appointed in the first degree do not demand praetorian possession of the estate, the said son can obtain possession of the same in opposition to the terms of the will.

(2) Every disinheritance does not bar a child from obtaining possession of an estate contrary to the provisions of the will, but only where this is legally done.

(3) When the son who is disinherited is one of several heirs, Marcellus, in the Ninth Book of the Digest, says that he is not considered to be disinherited, and therefore he can claim possession under the Praetorian Law, in opposition to the terms of the will, against any of the other heirs.

(4) If a son is disinherited, and then appointed heir, and the degree in which he is appointed takes effect, I think the Edict will become operative with reference to the other son, and that he can demand praetorian possession of the estate in opposition to the terms of the will.

(5) Where a son is passed over in the first degree, and disinherited in the second, and the heirs appointed in the first degree die before the death of the testator, it must be said that the son who has been passed over will not be entitled to praetorian possession of the estate in opposition to the terms of the will; for the condition of the estate with reference to the second degree is such that it cannot be entered upon in the first degree, nor can praetorian possession of it be claimed.

If, however, the appointed heir should die after the death of the testator, Marcellus holds that the right of praetorian possession of the estate, contrary to the provisions of the will, having once vested in the son, he will continue to be entitled to it. And even if the condition upon which the appointment of the heir depended should fail to be fulfilled, he also says that the son who was passed over in that degree can also claim praetorian possession contrary to the provisions of the will.

He also says that the same rule will apply even if a posthumous child, who was appointed the heir, should not be born; for he holds that, in this instance, the son will be entitled to praetorian possession of the estate in opposition to the terms of the will.

(6) Where anyone writes his disinheritance with his own hand, let us consider whether he can obtain praetorian possession of the estate contrary to the provisions of the will. Marcellus, in the Ninth Book of the Digest, says that a disinheritance of this kind will prejudice his rights,

because the Senate has not prescribed that, where anyone performs some act against himself, it shall be considered as not having been written.

(7) Where anyone, after having disinherited his emancipated son, arrogates him, Papinianus, in the Twelfth Book of Questions, says that natural rights will always prevail in a case of this kind, and therefore that such a disinheritance will prejudice the son.

(8) With reference to a stranger, however, he adopts the opinion of Marcellus that disinheritance will not prejudice his rights, if he should subsequently be arrogated by his father.

(9) Where a son has returned from captivity under the right of *postliminium,* it must be said that disinheritance previously made will injure him.

(10) If a natural father should disinherit his son while he belongs to an adoptive father, and afterwards his son is emancipated, the disinheritance will prejudice his rights.

(11) The Praetor does not wish that children who have been given in adoption should be excluded from the possession of an estate, provided they are the appointed heirs; and Labeo says that his decision is most just, for the children are not entirely strangers. Therefore, if they should be appointed heirs, they can obtain praetorian possession of the estate in opposition to the terms of the will; but they themselves, alone, cannot render the Edict operative, unless one of those who have been passed over can cause it to be applicable. If, however, this child should not be appointed heir, but another person, who can acquire the estate for him, is, there will be no reason why we should permit him to obtain possession contrary to the provisions of the will.

(12) Moreover, in order that these children should be permitted to obtain praetorian possession, they must be the direct descendants of the testator, for if I have given in adoption a son, whom I myself have adopted, and the Edict is rendered operative by my other children, praetorian possession of the estate contrary to the provisions of the will shall not be granted to the aforesaid child.

(13) Praetorian possession in opposition to the terms of the will is also granted to a child belonging to an adoptive family, if he is appointed heir in the degree against which possession of the estate can be demanded.

(14) It is not surprising that an emancipated son, who has been passed over, should be able to confer upon the appointed heirs greater rights than they would have been entitled to, if they had remained the sole heirs; for if a son, who was under the control of his father, is appointed heir to a fourth part of his estate, and another son, who has been emancipated, is passed over, he will receive half of the estate through the emancipated son, and if he did not have an emancipated brother, he would only be entitled to a twelfth part of the property.

Where an heir is only appointed for a very small share of an estate, and the Edict is applicable, he will be not only entitled to the enjoyment of the share to which he was appointed heir, but he can obtain much more through praetorian possession. For the Praetor, when he grants possession of an estate in opposition to the terms of the will, decides to give those shares to each of the children which they would have been entitled to, if their father had died intestate, and the child had remained under his control. Therefore, whether the child who was emancipated, or remained under his control, or was given in adoption, was appointed heir to a small share of the estate, he will not be restricted to that portion of the same to which he was appointed heir, but will be entitled to a full share.

9. *Gaius, On the Provincial Edict, Book XIV.*

It makes no difference whether the adoptive father is living or dead, for the only inquiry made is whether the child belongs to the adoptive family.

10. *Ulpianus, On the Edict, Book XL.*

If, after the death of the testator, the appointed heir should give himself in adoption, he can obtain praetorian possession of the estate contrary to the provisions of the will, because the adoption of the appointed heir does not prejudice other heirs mentioned in the will.

(1) If a son should be given in adoption to his maternal grandfather by his natural father, and the Edict takes effect with reference to another child, the better opinion is that the latter can obtain possession of the estate; for we do not require him to enter upon it, but it is sufficient for it to be transferred to him, and that it can be legally acquired.

(2) Where a son is given in adoption, and, after having accepted the estate by the order of his adoptive father, he is emancipated, he can obtain praetorian possession of the estate in opposition to the terms of the will; for he himself will be more entitled to it than the adoptive father.

(3) It should be noted that if a son given in adoption should enter upon the estate, possession will be granted to him contrary to the provisions of the will; but, on the other hand, if anyone should receive a legacy or a share of the estate, he will be excluded from praetorian possession contrary to the terms of the will.

(4) Children who are not entitled to possession contrary to the provisions of the will cannot even obtain a share of the estate, if the Edict is applicable; for what good would it do to favor them and enable them to have a portion of it, since they are not entitled to anything?

(5) Children who have been disinherited cannot render the Edict operative, hence they cannot be joined with the others when the latter obtain possession of an estate under the Praetorian Law; and they have only one ground of complaint, that is, to allege that the will is inofficious.

(6) Those who demand praetorian possession in opposition to the terms of the will, for the benefit of others, do not wait until those children who have been passed over make application for possession, but they themselves can demand it at any time. For, having been once admitted to obtain it for the benefit of others, they do not concern themselves as to whether the former heirs intend to demand it or not.

11. *Paulus, On the Edict, Book XLI.*

Where a son given in adoption is appointed heir by his natural father, and another claims the benefit of the Edict contrary to the provisions of the will, the latter will be entitled to the preference. If, however, the condition should fail to be fulfilled, he will be excluded from possession.

I think that this also applies to him who has been absolutely appointed an heir, but that was not done in conformity to law.

(1) Praetorian possession of an estate contrary to the provisions of the will is divided in the same manner as legal succession on the ground of intestacy. Hence grandsons by one son will have a single share between them.

12. *Gaius, On the Provincial Edict, Book XIV.*

Where two sons together with two grandsons by another son are entitled to praetorian possession of an estate, and one of the grandsons does not claim it, his share will accrue to his brother; but if one of the sons does not claim possession, his brother, as well as the grandsons, will profit by it, for then the estate will be divided into two equal parts, of which the son will obtain one, and the grandsons the other.

(1) Where there are two wills, and one, by which a son is disinherited, is pr'operly drawn up, and the second, in which the son is passed over is imperfect, he who is passed over in the last will can legally claim praetorian possession of the estate, if the heirs mentioned in the second

will are such as should have preference over those mentioned in the first, in case the son should be excluded. Hence the rule is established that, when he against whom the son claims praetorian possession of the estate can obtain it if the son should be excluded, the latter also can legally demand praetorian possession, but if he could not obtain the estate, the son will also be excluded.

13. *Julianus, Digest, Book XXIII.*

Where an emancipated son obtains praetorian possession of an estate in opposition to the terms of the will, the appointed heir will be compelled to surrender to him the lands and slaves belonging to the estate; for it is only just that everything which the appointed heir has obtained from the estate should be transferred to him whom the Praetor has appointed in his place.

(1) Where anyone has two sons, and gives in adoption a grandson by one of them, and appoints him his heir, after having passed over the other son, the question arises what rule should be followed in this instance, and whether the grandson should obtain merely the share of his father, or a full share of the inheritance. I answered that where a grandson is given in adoption and appointed an heir, as long as his father is under the control of another, or is emancipated, he cannot obtain praetorian possession in opposition to the terms of the will. If, however, his father should die before obtaining praetorian possession of the estate, the grandson will not be permitted to claim it.

(2) If a father, after having passed over an emancipated son, should appoint his other two sons his heirs, one of them being still under his control, and the other given in adoption, and two grandsons by the latter belonging to the family were also passed over in the will, the emancipated son, the son who remained under his father's control, and the one given in adoption, together with his two children, can each demand possession of a third of the estate, in such a way that the last one mentioned will be entitled to a sixth, and his children to another sixth of the same.

(3) Where a father, who had two sons, emancipated one of them who himself had children, and afterwards adopted one of the grandsons whom he had previously emancipated, instead of his son, died after having passed over the emancipated son in his will, it would be but just to grant relief to the grandson who took the place of the son, and for the estate to be divided into three parts, in such a way that the son who remained under the control of his father should have one; the grandson who was adopted instead of the son, another; and the emancipated son, along with his own son who took the place of the grandson, the third. And even if the son should die and another of the grandsons be adopted in his stead, the estate must be divided into three parts, and it would be equitable for the grandson, who was adopted instead of the son, not to have less than he would have had if he had not been included among the grandsons, but a stranger had been adopted.

14. *Africanus, Questions, Book IV.*

If of two sons who had been emancipated one was appointed an heir, and the other was passed over in the will, and the one appointed should enter upon the estate, it is held that, although a case of this kind is not expressly referred to by the terms of the Edict, still, the son who was appointed heir cannot demand praetorian possession of the estate because he has accepted the will of his father. For the Edict does not permit an emancipated son to obtain praetorian possession if he has received the legacy, whether he received it from the appointed heir, or from those who under the Praetorian Law claim possession contrary to the provisions of the will.

It must, however, be observed that the Praetor should protect the appointed heir who accepts the share of the estate left him by the will, provided he does not receive a larger share of the same than he would have been entitled to, if he had obtained praetorian possession; and it is in

this respect only that he can prejudice himself. But if he was appointed heir to a small portion of the estate, he can only retain that portion, and he will be compelled to pay any legacies which may be due to foreign heirs.

Where the appointed heir is under paternal control, and he becomes a necessary heir, it may be said that he can demand praetorian possession of the estate, provided he has not interfered in its affairs, for if he has, he will be considered to occupy the same position as an emancipated son, because he has approved the will of his father.

(1) A son, while a member of an adoptive family, married and had a son, and emancipated him after the death of his adoptive father. It was held that his grandson could, by a decree of the Praetor, claim possession of the property of the estate of his natural grandfather, in opposition to the will of the latter.

Again, if an emancipated son, after having himself had a son, and emancipated him, should give himself to be arrogated, and die after the death of his adoptive father, there can be no doubt that, under a decree of the Praetor, he would be entitled to praetorian possession contrary to the provisions of the wills of his father and grandfather, in order to prevent him from otherwise being excluded from the estate of both of them.

15. *Marciamis, Rules, Book V.*

Where an emancipated son is passed over in a will, I do not think that he can claim praetorian possession of the estate in opposition to the terms of the will, if the appointed heir should interpose an exception on the ground of fraud, based on a debt which he owed his father; for, in this instance, he has, as it were, abandoned the right to claim praetorian possession of the estate.

This, however, must be understood to be applicable where the son was not willing to bar the heir claiming the debt, by means of the exception, "If possession of the estate contrary to the provisions of the will cannot be granted to the son," but prefers to avail himself of an exception on the ground of bad faith.

16. *Pomponius, On Sabinus, Book IV.*

If an emancipated son should leave his son under the control of the grandfather of the latter, and charge a foreign heir under a trust to transfer his estate to him, if he should be released from the control of his grandfather, possession of the estate ought not to be given to the grandfather by the Praetorian Law, if there was reason to think that he would waste the property of the grandson.

17. *Ulpianus, On Sabinus, Book XXXV.*

If a father should give himself in adoption, and his son should not follow him on account of his having been previously emancipated, the son will not be permitted to demand praetorian possession of his father's estate, because the latter belonged to one family and the son is a member of another. This opinion was also adopted by Julianus.

Marcellus, however, says that it seems to him to be unjust that the son should be excluded from praetorian possession of the estate, for the reason that his father gave himself in adoption, for when a son does not give himself in adoption and his father does, this leaves the son without any father; which opinion is not unreasonable.

18. *Hermogenianus, Epitomes of Law, Book III.*

Where, however, a son is disinherited under a condition, and demands praetorian possession of the estate contrary to the provisions of the will, even though he may have been appointed heir under a condition, he shall be excluded from possession of the estate; for children are deprived of the estates of their parents in consequence of a positive

resolution.

(1) The retention of a legacy and of a donation *mortis causa,* as well as the execution of a trust is refused to one who has obtained praetorian possession of an estate in opposition to the terms of the will; and it makes no difference whether the bequest was acquired directly, or by the intervention of another.

19. *Tryphoninus, Disputations, Book XV.*

When it is said that praetorian possession of an estate contrary to the provisions of the will is granted to children, this should be understood to mean that it is sufficient that there was a will at the time of the death of their father, under which they could either accept the estate, or demand possession of it under the Praetorian Edict; although neither of these things was done, or could have been done afterwards. For if all the appointed heirs and their substitutes should die before the testator, and an heir should be appointed who was not capable of taking under the will, it would be useless to claim possession contrary to the provisions of the will, which would be absolutely without effect.

20. *The Same, Disputations, Book XIX.*

A testator disinherited his son, who was under his control, and passed over another whom he had emancipated. The question arose under what circumstances the emancipated son would be entitled to praetorian possession of the estate. I answered that if the foreign heirs who were appointed should accept the estate, the son who remained under the control of his father would be excluded. If, however, the said heirs should reject it, which they could easily do, as they could obtain

nothing from it on account of him who was entitled to praetorian possession contrary to the provisions of the will, and because the son who had remained under the control of his father, having become his own master, would be the heir-at-law of his father; still, the emancipated son, having demanded praetorian possession in opposition to the terms of the will, would alone be entitled to it. But, as disinheritance is of no force or effect, where an estate is not accepted under the will, Julianus very properly holds that this should not prevent the disinherited son from acquiring praetorian possession of the estate of his father contrary to the provisions of the will. In order to prevent a will, void in every other respect, from seeming to be effective solely so far as the reproach of disinheritance is concerned, the matter is referred to the death of the intestate, so that the Praetor may protect the emancipated son against the direct and sole heir-at-law, and secure for him half of the inheritance.

Therefore the benefit to be obtained from the appointed foreign heir is purchaseable, and as he can legally obtain nothing of the estate, by entering upon the same he can exclude the son remaining under parental control, and by law will transfer it in its entirety to the emancipated son, in opposition to the terms of the will.

If, however, the appointed heir should reject the estate, he will render the disinherited heir, who now becomes the sole heir, entitled to his share of the same. For, just as the Praetor protects the emancipated heir when an estate is not entered upon, so the son who remained under his father's control should not be absolutely excluded in case the estate should be accepted; but he will be permitted to claim it, as against the emancipated son, on the ground that the will is inofficious.

(1) Let us see, however, where both heirs obtain the estate of their father, whether the one who has been emancipated is subject to contribution to the other, as he is not obliged to do this by the terms of the Section of the Edict under which he obtains praetorian possession in opposition to the terms of the will, since it directs security for contribution to be furnished by the emancipated heir, to those to whom possession of the estate is given. For the heir who is under the control of his father is not called to the praetorian possession of the estate contrary

to the provisions of the will, because he was expressly disinherited. Nor is contribution required by that Section of the Edict under which the emancipated son is permitted to obtain praetorian possession after his father has died intestate, for the reason that although his brother may be the heir-at-law; still, the emancipated son does not obtain praetorian possession of the estate on account of the above mentioned Section.

I fear that the act of the appointed heir, who rejects the estate, will not be of any benefit to the son, except to enable him to obtain half of the estate of his father; but by it he will not acquire half of the property of the son who was emancipated. In a case of this kind the result will be that, if the heir who is under the control of his father is appointed to a smaller share than he would otherwise have been entitled to, and if his emancipated brother has obtained praetorian possession of the estate, although contribution is indicated by the words of the Edict, still by the decision of the Praetor this advantage will be denied him.

There is, however, much more reason that he should not be benefited by contribution, because, having been disinherited by his father, he is not called to the praetorian possession of the estate in opposition to the terms of the will; and on account of the rejection of the estate by the appointed heir, he will not be entitled to anything, because the emancipated son, having obtained possession contrary to the provisions of the will from the Praetor, occupies the position of the proper heir.

(2) The said emancipated son will be compelled to pay out of his share any legacies bequeathed to children, and ascendants of the deceased, not all of them, but only half; because of what remains of the inheritance for the son under paternal control. There is, however, no cause for the legatees to bring suit against him, since he is rightfully the heir at law. But where he received praetorian possession of the estate in opposition to the terms of the will, even if the estate should not be accepted by the appointed heir, he must pay the legacies granted by that part of the will in opposition to which he obtained possession of the estate. Therefore, in this instance, the condition of the son who remains under paternal control will, in fact, be better than if he had not been disinherited.

21. *Modestinus, Pandects, Book VI.*

Where a man has a son, and by him a grandson under his control, and gives his son in adoption, but retains his grandson under his authority, and his son, having subsequently been emancipated by his adoptive father, dies, after appointing foreign heirs, the son of the one who remained under the control of his grandfather can demand praetorian possession of the estate of his father, although he may never have been under his control. Hence it is held that it is not indispensable for him to have been under his control; for if it is decided otherwise, and the son should not be emancipated, the grandson of him who remained under the control of his grandfather can demand praetorian possession of the estate contrary to the provisions of the will.

(1) The same rule of law applies where a son, having been emancipated, a grandson by him remains under the control of his grandfather, and is afterwards given in adoption to his father; that is to say, he can demand praetorian possession of the estate of his grandfather in opposition to the terms of his will, because by this adoption he does not become a member of another family.

(2) If, however, my emancipated son should adopt a stranger as his son, the said adoptive son cannot demand praetorian possession of my estate contrary to the provisions of my will, for the reason that he never sustained the relation of grandson to me.

TITLE V.

CONCERNING THE PAYMENT OF LEGACIES WHERE PRAETORIAN POSSESSION OF AN ESTATE IS OBTAINED CONTRARY TO THE PROVISIONS OF THE WILL.

1. *Ulpianus, On the Edict, Book XL.*

This Title treats of a principle of natural equity which is introduced for a definite purpose; that is, in order to compel those who render a will of no effect by obtaining possession in opposition to its provisions to pay legacies and execute trusts for the benefit of certain persons, namely, children and ascendants, wives and daughters-in-law, to whom bequests of dowries have been made.

(1) The Praetor employs the terms ascendants and children in a general sense, and does not specify the different degrees of relationship ; hence, payment must be made to them *ad infinitum.* Nor has the Praetor designated the different persons, or whether they belong to the male or the female sex. Therefore, anyone either in the ascending or descending line is permitted to claim his legacy; provided, however, the tie of blood-relationship exists between them.

(2) We permit those children also to claim their legacies who have been given in adoption by the testator, or who are adoptive, in case they still remain children until his death.

(3) Legacies bequeathed to posthumous descendants shall also be paid.

2. *Julianus, Digest, Book XXIII.*

Therefore, if a son should be emancipated while his wife was pregnant, and receive praetorian possession of an estate in opposition to the terms of the will, he will be obliged to pay a legacy bequeathed to the grandson.

3. *Ulpianus, On the Edict, Book XL.*

Where, however, donations *mortis causa* have been made, I think that they should be sustained; but if they are given to different persons than those above mentioned, it is my opinion that the recipients should be deprived of them.

(1) The Prsetor, however, had in mind only descendants and ascendants, for he does not include a legacy left to a brother or a sister.

(2) Moreover, that solely is owing which was left directly to the ascendants or descendants; for if anything should be bequeathed to a slave belonging to them, or to a person subject to their authority, they will not be entitled to it, for we do not ask by whom the legacy is acquired, but who has received the honor.

(3) Where, however, a legacy is bequeathed conjointly to one of the above-mentioned persons and to another to whom payment should not be made, only the portion belonging to the former will be preserved.

(4) Likewise, if any one of those persons is charged to pay to a stranger a legacy which was left to himself, it must be said that it should not be paid, because he will obtain no advantage thereby.

(5) If you suggest a case where a legacy is bequeathed to a stranger, and he is charged to pay it to one of the descendants or ascendants of the testator, we hold that, under the circumstances, it should be paid.

(6) Moreover, if a bequest is left to a stranger under the condition that he shall pay it to one of the descendants of the testator, it is perfectly just to say that the Prsetor ought not to refuse him an action to recover it.

(7) Again, only those legacies which are legally bequeathed should be paid by the persons

who obtain praetorian possession of the estate contrary to the provisions of the will. Hence it is true that they are not payable where a son obtains praetorian possession in opposition to the terms of the will.

4. *Julianus, Digest, Book XXIII.*

On this account it frequently happens that heirs who have been appointed reject the estate, because they know that an emancipated son has either demanded, or is about to demand, possession contrary to the provisions of the will.

5. *Ulpianus, On the Edict, Book XL.*

A testator appointed his son, who was under the age of puberty, his heir, and appointed a substitute for him, but passed over his emancipated son; and both sons afterwards obtained praetorian possession of the estate. Certain legacies were bequeathed which were to be paid by the substitute of the minor, not only to descendants and ascendants, but also to strangers.

The question arises, if the child under puberty should die, whether the substitute would be compelled to pay the legacies. It may be stated that if the said minor is charged with the legacies, they must be paid only to the descendants or ascendants of the testator; but if the substitute of the minor was charged with their payment, he must pay them to all the legatees, after taking into account the Falcidian Law; that is to say, he can retain the fourth of the half of the estate of the father which came into his hands, or an eighth of the entire estate.

(1) If the said child under the age of puberty should be appointed heir to only one-twelfth of the estate, .the better opinion is that the substitute must subject half of the assets to contribution and then pay the legacies, after having retained the fourth allowed by the Falcidian Law; for, even if the minor was appointed heir only to a twelfth of the estate, still, the accrual will increase the legacies with which the substitute is charged.

(2) The Prsetor, moreover, desires that legacies should be paid to all the children, excepting those to whom he grants possession contrary to the provisions of the will, for the reasons above mentioned; since he does not think that they should be permitted to claim the legacies bequeathed to them after he has granted them praetorian possession. Hence a child should determine whether he prefers to demand praetorian possession in opposition to the terms of the will, or to claim his legacy. If he should elect to proceed against the will, he will not be entitled to the legacy; if he should accept the legacy, he cannot claim praetorian possession contrary to the provisions of the will; which is our present practice.

(3) Where anyone obtains praetorian possession of an estate in opposition to the terms of the will, and it afterwards should appear that he is not one of the children who is entitled to it, but still is one of those to whom legacies should be paid, it has been established that he shall not be deprived of the right to claim his legacy, whether by the ordinary proceeding under the Praetorian Law, or by that authorized by the Carbonian Edict.

(4) Again, a legacy may be refused not only if a person has obtained praetorian possession, but also if he has received anything by the will of the deceased. The result is, as Julianus says, that if an heir, who has obtained praetorian possession of the estate contrary to the provisions of the will, had already been appointed a substitute for his brother, who was under the age of puberty, in case of the death of his minor brother, he will be refused an action to recover his estate.

(5) Where legacies are bequeathed to the children of the testator, and to strangers, although the deduction prescribed by the Falcidian Law will be made in the case of all of them, and will diminish the legacies of the children; still, for the reason that the legacies will not be paid to the strangers, those of the children will be increased.

(6) If, however, a share of the estate should be bequeathed to one of the descendants or ascendants, must it be preserved for him in the same way as is customary with legacies?

Julianus very properly holds that, in this instance, the same rule should be observed with reference to a share of the estate, as has been adopted with respect to a legacy.

This opinion is approved by a Rescript of the Divine Pius, as estates are not only bestowed by an honorable title, but such testamentary dispositions are also invested with greater distinction than where mere legacies are bequeathed.

(7) Moreover, relief should be granted persons of this kind to the extent, however, of protecting only their full shares, even though they may have been left a larger portion of the estate; for if they had received a smaller portion, they would be only entitled to an action to recover as much as had been bequeathed to them.

The same rule should be observed with reference to legacies, property left in trust, and donations *mortis causa.*

(8) Shall he to whom a portion of the estate has been left be compelled to pay the bequest to all the legatees, or only to certain privileged persons? It is approved as the better opinion that they should be paid only to the privileged persons. He, however, will not be the only one to be benefited by this; for if any share of the estate is charged with legacies, whether to descendants, ascendants, or strangers, we can entertain no doubt that whatever is not paid to the strangers will benefit the descendants and ascendants.

Therefore, the only instance where legacies not paid to strangers will accrue to him who demands praetorian possession in opposition to the terms of a will is where they should not be paid to legatees who are either descendants or ascendants.

6. *Julianm, Digest, Book XXIII.*

Salvius Aristo to Julianus, Greeting. A certain man had an emancipated son, and, having passed him over in his will, he appointed his father and a stranger his heirs, and gave his father a legacy in addition. The son demanded praetorian possession of the estate in opposition to the terms of the will. I ask, if both the heirs entered upon the estate, or if either of them did, or if neither of them should have done so, whether the legacy would be payable to the father, and if so, how much of it he would be entitled to ?

I answered that I have often remarked, that the Section of the Edict by which an emancipated son who has obtained praetorian possession of an estate contrary to the provisions of the will is ordered to pay legacies, bequeathed to children and parents, is somewhat defective ; for if three-fourths of an estate should be bequeathed to anyone, he to whom it was left would be entitled to more than the emancipated son. This, therefore, should be regulated by a decree in such a way that the emancipated son may have his share of the estate, and that the appointed heir will not receive more than he does; and the amount of the legacies should be regulated so that no more will be paid to anyone on this account than will remain in the hands of the emancipated son by virtue of praetorian possession of the estate.

7. *Tryphoninus, Disputations, Book XVI.*

For, according to a Constitution of the Divine Pius, addressed to Tuscius Fuscianus, Governor of Numidia, parents and children, who have been appointed heirs, should be protected to the amount of their full shares, just as in the case of legacies, in order that such persons may not obtain any more through their appointment as heirs than would proportionally come into the hands of one who had obtained praetorian possession of the estate contrary to the provisions of the will.

8. *Ulpianus, On the Edict, Book XL.*

Let us see what we should understand by the term "full shares." Suppose, for instance, that there are two persons who have obtained praetorian possession contrary to the provisions of the will, and there is only one heir among the descendants and ascendants, the third of the

estate would be the full share due to each. Where, however, there are three persons who have obtained praetorian possession in opposition to the terms of the will, the full share due to each will be one-fourth. This rule is also observed in the case of legacies.

Where, however, one of the descendants obtains praetorian possession in opposition to the terms of the will, and several of the descendants and ascendants have received legacies, we must understand the rule to be, that a son who has been passed over will be entitled to half of the estate, and that all the other heirs who are among the number of descendants and ascendants will be entitled to the remaining half.

(1) Where any one of the descendants or ascendants is appointed an heir, as well as a legatee, shall we preserve for him only his legal share of the estate, or shall we also pay him his legacy; or shall we only give him which of the two he may select? The better opinion is, that both should be preserved for him, in such a way, however, that in receiving both he shall not have any more than the share of the estate to which he is entitled.

(2) If he for whom the share is preserved enters upon the estate, the grants of freedom made by the testator will necessarily become valid through his acceptance. Nevertheless, we must consider whether he who enters upon the estate should be liable to an action on the ground of bad faith. The better opinion is that, if after notice has been served upon him by the heir who was passed over, he obtained praetorian possession of the estate contrary to the provisions of the will, he should accept it, promising to pay the other his full share, he will be somewhat to blame, and will be liable to an action on the ground of bad faith, for he injures the estate, as the grants of freedom will become valid.

(3) Where anything has been bequeathed to the wife or daughter-in-law of the testator over and above her dowry, the excess shall not be paid, where praetorian possession has been obtained contrary to the provisions of the will.

(4) There is no doubt, whatever, that by the term "daughter-in-law" the wives of grandsons and others are not indicated.

(5) Moreover, where a dowry is increased, I do not think that the bequest should be reduced to the full share, where it was left to the wife or the daughter-in-law, as these women are entitled to it as a valid debt.

(6) The Praetor not only includes a dowry as a privileged bequest, but also anything which has been left instead of the dowry; as, for example, where the dowry consists of certain property, and a sum of money can be bequeathed in its stead, or *vice versa;* provided, however, that it is expressly stated that the money is left in lieu of the dowry.

9. *Paulus, On the Edict, Book XLI.*

An action will be granted to the woman, even though the legacy is larger than the dowry.

10. *Ulpianus, On the Edict, Book XL.*

I think that the woman should also be protected, even if she has been appointed heir to a certain portion of the estate in lieu of her dowry.

(1) Moreover, we require that the woman should have been the wife of the testator at the time of his death. If he left the dowry as a preferred legacy to his daughter-in-law, and she should be married at the time of his death, the legacy is void, because the dowry is not yet payable. But as, while the marriage exists, an action will be granted against the heirs of the father-in-law, it must be held that the woman has the right to claim this preferred legacy of her dowry.

(2) He who demands praetorian possession in opposition to the terms of the will is not obliged to pay all the legacies bequeathed in the different degrees mentioned in the will, but only those which are bequeathed in that degree against which he obtained praetorian possession. For possession is sometimes demanded against another degree in which legacies must be paid;

as, for example, when the testator has established two degrees of heirs, and has passed over his emancipated son, and still, in both degrees, he bequeathed legacies to descendants and ascendants.

Julianus says that if anyone appointed in the first degree is living, the person obtaining praetorian possession must pay the legacies bequeathed to children and parents in the first degree; if, however, none of them are living, he must pay those left to persons in the second degree. But if no one belonging to either the first or the second degree should be alive at the time of the death of the testator, then, the son who has been passed over would seem to be entitled to praetorian possession *ab intestato,* and the legacies need not be paid to anyone.

If, however, the appointed heirs should die after the death of the testator, and before the acceptance of the estate, the claim for praetorian possession would appear to be asserted against them; and any legacies with which they were charged should not be paid, but only those with which the substitutes have been charged.

11. *Paulus, On the Edict, Book XLI.*

Where both the appointed heir and the substitute are living at the time of the testator's death, we hold that the legacies with which the appointed heir was charged should be paid, even though no one may enter upon the estate.

12. *Ulpianus, On the Edict, Book XL.*

Whether the appointed heirs accept the estate or not, it must be said that the legacies with which they are charged shall be paid, although those appointed in the second degree may have accepted the estate, after the first ones have rejected it.

13. *Tryphoninus, Disputations, Book II.*

We also hold that legacies with which a substitute is charged are payable where the appointed heir has failed to comply with a condition, which was not in his power. For if he should not comply with it when he was able to do so, he should be considered as occupying the same position as an heir who refuses to accept an estate, as he will not be entitled to any benefit from it, and deservedly so, as he did not observe the condition.

14. *Ulpianus, On the Edict, Book XIV.*

Sometimes a person obtains praetorian possession of an estate contrary to the provisions of the will, by a right which he enjoys in accordance with its provisions; for instance, where an emancipated son is appointed the heir, and another emancipated son is passed over in the will, and the appointed heir obtains praetorian possession in opposition to the terms of the will, and the heir who has been passed over fails to apply for it. In this instance, it is perfectly clear that the former can be compelled to pay all the legacies, just as if recourse had not been had to the Edict; for the accident of the emancipated son who was passed over ought not to be a source of profit to the heir who was appointed, merely because he who was passed over did not avail himself of his right.

(1) Where a son has been appointed heir by a testator, and is charged with a legacy to one of his descendants, or ascendants, and together with the others obtains praetorian possession of the estate in opposition to the terms of the will; it is better to decide that all those who have obtained praetorian possession in opposition to the terms of the will should be compelled to pay this legacy.

15. *Paulus, On the Edict, Book XLI.*

Where a son who is under paternal control is passed over, he will not be obliged to pay the legacies, even though he should demand possession of the estate in opposition to the terms of the will; because he will obtain the estate on the ground of intestacy, and not through having claimed praetorian possession. An exception based on fraud will not prejudice his rights; and

it would be absurd for him to be compelled to pay the legacies because he demanded praetorian possession; as, without this, he would be entitled to the whole estate as heir at law.

Whence, if there are two heirs who have been passed over, namely, one who has been emancipated, and the other who was still under paternal control, some authorities hold that the emancipated heir is not obliged to pay the legacies, because by the act of his brother he obtained half of the estate, when if he had not made the demand he would have been entitled to all of it.

What, then, should be done when the proper heir is passed over? The rule which has just been mentioned will apply. Where, however, an heir is appointed and has the will of his father, he should be liable to the legatees, even if he fails to demand praetorian possession of the estate.

(1) But if one of the sons who was emancipated is appointed heir, and the other is passed over, and both of them obtain praetorian possession of the estate in opposition to the terms of the will, the one who was appointed heir, as well as the one who was passed over, must pay the legacies. If, however, the appointed heir is the only one who obtained praetorian possession contrary to the provisions of the will, he must pay the legacies to all the legatees, just as if he had accepted the estate. But if he should accept the estate, and the one who was passed over should obtain praetorian possession of the same, the latter must pay the legacies only to those persons who are privileged.

A question arises with reference to the appointed heir, and many authorities hold that he should pay the legacies to the privileged persons. I think this opinion to be correct, since the Praetor protects him, for the reason that he is one of the children who can demand possession of the estate contrary to the provisions of the will.

(2) He must also be protected with reference to half of the estate, if he was appointed heir to a larger share than that amount, or was appointed heir to exactly one-half. Where he was appointed heir to less than half, we hold that he should be protected for no larger amount than that to which he was appointed; for how could he be entitled to more, since he did not obtain praetorian possession of the estate, and was not appointed heir to a greater portion?

(3) No legacy shall be paid to a woman who did not bring any dowry to her husband, even though it is bequeathed under the pretext of the return of her dowry.

(4) Where a foreign heir is appointed under the condition that a legacy shall be bequeathed to a privileged person, if he should pay ten *aurei* to the heir, an action will be granted him to recover his legacy, if he should pay it to anyone who has obtained possession of the estate contrary to the provisions of the will, but not if he should pay it to the appointed heir; for it is absurd that he should enjoy the benefit of the estate, and that the other should sustain the burden of paying the legacy. If, however, he should be ordered to pay it to Titius, he must not pay it to him, but to his son.

16. *Ulpianus, Disputations, Book IV.*

If we suppose the case of two children, one of whom, being under the control of his father, was passed over in his will, and the other, having been emancipated, was appointed by him his heir, the Edict will be applicable so far as the one who is under parental control is concerned. If both of them should demand praetorian possession contrary to the provisions of the will, he who remained subject to the authority of his father will not be required to pay the legacies to the descendants and ascendants of the testator as he is entitled to the property *ab intestato.*

But can it be said that the emancipated son should not pay them himself, because he was deprived of the estate by one who would not be compelled to pay them, if he were alone? The better opinion is that the latter should, by all means, pay the legacies to the descendants and ascendants; hence if he did not obtain praetorian possession contrary to the provisions of the

will, it must be said that he should be protected with reference to half of the estate, and that he must pay the legacies to the legal representatives of the testator. I doubt whether he will be obliged to pay all the legatees; still, for the reason that he is in full enjoyment of the property of the testator, he should discharge his entire duty under the will, so far as his share of the estate is concerned.

17. *Ulpianus, Digest, Book XXXVI.*

Where an emancipated son was passed over in a will, and his father appointed a foreign heir, and charged him with the delivery of property which was lost through the fraud of the said heir, after the estate has been accepted, a praetorian action should be granted against the emancipated son, that is to say, in favor of the person to whom the son was obliged to pay the legacy; because the intention of the Praetor is that possession of an estate in opposition to the terms of the will should be granted without prejudicing the rights of other persons.

18. *Africanus, Questions, Book IV.*

A son and grandson were under the control of their father, were appointed his heirs, and the testator, in addition to this, left a legacy to the grandson. The father of the latter, another son, who had been emancipated, demanded praetorian possession of the estate, and the grandson remained content with the legacy. Certain authorities were of the opinion that an action to recover the legacy should be granted to the grandson against the son alone who remained under his father's control, because he was deprived of nothing, and the son who was emancipated obtained the share of his son, which could not be burdened with a legacy.

The more just decision is that an action would lie only against the emancipated son, and, indeed, for not more than a fourth of the estate,

19. *The Same, Questions, Book V.*

For the reason that if all the heirs should demand praetorian possession of the estate, half of it would be divided between the grandson and his father.

20. *Marcianus, Rules, Book IV.*

If the emancipated son should demand praetorian possession contrary to the provisions of the will, it is established that the descendants and ascendants of the testator should be protected. If, however, various donations *mortis causa* should have been made to privileged persons by the testator, they must contribute *pro rata* to the share of the emancipated son, just as happens in the case of the division of an estate and legacies.

(1) Where, however, a father dies intestate, his son cannot complain of donations *mortis causa,* as no contribution of legacies takes place.

21. *Papinianus, Questions, Book XIII.*

If the portion of an estate to which a privileged person is entitled through the benefit of the law is rejected, the son who has received praetorian possession will profit by that share, but he shall not pay the legacies to anyone else than to privileged persons.

22. *The Same, Opinions, Book V.*

Where praetorian possession of the estate contrary to the provisions of the will is given to an emancipated son, who has been passed over, the other son, that is the appointed heir, who has also obtained praetorian possession, or who, having been content with what he acquires under the Civil Law, does not apply for praetorian possession, he will not be entitled to any preferred legacy which may have been left to him.

23. *Hermogenianus, Epitomes of Law, Book HI.*

Those whom the Divine Pius stated could retain either what was left to them, or their legal

shares of the estate, shall obtain nothing from slaves who have been unable to secure their freedom on account of praetorian possession given contrary to the provisions of the will.

24. *Tryphoninus, Disputations, Book XVI.*

The following question has arisen, namely: should he to whom a legacy has been bequeathed be included among the number of children, so that it can be paid to him by the son who has obtained praetorian possession of the estate in opposition to the terms of the will? It was decided that he must sustain this character at the time when the legacy begins to be payable.

25. *Marcellus, Digest, Book IX.*

A certain man who had emancipated his son, and retained his grandson under his control, disinherited his son, appointed his grandson his heir to a certain part of his estate, and passed over his other emancipated son in his will. It can be maintained that the grandson had a right to demand praetorian possession of the estate contrary to the provisions of the will; for praetorian possession is distributed in proportion to the share which each one would have obtained in case of intestacy, if the father had not been a proper heir.

(1) A testator, whose son had been adopted, appointed as his heir his grandson, whom his son had subsequently begotten, and passed over the emancipated son. Will the said grandson be entitled to praetorian possession of the estate under the Edict? He ought, nevertheless, to be protected, just as ascendants and descendants are to whom legacies must be paid by those who have obtained praetorian possession in opposition to the terms of the will.

(2) If the testator had retained under his control one or more grandsons by his said son, there is no doubt whatever that he or they should be protected to the same extent, as would have been the case if the grandson by his son, or the mother of the deceased, had been appointed heirs, for he can be compared to them.

TITLE VI.

CONCERNING THE COLLATION OF PROPERTY.

1. *Ulpianus, On the Edict, Book XL.*

The subject of this Title manifestly is an equitable one; for the Praetor permits emancipated children to obtain possession of the estate in opposition to the terms of the will, and thus makes them share in the paternal estate with those who were under the control of the testator; and he thinks, on account of this, that those who desire to obtain the property of their father should place all their own property in the mass of the estate.

(1) Collation affects all those to whom praetorian possession has been given.

(2) It is clear that if the Praetor should grant complete restitution to a minor, or to anyone else entitled to it, he will also reinvest him with the right to obtain possession of the estate contrary to the provisions of the will, which he had failed to take advantage of, and will, in addition, restore to him the advantage of collation.

(3) If a son, who is under the control of his father, should be appointed heir to three-fourths of his estate, and a stranger heir to the remaining fourth, Julianus says that an emancipated son, who has obtained praetorian possession contrary to the provisions of the will, will only be compelled to collate his own property in proportion to a fourth of the estate, because he deprived his brother of only that amount. In proof of this opinion Pomponius states that an emancipated son is only obliged to collate his property with the grandsons of the testator, who were his own sons.

(4) A father appointed his son, whom he retained under his control, and a stranger his heirs, and passed over an emancipated son in his will. Both sons obtained praetorian possession of his estate in opposition to the terms of the will. It can, and not improperly, be held that the

emancipated son should only collate with his brother in proportion to the amount of the estate of which he deprived him; for if the son who was under the father's control had been appointed heir to less than half the property, it would seem unjust that collation should be required of him through whom the other son obtained a larger share of his father's estate.

(5) Therefore, there is ground for collation as often as the heir who is under paternal authority is caused any inconvenience by the intervention of the emancipated heir. Where, however, this is not the case, there no reason for collation exists.

(6) Moreover, it is certainly not necessary for the emancipated son to place his property in the mass of the estate, when he obtained it through the will of his father and received no more than the latter left him.

(7) If he received half of the estate as a legacy, or as much as he could by praetorian possession contrary to the provisions of the will, it must be said that he cannot be subjected to collation.

(8) Julianus, in the same place, says that if after praetorian possession has been obtained by the emancipated son, the son who was under paternal control should die, the former can be compelled to make collation of his property in such a way as to contribute as much to his nephew as he would have contributed to his brother himself, if he had lived.

If, however, the proper heir should die before having obtained praetorian possession of the estate, he says that the Praetor must protect his heir to the extent of the portion to which the son who was under paternal control was appointed heir, provided this does not exceed his share of the estate; but he does not permit him to apply for collation in this instance, because praetorian possession does not take effect.

(9) Again, the Praetor orders collation to be made in order that sufficient security may be given. Pomponius says that security should be furnished by means of sureties; but let us see whether it can also be furnished by depositing pledges. Pomponius, in the Seventy-ninth Book on the Edict, asserts that security for collation can be legally given either by sureties, or by pledges; and I concur in this opinion.

(10) If the brother cannot furnish security, a curator of his share must be appointed, with whom the money obtained from the estate should be deposited, so that the emancipated son can receive what was paid in after he has placed his own property in the mass of the estate. If, however, on account of his obstinacy, an action to collect his share of the estate should be refused him, after having given bond, he can recover his former rights.

(11) Moreover, although a bond is mentioned in the Edict of the Praetor, still Pomponius, in the Seventy-ninth Book of the Edict, states that even collation of the property itself can be made; for he remarks that collation can be made either by delivering the actual property or by executing a bond. Therefore, as he says, the emancipated heir divides his property with his brothers, and, although he does not give security, the terms of the Edict are complied with. We may also hold that they are complied with if he divides a portion of the property with them, and gives security to contribute more. But as some articles may remain concealed, he who does not furnish security will not make collation sufficiently, even though he divides his property. If, however, it is known of what the property of the emancipated son consists, the division of the same will constitute a sufficient collation. If this is not known, but it is said that certain effects have not been brought into the common mass, then bond must be given on account of their uncertainty.

(12) But even if the emancipated son should only place in the mass of the estate of his father as much of his own property as he will be entitled to, aside from the collation, he is said to have contributed sufficiently.

The same rule applies where he surrenders the note of a debtor to the estate, or transfers a

tract of land, or any other property, instead of what he should place in the common mass.

(13) If the emancipated son is obliged to make collation with two of his brothers, and does so with one, but not with the other, whether he gives him security, or divides his own property with him, it should be considered whether he will lose only one-sixth of the estate, or whether he should be deprived of the entire third of the same. I think that if he does not furnish security through obstinacy, an action to recover the entire third should be refused him; for he is not considered to have given security who did not provide for the indemnification of all the parties interested. But if he is not able to furnish it, only an action to recover the sixth should be denied him; in such a way, however, that he can supply the defect of the bond of the collation by the other means which we have mentioned above, or a curator may be appointed for the preservation of his property. Some allowance should, however, be made for one who does not fully contribute for some other reason than through obstinacy.

(14) A child who belongs to an adoptive family is compelled to make collation; that is to say, not he himself but the person to whose authority he is subject when required to do so, if he prefers to obtain praetorian possession contrary to the provisions of the will. It is evident that if his adoptive father should emancipate him before he claims praetorian possession of the estate, he will not be compelled to make collation, and this was stated in a Rescript of the Divine Brothers; provided, however, that the adopted son who has been emancipated releases his brothers from collation, if this was done without fraud.

(15) Neither *castrense peculium,* nor *quasi castrense peculium* is the subject of collation among brothers; for it is laid down in many Imperial Constitutions that such property must belong exclusively to each individual.

(16) But let us see whether anyone can be compelled to place, in the common mass of the estate, property which has been given by the father, or which is still due and payable on account of some office. Papinianus, in the Thirteenth Book of Questions, says that he should not be compelled to place such property in the common mass; for it must be considered to be of a private nature, on account of the obligations attaching to the office. If, however, it should still be due, the matter must be settled, so that not he alone who has obtained the office shall be liable for the debt, but that the common burden shall be sustained by all the heirs.

(17) Where a son, having been captured by the enemy, returns after the death of his father, even though at that time he had no property while he was in the hands of the enemy, he will, nevertheless, be permitted to obtain praetorian possession of the estate, and he must make collation of the property which he would have had at the time of his father's death, if he had not been taken prisoner. Collation must also be made by him, if it should be ascertained that he had been ransomed from the enemy at the time of his father's death.

(18) If a legacy should be bequeathed to an emancipated son, to take effect at the time of his father's death, he must also make collation of the legacy.

(19) If a father should be appointed an heir, and a legacy be left to him in trust for his son, to be paid at the time of his death, must this also be the subject of collation, since the trust is valid? The fact is that it should be considered just as if it had been left after the death of the father, and the son will not be compelled to place it in the mass of the estate, because, at the time of his father's death, it did not belong to him.

(20) If an emancipated son has received a dowry from his wife, he will not be required to place it in the mass of the estate, even if his wife should have died before the death of the testator.

(21) Where a minor, under the age of puberty, has been arrogated, he will be entitled to a fourth of the estate, in accordance with a Rescript of the Divine Pius; but let us see if he claims praetorian possession of the estate of his natural father, whether he must make

collation of the said fourth. This question is merely whether he shall relinquish his right of action for the fourth to his heir, or not. The better opinion is that it passes to his heir, because the action is a personal one, and therefore he must give security to place the fourth in the mass of the estate. This, however, only takes place where the right to obtain the fourth has been already established; for if the adoptive father, who emancipated the heir, is still living, it must be said that no reason exists why security should be furnished; for the hope of collation is still premature, as he, the fourth of whose estate is due, is still living.

(22) Where a person who should make collation of his property has a son who is in possession of *peculium, castrense,* he cannot be compelled to place the *peculium* in the mass of the estate. If, however, the son who had the *castrense peculium,* and the possession of whose estate was claimed under the Praetorian Edict, should already be dead at the time, can the father be compelled to subject the *peculium* to collation? As it is not necessary for the father to claim it, it must be said that it should be placed in the mass of the estate; for it is neither acquired nor taken away. I further hold that if an heir has been appointed by the son, but he does not accept the estate, and should have a substitute, the *peculium* should be placed in the mass of the estate, for the reason that it is neither acquired nor alienated at that time.

(23) Moreover, collation must take place where property no longer, belongs to the emancipated son, and he has been guilty of fraud to avoid having possession of the same. This, however, must be understood to mean that it shall only be the subject of collation where he has relinquished possession of it fraudulently, but if he has done something in order to avoid obtaining the property, it will not be subject to collation; for, in this instance, he has plotted against himself.

(24) Collation must be made of different shares as follows: for instance, where there are two sons under the control of their father, and another who, having been emancipated, has three hundred *aurei* of his own, he must contribute two hundred to his brothers, after reserving a hundred for himself; for in this way he will share equally with them, even though he may be one who ordinarily does not make collation. Where, however, there are two emancipated sons, who have three hundred *aurei,* and two of them are under the control of their father, it must also be said that each one must contribute a hundred *aurei* to each brother who is under paternal control, and retain a hundred; but the emancipated brothers themselves will not be liable to collation with one another.

(25) The collation of a dowry is made in the same manner, so that whoever makes it will also include himself among those who share it.

2. *Ulpianus, On the Edict, Book XLI.*

When we say that a grandson, born after the death of his grandfather, can obtain praetorian possession of the estate of the latter, in the name of an emancipated son, it will be necessary to hold that his property will be subject to collation; although it cannot be said that he who had not yet been born had the property at the time of his grandfather's death. Therefore, he must place the property in the mass of the estate, whether he received all of it from his father, or merely a legacy.

(1) The property of a son is understood to mean what he has left after deducting his debts. If, however, he owes a sum of money under a condition, it should not immediately be deducted, but it still ought to be placed in the mass of the estate. On the other hand, a son who is under the control of his father should give him security that, if the condition is fulfilled, he will protect him with reference to that portion of which he has made collation.

(2) Where property has been lost after the death of the father without the emancipated son being to blame, the question arises, who shall suffer the loss? Many authorities hold that property which has been lost without fraud or negligence should not be subjected to the burden of collation; and this is understood from the words with which the Praetor orders the

property to be subjected to collation, in accordance with the judgment of a reliable citizen; for a reliable citizen would not decide that property is liable to collation which a person no longer has, and which he did not lose either through fraud or negligence.

(3) Property which, by virtue of an agreement, is due under a condition, should be placed in the mass of the estate by the emancipated son.

The rule is different with reference to a conditional legacy; for, even if he should be under the control of his father, and the condition should be complied with after the death of the latter, he himself will be entitled to an action.

(4) If the emancipated son brings suit against anyone for injury committed, he need not make it the subject of collation; for a proceeding of this kind is brought rather for the gratification of revenge than for the recovery of money. If, however, he has an action growing out of theft, he should make collation of the same.

(5) Where there are three emancipated sons, and also two who are under the control of their father, Gaius Cassius, in the Seventh Book of the Civil Law, says that the emancipated sons should make collation of a third of their private property; so that, although they do not contribute to one another, they may be regarded as a single individual. They should not consider themselves ill treated if they contribute more, and receive less; because it was in their power not to apply for praetorian possession of the estate.

Julianus also assents to the Opinion of Cassius.

(6) If an emancipated grandson, born to an emancipated son, after the death of both his father and his grandfather, should obtain praetorian possession of the estates of both, each having left a proper heir, the collation to be made can be explained as follows: for example, if he has property worth a hundred *aurei,* he should contribute fifty to his uncle, and fifty to his brother, for this ratio applies whether we take into consideration the persons themselves, or the shares of the estate to which they are entitled.

(7) Where there are two emancipated grandsons, the issue of a deceased son, who demand praetorian possession of the estate of their grandfather, the question arises whether they should contribute half, or a quarter, of their property to their uncle, by way of collation. The better opinion is that each should contribute half of his property, for if, during the lifetime of their grandfather, and while they were under his control, they had received, for instance, two hundred *aurei,* the son would be entitled to a hundred, and the two brothers to two hundred out of the estate of the grandfather.

(8) Where two emancipated sons demand praetorian possession of an estate, and one of them makes collation, and the other does not, the share of the latter will only benefit a son who is under paternal control, and not the one who has been emancipated, as it is on account of the one who is under paternal control that an action is denied to the other.

(9) Where an emancipated son cannot furnish security, he must not immediately be deprived of praetorian possession, but he may retain it until he can find sureties, in such a way, however, that an action can be granted to those who are under paternal control for the recovery of any property which is liable to be damaged by delay; and they must give security to place it in the mass of the estate, if they also are secured against loss.

3. Julianus, Digest, Book XXIII.

The Praetor does not promise possession of the property of an estate in opposition to the terms of the will, under the condition that collation shall be made, but he shows what must be done after possession has been given. Otherwise, great advantage would be taken of an emancipated son, if he was not understood to have obtained praetorian possession of the estate, unless he had given security to make collation; for if, in the meantime, he himself should die, he would leave nothing to his heir. Moreover, if his brother should die, he will not

be permitted to obtain praetorian possession of the estate. What should be done under such circumstances? It must then be held that he obtained legal possession of the estate, even before he gave security; but if he should not give security, the result will be that the entire estate will go to the son under paternal control.

(1) An emancipated son entered into a controversy with a minor under the age of puberty, who declared that he was his brother, and was under the control of his father. I ask whether the emancipated son should make collation of his property with him. Paulus remarks on this point: "I think that collation should be made, after a bond has been required that, if the minor loses the case, he will transfer the estate as well as the property of which collation was made."

(2) Julianus: Whenever praetorian possession is given contrary to the provisions of the will, the emancipated sons should make collation of their property only with those who remain under the control of their father. The question arises how this can be done. For, if the property left by the father, as well as that belonging to the emancipated sons, is placed in one mass, and full shares of the same are taken, the result will be that the emancipated sons will profit by the collation made by themselves. Therefore, let us see whether it will not be more convenient for the emancipated sons to receive a fourth of their father's estate, and a third of their own property. What I mean will become more plain by an example.

Let us suppose that a father left four hundred *aurei,* and two sons under his control, and two have been emancipated. Of these one will have a hundred and the other sixty *aurei* out of his estate; the one who will be entitled to a hundred will obtain in all a hundred and thirty-three and a third; and he who contributed sixty will obtain a hundred and twenty, so that the result will be that those only who remained under the control of their father will obtain the benefit of the collation.

(3) Emancipated sons are ordered to place their property in collation with those who are under the control of their father.

(4) Wherefore, as he who is under the control of his father receives the dowry of his wife as a preferred legacy, so, also, can an emancipated son retain that of his wife as a preferred legacy.

(5) Where an emancipated son, who was passed over in a will, gives security with reference to the collation of his property, while he is deliberating whether he will demand praetorian possession of the estate or not, and he does not do so, and his brother brings suit against him on the stipulation, he will be secure under the will.

If, however, he has deposited money by way of collation, he can recover it by an action; for, after he has declined to apply for praetorian possession, there will be no reason for the money to remain in the hands of the heir.

(6) A man who had two sons under his control, and also a grandson who was the son of one of them, emancipated the one by whom he had the grandson; and, after having been emancipated, the son had another son whom his grandfather adopted in his stead; and then the grandfather died, either intestate, or after making a will in which his emancipated son was passed over.

The question arose, what would the rule be with reference to praetorian possession, and what ought to be done with respect to collation? The answer was that, so far as the property was concerned, three parts should be made of it, one of which would belong to the son who remained under paternal control, the second to the grandson who was adopted instead of the son, and the third to the emancipated son and the grandson who remained under paternal control; so that the father would be liable to collation only with the one who had obtained praetorian possession of the estate.

4. *Africanus, Questions, Book IV.*

An emancipated son is not obliged to place in collation the dowry which he gave to his

daughter, because it is not understood to be included in the property of the father from whom it was derived, as it is in that of the mother.

5. Ulpianus, On the Edict, Book LXXIX.

Where anyone has a son who is his own master, and by him a grandson who is under his control, it must be said that if the grandson receives praetorian possession of the estate of his emancipated father, he must give security to place his property in collation, and he is like one who has adopted the son of another; for the Divine Brothers stated in a Rescript that the grandfather was compelled to place his property in the mass of the estate. It is true that the following is added in the same Rescript: "Unless the grandfather does not desire to obtain any benefit from his property, and is ready to release his grandson from his authority, so that all the benefit of praetorian possession of the estate may be enjoyed by him after his emancipation." Hence a daughter, who was born after the emancipation of her father, and who became his heir, cannot justly complain of being excluded from the benefit of the collation by what has been done; as after her grandfather dies, she can, along with her brother, succeed to the estate. This reason cannot be advanced in the case of an adoptive father, and, still we adopt the same rule with reference to him, if he emancipated the son without committing any fraud.

(1) The stipulation referring to collation takes effect when the person called upon does not act within the time when he ought to have placed his property in the mass of the estate; especially as it is inserted in the Edict of the Praetor that collation should be made in accordance with the judgment of a good citizen.

(2) Therefore, if collation does not take place in accordance with the terms prescribed, or if it is only partially carried out, the stipulation will become operative.

(3) And, whether the son does make collation or not, according to the terms of the stipulation, or whether he avoids doing it by means of some fraudulent act, judgment shall be rendered against him for a sum equal to the value of the property.

6. *Celsius, Digest, Book X.*

The question arises whether the dowry given by a paternal grandfather should be returned to the father after the death of the grandfather, the woman having died during marriage. The equity of the case seems to be that what my father has given to my daughter on my account is just the same as if I had given it myself, for the duty of a grandfather towards his granddaughter depends upon the affection which a father entertains toward a son, and because the father should endow his daughter, so a grandfather should endow his granddaughter for the sake of his son.

But what if the son was disinherited by his father? I hold that it would not be absurd for the same rule to be maintained in the case of a disinherited son. I think that it is not an improper opinion that the son should be entitled to what was bestowed out of his father's estate on his account.

7. *The Same, Digest, Book XIII.*

Where grandsons succeed to the place of sons, only one share should be contributed to them by way of collation, so that they may have one share of the estate under praetorian possession. They themselves, however, must place their property in the mass of the estate, just as if all of them only constituted one person.

8. *Papinianus, Questions, Book HI.*

The Praetor sometimes does not exclude one who is irresolute, or reject him after he has changed his mind. Therefore, certain authorities have held that an emancipated son who refused to give security with reference to placing his property in the mass of the estate ought

afterwards to be heard, if, after having furnished security, he should desire to take advantage of the benefit of the praetorian possession of the estate; although it might be said that he seemed to have rejected possession who was unwilling to observe the formalities by which it could be acquired.

The former opinion, however, is the more equitable one, especially where a dispute arises among brothers with reference to their father's estate; and I think that the emancipated son should be permitted to obtain possession, if, in the time prescribed for doing so, he offers to give security; for it will be more difficult to excuse voluntary delay in giving security after the lapse of a year, within which time praetorian possession of an estate can be granted.

9. *The Same, Opinions, Book V.*

An emancipated son obtained praetorian possession of the estate of his intestate father. The grandson by the said son, who remained in the family, will be entitled to half of the estate, together with the benefit of collation. If the same grandson should afterwards obtain praetorian possession of the estate of his intestate father, he will be obliged to place his property in the mass of the estate by way of collation with his brother,'who was born after the emancipation of his father.

.10. *Scsevola, Questions, Book V.*

If a son under the control of his father, after having been appointed his heir, enters upon his estate, and an emancipated son demands praetorian possession of the same contrary to the provisions of the will, and he himself does not do so, no contribution by way of collation should be made for his benefit; and it is so stated in the Edict.

I think, however, that just as he can legally retain the estate in proportion to his share, because he can demand praetorian possession of it, so, also, he certainly should contribute by way of collation for the benefit of his brother, as the latter suffers wrong through his obtaining praetorian possession.

11. *Paulus, Opinions, Book XI.*

Paulus gives it as his opinion that an emancipated son is not obliged to make collation of such property as should be transferred to him after the death of his father, for the benefit of his brother who was left under paternal control, even if he obtained the said property before he was entitled to it; as he is held to have had possession of the same after the death of his father, not so much by virtue of the donation, as on account of the debt.

12. *The Same, On the Edict, Book XLL*

Where anyone leaves a wife who is pregnant, and she obtains praetorian possession in the name of her unborn child, collation is suspended for a time; for before the child was born it could not be said to have been under the control of the deceased; but after it is born, collation must be made.

TITLE VII.

CONCERNING COLLATION OF THE DOWRY.

1. *Ulpianus, On the Edict, Book XL.*

Although the Praetor only compels a daughter to make collation of her dowry where she demands possession of the estate under the Edict; still if she does not do so she should make collation, provided she meddles with the estate of her father. This was stated by the Divine Pius in a Rescript addressed to Ulpius Adrian; for, according to it, a woman who does not demand praetorian possession of an estate can be compelled to contribute her dowry in collation by means of an action in partition brought by her co-heirs.

(1) Where a dowry has been provided for under an agreement, and the woman herself has

stipulated for it, or someone has done so who has charge of her business, she can also be compelled to place it in the mass of the estate.

If, however, the stipulation was solicited by another, it must be said that collation need not be made, and where the dowry was merely promised, collation of the same ought to take place.

(2) Where there is a grandson, as well as a granddaughter by the same son, and the granddaughter was endowed, and there was another son who was not the father of the said children, the granddaughter must place her dowry in collation for the benefit of her brother alone. Moreover, if the granddaughter should be emancipated, she must place her dowry and her property in the mass of the estate for the benefit of her brother alone, and not for that of her uncle.

(3) Where, however, there is only a granddaughter, and no grandson by the same father, then collation must be made for the benefit of the paternal uncle, as well as for that of cousins of either sex.

(4) Where there are two granddaughters by different sons, they contribute in collation reciprocally, and for the benefit of their uncle; if they have the same father, they only contribute reciprocally.

(5) Where a dowry is placed in the mass of an estate, a deduction of necessary expenses, but of no others, is made.

(6) If a divorce has taken place, and the husband is insolvent, the wife is not compelled to account for her entire dowry, but only as much of it as can come into her hands; that is, as much as her husband is able to pay.

(7) If, however, the father or a stranger has promised a dowry under a condition, a bond must be given; and then the woman can make collation of her dowry as soon as she is endowed.

(8) A daughter who is the heir at law of her father must also contribute her dowry, and the result will be that where the dowry is promised she will release her brother from half the obligation; for it is more just that she should be endowed out of her own property.

(9) Where an emancipated son, who has obtained praetorian possession of the estate in opposition to the terms of the will, has a daughter who has been endowed by someone else, he will not be obliged to place her dowry in the mass of the estate, because it does not constitute any part of his property.

2. Gams, *On the Provincial Edict, Book XIV.*

A daughter who has been given in adoption and appointed heir must, in the same manner as an emancipated daughter, contribute for collation her private property, as well as the dowry which she may have received. If her adoptive father should still be living, it will be necessary for him to make the collation.

3. *Ulpianus, Disputations, Book IV.*

If a daughter should be appointed heir, she will not be required' to place her dowry in the mass of the estate. Therefore, if another child has taken advantage of the Edict, she also must obtain possession of the estate in opposition to the terms of the will, for since she commits no wrong against her brother, she need not contribute her dowry, as what she obtained by the will is changed into what she would obtain through praetorian possession of the estate, contrary to its provisions.

It is clear that, if she was appointed heir to a smaller portion of the estate than her legal share, and she obtained something else through the praetorian possession, as her share is increased thereby, she will be obliged to contribute for collation, unless she remains content with the share which was left her. For then it must be held that she will not be obliged to perform the

duty of collation, as she acquired the property by the will of her father.

4. *Pomponius, On Quintus Mucius, Book HI.*

Where a father promised a dowry for his daughter whom he afterwards disinherited, or if he bequeathed her a legacy after she had been emancipated, and passed her over in his will, she will be entitled to the dowry as a preferred legacy, as well as to the legacy.

5. *Papinianus, Opinions, Book V.*

An emancipated son, who could have obtained praetorian possession contrary to the provisions of the will, acquired possession of the estate of his father, under the Edict, on the ground of intestacy. A daughter also, who remained under parental control, having been appointed heir along with a brother of the same family, repeated the error of her emancipated brother, and obtained possession under the Edict on the ground of intestacy. She will not be obliged to contribute her dowry by way of collation for the benefit of her brother, who was appointed heir; as the praetorian possession which she claimed was of no force or effect, and she will retain her entire share of the estate under the will of her father; that is to say, each of the three children will have a third, and it will be presumed that the praetorian possession of the estate contrary to the provisions of the will, designated *unde liberi,* was demanded.

(1) A daughter, who was obliged to contribute her dowry after the dissolution of her marriage, delayed doing so. She will be obliged to pay interest on the dowry in accordance with the judgment of a good citizen, since her emancipated brother must also place his income in collation, and she has received the income of her share.

6. *The Same, Opinions, Book VI.*

A father appointed his emancipated son his heir, and disinherited his daughter, who, having brought an action to declare the will inofficious, recovered half of the estate. I gave it as my opinion that her brother should not be compelled to place his own property in the mass of the estate; for it has been established that under such circumstances even bequests of freedom are valid.

7. *Paulus, Opinions, Book XL*

Nor shall she contribute her dowry for the benefit of her brothers, as the latter are heirs under a different right than hers.

8. *Papinians, Opinions, Book XL*

A father gave his daughter, at the time of her marriage, certain property in addition to her dowry, retained her under his control, and appointed her co-heir with her brothers, subject to the condition that she would contribute her dowry, and any other property which he had given her when she was married, by way of collation. As the daughter did not accept the estate, it was held that she could interpose an exception, on the ground of bad faith, against her brothers who brought an action to recover the property not included in the dowry, for the reason that her father intended that she should have one or the other of these.

9. *Tryphoninus, Disputations, Book VI.*

The question was raised whether a daughter who, along with her brothers, was a proper heir of her father and, being content with her dowry, refused to accept the estate, could be compelled to place it in collation. The Divine Marcus stated in a Rescript that, if she did not accept her father's estate, she could not be forced to do so. Therefore, the dowry which was given will not only remain in the hands of the husband, but also, if it has been promised it can be collected from her brothers, and is considered a debt, as it is no longer included in the estate of the father.

TITLE VIII.

CONCERNING THE CONTRIBUTION TO BE MADE BETWEEN AN EMANCIPATED SON AND HIS CHILDREN.

1. *Ulpianus, On the Edict, Book XL.*

Where anyone of those to whom the Praetor promises the possession of an estate is not under paternal control at the time of the death of his father, and he has children forming part of the family of the testator, and the estate will belong to them in their own right, and they have not been disinherited, possession of his share of the estate which would have belonged to him if he had remained under the control of his father is given him by the Praetor, in such a way that his share will be divided into two parts, one of which will belong to him, and the other to his children, and he will be compelled to place his own property in collation for their benefit alone.

(1) This Section of the Edict is perfectly equitable, as it provides that the emancipated son cannot alone obtain the estate, and thereby exclude the grandsons remaining under paternal control, and the grandsons cannot interfere with their father on the ground that they themselves were under the control of the testator.

(2) The case where a son is given in adoption, and a grandson, who is under the control of his natural grandfather, is joined with him in the succession, is also referred to in this Section of the Edict. Moreover, the grandson is joined with his emancipated father, whether his father was passed over, or was appointed an heir.

There is this difference, however, between a son given in adoption and one who is emancipated, namely: the grandson is not joined with the one given in adoption unless he has been appointed an heir, and a third part is responsible for the Edict taking effect; but he is joined with an emancipated son, whether the latter was appointed an heir or passed over in the will.

(3) Julianus says that, where a son under paternal control is appointed an heir to two-thirds of the estate, and an emancipated son to one-third, if the grandson who has been passed over should obtain praetorian possession contrary to the provisions of the will, he will take from his uncle one-sixth, and from his father one-twelfth of the estate.

(4) If the emancipated father should be disinherited, and his children, the grandsons of the testator under paternal control, should be passed over, the said grandsons will be permitted to obtain praetorian possession; for it is absurd that, as they were joined with their father, and he was passed over in the will, they should not be admitted to praetorian possession, when their father has either been appointed an heir, or disinherited.

(5) If the uncle of the said grandchildren, who was under parental control, was passed over in the will, and their father should be disinherited, the said grandsons must be permitted to obtain praetorian possession, as their father, having been disinherited, is considered as dead.

(6) Scaevola says that if a father, who remains under paternal control, is either disinherited or appointed an heir, a son born to him, whether he remains subject to paternal authority or has been emancipated, cannot, and should not be called to the succession of his grandfather; for the Praetor only provides for a grandson as long as he is retained under the control of the testator, his father having been emancipated. Therefore, for this Section of the Edict to be applicable, children must remain in the family, that is to say, that family the possession of whose estate is demanded. If, however, a posthumous child, having been conceived before his emancipation, should be born to the emancipated son, the same rule must be held to apply.

(7) The Praetor does not call all the descendants to the succession indiscriminately, but according to their several degrees; that is to say, first the direct heirs, for instance, the grandsons, if there are any, and if there are none, those of a lower degree; but we must not

mix them. It is clear that if a grandson is descended from an emancipated son, and a great-grandson from another grandson, it must be said that both of them should be joined, for both have succeeded to the place of direct heirs.

(8) If a grandson should return under the law of *postliminium,* it must be held that he should be joined with his emancipated father.

(9) If a father should emancipate one of his two sons, both of whom he has under his control, and adopt a grandson by one of them, instead of his son, and, having passed over his emancipated son in his will, should die, Julianus says that relief must be granted the grandson who was adopted instead of the son, so that, in the capacity of son, he will have that share of the estate to which a stranger would have been entitled if he had been adopted by the testator. He says that the result will be that the son under paternal control will be entitled to a third part of the estate; the grandson adopted instead of the son will be entitled to another third; and the emancipated son will divide the remaining third with the other grandson remaining under the control of the testator.

(10) It makes no difference to what portion of the estate the grandson may be entitled, or even if it is very small; for in case it is insignificant, we still hold that there will be ground for the application of this Section of the Edict.

(11) The estate is divided between the son and his children so that he will obtain one-half, and they the other. Hence, if you suppose that there is only one son emancipated, and two grandsons remaining under paternal control, and that there are no other descendants besides these, the emancipated son will be entitled to half of the estate, and the two grandsons to the other half, after dividing it into fourths.

If there should happen to be another son from whom no grandsons have ascended, he will be entitled to half the estate, and the other son, along with his sons, to the other half, so that he himself will have a fourth of the estate, and the other fourth will be divided among his children. Where, however, both sons have been emancipated, and both of them have issue, the result will be that each must divide half of the estate with his children, so that they themselves will each have a fourth, and their children respectively the remaining fourth.

If one of them has two sons, and the other three, one-fourth will be divided among the two, and the other among the three children.

(12) Where one of the grandchildren refuses to accept his share of the estate, the result will be that his share will not belong to his father, but preferably to his brother. If, however, all the grandchildren refuse to accept their shares, none of them will accrue to the uncle, but to the father alone. If, however, their father should refuse them, then they will accrue to their uncle.

(13) If an emancipated son has no children under the control of their grandfather, the testator must place his property in collation for the benefit of his brothers. If there are any grandchildren, the Praetor wishes him to make collation only for the benefit of those of his children who are under the control of their grandfather. This is reasonable, because by obtaining praetorian possession of the estate he prejudices only the rights of his children.

(14) Now let us see how much he must contribute for their benefit. And, indeed, when the emancipated son makes collation for the benefit of his brothers, does he always deduct his own share for himself ? And, in the above-mentioned instance, shall he deduct his entire share, or must only half of his own private property be placed in the mass of the estate, as he only is entitled to half of the share of what is obtained by praetorian possession? I think that he should contribute only half of his own private property for their benefit; but even if one son has been emancipated, and the other remains under the control of the testator, the emancipated son will only contribute one share for the benefit of the two grandsons, and one-third for the benefit of the uncle of those retained under the power of the testator, and he

himself will be entitled to the other third. For whatever is placed in collation for the grandsons by the emancipated uncle, they themselves will not place in collation for the benefit of their own father; for they do not obtain this from the estate of their grandfather, but it is done on account of property which they have subsequently received.

(15) Hence, the result will be that if the emancipated father has a hundred *aurei* among his property, he will retain fifty for himself, and give the remaining fifty in collation to all the grandchildren, that is to say, to his own children; or if he has one grandson, and two great-grandsons by another grandson, he must divide the fifty *aurei* so that the grandson may have twenty-five, and the great-grandsons twenty-five together; for both are entitled to only one share in the praetorian possession of the estate.

(16) Scsevola ingeniously discusses the following question, namely: where there is one son under the control of his father, and another is emancipated, and a grandson of a deceased son under the control of the testator, and another grandson who has been emancipated, how much should the emancipated uncle place in collation for the benefit of his nephews, and how much for that of his brother? He says it can be held that the property ought to be divided into three shares, one of which he shall retain, one shall be placed in collation for the benefit of his brother, and one for that of his nephews, although the latter, if they share with their father in the estate of their grandfather, will have less than their uncle. This opinion is correct.

(17) Even if there are two grandsons by the same son, and they are emancipated, and a great-grandson by one of them was under the control of the deceased, one grandson will have one share of the estate and the other grandson, together with his son, will be entitled to the other.

(18) If there is a grandson, and two great-grandsons by another grandson who is dead, and one of the said great-grandsons has been emancipated, he will only make collation for the benefit of his brother, or if he has no brother, for the benefit of his uncle, and not for that of his great uncle.

2. *Paulus, On the Edict, Book XLL*

In this section of the Edict the Praetor makes no provision with reference to legacies which the grandson shall pay to privileged persons. What has previously been said on this point is applicable here, for it is absurd that the father of the grandson should be obliged to pay such legacies, and that the grandson should have more, where, under the same circumstances, he is called to the same share under the Praetorian Law.

3. *Marcellus, Digest, Book IX.*

A father who had two sons emancipated one of them, and retained his grandson by the latter under his control. The emancipated son himself had a son, who was disinherited by his father. I ask, if his brother and the emancipated son himself should be passed over in the will, and the grandsons of the emancipated son be appointed by the grandfather heirs to his estate, what would be the rule, in case of praetorian possession, and what difference would it make if we suppose that the emancipated son, from whom the grandsons were descended, should also be passed over in the will? I answered that if the testator should have emancipated his son, and retained the grandson by the latter under his control, and the emancipated son should have a son, and both grandsons should be appointed heirs, and their father be disinherited, and the other son passed over, the latter alone could demand praetorian possession in opposition to the terms of the will; for the disinherited son is an impediment in the way of his own children born after emancipation.

Praetorian possession should, however, be granted to the grandson remaining under the control of his grandfather; as, if his father, who had been emancipated, should be passed over in the will, he can obtain praetorian possession of the estate under that Section of the Edict which was introduced by Julianus; that is to say, under the new clause. Nor would he be in

worse condition because his father was disinherited, and he must be shown the same consideration if he himself had been passed over in the will. The condition of his brother, however, who was born after emancipation, is different; for the estate must be preserved for his benefit, so far as his entire share is concerned, as the Emperor Antoninus stated in a Rescript with reference to a granddaughter, the child of the daughter of the testator.

4. *Modestinus, Pandects, Book XVI.*

A certain man, having emancipated his son, retained the children of the latter under his control. The emancipated son, having had children, afterwards died. It was decided that those grandchildren who remained under the control of their grandfather, were, by virtue of a special decree, entitled to praetorian possession of the estate of the latter, together with those who were born after the emancipation, with the exception that, if the grandfather desired to obtain the estate of his son, by means of his grandchildren, he could place his property in collation, or he could emancipate them, in order that they might obtain for themselves the benefit of their father's estate. This the Divine Marcus stated in a Rescript.

5. *The Same, Differences, Book VI.*

If the disinherited grandson should become the heir of him whom the grandfather appointed his heir, and then his emancipated father, who had been passed over in the will, should obtain praetorian possession of the estate of his father contrary to the provisions of the will, the grandson could not be joined with his father, but would be excluded as a stranger, because he is not the heir of his grandfather in his own right.

6. *Scsevola, Questions, Book V.*

Where anyone who has a son under his control adopts a stranger in the place of his grandson, just as if he had been born to his son, and afterwards emancipated his son, the grandson will not be joined with the emancipated son in the praetorian possession, because he has ceased to be included among the children of the latter.

7. *Tryphoninus, Disputations, Book XVI.*

If a testator, after the emancipation of his son, has a grandson by the latter, his share of the estate of his grandfather must be preserved for him. Let us, however, see how much this will amount to. For suppose that the grandson was appointed co-heir with his uncle, and that the father of the said grandson, having been passed over in the will, should obtain praetorian possession contrary to the testamentary provisions, in accordance with the terms of the Praetorian Edict, the property of the estate would be divided into two parts. Now, however, after the Constitution of the Divine Pius has been promulgated, must that to which the grandson is entitled be his entire share, or merely a fourth? For if, after his birth, he had been under the control of his grandfather, he will be joined with his father, and both together will be entitled to half of the estate.

Let us suppose that there was another grandson, descended from the same son, and belonging to the family of the grandfather, the two grandsons together would be entitled to a fourth of the estate, if their father had obtained praetorian possession in opposition to the terms of the will, and they had been under the control of their grandfather. Must he who had not been retained in the family now be permitted to receive an eighth of the estate? And who must be deprived of his share to obtain what is given him ? Would it be taken only from his father, or from his uncle as well? I think it would only be taken from his uncle, for he would be compelled to pay the legacy bequeathed to the said grandson.

TITLE IX.

CONCERNING THE PLACING OF AN UNBORN CHILD IN POSSESSION OF AN ESTATE, AND HIS CURATOR.

1. *Ulpiamis, On the Edict, Book XLI.*

The Prastor not only provides for the welfare of children who are already born, but also does not neglect those who are as yet unborn; for he protects their interests in one of the Sections of the Edict by placing an unborn child in possession of an estate instead of praetorian possession contrary to the terms of the will.

(1) It is absolutely necessary that the woman should be pregnant, and it is not sufficient for her to merely allege that she is in this condition. Therefore, such a grant of the possession of an estate is not valid, unless she was actually pregnant at the time of the death of the testator, on account of which she demands to be placed in possession.

(2) An unborn child is placed in possession of an estate whenever it is not disinherited, and where it will afterwards be included among the proper heirs. When, however, it is uncertain whether this will be the case, we sometimes place the unborn child in possession, if it may, under certain circumstances, become a proper heir; as it is sometimes more equitable for unnecessary expenses to be incurred than for maintenance to be refused to one who may become the owner of the estate.

(3) Therefore, if disinheritance is expressed in the following terms, "If a son should be born to me, let him be disinherited," because a daughter may be born, or several sons, or a son and a daughter, and in either of these cases the unborn child will be placed in possession of the estate; for, while it is still uncertain what the birth will be, it is better for the child that has been disinherited to be supported than for one which may not be disinherited to perish with hunger, and any diminution of the estate made on this account ought to be ratified, even though the child who was excluded from the succession should be born.

(4) The same rule will apply if the woman who was in possession of the estate should have a miscarriage.

(5) If, however, the posthumous child was disinherited under a condition while the condition is pending, we adopt the opinion of Pedius, who held that the unborn child should be placed in possession of the estate; because, in case of uncertainty, it is always better for it to be supported.

(6) Where an unborn child is disinherited in the first place, and passed over as a substitute, Marcellus denies that it can be placed in possession while the appointed heirs are living, for the reason that it was disinherited; which is true.

(7) On the other hand, if an unborn child is passed over, as one of the appointed heirs, and is disinherited as a substitute, it should be placed in possession of the estate while the appointed heirs are living. If, however, they are not living, he says that this should not be done, because the estate passes to the degree in which the child was disinherited.

(8) Where a son has been captured by the enemy, and his wife is pregnant, she should be placed in possession of the estate of her father-in-law, for a case might occur where the child, after its birth, may become a direct heir; as, for instance, if its father should die in the hands of the enemy.

(9) If, however, anyone should disinherit an unborn child as follows, "If a child should be born to me within three months after my death, let it be disinherited," or "After three months," the unborn child is placed in possession because there is a chance that it may become a direct heir. In cases of this kind, the Praetor should always be very indulgent, in order that the child whose birth is expected may not die before it is born.

(10) Again, the Praetor never mentions the name of the wife, because it may happen that the woman who alleges that she is pregnant by her husband may not have been his wife at the time of his death.

(11) The unborn child of an emancipated son also may obtain possession of his estate. Therefore, in the Twenty-seventh Book of the Digest, the question is asked, if a son who was emancipated while his wife was pregnant, should afterwards die, and his father should also die, whether the unborn child can be placed in possession of the estate of his emancipated father. And he very correctly says that there is no reason why the unborn child whom the Edict permits to obtain possession should be excluded from it; for it is perfectly just to provide for the child who, after its birth, will be entitled to possession of the estate. If its grandfather should still be living, we also permit the unborn child to obtain possession of the estate of its father.

(12) If a son who is given in adoption should die, leaving his wife pregnant, and then the adoptive father should die, the unborn child will be placed in possession of the estate of his adoptive father. Let us, however, see whether he should also be placed in possession, of the estate of the father who gave his son in adoption. If this posthumous grandson is appointed heir of his natural grandfather, he will be placed in possession of his estate, because if there was no other child at the time of his birth, praetorian possession in accordance with the provisions of the will could be given him; or if there were other children, who had been passed over, he could, also, along with them obtain praetorian possession in opposition to the terms of the will.

(13) If a father should emancipate his son while his daughter-in-law is pregnant, the unborn child ought not to absolutely be excluded; for, after it has been born, it can be joined with the father under the new clause of the Edict. And, generally speaking, in those cases where a child, after its birth, can be joined with its father in the succession, it should be permitted to obtain possession before it is born.

(14) Where the woman who desires to be placed in possession of an estate is not the wife of the testator, nor his daughter-in-law, nor has ever sustained such a relation to him, or it is asserted that she is not pregnant by him, the prsetor will render a decree, as under the Carbonian Edict. This the Divine Hadrian stated in a Rescript addressed to the Praetor, Claudius Proculus, directing him to assume summary jurisdiction of the case; and if it was evident that the woman who desired to be placed in possession of the estate in the name of her unborn child had been guilty of fraud, he must not decide in her favor. If, however, any doubt should exist, he was ordered to be careful not to cause any injury to the unborn child, but to place it in possession of the estate. Hence, it appears that, unless the woman was evidently guilty of deceit, she could demand a decision of the Praetor; and in case there should be any reasonable doubt as to whether she was pregnant by her husband, she must be protected by a decree, in order that the rights of the unborn child might not be prejudiced.

The same rule is applicable where a controversy arises with reference to the social status of the woman.

(15) Generally speaking, we do not doubt that the Prsetor should come to the relief of an unborn child in all those instances in which he is accustomed to grant possession under the Carbonian Decree where the child is already born; and this is done the more readily because the case of an unborn child is treated with greater indulgence than that of one who is already born; for this preference is conceded to the former in order that it may be brought into the world. A child is favored after it is born in order that it may be reared in the family, and an unborn child must be supported, because if he is not the son of his alleged father he will still be born to the State.

(16) If anyone, after having rendered his first wife pregnant, marries a second, and also

renders her pregnant, and then dies, the Edict will suffice for both cases, provided no one disputes the right of either of the women, or accuses either of fraud.

(17) Moreover, whenever an unborn child is placed in possession of an estate, the mother usually asks that a curator be appointed for it, as well as for the estate. If, however, a curator is only appointed for the child, the creditors of the estate will be permitted to take charge of the property for safe keeping; but if a curator is appointed, not only for the child, but also for the estate, the creditors may rest secure, as the curator must assume the responsibility. Hence a curator should be appointed for the estate after an examination as to its solvency; and the creditors, or any other person interested in it, must see that the curator is solvent, and is not one who will be entitled to the succession, in case the child should not be born.

(18) The present practice is to appoint the same curator for both the property and the child. If, however, creditors, or anyone who has hopes of succeeding to the estate appears, the appointment should be made more carefully and circumspectly, and several curators should be appointed, if this is requested.

(19) Moreover, a woman who is placed in possession of an estate should take from the property only those things without which her child cannot be either nourished or born; and it is for this purpose that a curator ought to be appointed who will furnish food, drink, clothing, and lodging to the woman, in proportion to the means and rank of the deceased, and that of the woman.

(20) The deduction required for these expenses should be first made from the ready money belonging to the estate, and, if there is none, from the property which causes the greatest expense to the estate rather than from that which increases it by its income.

(21) Again, if there is any danger that some of the property may be obtained by usucaption, or debtors of the estate be released from liability by lapse of time, the curator must also attend to these matters.

(22) Therefore he must discharge the duties of his office just as the curators and guardians of wards are accustomed to do.

(23) A curator is selected from among those who have been appointed guardians pf a posthumous child; or from the near relatives and connections; or from the substitutes; or from the friends or creditors of the deceased. A person who is considered solvent should be chosen; and if there is any question as to the personal character of those above mentioned, an honorable man must be selected.

(24) If no curator should yet be appointed (for the reason that frequently application is not made for one, or it is made too late, or the appointment is made too late), Servius says that the testamentary heir or the substitute need not seal up the property, but shall make an inventory of it, and assign to the woman what she may require.

(25) He also says that a custodian ought to be appointed by the heir to take care of such property as cannot otherwise be preserved; as for instance, flocks or grain, and vintages, where the crops have not been gathered. If any controversy should arise as to how much should be taken from the estate, an arbiter must be appointed.

(26) I think that all this is disposed of when a curator has been appointed; the bills of sale and the inventory of the estate should, however, be signed by him.

(27) The unborn child should remain in possession until it comes into the world; or the mother has a miscarriage; or until it is certain that she is not pregnant.

(28) If she, being well aware that she was not pregnant, should use part of the estate, Labeo says that it should be taken out of her property.

2. *Paulus, On the Edict, Book XLI.*

If she should have a child that has been excluded from the estate, she must withdraw.

3. *Hermogenianus, Epitomes of La/w, Book III.*

Where any expense has been incurred by her in good faith, it should not be recovered from her.

4. *Paulus, On the Edict, Book XL1.*

A lodging, also, must be rented for the woman, if the deceased did not have a house.

(1) The slaves of the woman likewise must be provided with subsistence—where they are necessary for her service—in accordance with her social rank.

5. *Gaius, On the Provincial Edict, Book XIV.*

The curator of the unborn child should also provide the woman with maintenance; for it makes no difference whether she has a dowry by means of which she can support herself, or not, because what is furnished her is considered to have been given for her unborn child.

(1) Where a curator is appointed for an unborn child, he should take care to pay the debts of the estate, especially those whose non-payment involve pecuniary penalties, or where valuable pledges have been deposited as security.

6. *Ulpianus, On the Edict, Book XLI.*

Where a posthumous heir is appointed who is a stranger, the unborn child will not be placed in possession of the estate unless its mother cannot support herself otherwise; for we hold that maintenance should not be denied to one who, after his birth, will become the possessor of the estate.

7. *The Same, On the Edict, Book XLI.*

Whenever anyone becomes an heir *ab intestato,* in this instance also, an unborn child is permitted to obtain possession of the estate; that is to say, if it is such a child that when it is born, it will be entitled to praetorian possession; and in all the Sections of the Edict an unborn child is considered as a survivor.

(1) Sometimes, but not indiscriminately, an unborn child should not be placed in possession of the estate; but only after proper cause is shown, where anyone contests its right. This, however, merely has reference to an unborn child who, with other children of the deceased, can obtain possession. But if it should be placed in possession as the next of kin, or under any other Section of the Edict, it must be said that an investigation will not be necessary; for it is not just that the child should be supported by the property of another until it arrives at puberty, because the settlement of the controversy should be deferred until that time.

It is established that all controversies relating to the condition of children must be postponed until they arrive at puberty; not that the child can remain in possession during the existence of the disputes, but that the delay should be without possession.

(2) Moreover, although the Praetor can place the unborn child in possession of the estate, along with those to whom he has already granted it; still, the unborn child alone may be permitted to hold possession of the property.

8. *Paulus, On Adultery, Book I.*

Where a woman is placed in possession of an estate in the name of her unborn child, the Divine Hadrian stated in a Rescript addressed to Calpurnius Flaccus that an accusation of adultery should be postponed, in order that no wrong may be done to the child.

9. *Ulpianus, On Sabinus, Book XV.*

Where an unborn child is placed in possession of an estate, what is taken from the estate for

its support should be deducted as a debt.

10. *Paulus, Questions, Book VII.*

A posthumous child, no matter when it may be born, provided it was conceived at the time of the death of the testator, can obtain praetorian possession of the estate, for the Praetor places it in possession under all the Sections of the Edict by which it may obtain it, but it will not be placed in possession, if, after its birth, it is not entitled to it.

TITLE X.

CONCERNING THE CARBONIAN EDICT.

1. *Ulpianus, On the Edict, Book XLI.*

If a dispute should arise as to whether a child under the age of puberty should be included among the descendants of the deceased, possession will be given it after proper cause is shown, just as if no controversy had arisen with reference to the matter; and, after investigation has taken place, the decision will be postponed until the time that the child arrives at puberty.

(1) If security for the minor is not given to him who raises the question, the Praetor orders him to be placed in possession of the estate along with the minor.

(2) Not only males, but also females descendants from males, are entitled to the benefit of the Carbonian Edict.

(3) In general, we say that those are entitled to the benefit of the Carbonian Edict who can obtain praetorian possession of an estate contrary to the provisions of the will; but those are not entitled to it who are excluded from obtaining such possession.

(4) If a child is made the subject of a controversy of this kind, namely: where it is denied that he should be included among the descendants of the deceased, and the question was raised not by a stranger, but by his own father; as, for instance, where a grandson alleges that his father was emancipated, and that he was retained under the control of his grandfather, and asks to be joined with his father, should the decision in this case be postponed ? The better opinion is that it should be; for it makes very little difference who raises the controversy, as even if the testator should deny that he was included among his descendants, and he, nevertheless, did not disinherit him, there will be ground for the application of the Carbonian Edict.

(5) If anyone should deny not only that the child has a right to be included among the descendants of the testator, and should even allege that he is a slave, for instance, born of a female slave, Julianus says that there is ground for the application of the Carbonian Edict, which the Divine Pius also stated in a Rescript. For great care should be exercised with reference to those who are threatened with a serious wrong; as, if it were otherwise, any extremely bold man could inflict injury upon a minor under the age of puberty by relating many grave slanders and falsehoods about him.

(6) The same rule will apply, even where the deceased himself is said to have been a slave.

(7) There will also be ground for the application of the Carbonian Edict, where the Treasury raises the question as to the status of a minor under the age of puberty.

(8) Pomponius, in the Seventy-ninth Book of the Edict, says that where a son is appointed an heir, or is disinherited, the Carbonian Edict will not apply, even though it is denied that he is a son; because being, as it were, appointed heir, he has possession of the estate, even if he is not a son, or he will be excluded because of being disinherited, even if it should appear that he is a son; unless a posthumous child is appointed an heir, and, after his birth, it is denied that he is a son, although he is said to be under paternal control; in which case praeto-rian possession should only be given to him in proportion to the share of the estate to which he was appointed

heir.

(9) He also holds that where anyone has disinherited his son, because he said that he was conceived in adultery, or where it was disputed as to whether he should be included among his children, he will be entitled to possession of the estate under this Section of the Edict; for, since he had been disinherited without giving any reason for it, he would not be entitled to possession of the estate.

The same rule will apply where the following clause was inserted into a will, "Let anyone who says that he is my son be disinherited," because a son is not disinherited in this way.

(10) If anyone should appoint his son his heir to a very small portion of his estate, as follows, "Let So-and-So, born of such-and-such a woman, be my heir," and afterwards the said son should not admit that his father died intestate, and that he was his heir at law, it makes a difference whether his co-heirs deny that he is the son of the testator, or whether they say that the will is valid. If they say that the will is valid, the dispute should not be deferred, and the Carbonian Decree will not apply. If, however, they deny that he is the son of the testator, and allege that the estate belongs to them, as being the next of kin; possession of the estate will be given to the minor, and the decision of the controversy will be postponed until he arrives at the age of puberty.

(11) If the mother is accused of introducing a supposititious child, the question arises whether the controversy with reference to the civil condition of the child should be deferred for decision. Where only the condition of the child is in doubt, the question should be deferred until the age of puberty, because there may be reason to fear that it will not properly be defended. But where the mother herself is accused, as there is no doubt that she will, from the first moment, defend the civil status of the child, with the greatest good faith and constancy, there is no doubt that an investigation should be made, and if after the investigation it appears that the child was supposititious, every action for the recovery of the estate must be refused to it, and everything will remain in the same condition as if the child had not been appointed heir.

2. *Marcianus, Institutes, Book XIV.*

Although the woman who is said to have introduced a supposititious child may be dead, still, if there are any others implicated in the crime, an investigation should take place at once. When, however, there is no one who can be punished, because all those who participated in the offence are dead, the investigation must be deferred until the time of puberty, in accordance with the Carbonian Edict.

3. *Ulpianus, On the Edict, Book XIV.*

The Carbonian Edict is applicable to the praetorian possession of an estate contrary to the provisions of the will, as well as to the possession *ab intestato;* since in some instances, the application of the Edict may become necessary when praetorian possession in accordance with the terms of the will has been granted; for example, where the testator appointed an heir as follows, "Let my posthumous child, whether it be a boy or girl, be my heir," and it is denied that the statement in the will is true.

(1) Where a question arises with reference to a trust or a legacy, the matter can be deferred until the time of puberty; as the Divine Pius stated in a Rescript addressed to Claudius Hadrian.

(2) Although it is certain that praetorian possession under the Carbonian Edict is not promised to an appointed heir, still, there is no doubt whatever that any question as to his condition must be postponed until he reaches puberty. Hence, if at the same time a controversy arises with reference to the estate of his father and his own condition, this Edict will be applicable. Where, however, only his civil condition is in dispute, the question will be postponed until the

time of puberty, not under the Carbonian Edict, but in accordance with the Imperial Constitutions.

(3) The Carbonian Edict gives no relief to children who have arrived at puberty, even though they are under twenty-five years of age. If, however, a child, who has arrived at puberty, represents himself as being under that age, and obtains praetorian possession of the estate, it must be said that the decree is void. For even if he was under the age of puberty, as soon as he arrives at that age, the benefit of the possession of the estate will terminate.

(4) In cases of this kind, an investigation is instituted to prevent possession of an estate from being given, if the deceit of those who demand possession of property in behalf of children should be clearly established; therefore, where possession is demanded under the Car-bonian Edict, the Praetor should immediately take cognizance of the case. If he finds that it can be easily decided, and it is positively proved that the child is not a son, he can refuse to grant it Carbonian possession of the estate. But when he finds that the matter is involved in doubt, that is to say, that there is some slight evidence in favor of the child, and it does not clearly appear that he is not the son of the testator, he shall grant him Carbonian possession of the estate.

(5) Two causes exist for this investigation: one of them is to determine whether Carbonian possession which confers the advantage of enabling the minor to obtain praetorian possession, just as if no controversy had arisen, shall be granted; and the other is, to ascertain whether a decision ought to be rendered at once, or deferred until the age of puberty. The Praetor should carefully examine whether it is advantageous for the minor to have the decision rendered at once; or whether it will be better to postpone it until he reaches the age of puberty; and this he must, by all means, learn from the relatives, the mother, and the guardians of the minor.

Suppose, for instance, that there are certain witnesses who, if the decision of the case is postponed, may either change their minds, or die, or whose testimony will not have the same force after a long period of time. Or, suppose there is some old midwife, or certain female slaves who can tell the truth with reference to the child; or that certain documents essential to his success are in existence; or that there are other proofs, and the minor will suffer greater injury if the examination is deferred than he will obtain benefit if the case is not decided at once.

Suppose that the minor cannot give security, and that those who have been permitted to obtain possession of the estate are the persons who raised the controversy with reference to it, and who can abstract, change, or destroy much of the property belonging to the same; it would be either foolish or unjust for the Praetor to defer the matter until puberty, to the serious disadvantage of him who desires the matter to be disposed of.

The Divine Hadrian stated in a Rescript: "Where the decision is ordinarily deferred until the age of puberty, this is done for the benefit of the minors, in order that this condition may not be imperiled before they are able to protect themselves. Moreover, if they have persons by whom they may be properly defended, and if it is to the interest of the said minors that the case should be quickly brought to trial, and a decision rendered, and the guardians of the minors desire it to be heard, what has been devised for the benefit of the minors should not be employed against them, and their condition remain in suspense when it can be established beyond a doubt."

(6) If the mother of the minor, after being accused of having introduced a supposititious child, gains her case, the question as to the condition of the child may still remain unsettled; for example, it may be alleged that it was not begotten by the deceased, or, if it was, that it was not born in wedlock.

(7) If the person who disputed the condition of the child, and alleged that he himself was the only son, should die, and his mother should become his heir, and raise the same controversy

with reference to the minor, that her own son did, stating that he was born of another woman; that is to say, if she should deny that he was the child of the deceased, and therefore that she herself was entitled to the entire estate of the deceased son, as his heir, Julianus says that a decision should not be rendered until the age of puberty, because it makes no difference whether the person who raises the question does so in his own name, or in that of the estate. It is evident that if the mother should admit that the child is the son of the deceased, and therefore claims for herself only half of the estate of the father, the decision of the case should not be deferred until the time of puberty; for she does not dispute the claim of the minor to the estate of his father, but to that of his brother.

(8) Julianus says, in the same place, that if a dispute arises with reference to the status of two minors under the age of puberty, and one of them reaches that age, they should wait until the other also arrived at puberty, so that the condition of both may be determined in such a way that the rights of the one who had not arrived at puberty, may not be prejudiced through a decision rendered against the one who had reached that age.

(9) It makes little difference whether the claimant is a minor under the age of puberty, or the possessor of the estate who raises the question as to the condition of the minor, for whether he is in possession, or demands it, the decision must be deferred until the time of puberty.

(10) Where two minors under the age of puberty raise a question as to the condition of one another, it makes a difference whether one of them alleges that he is the only son, or whether the other alleges that he also is a son. For if one says that he is the only son, it must be held that the decision of the case should be postponed until both of them arrive at puberty, whether the claimant or the possessor is the one who gives rise to the controversy. If, however, one alleges that he is the only son, and the other says that he is also a son, and the former should be the first to reach the age of puberty, the decision must be deferred on account of the youth of the one who asserts that he is a son; but this must be done partially and not entirely, for there is no dispute with reference to half of the estate. Where he who declares that he is also a son is the first one to attain the age of puberty, and he who alleges that he is the only son is under that age, the decision shall not be deferred; for there is no question with reference to the condition of the latter, since he is the one who makes the contest, as the one who has reached puberty, while he says that he is a son, does not deny that the other is also a son.

(11) Where a slave who is ordered to be free, and is appointed an heir, disputes the status of a minor, who is said to be the son of the testator, and has broken the will of his father, Julianus says that the decision with reference to both the estate and the bequest of freedom should be deferred until the age of puberty; for neither of.these questions can be determined at once without prejudicing the rights of him who says that he is the son of the testator. Other matters with reference to testamentary bequests of freedom, and which are pending, shall also be postponed until the time of puberty.

(12) Where a minor under the age of puberty appears, and alleges that he is the son of the deceased, and debtors to the estate deny that this is true, but say that the property of the deceased intestate belongs to a relative, who, for instance, is beyond seas, the child must have recourse to the Carbonian Edict; but the interest of the absent person must be consulted by requiring security to be given.

(13) The Praetors exert themselves to place in actual possession those to whom possession has been given under the Carbonian Edict. If, however, a possessor under the Carbonian Edict should attempt to claim the estate, or any particular property belonging to the same, Julianus, in the Twenty-fourth Book of the Digest, very properly says that he should be barred by an exception, for he ought to remain content with the privilege of possession which the Praetor in the meantime has granted him. Therefore, if he wishes to claim the estate, or any property forming part of the same, he says that he must do so by means of a direct action in the capacity of heir; so that, after his application, it may be determined whether he is an heir, and

is included among the children, in order that the presumption of Carbonian possession of the estate may not injure his adversaries.

This opinion is both reasonable and just.

(14) Moreover, this possession is granted within the year, just as ordinary ones which are given to children.

(15) It is, however, necessary that he who alleges that he is a son should not only obtain Carbonian possession of the estate, but should also demand the ordinary praetorian possession.

(16) The periods necessary for obtaining both possessions run separately. The one which has for its object ordinary praetorian possession runs from the time when the son knew that his father was dead, and had the power to demand pra?torian possession of the estate; and that of Carbonian possession runs from the time when the son knew that his condition was disputed.

4. *Julianus, Digest, Book XX.*

Therefore, if a child does not demand possession of the estate under the First Section, he can, in some instances, obtain possession under the following Section of the Carbonian Edict, and sometimes he cannot do so; for if a controversy should arise immediately after the death of the father as to whether he could demand possession of the estate with the other children, the year will be considered to have expired at the same time, so far as both periods are concerned. If, however, after a certain term has elapsed, he should ascertain that his rights were disputed, he can, even if the time has expired during which he could have demanded possession of the estate under the First Section of the Edict, demand it under the Second Section; and when he has obtained it, he can always avail himself of the possessory actions. But where judgment has been rendered against him after he has reached puberty, the actions will be refused him.

5. *Ulpianus, On the Edict, Book XLI.*

If he who institutes a contest against the minor is one of the children of the deceased, the result will be, whether he whose condition is in dispute gives security, or whether he does not do so, he will still be placed in possession.

(1) If the child under the age of puberty is not defended, and therefore his adversary is placed in possession, who will have the right to bring the actions in which the estate is interested? Julianus, in the Twenty-fourth Book of the Digest, says that a curator should be appointed who can take charge of everything, and bring the actions. He, moreover, says that the person who is placed in possession with the minor is not forbidden to institute proceedings against the curator, for in this way no injury is done to the estate, as he can legally bring his actions against the minor himself, if he has furnished security.

(2) Whenever a minor under the age of puberty does not give security, his adversary is placed in possession, whether he himself gives security or not. If his adversary wishes the administration of the property to be entrusted to him, he should furnish security to the minor; but if he does not do so, a curator should be appointed by whom the property shall be administered.

Again, if the adversary should give security, he ought to sell any property which is liable to be either destroyed or depreciated by delay, and he must also collect all debts from the debtors, if they will be released by lapse of time; the remainder of the estate he shall keep possession of along with the minor.

(3) Moreover, let us see whether he who is placed in possession under the Carbonian Edict can diminish the estate in order to provide for his own support. If the minor has given security, he can use part of the estate for his support, whether a decree authorizing him to do so has been granted, or not; and he must return the remainder of the estate to the person who

claims it.

If, however, he is unable to give security, and it is evident that he cannot otherwise support himself, he should be placed in possession in order to enable him to obtain what is necessary for his subsistence. It ought not to appear surprising that a person, who may not prove to be the son of the deceased, is allowed to use part of the property for his support, since an unborn child is placed in possession of the entire estate by the Edicts, and support is given to his mother for the benefit of a child that may not be born; and greater care should be exercised to prevent the son from dying from hunger than to prevent a smaller amount of property coming into the hands of the claimant, if it should be decided that the child was not the son of the deceased.

(4) I think that it should, by all means, be asked of the Praetor that the documents of the estate shall not be placed in the hands of the adversary, if he obtains possession; otherwise, the minor may be defrauded either by his adversary obtaining information through them, or by enabling him to suppress them.

(5) When neither the minor nor his adversary gives security, a curator should be appointed who shall administer the property and deliver it to whoever gains the case.

What, however, must be done if the guardians of the minor demand the administration ? They should not be heard unless they give security in the name of the minor, or unless they themselves are appointed curators.

6. *Paulus, On the Edict, Book XLI.*

The question arises, can a decree be rendered with reference to the property of a mother? And, in fact, a decree cannot be rendered in this instance, under the Carbonian Edict; for a long delay should be granted which will defer the decision until the age of puberty.

(1) Julianus says it is clear that if a controversy arises with reference to the estates of the father and mother, at the same time, or even with reference to that of a brother, the decision of the controversy must be postponed until the time of puberty.

(2) There will be ground for the application of this Edict, even if the children should obtain praetorian possession *ab intestato;* even when they demand it under the last Sections of the Edict, where heirs at law are called to the succession as they are proper heirs, or under that Section by which possession is granted to cognates.

(3) This Edict also applies where a controversy exists both with reference to the status of the minor, and his right to the estate; for if only his status is involved, as, for instance, where he is said to be a slave, and there is no dispute as to the estate, under such circumstances the question of his freedom should be immediately determined.

(4) If he who raises a controversy concerning the minor is placed in possession with him at the same time, he should not be supported out of the property of the deceased, nor can he take anything from the estate, for this possession is only given him in lieu of security.

(5) Not only should support be furnished the minor, but also money for his education, and all other necessary expenses should be paid in accordance with the amount of the estate.

(6) The question arises whether he who has been placed in possession under the Carbonian Edict can, after he arrives at puberty, take the part of plaintiff in court. It has been established that he can take the part of defendant, especially if he gives security. Where he does not give security, and is not prepared to do so, suit can be brought against him as the possessor of the estate. If he does not then furnish security, possession will be transferred to his adversary, provided that he banishes it; just as if the estate had been, from that moment, claimed by him for the first time.

7. *Julianus, Digest, Book XXIV.*

If it is denied that a minor has been legally adopted, and for that reason his right to the estate of his father is disputed, it will not be unjust for a decree similar to those issued under the Carbonian Edict to be rendered.

(1) Likewise, where a minor, under the age of puberty, is said to have been given in adoption, and hence his right to the estate of his natural father is denied, since in this case the question arises whether he is entitled to the estate as a son, there will be ground for the application of the Carbonian Edict.

(2) If, however, we suppose that the son is disinherited, it will not be necessary to postpone the decision of the controversy until the age of puberty, because the question does not involve the right of the son himself, but the validity of the will.

(3) If the mother of the person whose freedom and claim to the estate of his father are in dispute is called into court to testify in a suit brought to establish his freedom, the decision with reference to his mother should not always be deferred to the time of puberty; for there are instances where the cases of those who are said to be supposititious children are determined without delay.

(4) Whenever a decree is rendered under the Carbonian Edict, the matter is considered to be in the same condition in which it would have been if no controversy had arisen with reference to the person who obtained praetorian possession of the estate.

(5) Again, where two brothers have been placed in possession under this decree, and one of them refuses to defend his share of his father's estate, the other will be compelled to defend the whole of it, or abandon it all to the creditors.

(6) Sometimes, a disinherited son obtains possession of the estate under the Carbonian Edict, where he does not demand praetorian possession contrary to the provisions of the will, but, on the ground of intestacy, which is granted to children; because he denies that his father's will is such that praetorian possession can be given under it, as it is alleged that he is not his son.

(7) If a minor demands possession of the estate of a freedman of his father, and it is denied that he is the son of the patron, for the reason that there is no dispute with reference to the estate of his father, the determination of the controversy should not be postponed. If, however, this controversy should arise after a decree under the Carbonian Edict had been rendered, its determination should be deferred until the time of puberty.

(8) The question arose whether a minor could have possession under the Carbonian Edict at the same time with the appointed heirs, who obtained it in accordance with the terms of the will. I answered that if he should not be the son, or had not obtained praetorian possession of the estate contrary to the provisions of the will, on the ground of intestacy, he could obtain it under the Carbonian Edict, at the same time that the appointed heirs acquired praetorian possession of the estate in accordance with the provisions of the will.

8. *Africanus, Questions, Book IV.*

The person whom I declare to be my son, and under my control, died. A minor, under the age of puberty, appeared, who alleged that the deceased was the father of a family, and that the estate belonged to him.

It was held that the decree should be rendered.

(1) Again, my emancipated son died intestate, leaving a son under the age of puberty, who alleged that he was the direct heir. I maintain the latter was conceived before emancipation took place, and, for this reason, was under my control, and that the estate of the emancipated son belonged to me.

It was established that this child was the son of the deceased, but a question arose as to his legal condition, that is to say, whether he was under the control of his father, or not; and there

is no doubt whatever that the Carbonian Edict is applicable in this instance.

9. *Neratius, Parchments, Book VI.*

Labeo stated that whenever a minor is said to be supposititious, and a controversy arises with reference to his right to his father's estate, the Praetor should be careful to place him in possession of the same. I think that Labeo intended this to be applicable to a child born after the death of his father, who alleges that he was his son, even though the deceased thought that he had no children; for he who has been acknowledged by the person whose estate is in dispute has a more equitable claim to it than a posthumous child.

10. *Marcellus, Digest, Book VII.*

Where a woman, to whom an oath has been tendered by the heir, swears that she is pregnant, possession of the estate should be granted under the Carbonian Edict, or it should be refused if she tendered the oath to the heir; for possession should be given after proper cause has been shown to prevent the heir from being prejudiced if it should be given; or if it should be denied, to avoid depriving the minor of his legal rights.

11. *Papinianus, Questions, Book XIII.*

There is no ground for the application of the Carbonian Edict, where the son, whose civil condition is contested, cannot become the heir without the intervention of the Praetor; for example, if he has been appointed. The same rule applies where it is certain that he still cannot be the heir, even though he may be the son; as, for instance, if Titius was appointed heir, and a posthumous child or a disinherited minor should be denied to be the son of the testator.

Nor does it make any difference what interest the minor may have in being proved to be the son, with reference to other matters, for example, in order to obtain the property of his brother by another mother; or to acquire rights over freedmen and burial places; for it is established that these cases do not come under the Carbonian Edict.

12. *The Same, Questions, Book XIV.*

An appointed heir, against whom a minor son who is said to be supposititious demands praetorian possession under the First Section of the Edict, as in the case of an heir at law, cannot, in the meantime, obtain possession in accordance with the provisions of the will. If, however, in the interim, either the appointed heir, or he who is entitled to possession as the heir at law, should die, relief must be granted to his heirs. For what if they had not been able to enter upon the estate, because the law prevented them from doing so, or on account of the decision of the controversy being doubtful?

13. *Paulus, Opinions, Book XI.*

Titia had a posthumous child after the death of her husband, and Sempronius brought an accusation of adultery against her before the Governor of the province. I ask whether trial of the accusation of adultery should be deferred until the age of puberty, in order that the rights of the posthumous child may not be prejudiced. Paulus answered that if there was no question as to the right of the minor to the estate of her father, her guardians have no reason to defer the trial for adultery until their ward reaches the age of puberty.

14. *Scaevola, Opinions, Book II.*

The question arises whether a minor under puberty has obtained possession of an estate by the Carbonian Edict, and reaches that age before the possession has been transferred to him, can perform the duties of plaintiff. The answer was that he must introduce proof of any claim which he makes against the possessor.

15. *Hermogenianus, Epitomes of Law, Book HI.*

This possession will benefit the minor if security is furnished not only to obtain actual possession, but also to recover property, to collect debts, to give dowries, and to do everything else which we have already stated is liable to contribution in collation.

16. *Paulus, On the Edict, Book XLI.*

Just as security is given to an emancipated son with reference to the estate of his father, so it must also be given to a minor with reference to the property which he himself places in collation.

TITLE XI.

CONCERNING PRAETORIAN POSSESSION OF AN ESTATE IN ACCORDANCE WITH THE PROVISIONS OF THE WILL.

1. *Ulpianus, On the Edict, Book XXXIX.*

By a will we should understand any kind of material upon which it is written; therefore, whether it is written upon tablets of wood, or upon those of any other kind of material, or upon papyrus, or parchment, or upon the skin of any animal whatsoever, it is also properly designated a will.

(1) The Praetor does not, under this Section of the Edict, confirm all wills, but only the last ones; that is to say, those which were most recently made, and after which no others have been drawn up. A last will is not one which was executed at the very time of death, but one after which no other has been executed, even though it is old.

(2) It is sufficient for there to be a will, although it may not be produced, if it is certain that it does exist. Therefore, if it is in possession of a thief, or in the hands of one with whom it has been deposited for safe-keeping, there is no doubt that praetorian possession of the estate should be granted; for it is not necessary to open the will in order that praetorian possession may be obtained in accordance with its provisions.

(3) Again, it is necessary for the will to have been in existence at the time of the death of the testator, even if it may have ceased to exist afterwards, hence, where it has subsequently been destroyed praetorian possession can be demanded.

(4) Nevertheless, we require that the heir should know that the will existed, and be certain that the possession of the estate was given to him by its provisions.

(5) Where anyone makes two copies of his will, and one of them remains, and the other is destroyed, the will is considered to be in existence, and praetorian possession of the estate can be demanded.

(6) Even if the testator made two wills, and sealed them at the same time, and appointed different heirs by each one, and both are in existence; possession of the estate can be obtained under both, because they are considered as one document and the last will of the testator.

(7) If, however, a testator should execute a will, and also a copy of the same, and if the one which he intended to be his will is in existence, praetorian possession of the estate can be demanded; but Pomponius says that if only the copy is in existence, possession of the estate cannot be claimed.

(8) For possession to be given of an estate of anyone, the Praetor requires that he should have the right of testation, not only when he made the will, but also at the time of his death; hence, if a minor under the age of puberty, or an insane person, or anyone else of those who have not testamentary capacity should make a will and afterwards became competent to do so, and die, praetorian possession of his estate cannot be demanded.

If, however, a son under paternal control, thinking that he was the head of a household when he was not, should make a will, and afterwards be found to be his own master at the time of

his death, possession of his estate in accordance with the provisions of the will cannot be claimed under the terms of the Praetorian Edict. But if a son under paternal control, who was a veteran, should make a will disposing of his *castrense peculium,* and afterwards be emancipated, or become the head of a family and then die, praetorian possession of his estate can be demanded.

If anyone should have the power to make a will at both the times above mentioned, but should not have that power in the interval, praetorian possession of his estate can be claimed in accordance with the provisions of his will.

(9) Moreover, if anyone should make a will, and afterwards be deprived of testamentary capacity either through becoming insane, or for the reason that he was forbidden to manage his property, possession of his estate can be demanded under the Edict, because his will is valid in law. Generally speaking, this may be said of all persons of this kind who have lost the power to make a will at the time of their death; but their wills executed before that time are valid.

(10) Where the cord which binds the tablets of the will together is cut, even though this was done against the wish of the testator, praetorian possession of the estate can be demanded. If, however, the testator himself should cut it, the will is not considered to have been sealed, and therefore possession of the estate cannot be claimed.

(11) If the tablets on which the will is written should be gnawed by mice, or the cord be broken in some other way, either through being decayed by age, or by the dampness of the place where it was deposited, or by a fall, the will is considered to have been sealed; especially if you suppose that it is fastened with only one cord. If a cord is wound three or four times around the tablets, it must be held that they are sealed, even though it may be cut or gnawed in one place.

2. *The Same, On the Edict, Book XLI.*

The Praetor has adopted a most equitable order of succession in the Edict. For he desires that, in the first place, the children shall be entitled to possession of the estate in opposition to the terms of the will, and then, if this should not be done, the will of the deceased must be complied with. Therefore the matter must remain in abeyance for the time during which the children can demand possession of the estate. When this period has elapsed, or if before this they should die, or reject the estate, or should lose the right to claim possession of it, then possession of the estate under the Praetorian Edict will revert to the appointed heirs.

(1) Where a son is appointed an heir under a condition, Julianus very properly holds that he can demand possession of the estate in accordance with the terms of the will, in the capacity of appointed heir, no matter what the condition is, even if it should be as follows, "when a ship should arrive from Asia." And although the condition may not be fulfilled, the Praetor must, nevertheless, protect the son whom he permits to have possession in accordance with the provisions of the will, even if he had already obtained possession in opposition to them. This protection is especially necessary to a son who has been emancipated.

(2) Each appointed heir shall be given possession of the estate in proportion to the share of the same which has been bequeathed to him, in such a way, however, that if there is no one who demands it with him he may have sole possession. Nevertheless, while one of the heirs is deliberating whether or not he will take praetorian possession of the estate, possession of the share of his co-heir shall not be granted the latter.

(3) Where one substitute has been appointed for an heir if he should die within ten years, and another if he should die between the ages of ten and fourteen years, and the heir dies before he is ten years old, the first substitute will become the heir, and will obtain praetorian possession of the estate; but if the heir should die after he is ten years old, and before he reaches his

fourteenth year, the second substitute will become the heir, and will obtain possession; but both cannot be joined, as each of them is substituted under a different condition.

(4) Praetorian possession of an estate in accordance with the terms of the will is granted to heirs appointed in the first degree, and afterwards, if they do not claim it, to the substitutes who come next in order, as well as to those who were substituted for the substitutes; and we grant possession to substitutes in regular order. We should understand heirs to be appointed in the first degree who are appointed first; for as they have the prior right to accept the estate, so also they should be the first entitled to praetorian possession.

(5) If anyone should say in his will, "Let the first be heir to half of my estate and if he should not be my heir, let the second be my heir; let the third be my heir to half of my estate, and if he does not become my heir, let the fourth be my heir," the first and the third are those who will be permitted to obtain praetorian possession of the estate.

(6) If anyone should appoint heirs as follows, "Let whichever of my brothers who shall marry Seia be the heir to three-fourths of my estate, and let the one who does not marry her be the heir to a fourth of the same," it is evident that if Seia should die, the heirs will be entitled to equal shares of the estate. If, however, she should be married to one of them, he will be entitled to three-fourths, and the other to one-fourth of the estate, respectively; but neither of them can demand praetorian possession before the condition has been complied with.

(7) If the name of the heir has been designedly erased, it is settled beyond a doubt that he cannot demand praetorian possession of the estate, any more than one who has been appointed an heir without consulting the testator; for he is considered as not having been designated whom the testator did not wish to appoint.

(8) Where two heirs are appointed, namely the first and the second, and a third is substituted for the second, if the second declines to take possession of the estate, the third will succeed to his place. If, however, the third should refuse to enter upon the estate, or to take praetorian possession of the same, possession of it will revert to the first; nor will it be necessary for him to demand praetorian possession, for it will accrue to him by operation of law, as praetorian possession accrues to an appointed heir in the same manner as his share of the estate.

(9) Where a slave is appointed an heir, praetorian possession of the estate is given to his master to whom the estate will belong; for praetorian possession follows the ownership of the property. Therefore, if at the time of the death of the testator, the appointed heir, Stichus, was the slave of Sempronius, and Sempronius did not order him to enter upon the estate because of his death, or for the reason that he had alienated the slave, and the latter had become the property of Septitius, the result will be that if Septitius should order the slave to accept the estate, praetorian possession of the same will be given to Septitius, for the estate will belong to him. Wherefore, if a slave should pass to three or four masters in succession we will grant praetorian possession of the estate to the last of them.

3. *Paulus, On the Edict, Book XLI.*

It is true that every posthumous child who was unborn at the time of the death of the testator can demand praetorian possession of the estate after his birth.

4. *Ulpianus, On the Edict, Book XL1L*

The term "papyrus" applies not only to such as is new, but also to that which has been already used. Hence, if anyone should draw up his will upon a sheet the back of which is already written on, praetorian possession of property based on such a will can be obtained.

5. *The Same, Disputations, Book IV.*

Where anyone is appointed an heir under a condition, and after he has obtained praetorian possession in accordance with the terms of the will, the condition is not fulfilled, the result

will be that the property in the meantime will remain in the hands of the possessor; as,' for instance, where an emancipated son is appointed an heir conditionally. For, if the condition should fail to be fulfilled, Julianus says that he can, nevertheless, obtain praetorian possession in accordance with the terms of the will; but he also says that he should be protected if he is one who can obtain praetorian possession of the estate as heir at law. This is our present practice.

(1) Let us see whether legacies must be paid by these heirs. The son, indeed, who has obtained possession, as it were, contrary to the [provisions of the will, is considered to hold the estate by virtue of his appointment, but the others hold it as heirs at law; therefore the son is only compelled to pay the legacies left to descendants and ascendants, but not those left to others. It is evident that a trust must be executed for the benefit of him who was entitled to it as heir-at-law; as otherwise it would seem that praetorian possession under the terms of the will had been claimed for the purpose of defrauding him.

6. *The Same, Disputations, Book Vill.*

Those who have been appointed heirs conditionally can demand praetorian possession in accordance with the terms of the will, even while the condition is pending, and has not yet been fulfilled, provided they have been legally appointed; for where anyone has been illegally appointed, his nomination will be of no advantage to him in obtaining praetorian possession of the estate.

7. *Julianus, Digest, Book XXIII.*

When the tablets of the will were sealed in several places, and some of the seals are broken but seven still remain, this will be sufficient to enable praetorian possession of the estate to be granted; just as where the seals of seven witnesses appear, although they may not include the seals of all who sealed the will.

8. *The Same, Digest, Book XXIV.*

If the following was inserted into a will, "Let Sempronius be the heir to half of my estate; let Titius be an heir to a third of my estate, if a ship should arrive from Asia; and let the said Titius be the heir to a sixth of my estate, if a ship should not arrive from Asia," in this instance, Titius is not appointed heir to two different shares of the estate, but he is understood to be substituted for himself, and therefore he is held to be entitled to no larger a share than one-third. In accordance with this statement, as a sixth of the estate remains undisposed of, Titius will not only obtain possession of a third of the same under the Praetorian Edict, but also of the sixth which will accrue to him.

(1) Where a substitute is appointed for a son under the age of puberty, as follows, "If my son should die before reaching the age of puberty, then let Titius be my heir," he can claim the estate just as if the word "my" had not been added, and he can also obtain praetorian possession of it.

(2) If a mistake is made in the name or the surname of the person entitled to the estate, he can, nevertheless, obtain praetorian possession of the same.

(3) Moreover, where the name of the heir has been erased in the will at the desire of the testator, even though it can still be read, he is not understood to have been appointed, so that he can either enter upon the estate, or demand praetorian possession of the same in accordance with the Civil Law.

(4) A certain man drew up his will in writing, but appointed orally a substitute for his son, who was under the age of puberty. I gave it as my opinion that the intention of the Praetor in granting jpossession of the estate was that the heirs of the son and those of the father should be considered separately. For just as praetorian possession of an estate is granted to the appointed heir of the son separately from the heirs of the father, so it should also be given

separately from the appointed heirs of the father, where the heir is orally appointed.

9. *Pomponius, On Sabinus, Book II.*

In order that praetorian possession of an estate may be granted in accordance with the pupillary substitution, inquiry should be made whether the will of the father was sealed, even though that portion containing the substitution was produced unsealed.

10. *Paulus, On Plautius, Book Vill.*

When a slave is appointed an heir conditionally, there is some doubt as to whether he can obtain praetorian possession of the estate, or not. Our Scaevola holds that he can obtain it.

11. *Papinianus, Questions, Book XIII.*

"Let Titius be the heir of the one of my children who shall be the last to die before reaching the age of puberty." If the two children should die in a very distant place, and the substitute did not know which one of them died last, the opinion of Julianus must be adopted, which was that, on account of the uncertainty of the condition, possession of the estate of even one who died first could be demanded by the substitute.

(1) Where a son who was appointed heir returns from captivity after the death of his father, he can obtain praetorian possession of his estate, and the term of a year in which he can do so will be computed from the day of his return.

(2) Titius, after having made his will, gave himself to be arrogated, and then, having become his own master, died. If the appointed heir should demand praetorian possession, he will be barred by an exception on the ground of fraud; because, by giving himself to be arrogated, the testator transferred all his property, together with himself, to the family and household of another. It is clear that if, having become his own master, he stated in a codicil, or in some other document that he wished to die without changing his will, the will which had become inoperative is understood to have been restored by this subsequent statement, in the same way as if he had executed another will and had torn it up, so as to leave the first one in force.

Nor should anyone think that a will can be made by the mere expression of a wish; for, in this instance, no question whatever is raised with reference to the legality of the instrument, but only with reference to the force of the exception that, under these circumstances, may be filed against the plaintiff, which must depend upon the person of the adversary.

12. *Paulus, Questions, Book VII.*

In order that the appointed heir may obtain praetorian possession of the estate I think it should be required that his identity be established by a suitable designation, so that the share to which he is entitled can be found, even if he was appointed without any share; for when an heir is appointed without a share he can take one which is undisposed of, or some other portion of the estate.

If, however, the heir was designated in such a way as to seem to be excluded by the will, because the share of the estate to which he was appointed cannot be found, he shall not obtain praetorian possession. This occurs where anyone appoints an heir as follows, "Let Titius be my heir to the same portion of my estate to which I have appointed him by my first will," or "Let him be my heir to the same share to which I have appointed him by my codicil," and it should be ascertained that he was not appointed.

If, however, I should say, "Let Titius be my heir if I have appointed him heir to half of my estate in my first will," or "Let him be my heir if I have appointed him heir to half of my estate in my codicil," he can then obtain possession of my estate, as he was appointed heir conditionally.

TITLE XII.

CONCERNING PRAETORIAN POSSESSION WHERE A SON HAS BEEN MANUMITTED BY HIS FATHER.

1. *Ulpianus, On the Edict, Book XLV.*

A son who has been emancipated by his father is in the same condition, so far as praetorian possession contrary to the provisions of the will is concerned, as that of a freedman. This appears to the Praetor to be perfectly just, because the son obtains the advantage of acquiring property from his father; whereas, if he was under paternal control, and should acquire anything for himself, his father would reap the benefit of it. Hence, the rule was established that the father should be allowed to obtain praetorian possession contrary to the provisions of the will, just as a patron is permitted to do.

(1) Therefore, persons who have been manumitted are enumerated in the Edict as follows, "He who had been emancipated by his father, or by his paternal grandfather, or by his paternal great-grandfather."

(2) Where a grandson, who has been manumitted by his grandfather, gives himself in arrogation to his father, even if he should die while still under paternal control, or should die after having been manumitted, his grandfather will only be admitted to the succession in accordance with the interpretation of the Edict; because the Praetor grants the possession of the estate, just as where a slave has been manumitted from servitude. If, however, this should be the case, or if the son should not be arrogated because the arrogation of a freedman is not permitted, or if it should be done fraudulently, the rights of the patron would, nevertheless, remain unimpaired.

(3) If a father has either received money to induce him to emancipate his son, or if, afterwards the son, during his lifetime, should pay him enough to prevent him from opposing his will; he will be barred by an exception on the ground of bad faith.

(4) There is another instance in which a father does not obtain ipossession of the estate of his emancipated son, contrary to the provisions of the will, and that is where the son happens to enter the army; for the Divine Pius stated in a Rescript that the father could not, under these circumstances, obtain possession of the estate of his emancipated son in opposition to the terms of the will.

(5) It is settled that the children of a father, who manumitted his son, cannot obtain possession of the estate of the latter, in opposition to the terms of the will; even though the children of a patron can do so.

(6) Julianus says that where a father has obtained possession of the estate of his emancipated son, in opposition to the terms of the will, he will retain the former privilege which he enjoyed without manumission; for he should not be prejudiced because he possessed the rights of a patron, as he is still a father.

2. *Gaius, On the Provincial Edict, Book XV.*

A father is not to be considered the equal of a patron to the extent that the Favian or Calvisian Action may be granted him, for the reason that it is unjust for freeborn men not to have unrestricted power to alienate their property.

3. *Paulus, On Plautius, Book Vill.*

Paconius says that if a son who had been emancipated and manumitted by his father should appoint some disreputable persons his heirs (as, for instance, prostitutes), possession of his entire estate contrary to the provisions of the will shall be given to his father; otherwise he would be entitled to only half of the estate, if a disreputable heir had not been appointed.

(1) If an emancipated son should pass his father over in his will, or should appoint him his heir, the father will not be obliged to execute any trust, so far as the share of the estate to which he is entitled is concerned, even if he enters upon it. Where, however, a daughter or a granddaughter is manumitted, and the father or grandfather, having been passed over in the will, demands praetorian possession of the estate, the same rule will apply as in the case of a son.

4. *Marcellus, Digest, Book IX.*

The Praetor makes no provision in the Edict with reference to a father who has emancipated his son, and imposed upon the latter certain conditions in consideration of granting him freedom; and therefore the father can enter into no valid stipulation as to any services to be rendered by his son.

5. *Papinianus, Questions, Book XI.*

The Divine Trajan compelled a father to emancipate his son whom he had treated badly, and in a way contrary to that dictated by paternal affection, and the son, having afterwards died, the father declared that he was entitled to the possession of his estate on account of having manumitted him. This, however, was refused him on the advice of Neratius Priscus and Aristo as the emancipation took place through necessity, because of the want of paternal affection.

TITLE XIII.

CONCERNING PRAETORIAN POSSESSION OF AN ESTATE IN THE CASE OF THE WILL OF A SOLDIER.

1. *Ulpianus, On the Edict, Book XLV.*

There is no doubt that the wishes of those who make their last wills while in arms against the enemy, no matter in what way they may do so, and who die while in the army, should be observed. For, although the condition of a soldier is different from that of those persons who are privileged by the Imperial Constitutions, still, as men who constantly go into battle are exposed to the same dangers, it is only reasonable that they should claim the same privileges for themselves. Therefore, all who are in such a position that they cannot make wills under military law, if they are found in the train of the army and die there, can execute wills in whatever way they desire, and in whatever way they may be able, whether they are governors of provinces, Imperial deputies, or any others who are incapable of testation in accordance with military law.

(1) Moreover, there is no doubt that the captains of ships and the commanders of triremes can make wills under military law. All the oarsmen and sailors of fleets are considered as soldiers, and also the guards are classed as such; and there is no doubt that all these are capable of testation in accordance with military law.

(2) If a soldier is transferred from one command to another, even though he may have left one and not yet have been enrolled in another, he can, nevertheless, make a will according to military law; for he is still a soldier, although he may not yet have been assigned to any particular legion.

TITLE XIV.

CONCERNING THE RIGHT OF PATRONAGE.

1. *Ulpianus, On the Office of Proconsul, Book IX.*

Governors should hear the complaints of patrons against their freedmen, and their cases should be tried without delay; for if a freedman is ungrateful, he should not go unpunished. Where, however, the freedman fails in the duty which he owes to his patron, his patroness, or their children, he should only be punished lightly, with a warning that a more severe penalty

will be imposed if he again gives cause for complaint, and then be dismissed. But if he is guilty of insult or abuse of his patrons, he should be sent into temporary exile. If. he offers them personal violence, he must be sentenced to the mines.

The same rule will apply where he has caused them annoyance by means of a vexatious lawsuit, or suborned an informer against them, or has attempted to make some accusation against them.

2. *The Same, Opinions, Book I.*

Freedmen should not be forbidden by their patrons to transact lawful business.

3. *Marcianus, Institutes, Book II.*

Where anyone is appointed a testamentary guardian, and a female slave is bequeathed to him, and he is asked to manumit her, and, after doing so, he receives a legacy and excuses himself from accepting the guardianship of the minor, the Divine Severus and Antoninus stated in a Rescript that while he was, in fact, a patron of the slave, he should be deprived of all the rights attaching to the condition of patronage.

4. *The Same, Institutes, Book V.*

The Emperors Severus and Antoninus very properly stated in a Rescript that the rights over freedmen are preserved for children, where their father has been convicted of treason; just as such rights are preserved for the children of those who are punished for any other cause.

5. *The Same, Institutes, Book XIII.*

The Divine Claudius ordered that a freedman who had been proved to have instigated informers to raise a question as to the civil status of his patron should again become the patron's slave.

(1) It is provided by a Rescript of our Emperor that if a patron does not support his freedman, he shall forfeit his right of patronage.

6. *Paulus, On the Lex Julia Sentia, Book II.*

He who permits his freedman to swear that he will not marry, or have any children, is understood to be in the same position as one who compels his freedwoman to swear that she will not marry, or have any children. If, however, his son should do this, without his father's knowledge, or if he should enter into a stipulation with the freedman, this will not prejudice him in any way; but if a son who is under the control of his father should do so by his order, it is clear that he will be liable under the above-mentioned law.

(1) A patron stipulated for a hundred days of labor to be performed, or five *aurei* to be paid for each day by his freedman. This agreement does not seem to be contrary to law, because the freedman has the power to perform the labor.

(2) Although no person is excepted by this law, still it should be understood only to refer to those who can have children. Hence, if anyone should compel a freedman who has been castrated to take such an oath, it must be said that he cannot be held liable under this law.

(3) If a patron should compel his freed woman to swear to marry him, and he does so with the intention of marrying her, he will not be considered to have done anything illegal. If, however, the patron should not marry her, and only required her to take the oath to prevent her from marrying another, Julianus says that he has committed a fraud against the law, and that he should be liable, just as if he had compelled his f reedwoman to swear not to marry at all.

(4) An oath is permitted by the *Lex Julia* relating to marriages of different orders, which, in this instance, is imposed upon a freedman or a freedwoman, not to marry, provided they

desire to contract a legal marriage.

7. *Modestinus, On Manumissions.*

The Divine Vespasian decreed if a female slave had been sold under this law upon condition that she should not be prostituted, and she should be prostituted, that she would become free; and that if she afterwards came into the possession of another purchaser, without this condition, that she should be free by virtue of the sale, and become the freedwoman of the former vendor.

(1) It is provided by the Decrees of the Emperors that the governors of provinces, who have jurisdiction over the complaints of patrons, should impose penalties upon their freedmen in proportion to the gravity of their offences. These penalties are sometimes required in the case of an ungrateful freedman, and he is either deprived of a part of his property which is given to his patron, or he is scourged with whips, and then discharged.

8. *The Same, Rules, Book VI.*

The Divine Hadrian stated in a Rescript that where a slave was manumitted by a son under paternal control, who was a soldier, he became the freedman of the soldier and not of his father.

(1) A slave who is not manumitted will obtain his freedom when he is sold under the condition that he be manumitted within a certain time; and, after the time has elapsed, he will become the freedman of the purchaser, even though he may not have been manumitted.

9. *The Same, Rules, Book IX.*

Sons who refuse to accept the estates of their fathers do not lose their rights over the freedmen of the latter.

The same rule applies to an emancipated son.

(1) Some masters, who do not retain their rights as patrons over the property of their freedmen, are excepted by the law, as in the case of one who has been condemned to death, and has not been restored to his civil rights; or one who has been the informer of a crime committed by his freedman; or where a son, over twenty-five years of age, has accused a freedman belonging to his father of a capital crime.

10. *Terentius Clemens, On the Lex Julia et Papia, Book IX.*

It has been decided that a patron who has accused his freedman of a capital crime is excluded from praetorian possession of his estate contrary to the provisions of the will. Labeo thinks that the accusation of a capital crime should include both those which involve the penalty of death, and those punished by exile. An accuser is understood to be one who gave the name of the alleged guilty person, unless he asks that he receive immunity. Servilius says that this was also the opinion of Proculus.

11. *Ulpianus, On the Lex Julia et Papia, Book X.*

Moreover, he will not be admitted to the succession of his intestate freedman which is granted him by the Law of the Twelve Tables.

12. *Modestinus, Opinions, Book I.*

Gaius Seius, having died after making his will, appointed his freedman Julius, together with his sons, heir to part of his estate, just as if he had been his own child. I ask whether an appointment of this kind can change the civil condition of the freedman. Modestinus gave it as his opinion that it would not change his condition.

13. *The Same, Pandects, Book I.*

A son under paternal control cannot manumit a slave who is part of his *peculium,* unless he does so by order of his father; and the slave, after having been manumitted, becomes the freedman of the father.

14. *Ulpianus, On the Lex Julia et Papia, Book V.*

If I should swear in court that I am the patron of a certain slave, it must be held that I am not entitled to his estate in that capacity, because an oath does not constitute a patron. The case would, however, be different, if it had been judicially decided that I was his patron, for then the judgment will stand.

15. *Paulus, On the Lex Julia et Papia, Book Vill.*

Anyone who compels his freedman to be sworn contrary to the *Lex ^Slia Sentia* will neither himself nor his children have any rights over the freedman.

16. *Ulpianus, On the Lex Julia et Papia, Book X.*

When a freedman commits a fraud against the law, in order that he may die worth less than a hundred thousand *sesterces,* his act is void by operation of law; and therefore his patron will succeed him as a freedman possessed an estate of that amount. Hence, everything which he has alienated, for any reason whatsoever, will be of no force or effect.

It is evident that if he should alienate any property for the purpose of defrauding his patron, and, after doing so, he should remain worth more than a hundred thousand *sesterces,* the alienation will be valid, but any property which was fraudulently disposed of can be recovered by the Favian or the Calvisian action. Julianus has frequently stated this, and it is our practice. The reason for this difference is that whenever an alienation of anything is made for the purpose of defrauding the law the act is void.

Moreover, he is guilty of fraud who diminishes the value of his estate to less than a hundred thousand *sesterces* for the purpose of evading the provisions of the law. But if, after the alienation has taken place, he still remains the owner of property worth a hundred thousand *sesterces,* he is not considered to have committed a fraud against the law, but only against his patron; and therefore the property which he has disposed of can be recovered by either the Favian or the Calvisian Action.

(1) Where anyone, for the purpose of diminishing the value of his property to an amount under a hundred thousand *sesterces,* alienates several articles at once, so that by revoking the sale of one, or of portions of all of them, he will be worth more than a hundred thousand *sesterces,* will it be necessary for us to revoke the sale of all the articles, or that of each one *pro rata,* in order to render his fortune equal to a hundred thousand *sesterces?* The better opinion is that the alienation of all the articles is of no force or effect.

(2) If anyone should not sell all of his property at once, but a part of it at one time, and a part of it at another, the subsequent alienation will not be revoked by operation of law, but the former one will be; and there will be ground for the institution of the Favian Action with reference to the property last disposed of.

17. *The Same, On the Lex Julia et Papia, Book XI.*

The Divine Brothers stated the following in a Rescript: "We have ascertained from those who are the most learned in the law that it was sometimes doubtful whether a grandson could demand praetorian possession of the estate of his grandfather contrary to the provisions of the will, if his father, who was over twenty-five years of age, had accused him of a capital crime.

"It is true that Proculus, a jurist of great authority, was of the opinion that, in a case of this kind, praetorian possession should not be given to the grandson; and we adopted this opinion when we issued a Rescript in answer to the application of Csesidia Longina. But, our friend Volusius Maecianus, Praetor of the Civil Law, and one who

pays the greatest attention to old and well-founded precedents, being influenced by his respect for Our Rescript (as he stated to Us) did not think that he could decide otherwise. But as We have discussed this point very fully with Maecianus himself, and with others of our friends learned in the law, the better opinion seems to be that a grandson will not be excluded from the estate of his freedman's grandfather, either by the words or the spirit of the law, or by the Edict of the Praetor, or on his own account, or by the stigma attaching to his father.

"We are also aware that this opinion has been adopted by many eminent jurists, as well as by that most illustrious man Salvius Julianus, our friend."

(1) The question also arose, if a son accused the freedman of his father of a capital offence, whether this would prejudice the rights of his children. Proculus held that the stigma attaching to the son of the patron would prejudice his children. Julianus, however, denies that this is the case; and it must be held that the opinion of Julianus should be adopted.

18. *Scaevola, Opinions, Book IV.*

I ask whether a freedman can be prevented by his patron from carrying on the same kind of business which his patron is transacting in the same colony. Scaevola answered that he could not be prevented from doing so.

19. *Paulus, Sentences, Book I.*

A freedman is ungrateful when he does not show proper respect for his patron, or refuses to manage his property, or undertake the guardianship of his children.

20. *The Same, Sentences, Book III.*

Where a freedman dies after making his will, power is given to his patron to demand either payment of whatever was due for granting him his freedom, or praetorian possession of a part of his estate; and even if the freedman sho'uld die intestate, the patron will still have the choice of these two things.

21. *Hermogenianus, Epitomes of Law, Book HI.*

If the patron or the freedman has been banished, and afterwards restored to his civil condition, the right of patronage, as well as that to demand praetorian possession contrary to the provisions of the will, which have been lost, will be restored; and this right is preserved, even if the patron or the freedman should be restored to his former status after having been sentenced to the mines.

(1) A patron is excluded from praetorian possession contrary to the provisions of the will when he is appointed heir to only a twelfth of the estate; and what is necessary to make up the amount to which he is entitled can be obtained through his slave by a bequest of the freedman payable unconditionally, and without delay, either by leaving him the estate, or a legacy, or a sum of money payable under a trust.

(2) Where only one of two patrons is appointed heir to what is due to him unconditionally, and without delay, he cannot demand praetorian possession in opposition to the provisions of the will; even if a smaller amount than he was entitled to has been left to him, and he should demand praetorian possession of the estate contrary to the provisions of the will, the share of the other patron will accrue to him.

(3) If the natural children of a freedman, who had been disinherited by him, should through their slaves succeed to a share of the estate of their father, a stranger having been appointed heir to the remainder, this will affect the right of the patron.

(4) Where the son of a freedman is appointed his heir, and rejects the estate, the patron will not be excluded.

22. *Gaius, On Special Cases.*

It is well established that even if the son of a patroness is under parental control, the estate will still belong to him by law.

23. *Tryphoninus, Disputations, Book XV.*

When a son left the death of a father unavenged, and a slave having detected the murderer, had deserved his freedom on this account, I held that the son should not be considered as the patron of the slave, for the reason that he was unworthy.

(1) Where a false codicil had been made, which at first was considered to be genuine, and the heir, ignorant of the fact, granted freedom to certain slaves by virtue of a trust created by said codicil, it was stated in a Rescript of the Divine Hadrian that the slaves would be free, but that they must pay the heir their full value. And it was justly held that the said slaves should become the manumitted freedmen of the heir, for the reason that his right over them as patron still remained in force.

24. *Paulus, In the First of the Six Books of the Imperial Decrees Rendered in Council; or the Imperial Decisions.*

Camelia Pia appealed from the decision of Hermogenes, which set forth that the judge who had jurisdiction over an estate to be divided between herself and her co-heir had divided not only the property, but the freedmen as well. It was decided that this had not been done in accordance with any law, and that the division of the freedmen was void; but that the appointment of the provisions made by the judge among the co-heirs should be confirmed without any alteration.

TITLE XV.

CONCERNING THE RESPECT WHICH SHOULD BE SHOWN TO PARENTS AND PATRONS.

1. *Ulpianus, Opinions, Book I.*

The filial affection due to parents should also be manifested by soldiers. Wherefore, if a son, who is a soldier, commits any improper act towards his father, he must be punished in proportion to his offence.

(1) Filial affection between a mother and a son who have been liberated from slavery together should be maintained in accordance with natural law.

(2) If a son, by the use of abusive language, should insult his father or his mother, whom it is his duty to respect, or should lay impious hands upon either of them, the Prefect of the City shall punish the crime, which affects public order, in proportion to its gravity.

(3) A son should be considered as unworthy to be a soldier, who calls his father and his mother, by whom he acknowledges that he has been brought up, malefactors.

2. *Julianus, Digest, Book XIV.*

The respect due to parents and patrons is of such a character that an action for fraud or injury can not be granted against them, even though they may appear by an attorney; for although, by the terms of the Edict, if judgment be rendered against them, they might not be considered infamous; still, according to public opinion itself, they will not escape the imputation of infamy through the very proceeding.

(1) Judgment for forcible possession is also forbidden to be rendered against them.

3. *Marcellus, Opinions.*

Titius purchased a boy slave, and after the lapse of several years ordered him to be sold, but subsequently having been begged to manumit him, did so, having received from him a sum of money as his value. I ask whether the son and heir of the master who manumitted him can

accuse the freedman of being ungrateful. The answer was that he could, if there was no other obstacle; for it makes a great deal of difference where anyone has given freedom to his slave in consideration of money obtained from him, or from a friend of his, and where a slave, who had belonged to another, becomes his property and pays him a sum of money for his freedom. For the former confers a benefit upon him, although it is not gratuitous; the latter, however, can be considered to have done nothing more than to have lent him his aid.

4. *Marcianus, Public Decisions, Book II.*

The Divine Severus and Antoninus stated in a Rescript that an ungrateful freedman could be accused by the agent of his patron.

5. *Ulpianus, On the Edict, Book X.*

A parent, a patron, a patroness, or the children of relatives of the latter, will not be liable to an action *in factum* on account of a transaction, in which they are said to have received a sum of money, in consideration of either the performance or nonperformance of some act.

(1) Neither will actions implying moral turpitude, nor such as are based upon bad faith, or fraud, be granted against them.

6. *Paulus, On the Edict, Book XL*

Nor can suit be brought against them for corrupting a slave:

7. *Ulpianus, On the Edict, Book X.*

Although such actions may not imply moral turpitude.

(1) And judgment shall be rendered against them only for the amount which they are able to pay.

(2) Nor can they be opposed by exceptions on the ground of bad faith, or for force, or fear, or by interdicts *unde vi,* or for any injury suffered through violence.

(3) When these persons tender an oath, they are not compelled to swear that this is not done maliciously.

(4) When a freedman alleges that his patroness has fraudulently been placed in possession of an estate in the name of her unborn child, he shall not be heard, because he cannot accuse his patroness of fraud, for such persons are entitled to respect; as is stated in the Sections of the Edict.

(5) Respect, however, is only due to them personally, and not to those who represent them; but if they themselves should appear for others, they will still be entitled to respect.

8. *Paulus, On the Edict, Book X.*

The heir of a freedman is entitled to all the rights of a stranger against the patron of the deceased.

9. *Ulpianus, On the Edict, Book LXVL*

The persons of a father and a patron should always appear honorable and sacred in the eyes of a freedman and a son.

10. *Tryphoninus, Disputations, Book XVII.*

A father has no right to place any obligation upon his emancipated son, in consideration of having granted him his freedom, for the reason that nothing of this kind can be imposed upon children. Nor can anyone say that a son is bound by an oath to his father, who manumits him, in the same way as a freedman is to his patron, as children owe their parents affection and not menial services.

11. *Papinianus, Opinions, Book XIII.*

A freedwoman is not considered ungrateful because she works at her trade in opposition to the wishes of her patron.

THE DIGEST OR PANDECTS.

BOOK XXXVIII.

TITLE I.

CONCERNING THE SERVICES OF FREEDMEN.

1. *Paulus, On Various Passages.*

The services above mentioned signify daily labor.

2. *Ulpianus, On the Edict, Book XXXVIII.*

The Praetor promulgated this Edict in order to restrict the demands for services imposed in consideration of the grant of freedom; for he perceived that the demands for services imposed in return for freedom increased excessively, for the purpose of oppressing and annoying freedmen.

(1) Therefore, in the first place, the Praetor promises that he will grant actions with a view to requiring services to be rendered by freedmen and freedwomen.

3. *Pomponius, On Sabinus, Book IV.*

Where a patron has stipulated for services to be performed by his freedmen, he cannot demand them until after the time has passed when they are due.

(1) Nor can a part of the services be performed by the freedmen working a certain number of hours, because the obligation requires the labor of an entire day. Hence a freedman who has only worked six hours in the forenoon will not be released from labor for the entire day.

4. *The Same, On Sabinus, Book IV.*

A slave who was manumitted by two masters promised his services to both. One of them having died, there is no reason why a demand for the services of the slave should not be made by his son, even though the other master may be living. This has nothing in common with the succession to, or praetorian possession of an estate; as services are demanded from freedmen just as if money had been lent to them. This was the opinion of Aristo, and I think it to be correct; for it is held that an action should be granted to a foreign heir for services which were due but not performed, without the fear of his being barred by an exception; and therefore, it should be granted to the son, even if the other patron is living.

5. *Ulpianus, On Sabinus, Book XV.*

If anyone should stipulate for services to be rendered for the benefit of himself and his children, the stipulation will also apply to his posthumous heirs.

6. *The Same, On Sabinus, Book XXVI.*

Services appertaining to a trade, and others which are the same as the payment of money, pass to the heir; but those relating to the duties of the freedmen do not pass to him.

7. *The Same, On Sabinus, Booh XXVIH.*

In order that, in a case of this kind, the obligation of an oath may be contracted in accordance with law, it is necessary that the person who is sworn be a freedman, and that he does so in consideration of the freedom which he has received.

(1) The question arises, if anyone should bequeath a legacy to his freedman, provided he will swear to pay ten *aurei* to his son, instead of giving his services, whether he will be bound by the oath. Celsus Juventius says that he will be bound, and that it makes very little difference for what reason the freedman takes an oath with reference to his services. I assent to the opinion of Celsus.

(2) In order that the oath may be binding, the freedman must take it after his manumission, and he will be equally bound whether he takes it immediately, or after a certain time.

(3) Moreover, he should swear that he will give his services, a gift, or a present; and he can promise any services whatsoever, provided that they can be lawfully and properly proposed.

(4) It was stated in a Rescript by the Divine Hadrian, and also subsequently by other Emperors, that a demand for services cannot be made against one who has obtained his freedom in consideration of the execution of a trust.

(5) The action to compel the performance of services will be granted against a minor when he reaches the age of puberty, and sometimes even while he is under that age; for services can be performed by him if he is a copyist, or one familiar with the names of citizens, or an accountant, or an actor, or the minister of any other kind of pleasure.

(6) If the children of a patron have been appointed to unequal shares of the estate, should they be entitled to an action to compel the performance of the services of freedmen, in accordance with their hereditary right to the estate, or to their shares? I think that the better opinion is that they will be entitled to an action in proportion to their hereditary right to the estate.

(7) It, however, makes little difference whether the children were under the control of the patron, or had been emancipated.

(8) If a patron should appoint his son, whom he had given in adoption, his heir, the better opinion is that he is entitled to the services of the freedmen.

(9) The children of a patroness are not excluded from demanding services from the freedmen of their mother.

8. *Pomponius, On Sabinus, Book Vill.*

Where a freedman has sworn to render his services to two patrons, it is held by Labeo that he owes a portion of them to each, and that this can be demanded of him; for services which have not been and could not be performed at the time are constantly required. This occurs whether the freedman has sworn to, or promised the patrons themselves, or a slave owned by both of them, to render his services, or where there are several heirs of one patron.

(1) It is established that anyone can act as surety for a freedman who takes an oath to render his services.

9. *Ulpianus, On Sabinus, Book XXXIV.*

Services are not property which, in the nature of things, exists.

(1) Services, however, to be performed from a sense of obligation, and which are to be rendered hereafter, are not due to anyone but the patron; as their ownership attaches to the person of the one who performs them, and to that of him to whom they are rendered. Services relating to a trade, and others of the same description, can be rendered by anyone and to anyone whomsoever; for where they have reference to some trade, they can be rendered to another by order of the patron.

10. *Pomponius, On Sabinus, Book XV.*

The slave of a patron cannot make the following stipulation with reference to a freedman: "Do you promise to render me your services?" Hence the stipulation should be made for the services to be rendered to his patron.

(1) Where a freedman takes the following oath with reference to his services, "I swear to render my services to my patron, or to Lucius Titius," he cannot be released from those which he owes to his patron by rendering his services to Lucius Titius.

11. *Julianus, Digest, Book XXII.*

It makes no difference whether Lucius Titius is a stranger, or the son of the patron:

12. *Pomponius, On Sabinus, Book XV.*

Because the services rendered to Lucius Titius are different from those to which the patron is entitled. Where, however, the freedman promises a certain sum of money to his patron, who is poor, in consideration of receiving his freedom, or promises it to Titius, the addi-. tion of the name of Titius will certainly be valid.

13. *Ulpianus, On the Edict, Book XXXVIII.*

When a slave is purchased under this law, subject to the condition that he shall be manumitted, and he obtains his freedom in accordance with the Constitution of the Divine Marcus, any services which have been imposed upon him will be of no force or effect.

(1) Nor can services be demanded from a freedman to whom property has been assigned under the Constitution of the Divine Marcus promulgated for the purpose of preserving the freedom of slaves, whether they have obtained their freedom directly, or in accordance with the terms of a trust, even if those who have obtained it as the beneficiaries of a trust become the freedmen of the person himself; for they do not become freedmen under the same circumstances as slaves whom we manumit without being compelled to do so.

(2) The action to compel the performance of services will lie when the time for performing them has passed; the time, however, cannot elapse before the services begin to be due, and they begin to be due after the time for their performance has been indicated.

(3) Even if the freedman should have a wife, his patron is not prevented from demanding his services.

(4) If the patron is a minor under the age of puberty, his freedman is not considered to be married with his consent unless the authority of his guardian confirms it.

(5) Where the marriage of a freed woman is ratified by her patron, it will bar him from objecting to it subsequently.

14. *Terentius Clemens, On the Lex Julia, et Papist, Book Vill.*

It is evident, when the freedwoman ceases to be married, that her services can be demanded, as almost all authorities hold.

15. *Ulpianus, On the Edict, Book XXXVIII.*

A freedman, after his services have been indicated, becomes so ill that he cannot perform them. Will he be liable, because it is clear that it is not his fault that he does not perform the services?

(1) Services cannot be promised, rendered, due, or demanded in part. Therefore Papinianus gave the following opinion, namely: where there are several distinct services and not merely one, and the patron who stipulated for them left several heirs, it is true that the obligation should be divided in proportion to the number of the heirs.

Finally, Celsus, in the Twelfth Book, says that if a freedman, who has two patrons, should swear that he will render a thousand services to a slave held by them in common, five hundred, rather than a thousand halves of the services will be due to each one.

16. *Paulus, On the Edict, Book XL.*

A freedman must render those services to his patron which belong to a trade that he learned after his manumission, provided they are such as can be performed honorably and without danger to life; but those which he learned at the time of his manumission should not always be rendered. If, however, he adopted some dishonorable occupation after his manumission, he must perform those services which he could have rendered at the time when he obtained his

freedom.

(1) Such services should be rendered to a patron as are suitable to the age, rank, health, requirements, and mode of life of both parties.

17. *The Same, On the Right of Patronage.*

A patron should not be heard if he demands services which the age of the freedman does not permit, or the weakness of his body cannot endure, or by the performance of which his condition, or mode of life will be injuriously affected.

18. *The Same, On the Edict, Book XL.*

Sabinus, in the Fifth Book of the Edict of the Urban Praetor, says that a freedman must render his services, and provide his own food and clothing. If, however, he cannot support himself, his food must be furnished him by his patron.

19. *Gaius, On the Provincial Edict, Book XIV.*

It is clear that services should not be required of a freedman without giving him certain days upon which to perform them, and allowing him sufficient time for earning enough to support himself.

20. *Paulus, On the Edict, Book XL.*

Unless this is done, the Praetor will not permit the services of a freedman to be rendered to his patron. This is entirely proper, because each one of them should furnish what he promised at his own expense, so long as what he owes is in existence.

(1) Proculus says that a freedman should go to Rome from his province in order to render his services; but, where he does so, the patron will lose the time consumed by him while coming to Rome. This is the case, provided the patron, as a good citizen and the careful head of a household, resides at Rome, or travels into the province, but if he wishes to wander about the world, the necessity of following him everywhere should not be imposed upon the freedman.

21. *Javolenus, On Cassius, Book VI.*

For the services should be rendered in the place where the patron resides, and of course at his expense for food and transportation.

22. *Gaius, On the Provincial Edict, Book XIV.*

Where a patron stipulates for services, the stipulation becomes operative when the patron makes the demand, and the freedman does not render them. Nor does it make any difference whether the words "when I demand them" are added or not; as one rule applies to the services of the freedman, and another to other matters. For as the performance of services is nothing more than the discharge of a duty, it is absurd to suppose that a duty should be performed on some other day than the one on which the person who is entitled to it wishes it to be done.

(1) When a freedman promises his patron to render him services, and does not include his children, it is settled that the services will only be due to his children if they become the heirs of their father. Julianus holds that, even if they become the heirs of their father, they will only have a right to demand the benefit of the services of the freedman where they did not become heirs through the intervention of another person. Therefore, if anyone, after having disinherited his emancipated son, should appoint his slave his heir, and the former should become his heir through the said slave, he ought to be barred from demanding the services of the freedman; just as a patron would be barred who did not impose any services upon his freedmen, or had sold those which he did impose.

(2) It should, by all means, be noted that in every kind of services such periods of time as are necessary for the proper care of his body should be granted to the freedman.

23. *Julianus, Digest, Book XXII.*

Services such as are promised by a freedman differ materially from those attaching to a trade or a profession; hence, if the freedman is an artisan, or a painter, as long as he is employed in this way he will be compelled to render his patron services of this kind. Therefore, just as anyone can stipulate for the performance of services relating to a trade for his own benefit, or for that of Titius, so, also, a patron can lawfully stipulate with his freedman for his services to be rendered either to himself, or to Sempronius; and the freedman will be released from his obligation by rendering his services to a stranger, just as he would be if he had performed them for his patron.

(1) Where there are several patrons who have designedly gone into different provinces, and have, at the same time, demanded the performance of services by a freedman, it may be said that the services are due, but that the freedman will not be bound, because it is not his fault, but that of his patrons, that the services are not performed; just as is the case where services are demanded from a freedman who is ill.

Where the patrons are residents of two different towns, and each one has his domicile there, they should agree with reference to the rendition of services by the freedman; otherwise, it would be a hardship that one who can be released by working for ten days, should, because his patrons do not agree with reference to the rendition of his services, and both demand them at once, be compelled to work for five days for one of them, and to pay the other the value of the five days of labor to which he is entitled.

24. *The Same, Digest, Book LII.*

Whenever a certain kind of service is specified in the stipulation, as, for instance, those of a painter, or of some artisan, they cannot be demanded unless the time for their performance has elapsed, as in the contract itself, time for performance is understood to be given, although it may not be expressed in words; for example, when we make a stipulation for services to be rendered at Ephesus, sufficient time to do so is implied. Hence the following stipulation is void, "Do you promise to give me to-day a hundred pictures which you have painted?" Services, however, begin to be due from the date of the stipulation. Those which a patron requires from his freedman are not due immediately, because it is understood to be agreed among the parties that they shall not be due before the time for their performance has been indicated; that is to say, that the freedman shall perform his services according to the convenience of his patron; which cannot be said with reference to those of an artisan, or a painter.

25. *The Same, Digest, Book LXV.*

A patron who hires the services of his freedman is not always understood to receive payment for said services; but this should be ascertained from the nature of the services, and The position of the patron and the freedman.

(1) For, if anyone has a freedman who is a comedian, or the chief actor in a pantomime, and his means are moderate, so that he cannot avail himself of his services unless he leases them, it should be considered that it is the services of the freedman that he requires, rather than the compensation therefor.

(2) Likewise physicians very frequently manumit their slaves who belong to the same profession, as they cannot make use of their services without hiring them.

The same rule can be said to apply to other occupations.

(3) But where anyone can make use of the services of a freedman, and prefers by hiring them to obtain their value, he should be considered to receive compensation for the services of his freedman.

(4) Sometimes, however, patrons hire the services of their freedmen at the request of the latter, and when this is done, they should be considered rather as receiving the price of their services than compensation for them.

26. *Alfenus Varus., Digest, Book VII.*

Where a physician, who thought that if his freedmen did not practice medicine he would have many more patients, demanded that they should follow him and not practice their profession, the question arose whether he had the right to do this or not. The answer was that he did have that right, provided he required only honorable services of them; that is to say, that he would permit them to rest at noon, and enable them to preserve their honor and their health.

(1) I also ask, if the freedmen should refuse to render such services, how much the latter should be considered to be worth. The answer was that the amount ought to be determined by the value of their services when employed, and not by the advantage which the patron would secure by causing the freedmen inconvenience through forbidding them to practice medicine.

27. *Julianus, On Minicius, Book I.*

If a freedman exercises the calling of a comic actor, it is evident that he should employ his services not only for the benefit of the patron himself, but also gratuitously at the entertainments of his friends; just as a freedman who practices medicine should, at the desire of his patron, treat the friends of the latter without compensation; for, in order that he may employ the services of his freedman it is not necessary for a patron always to give entertainments, or constantly to be ill.

28. *Paulus, On the Right of Patronage.*

Where a freedwoman, who has two or more patrons, marries with the consent of one of them, the other will continue to have the right to her services.

29. *Ulpianus, On the Edict, Book LXIV.*

Where suit is brought against a freedman to compel the performance of services, and his patron dies, it is established that the right of action does not pass to a foreign heir. If, however, there is a son, and he should not be the heir, even though issue may not have been joined in the case, he will, nevertheless, be entitled to the services of the freedman, unless he has been disinherited.

30. *Celsus, Digest, Book XII.*

If a freedman should swear to render all the services that his patron may desire, the wishes of the patron will not be considered, except so far as is consistent with justice. The intention of freedmen who leave their services to the discretion of their patrons is based upon the fact that the latter will act with justice, and not because they wish to bind themselves heedlessly.

(1) An action is granted to a patron against his freedwoman, who marries without his consent, for services due from her before marriage.

31. *Modestinus, Rules, Book I.*

A freedman cannot be compelled to render services which he did not promise, where none were imposed, even if he may for some time voluntarily perform them.

32. *The Same, Pandects, Book VI.*

A freedman who promised money to his patron, which the latter demanded of him for the purpose of rendering his freedom oppressive, will not be liable; and if the patron should exact the money, he cannot obtain possession of his estate contrary to the provisions of the will of the freedman.

33. *Javolenus, On Cassius, Book VI.*

Services cannot be imposed upon a freedman in such a way that he shall be required to support himself.

34. *Pomponius, On Quintus Mucius, Book XXII.*

It should be noted that obligations for the performance of services are sometimes subject to diminution, increase, and modification; for when a freedman is enfeebled, the patron loses his services which had already begun to be due. If, however, a freedwoman who had promised her services is raised to such a rank that it will be improper for her to render them to her patron, the obligation will be annulled by operation of law.

35. *Paulus, On the Lex Julia et Papia, Book II.*

A freedwoman, who is more than fifty years of age, is not compelled to render services to her patron.

36. *Ulpianus, On the Lex Julia et Papia, Book XI.*

Labeo says that it is clear that a partnership formed between a freedman and a patron, in consideration of freedom being granted to the former, is void in law.

37. *Paulus, On the Lex Julia et Papia, Book II.*

"A freedman who has two or more male or female children under his control (exclusive of any who may have adopted the profession of buffoon, or have hired themselves to fight with wild beasts), will not be required to render their patron or patroness, or the children of the latter any services, or to make them any donation or present, or to do anything else which they have agreed to furnish, bestow, or perform, in consideration of freedom, with reference to which they have sworn, promised, or bound themselves; and if the said freedman should not, at the same time, have two children under his control, but only one of the age of five years, he shall be released from the obligation of performing services."

(1) Julianus says that the death of children is an advantage to a freedman, as releasing him from services subsequently imposed.

(2) If, after having lost a child, the freedman binds himself to render services to his patron and another child is afterwards born, Pomponius says that there is all the more reason for the child who is. dead to be joined with the living one, in order to release the freedman from liability.

(3) It makes no difference whether the freedman promises his services to the patron himself, or to those who are under his control.

(4) If the patron should assign the services of his freedman to a creditor, the same rule cannot be said to apply; for this assignment is made instead of a payment. It may, however, be said that the freedman can be released by the above-mentioned law, if the patron has assigned the services to another, after the freedman has promised them; for it is true that he promised them to his patron, although he no longer owes them to him. But if in the beginning, the freedman should promise his services on account of the assignment of his patron, he will not be released.

(5) The release from the rendition of services not only has reference to those to be performed in the future, but also to such as are already due.

(6) Julianus says that even if suit has already been brought to compel the performance of services, a release will take place if children should be born. Where, however, a decision has been rendered for services to be performed, the freedman cannot be released, as he has begun to owe a sum of money.

(7) A posthumous child does not discharge the heirs of his father from liability, because the release should be derived from the freedman, and no one can be considered to be discharged after death. But children born before the death of the freedman will cause a release under the

above-mentioned law.

(8) According to the spirit of the said law, even if the release has special reference to the person of the freedman, his sureties will also be discharged. If, however, the freedman should furnish a debtor as his substitute, this will be of no advantage to him.

38. *Callistratus, On the Monitory Edict, Book III.*

Services are only understood to be properly imposed where they can be performed without disgrace, and without danger to life. For if a slave, who is a prostitute, should be manumitted, she ought not to render the same services to her patron, although she may still profit by the sale of her body; and if a gladiator should be manumitted, he does not owe his patron the same services, because these cannot be performed without danger to life.

(1) Where, however, a freedman is employed in some trade, he should give his services relating thereto, even if he has learned the trade after his manumission. If he ceases to exercise that trade, he should contribute such services as are not inconsistent with his rank; as, for example, he can live with his patron, travel with him, or transact his business.

39. *Paulus, On Plautius, Book VII.*

A stipulation was entered into by a patron as follows, namely, "If you do not give me your services for ten days, do you promise to pay me twenty *sesterces?"* It must be considered whether an action for the twenty *sesterces* should not be granted, as having been promised for the purpose of rendering freedom burdensome; or whether services which have not been promised can be given; or whether this ought only to be assumed to have been promised, in order that the patron may not be entirely excluded? The Praetor decides that services have only been promised.

(1) Hence the following point arises, namely, whether the freedman can prevent a judgment for a larger sum than twenty *sesterces* from being rendered against him, because the patron seems to have valued his services at that amount, and therefore he himself should not desire to increase it. It would, however, be unjust to do this, nor is it necessary to show such indulgence to the freedman, for he should not, on the one hand, agree to the stipulation, and on the other complain of it as being unjust.

40. *Papinianus, Questions, Book XX.*

If the property of a patron is sold, an action will still be granted him to obtain any services of his freedman which have begun to be due after the sale. If he is able to support himself, an action will not be granted him to compel performance of the services which should have been rendered before the sale, since this relates to what took place before the property was disposed of.

41. *The Same, Opinions, Book V.*

A freedman who has been released from the obligation to render services, and hence has acquired full testamentary capacity, shall, nevertheless, be compelled to treat his patron with respect.

The case is different with reference to furnishing support, where the necessities of the patron are assumed for the purpose of annoying the freedman.

42. *The Same, Opinions, Book IX.*

"I wish my slave, So-and-So, who is a mechanic of a low order, to be manumitted, in order that he may perform services for my heir." The manumitted slave v/as not compelled to promise, but, if he should do so, an action will not be granted against him, for he who gave him his freedom under a trust cannot alter a public law.

43. *The Same, Opinions, Book XIX.*

A slave who is obliged to render services to his patron cannot, without injury to the latter, enlist in the army.

44. *Scsevola, Questions, Book IV.*

If a freedman is in default in rendering his services, his surety will be liable, but the surety himself cannot be in default. A surety, however, who has agreed to furnish a substitute for the debtor will be liable for delay.

45. *The Same, Opinions, Book II.*

Can the freedman of a merchant who deals in clothing conduct the same business in the same town, and in the same place, if his patron is unwilling for him to do so ? The answer was that there is no reason, in the case stated, why he cannot do so, if his patron sustains no injury thereby.

46. *Valens, Trusts, Book V.*

Where a freedwoman is the concubine of her patron, it is settled that he cannot bring an action against her to compel the performance of services, any more than if she was married to him.

47. *The Same, Trusts, Book VI.*

Campanus says that the Praetor should not allow the promise of any gift, present, or service to be imposed upon a slave who is manumitted under the terms of a trust. If, however, he permitted himself to be bound by an obligation, when he was aware that he could refuse, a suit to compel the performance of services should not be denied, because the slave is held to have donated them.

48. *Hermogenianus, Epitomes of Laiv, Book II.*

As in the case of a patron, so, also, his son, his grandson, and his great-grandson who consents to the marriage of a freedwoman, loses the right to require her services; for she to whose marriage he consented ought to be entirely at the disposal of her husband.

(1) If, however, the marriage-to which the patron consented is void, he will not be prevented from exacting her services.

(2) The exaction of the services of the freed woman is not refused to her patroness, or to the daughter, granddaughter, or great-granddaughter of her patron, where any of them consented to her marriage; because it is not improper that the services of a freedwoman who was married should be rendered to them.

49. *Gaius, On Cases.*

A freedman who has two patrons can, in some instances, perform different services for both of them, at the same time; as, for example, if he is a copyist, and works for one of his patrons by writing books, and takes charge of the house of the other while the latter is on a journey with his family; for nothing will prevent him from writing books while he is in charge of the house.

Neratius stated the same opinion in his Works of Parchments.

50. *Neratius, Opinions, Book I.*

The nature of the services to be rendered depends upon the status of the person who renders them, for they must conform to his rank, his means, his mode of life, and his occupation.

(1) Moreover, a freedman, and everyone else who is required to perform services, must be supported, or he must be given sufficient time to provide for his maintenance; and, in every instance, time must be granted him for the proper and necessary care of his person.

51. *Paulus, Manuals, Book II.*

The right to demand services sometimes remains even after the right of patronage has ceased to exist, which occurs in the case of the brothers of him to whom the freedman has been assigned; or with reference to the grandson of one patron, where there is a son of another patron.

TITLE II.

CONCERNING THE PROPERTY OF FREEDMEN.

1. *Ulpianus, On the Edict, Book XLII.*

This Edict was promulgated by the Praetor with the intention of modifying the deference which freedmen should show to their patron. *if or* (as Servius says) in former times they were accustomed to require the most onerous services from their freedmen, by way of remuneration for the extraordinary benerit conferred upon the latter, when, after having been liberated from slavery, they were made Roman citizens.

(1) The Praator Rutilius was the first who published an Edict providing that an action should not be granted to a patron against his freedman, except with reference to services, or property held in partnership; for instance, where it was agreed that unless the freedman would perform services for his patron, the latter should be permitted to have joint ownership of his property.

(2) Succeeding praetors were accustomed to promise possession of a certain portion of the estate of a freedman; for as the partnership existing between the parties implied the performance of services by the freedman, what he was required to furnish as his share of the partnership during his lifetime, he was also obliged to furnish after his death.

2. *Pomponius, On Sabinus, Book IV.*

If a patron, who was passed over in the will of his freedman, could demand praetorian possession of his estate contrary to the provisions of the will, and before doing so, died, or the time prescribed for demanding said possession has elapsed, his children, or those of another patron, can demand possession under that Section of the Edict by which when the first parties do not claim possession, or are unwilling to claim it, it is granted to those next in succession, just as if the former were not in existence.

(1) If a patron, who was appointed heir by his freedman, should die during the lifetime of the latter, leaving children, the question arose whether they could demand praetorian possession of the estate of the freedman, contrary to the provisions of the will. It was decided with reference to this point that the time of death, to which praetorian possession is referred, should be considered in order to ascertain whether there is any patron or not; so that, if there is one, his children cannot demand praetorian possession under the First Section of the Edict.

(2) If an emancipated son should leave a grandson under the control of his grandfather, praetorian possession of half of the property of the intestate freedman ought to be given to the son, although the estate may, by operation of law, belong to the grandson; for the reason that possession of the part which was due should be granted to the son contrary to the provisions of the will of the freedman.

3. *Ulpianus, On the Edict, Book XLL*

Even if the right to wear a gold ring may have been obtained from the Emperor by a freedman, his patron will be admitted to praetorian possession contrary to the provisions of the will, as is stated in several rescripts; for this privilege only confers upon him the rights of a freeborn citizen, but he dies as a freedman.

(1) It is clear that, if he should be restored to his birthright by a judicial decision, praetorian possession of his estate contrary to the provisions of the will cannot be obtained.

(2) The same rule will apply where he has obtained from the Emperor unrestricted power to

make a will.

(3) If anyone purchases a slave under the condition that he will manumit him, this will come under the above-mentioned Section of the Edict.

(4) When anyone receives a sum of money on condition that he will manumit his slave, he will not be entitled to praetorian possession of his estate in opposition to the terms of the will.

(5) In order that the patron may be able to obtain praetorian possession contrary to the provisions of the will, the estate must be entered upon, or praetorian possession of it demanded. It is, however, sufficient for one of the heirs to enter upon the estate, or to claim praetorian possession of the same.

(6) A patron has not the same right to the property of his freedman which the latter acquired while in the army, which he has to that otherwise acquired.

(7) Where a patron, after having been banished, is restored to his civil rights, he can obtain praetorian possession of the estate of his freedman contrary to the provisions of the will.

The same rule must be held to apply to a freedman who has been banished and afterwards restored to his rights.

(8) If a son under paternal control manumits a slave who forms part of his *castrense peculium,* he becomes his patron by a Constitution of the Divine Hadrian, and, in the capacity of patron, he can obtain praetorian possession of the estate of the freedman in opposition to the terms of the will.

(9) If he to whom a freedman has been assigned should accuse the latter of a capital crime, he cannot demand praetorian possession of his estate in opposition to the terms of the will, but this does not prevent his brothers from doing so, for they must demand praetorian possession just as they would do if they were the grandsons of the other son, as the freedman who was assigned to him does not cease to be the freedman of the remaining sons.

It must further be said that even if one brother should refuse to demand praetorian possession, the other to whom the freedman was not assigned can take his place, and claim praetorian possession of the estate contrary to the provisions of the will.

(10) A patron is entitled to praetorian possession of the estate of his freedman, contrary to the provisions of the will, whenever he is not appointed heir to that portion of said estate to which he is entitled.

(11) If a patron is appointed under a condition, and the condition is complied with during the lifetime of the testator, he cannot obtain praetorian possession of the estate in opposition to the terms of the will.

(12) What course should then be pursued if, at the time of death, the condition was in suspense, but was fulfilled before praetorian possession was granted to the patron; that is to say, before the estate of the freedman was entered upon? Would he be called to the praetorian succession under this section of the Edict?

The better opinion is that the time when the estate was entered upon should be considered; and this is our practice.

(13) Still, if the condition has reference to the past or the present time, the patron will not be held to have been appointed heir conditionally; for the condition has either been complied with ana he is held to have been appointed absolutely; or it has not been complied with, and he is not appointed heir.

(14) Where a freedman appointed his heir as follows, "If my son should die during my lifetime, let my patron be my heir," the will is not considered to have been improperly drawn; for if the son should die, as the condition has been fulfilled, the patron can obtain praetorian

possession of the estate.

(15) If the portion of the estate to which he is entitled is bequeathed to the patron, enough has been done for him, even if he should not have been appointed heir.

(16) Where, however, he was appointed to a smaller share than he was entitled to, and the remainder has been made up to him, either by legacies or trusts, he is held to have been satisfied.

(17) The share to which the patron is entitled by law can also be made up to him by donations *mortis causa,* for these take the place of legacies.

(18) The same rule will apply where a freedman did not make a donation to his patron *mortis causa,* but gave him property in consideration of the amount of the estate to which he was entitled; for then it will either be held to have been given *mortis causa,* or what the patron has received will exclude him from obtaining praetorian possession of the estate contrary to the provisions of the will.

(19) Where anything is given to a patron for the purpose of complying with a condition, it should be included in the legal share of the latter, if it was derived from the estate of the freedman.

(20) We grant the patron his legal share of the property which the freedman had at the time of his death, for we take into consideration the time when he died. If, however, he diminished his property by some fraudulent act, the Praetor will decide that the patron is also entitled to it, just as if it belonged to the estate.

4. *Paulus, On the Edict, Book XLII.*

Where a slave has detected the murderer of his master, the Praetor should decide that he is free, and it is established that he will be the freedman of no one, having obtained his liberty under a decree of the Senate.

(1) Where a freedman, after having been taken captive, dies in the hands of the enemy, although the name of freedman does not apply to him, still, in accordance with the Cornelian Law which confirms his will just as if he had died at home, possession of his estate should be granted to his patron.

(2) If a patron should be banished, his son will have a right to praetorian possession of the estate of his freedman, and his father, as patron, will be no impediment to this, as he is considered to be dead. The case, however, is different where a patron is in the hands of the enemy, for he is an impediment to his children, on account of the hope of his return, and the law of *postliminium.*

(3) If a stranger has been appointed heir by a freedman, and is charged to transfer the estate to his son, the patron should be excluded; as the estate is delivered under the Trebellian Decree of the Senate, and the son takes the place of the heir.

5. *Gaius, On the Provincial Edict, Book XV.*

Where a freedman has a patron, and the latter has children, and he appoints his patron heir to the share of his estate to which the latter is entitled, he should substitute his children for the same share, in order that, although the patron may die during the lifetime of the freedman, he can be considered to have satisfied the claims of his children.

(1) If a freedman has the emancipated son of his patron, and grandsons descended from another son, who is under the control of .the grandfather, the freedman must only leave what he owes to the son, and not to the grandsons; for, in this instance, it makes no difference whether they are equally called to the succession of their grandfather, or not.

6. *Ulpianus, On the Edict, Book XLIII.*

If the children of a freedman should be appointed heirs to only a small portion of his estate, the patron cannot demand praetorian possession contrary to the provisions of the will; for Marcellus, in the Ninth Book of the Digest, says that no matter to how small a share of the estate of a freedman his son may be appointed heir, the patron will be excluded.

(1) Where the daughter of a patron was appointed heir by the freedman of her father, and the will by which she was appointed was alleged to be forged, and an appeal was taken, and before it was heard the daughter died, the Divine Marcus came to the relief of the heirs, and decided that they should have whatever the daughter would have been entitled to if she had lived.

(2) If the son of the freedman, who had been appointed his heir, should reject the estate, although he will retain the name of heir, the patron can acquire praetorian possession.

(3) If the son should meddle with the estate of his father, or the heir who had entered upon it should obtain complete restitution of his rights, after having rejected the estate, the patron can be admitted to the succession.

(4) If the patron and his children should enter upon the estate of the freedman in accordance with the will of the deceased, or should prefer to claim a legacy or a trust bequeathed to them, they shall not be permitted to obtain praetorian possession in opposition to the provisions of the will.

7. *Gaius, On the Provincial Edict, Book XV.*

For it would be absurd to allow the same person to partly approve the will of the deceased, and partly reject it.

8. *Ulpianus, On the Edict, Book XLIII.*

If, however, the demand of the patron has had no effect, I think that there is no ^reason why relief should not be granted him. And, indeed, if he has entered upon the estate, under the impression that he had been appointed heir to the share to which he was legally entitled, and it should afterwards appear that he has obtained a smaller share than he had a right to expect, it is perfectly just that relief should be granted him. If, however, he notified the heir in the presence of witnesses to pay him his legacy, and should afterwards change his mind, I think that he is entitled to relief.

(1) Where a patron has received the legacy bequeathed to him, and afterwards has been evicted, he will have a right to demand his lawful share of the estate, because he did not receive what he expected to have. If, however, he is not deprived of the entire legacy by eviction, but obtains less than he had a right to expect, he will be entitled to relief.

(2) If a patron has received a legacy bequeathed to his slave, or to his son, he will be excluded from praetorian possession of the estate contrary to the provisions of the will, just as if he had accepted a legacy bequeathed to himself.

(3) And if he has received a donation *mortis causa,* it must be held that he is excluded from praetorian possession in opposition to the provisions of the will, just as if he had received it after the death of the freedman.

Moreover, if the freedman, during his lifetime, had given it to him, and he had accepted it, he will not, for this reason, be excluded from praetorian possession in opposition to the provisions of the will, because it may be said that he expected that some additional favor would be shown to him by the will of the freedman, and he should be permitted to reject what he has received, or the share to which he was entitled should be given to him *pro rata.*

(4) Therefore, it is said that if, for the purpose of complying with a condition, something has been given to the patron after the death of the freedman, the former will be excluded from praetorian possession of the estate in opposition to the terms of the will, as having, so to

speak, accepted it.

9. *Paulus, On the Edict, Book XLH.*

Where anyone has wrongfully attempted to again reduce to slavery a freedman belonging to his father, he cannot either himself, or in the name of his children, obtain praetorian possession of his estate.

10. *Ulpianus, On the Edict, Book XLIV.*

If satisfaction has not been given to one of two patrons, and more than his share of the estate of a freedman has been left to the other, an action will be granted to the one who did not receive that to which he was entitled, in such a way that his portion will be made up out of what was bequeathed to a foreign heir, and left to the other patron in excess of his own share.

The same rule shall also be observed where there are several patrons.

(1) Julianus says that he who has been disinherited by his grandfather is also barred from acquiring the estates of his freedmen, but will not be excluded from acquiring those of the freedmen belonging to his father. If, however, he has been disinherited by his father, but not by his grandfather, he should be excluded not only from the estates of the freedmen of his father, but also from those of his grandfather as well; because it is through his father that he acquires rights over the freedmen of his grandfather. If, however, his father has been disinherited by his grandfather, and he himself has not, a grandson can demand praetorian possession of the estates of the freedmen of his grandfather, in opposition to the provisions of the will.

He also says that if my father should disinherit me, and my grandfather should disinherit my father, and my grandfather should die first, I will be excluded from praetorian possession of the estates of the freedmen of both. But if my father should die first, and my grandfather afterwards, it must be said that the disinheritance of my father will not prejudice me, so far as the estates of the freedmen of my grandfather are concerned.

11. *Julianus, Digest, Book XXVI.*

If, however, my father was disinherited by his father, and I have been disinherited neither by my father nor my grandfather, and my grandfather should die, I will be entitled to the rights over the freedmen of both my grandfather and my father. But I cannot, during the lifetime of my father and as long as I remain under his control, demand praetorian possession of the estates of the freedmen of my grandfather; but if I have been emancipated, I will not be prevented from doing so.

12. *Ulpianus, On the Edict, Book XLIV.*

If a patron, having made his will in accordance with military law, should disinherit his son by passing him over in silence in his will, the disinheritance will prejudice him, for he will be actually disinherited.

(1) If anyone should assign a freedman to his son whom he has disinherited, the son can obtain praetorian possession of the estate of the freedman.

(2) If a son should be disinherited by his father without any evil intention, but for some other reason, the disinheritance will not prejudice him; as, for instance, suppose that he has been disinherited on account of insanity, or because he was under the age of puberty, and the appointed heir was charged to transfer the estate to him.

(3) When anyone is disinherited, and it is judicially decided that this was not the case, even should the judgment be wrongful, he will not be excluded; for matters which are decided by a court must stand.

(4) If the son of a patron is disinherited, and succeeds in obtaining a judicial decision that the

will is inofficious, but is defeated with reference to a part of his claim, let us see whether the disinheritance will prejudice his rights. I think that it will prejudice them, because the instrument by which he was disinherited is valid.

(5) Disinheritance causes no injury to children if the will is such that the estate cannot be entered upon, or praetorian possession obtained by it; for it is absurd that a will should be valid only so far as the disinheritance is concerned, while it is void in other respects.

(6) Where the son of a patron is appointed heir in the first degree, and is disinherited in the second, the disinheritance does not prejudice him, as he has been, or can be the heir under the will of his father; for his father could not be believed to have thought that his son was unworthy to obtain the property of his freedmen, when he himself had called him to his own succession in the first degree. And it is not credible that a son who has been disinherited in the first degree, and appointed as a substitute for the heir, would be excluded from the estate of a freedman. Therefore, a son appointed heir in the first or second degrees, or, indeed, in any other degree, even though he may have been disinherited by the same will, is not excluded from obtaining the estate of his freedman.

(7) If an emancipated son refuses to accept the estate, or a son who is under paternal control refuses to keep it, neither of them will be entitled to possession of the estate of the freedman. .

13. *Julianus, Digest, Book XXVI.*

The disinherited son of a patron, even though his own son has been appointed heir by the latter, cannot obtain praetorian possession of the estates of his father's freedmen in opposition to the terms of the will; for although he may be the necessary heir of his father, he is not admitted to the succession by himself, but through another. And it has been positively decided that if an emancipated son is disinherited and his slave is appointed the heir, and he orders his slave to enter upon the estate, and in this way he becomes the heir of his father, he will not be entitled to praetorian possession of the estates of the freedmen of his father, contrary to the provisions of the will.

14. *Ulpianus, On the Edict, Book XLV.*

A patron who is over the age of twenty-five years, and accuses a freedman of a capital crime, or makes application to have him reduced to slavery, shall be excluded from possession contrary to the provisions of the will.

(1) It must be said, however, if he was a minor when he made the accusation, that he is not excluded, whether he himself, or his guardian or curator brought the accusation.

(2) If, however, he should bring the accusation while he was a minor, and after he became of age should obtain judgment, he must be said to be entitled to indulgence, and should be pardoned, because he instituted proceedings while he was a minor. Nor ought we to blame him for not having abandoned the accusation, or for not demanding that it be dismissed, for if he had done one of these things,

he would be liable to the penalty of the Turpillian Decree of the Senate, and he could not have easily obtained the other. If, however, the case had been publicly dismissed, and the patron, having attained his majority, should repeat his demand, it must be said that he will be excluded from the succession, for, having become of age, he can without any risk abandon an accusation which has been dismissed.

(3) He only is considered to have brought an accusation of a capital crime who, by means of such a proceeding, seeks to have the accused party suffer the punishment of death or exile, instead of banishment, which causes the forfeiture of civil rights.

(4) If, however, anyone accuses his freedman of an offence, the penalty of which is not a capital one, and, nevertheless, the judge decides to increase the penalty, this will be of no

disadvantage to the son of the patron; for neither the ignorance nor the severity of the judge should prejudice the son of the patron, who has brought a less serious accusation against the freedman.

(5) Where, however, he does not accuse him, but gives his testimony against his freedman in a capital case, or provides the accuser, I think that he should be excluded from obtaining possession of his estate contrary to the provisions of the will.

(6) If a freedman accuses the son of his patron of the crime of *lese majeste,* and the son demands that the freedman be punished for slander, I think that he should not be excluded from the succession under the terms of this Edict; and if he has been accused by him and brings a counter accusation, the same rule will apply, for the patron should be excused, if after having been attacked, he desires to revenge himself.

(7) If a son is compelled to avenge his father's death and accuses his father's freedman, who was his physician, of the crime, or accuses his slave who slept in the same room with him, or any other who was attached to the person of his father, can it be said that relief should be granted him? I think that it should be, if it was necessary for him to bring an accusation against the freedman of his father, and he was influenced by motives of affection, and the risk he ran of losing his father's estate if he did not do so, even though the accusation should prove to be false.

(8) Moreover, we say that he has brought an accusation who alleges that another is guilty of crime, and causes the case to be tried until sentence is imposed. If, however, he does not proceed so far, he is not considered to have brought the accusation, and this is our present practice. But if he should desist after an appeal is taken, it has been very equitably decided that he has not prosecuted the case to a conclusion. Hence, if the freedman dies while the appeal is pending, the son of the patron shall be permitted to obtain possession of his estate, because the freedman has been removed by death from the consequences of the sentence.

(9) If the son of a patron gives his assistance, as an advocate, to the accuser of a freedman of his father, he should not be excluded from the succession on this account, for the advocate does not make the accusation.

(10) Where a father provides by his will that his freedman shall be accused of having prepared poison for him, or to have committed some other act of this kind to his injury, the better opinion is that his children who did not voluntarily bring the accusation ought to be excused.

(11) If the son of a patron should accuse the freedman of his father, and should convict him of a crime, and the said freedman should afterwards be restored to his rights, he shall not be excluded, for he prosecuted the accusation which was brought to the end.

15. *Tryphonimis, Disputations, Book XVII.*

The same rule applies where the crime which was proved against the freedman carries with it capital punishment, but the freedman was subjected to a lower penalty; as, for instance, he was only banished, for the Praetor only takes cognizance of a patron who brings a false accusation.

16. *Ulpianus, On the Edict, Book XLV.*

He is not considered to have demanded that a freedman be reduced to slavery, who opposes one who is already a slave, and denies that he be given his freedom; but he who demands that one who is in the enjoyment of freedom shall be reduced to slavery.

(1) Where anyone alleges that a slave is not entirely his, but that he has a share in him, or the usufruct of him, or some other right to which he would not be entitled unless the man was a slave, shall he be excluded from the succession of the freedman, as demanding that he be returned to slavery? This is the better opinion.

(2) If a patron should demand that his freedman should be reduced to slavery, and should succeed, and the truth having been afterwards ascertained, he suffers him to remain at liberty, this should not prejudice him, especially if he had good cause for his mistake.

(3) He is not considered to have made a demand to reduce the freedman to slavery who abandons the case before issue has been joined. If, however, he does so after issue has been joined, it must be said that this will not prejudice him, because he did not continue until a decision had been rendered.

(4) If the son of a patron, who has either been disinherited, or has demanded that a freedman of his father should be returned to slavery, or has accused the freedman of a capital crime, it will not prejudice his children, if they are not under his control. This the Divine Brothers stated in a Rescript to the Quintilians.

(5) If anyone should obtain praetorian possession of the estate of his freedman contrary to the provisions of his will, not only if he was appointed heir by the said freedman, but also if he had been substituted for his minor son, he will be excluded from all the benefits under the will of the said freedman. For Julianus says that if a patron, after making a demand for the praetorian possession of the estate of his freedman, should enter upon the estate of the minor son of said freedman, actions must be denied him.

(6) If, however, anything should be left to the patron by a codicil or a donation *mortis causa,* in like manner participation in these benefits shall be refused him.

(7) Sometimes it is evident that the right to claim a legacy should be granted to the patron, after he has demanded possession of the estate of his freedman, if he will receive no benefit therefrom; for the reason that he has been asked to transfer the legacy to another.

(8) Again, the Praetor says that he will not only refuse an action to the patron to recover what is specifically given to him, but also to recover anything which you may suggest might come into his hands through others; as, for instance, through those who are subjected to his authority, because he can retain such property, and will not be obliged to surrender it.

(9) We should grant the right to demand a bequest to a patron if the freedman had bequeathed a preferred legacy of the price of a slave to his patron, on condition that the latter should liberate the said slave.

(10) If the substitute for a patron should be asked by him to deliver possession of the estate of a freedman contrary to the provisions of the will, an action to recover the share of him to whose patron possession was given shall not be granted.

(11) Where a patron has been substituted for the heir, and dies during the lifetime of the testator, it is settled that if the son of the patron demands praetorian possession of the estate of the freedman contrary to the provisions of the will he can not only acquire the share of the substitute, but can deprive all the heirs of a certain portion of their inheritance, in order to make up the amount to which he is legally entitled.

17. *The Same, On the Edict, Book XLVII.*

When a freedman dies without leaving any children, his patron and his patroness can, at once, demand praetorian possession of his estate, and they can even do so together. Any persons who are next of kin to the patron and patroness can also be admitted to the succession together.

18. *Paulus, On the Edict, Book XLIII.*

The illegitimate children of a patroness can also obtain praetorian possession of the estate of a freedman of their mother, but children cannot be admitted to the succession of the estate of a freedman of their father unless they are legitimate.

19. *Ulpianus, Disputations, Book IV.*

Where a patron is appointed heir to a smaller share of an estate than he is legally entitled to, and alleges that the will is forged, and loses his case, there is no doubt that praetorian possession of the estate contrary to the provisions of the will should not be granted him, for the reason that he lost the estate by his own act when he rashly declared that the will was forged.

(1) If he has been appointed heir to the share of the estate to which he was entitled, whether he accepts it or not, he will be excluded from praetorian possession of the same contrary to the provisions of the will; for, as he received the share to which he was entitled, he cannot demand praetorian possession contrary to the provisions of the will.

20. *Julianus, Digest, Book XXV.*

A freedman appointed his patron his heir, under the condition of his being sworn (which condition the Praetor is accustomed to remit), and I do not think that there is any doubt that the patron will be excluded from praetorian possession of the estate, as it is true that he has been appointed heir.

(1) Where a legacy was left to Titius, and he was charged to transfer it to his patron, an action to recover the legacy should be denied to Titius, if the amount to which the patron is legally entitled has been paid to him by the appointed heir.

(2) A freedman appointed his patron and a stranger joint heirs to half of his estate. The fourth to which the patron was appointed heir should, all of it, be credited to him on his legal share, and the remainder which is due on said share should be deducted *pro rata* from the shares of all the other heirs.

(3) The same rule should be observed with reference to a legacy bequeathed to the patron and Titius conjointly; so that a part of the legacy may be credited upon the share due to the patron, and as much should be deducted from the share of Titius, proportionally, as that which ought to be deducted from the portion of the heir.

(4) Where a freedman appoints his emancipated son his heir under a certain condition, and the condition having failed, his substitute enters upon the estate, I ask whether the Praetor should give the patron possession of the share to which he was entitled against the substitute, or whether he should come to the relief of the emancipated son with reference to the entire estate. The answer was that, as the father had appointed his son his heir in the first degree conditionally, and the condition under which he was appointed had failed to be fulfilled, the estate will belong to the second degree; or if the son should die while the condition is still pending, the patron will acquire possession of the estate to the amount to which he was entitled by law, as against the substitute.

The same rule will apply where the son does not obtain possession of the estate through having been excluded by lapse of time, or because of his rejecting it. Therefore, if the condition should fail to be fulfilled, the estate will belong to the son, and the Praetor will, in preference, protect the emancipated son against the substitute. Moreover, I think whenever a son is appointed an heir conditionally, that, in some instances, disinheritance is necessary with reference to the substitution, and in others it is superfluous. For if the condition should be of such a nature that it is in the power of the son to comply with it; for instance, if it was that he should make a will, I hold that if the condition was not fulfilled, the son must give way to the substitute. If, however, the condition was such that it was not in the power of the son to comply with it, for instance, if it was that Titius should become Consul, then the substitute ought not to be admitted to the succession, unless the son had been specifically disinherited.

(5) If a freedman should appoint his emancipated son his heir, and charge him to deliver the entire estate to Sempronius, and the son should allege that he suspected the estate of being

insolvent, but should enter upon 'the same by order of the Praetor and transfer it to Sempronius, possession of the share of the estate to which he was entitled will, very properly, be granted to the patron, just as if not the son, but he to whom the estate was transferred, had been the heir of the freedman.

Moreover, if the son should reject the inheritance of his father's freedman, and his co-heir should assume all the burdens of the estate, praetorian possession must be granted to the patron; for, in either event, the share of the latter is not taken from that of the son, but from that of the stranger.

21. *The Same, Digest, Book XXVI.*

Where one of three patrons fails to demand praetorian possession of the estate, the other two will be entitled to equal shares of the same.

22. *Marcianus, Institutes, Book I.*

If a son under paternal control, who is a soldier, manumits his slave, he makes him the freedman of his father, according to the opinion of Julianus, which he adopts in the Twenty-seventh Book of the Digest; but he says that as long as his son is living, he will have the preference over his father with reference to the estate of the freedman. The Divine Hadrian stated in a Rescript addressed to Flavius Aper, that, in this instance, he made him his own freedman and not that of his father.

23. *Julianus, Digest, Book XXVII.*

If a freedman should pass over his patron in his will and appoint a foreign heir, and his patron should give himself in adoption before demanding praetorian possession in opposition to the terms of the will, and the appointed heir should reject the estate, the patron can, then, as heir at law, demand possession of the entire estate of the freedman.

(1) If a freedman should die intestate, and his patron should have a son and two grandsons by another son, the grandsons shall not be admitted to the succession of the freedman, as long as there is a son, because it is evident that the person who is in the nearest degree is the one who is called to the succession of the freedman.

(2) Moreover, if the freedman had two patrons, one of whom left a son and the other left two, I stated that the estate should be equally divided between them.

24. *The Same, Digest, Book LXV.*

Where two patrons had a freedman in common, and one of them required him to swear that he would not marry, and the other to whom this fault could not be imputed either died during the lifetime of the freedman, or survived him, he alone can acquire the shares of the estate to which both were legally entitled.

25. *The Same, On Urseius Ferox, Book I.*

Whenever praetorian possession of the share of the estate due to him can be granted to a patron, an exception may be granted to the debtors against the heir who demands payment, if the patron should not, in opposition to the terms of the will, demand praetorian possession of the share to which he is legally entitled.

26. *Africanus, Questions, Book II.*

A freedman devised land worth forty *sesterces* out of his estate which was valued at eighty, and after having appointed a stranger his heir, died on the day when the devise became due. I gave it as my opinion that the patron could demand the share of the estate to which he was entitled by law; for the deceased, at the time of his death, appeared to have had an estate of more than a hundred *sesterces,* as it could have been sold for more than that, including the amount of the legacy.

It would make no difference whether the appointed heir rejected the legacy left by the freedman, or not; for if a question should arise under the Falcidian Law, a bequest of this kind, even though it were rejected, would be charged by the legatees to the quarter of the estate due to the heir.

27. *The Same, Questions, Book IV.*

If a grandson should be disinherited by his grandfather, the patron, during the lifetime of his son, the disinheritance will prejudice him, so far as the estate of the freedman of his grandfather is concerned.

28. *Florentines, Institutes, Book X.*

If a freedman has incurred the penalty of death, the claim of his patron to that share of his estate to which he is entitled will not be extinguished, if he who had been sentenced to be executed should die a natural death; but it has been decided that the remainder of the estate which, under the Civil Law, would not belong to the person who emancipated him, may be demanded by the Treasury.

(1) The same rule should be observed with reference to the estates of those who have killed themselves, or have taken to flight, through fear of being accused, as has been established with respect to the property of those who have been condemned to death.

29. *Marcianus, Institutes, Book IX.*

Where a slave is manumitted under the terms of a trust, he becomes the freedman of the person who manumits him, and the latter can, as his patron, claim his estate, and can obtain praetorian possession of it contrary to the provisions of the will, as well as acquire it *ab intestato;* but no services can be imposed upon him, nor, if they have been imposed, can they be exacted.

(1) If, however, a father, at his death, should bequeath a slave to his son, and request the latter to manumit him, with the understanding that he shall have the full right of patronage over him, it may be maintained that he can afterwards legally impose services upon the said slave.

30. *Gaius, On the Edict of the Praetor; Title, Concerning the Cause of Freedom, Book II.*

If a son demands that a freedman of his father shall be reduced to slavery, in order to preserve for himself a case of eviction against a third party, he will not lose the benefit of praetorian possession of the estate.

31. *Marcellus, Digest, Book IX.*

Where a freedman devised to his patron a tract of land which he himself had purchased from him but which belonged to another, and the patron asserted that the legacy belonged to him, he cannot obtain praetorian possession of the estate contrary to the provisions of the will, even though the devise was of no benefit to him; because the freedman bequeathed to him property belonging to someone else, as well as for the reason that the patron himself had sold the land to his freedman.

32. *The Same, Digest, Book X.*

If my freedman, after having been returned to slavery, is afterwards liberated by another, he will become the freedman of the latter, and the person who manumitted him will have preference over me in obtaining praetorian possession of the estate of the freedman in opposition to the terms of the will.

33. *Modestinus, On Manumissions.*

If a patron does not support the freedman, the *Lex JElia Sentia* deprives him of all the services to which he was entitled in consideration of the grant of freedom; and this includes not only

himself but also those who may have any interest in the property, and it also deprives him and his children of the estate, unless the patron was appointed the heir, and it also deprives him of praetorian possession of the estate, except where this is acquired in accordance with the provisions of the will.

34. *Javolenus, On Cassius, Book III.*

When a freedman, who has two patrons, passes one of them over in his will, and appoints a stranger heir to half of his estate, the patron

who is appointed heir can claim the share to which he is entitled without deduction; and out of the other share which was left over and above what was due to him, and out of the remaining half bequeathed to the stranger, an amount shall be taken *pro rata* to make up the share to which the other patron is entitled by law.

35. *The Same, Epistles, Book HI.*

Seius, having appointed his freedman his heir, charged him with a legacy to Maevius of the usufruct of a tract of land. The freedman died, leaving Msevius his heir. I ask if the son of Seius should demand praetorian possession of the estate of the freedman against Maevius, whether the share of the land which was due to him, after deducting the usufruct, shall be transferred to him; or whether all of it ought to be transferred, because he had obtained possession of the property which belonged to the freedman at the time of his death. The answer was, I think that the usufruct should be restored to its original condition; therefore it would be best to demand an arbiter, in order that, by his decision, the usufruct may be transferred in its entirety.

36. *The Same, Epistles, Book Vill.*

A freedman who died insolvent, having passed oyer his patron, left his estate to foreign heirs. I ask whether the patron can demand praetorian possession contrary to the provisions of the will. The answer was that, as the estate had been entered upon by the appointed heirs, the patron can demand praetorian possession, because an estate is considered to be solvent ^whenever an heir is found to accept it: And, indeed, it is absurd that'the right of the patron to demand praetorian possession of an estate should be based on the estimate of others, and not on the wishes of the patron himself; and that the little that the latter can claim in a case of this kind should be taken from him. For many reasons may arise for which it might be expedient for the patron to demand praetorian possession, even if the amount of the indebtedness which the freedman left behind him exceeds the assets of the estate; for instance, if certain lands are included in the estate of the freedman in which are situated the burial places of the ancestors of the patron, and the latter takes advantage of his rights to obtain praetorian possession, in order that the said burial places may be obtained by him as his share, he considering this right to be of great importance to him; or, for example, where a slave whom the patron values, not from the price which he might bring but for the affection which he entertains for him, forms part of the estate.

Therefore, the patron should be none the less entitled to claim possession of the estate, who forms an estimate of the value of the property of the freedman, rather by his own opinion, than by the computation of others; for an estate should be considered to be solvent both because an heir is found for it, and for the reason that praetorian possession of the same is demanded.

37. *Ulpianus, On the Lex Julia et Papia, Book XI.*

Julianus says that if a patron should sell to his freedman the obligations which had been imposed upon him in consideration of liberating him from slavery, his son can be barred from obtaining praetorian possession of the estate of the freedman, for the reason that he does not obtain possession of the said estate in opposition to the terms of the will, as his father sold to

him the gift, present, or services for which he obtained his freedom.

He says that it is evident if the son of the patron should sell to him the services which were imposed upon the latter in consideration of giving him his liberty, that the brother of the patron can, nevertheless, obtain possession of the freedman's estate contrary to the provisions of the will, because the son, by selling to the latter the services which were the consideration of his freedom, did not bar his uncle from asserting the claim.

(1) If the freedman should appoint an heir, and the latter should enter upon the estate before having put the slaves of the deceased to torture, Julianus says that the patron will not be permitted to obtain possession of the estate in opposition to the terms of the will, for he also should avenge the death of the freedman.

This rule, likewise, is applicable to the patroness.

38. *Terentius Clemens, On the Lex Julia et Papia, Book IX.*

When a son has been disinherited by his father, the question arises whether the grandsons by said son are excluded from praetorian possession of the estate of a freedman of their grandfather. This point must be disposed of by deciding that as long as the son is living, and his children remain under his control, they cannot be admitted to praetorian possession of the freedman's estate to prevent those who are excluded from obtaining possession in their own names, or from acquiring it through the intervention of others. If, however, they have been emancipated by their father, or have become their own masters in any other way, they can obtain praetorian possession of the estate of the freedman without encountering any obstacle.

(1) If the son of the freedman rejects the estate of his father, it will be to the advantage of the patron.

39. *The Same, On the Lex Julia et Papia, Book X.*

If the daughter of the patron belongs to an adoptive family, she can obtain praetorian possession of the estate of a freedman of her father.

40. *The Same, On the Lex Julia et Papia, Book XII.*

If a father makes such a provision for his disinherited son that his right over his freedman remains unimpaired, the disinheritance will not prejudice his rights in this respect.

41. *Papinianus, Questions, Book XII.*

Where a freedman has satisfied the claim of his patron so far as the share of his estate to which he is legally entitled is concerned, but at the same time, being unwilling to concede it to him, attempts to deprive him of certain property, the question arises, how should the matter be decided? For what if, having appointed the patron his heir to the share to which he is legally entitled, he should bequeath him ten *aurei,* in addition, and charge him to manumit his own slave who is worth ten *aurei,* or less? It would be unjust for the patron to decide to accept the legacy, and not free his slave, but, having accepted his legal share, he cannot be compelled to accept the legacy and liberate the slave. This rule is adopted to prevent him from being forced to manumit a slave who is unworthy of it.

But what course must be pursued, if, having appointed his patron his sole heir, the freedman should make the same request of him? If the patron has a substitute, a decision may be rendered in such a way that the patron, having received the share to which he was entitled, the remainder will pass to the substitute; so that if the slave can be purchased, he may obtain his freedom.

Where, however, no substitution has been made, the Praetor, who has jurisdiction of the trust, may compel the patron who accepts the estate of the freedman to grant freedom to his slave.

42. *The Same, Questions, Book XIII.*

A son, who was his father's heir, arrogated his disinherited brother and died, leaving the latter his heir. In this case the disinherited son will not have the right to demand possession of the estate of the freedman of his natural father. For although an adoption of this kind does not affect the rights of a son who is not disinherited, it will prejudice those of one that is; as the penalty imposed both by the Civil Law and the Praetorian Edict is not rendered inoperative by the act of adoption.

Paulus says that anyone who obtains an estate by a different title than the one which he lost is not prejudiced by the latter, but is benefited by the one which he has acquired. Hence it has been settled by the Edict, that a patron, who is at the same time the son of a patroness, will not be excluded from, obtaining praetorian possession of the estate of a freedman, where he has committed some offence as patron. (1) Papinianus: A freedman appointed Titius heir to his cas-trensian property, and another heir to his other property. Titius entered upon the estate. The better opinion seemed to us to be that the patron could not yet demand praetorian possession of the estate contrary to the provisions of the will. However, the following question arose, namely, if the person to whom the remainder of the estate had been left should refuse to accept it, would it accrue to Titius, just as if they had accepted two different shares of the same estate? It seems to me more equitable that the remainder of the estate should be considered to be without legal heirs. Therefore, Titius could not require the patron to contribute, as the former had lost nothing, nor had anything been taken from the remaining assets which had not yet been disposed of by the will.

(2) Where the minor son of a freedman, who is under the age of puberty and is alleged to be supposititious, obtains praetorian possession of the estate of his father, under the First Section of the Edict, the question arises whether the patron also can obtain praetorian possession. There is no doubt that those who are in the second degree cannot, under the Edict, be admitted to the succession, so long as there are others entitled to it under the First Section; for, as long as another possession has precedence, those that follow cannot be permitted to take place.

There is no doubt that if a decision should be rendered against the child who is alleged to be supposititious, it is understood that possession will not be granted him; and the same rule will apply with reference to the patron, while the controversy is pending. It is clear that examination of the controversy should be deferred until the age of puberty, so far as the patron also is concerned.

(3) Where the will of a freedman is alleged to be forged by persons living in a province, and an appeal has been taken from the judgment, and, in the meantime, the daughter of the patron, whom the freedman appointed his heir, dies, the Divine Marcus decided that the share of the estate to which the daughter of the patron would have been entitled if she had lived should be preserved for her son.

43. *The Same, Questions, Book XIV.*

Where a patron, having been appointed a substitute for Titius (who himself had been appointed heir to half of the estate), while the latter was deliberating whether he would accept, or not, obtained praetorian possession of the estate of a freedman contrary to the testamentary provisions, and Titius should afterwards accept the estate, Julianus thinks that he has not been deprived of anything, any more than if he had been appointed under a condition. Therefore, as long as Titius deliberates, it will be uncertain whether half the estate will come into possession of the patron under the substitution, or, whether, if Titius should accept, the heirs will be compelled to contribute from their shares the amount legally due to the patron.

44. *Paulus, Questions, Book V.*

If you appoint a patron heir to the share to which he is entitled by law, and charge him to transfer absolutely a tract of land to someone, and bequeath him a legacy of the same value as said land, under a condition, the trust becomes conditional.

There is something here, however, which may cause annoyance, for the patron will be burdened with the execution of the trust. It must be said in this instance that security should be given by the trustee who is charged with the legacy to the patron, so that the latter may not, under any circumstances, suffer a diminution of his rights.

(1) A patron having been appointed an heir, and a slave having been bequeathed to him in order to make up the share to which he was entitled by law, cannot demand praetorian possession contrary to the terms of the will, even though the slave should die before the will is opened.

(2) If a freedman, either by appointing him his heir, or by a legacy, leaves his patron the share of his estate to which he is legally entitled at the time of his death, and, after the decease of the freedman, another slave having returned from captivity increases the value of the estate; the patron cannot, on this account, complain that he had a smaller interest in the slave than he would have had if he had been appointed heir to the share in him to which he was entitled by law.

The same rule applies with reference to alluvium, provided the patron is satisfied out of the estate which the freedman left at the time of his death. This is also the case when a portion of a legacy or of an estate is left to a freedman at the same time with others, and the latter refuse to accept, and their share accrues to the estate of the freedman.

45. *The Same, Questions, Book IX.*

Where a patron is appointed heir to the sixth of the estate of his freedman, and the slave of the latter is appointed heir to the remainder, the trust with which heirs are charged in favor of the patron will not apply to the share of the slave. If, however, the slave should be appointed sole heir, I do not think that the share due to the patron should contribute to the legacies bequeathed under the trust.

46. *The Same, Opinions, Book HI.*

Paulus gave it as his opinion that a patron who was deceived, and who accepted the forged will of his freedman as genuine, is not prevented from obtaining praetorian possession of his estate in opposition to the terms of the will.

47. *The Same, Opinions, Book XI.*

Paulus also held that the disinheritance of a grandson, which was not made by way of reproach, but for some other reason, did not injure him to the extent of preventing him from demanding praetorian possession of the estate of the freedman of his grandfather in opposition to the terms of the will.

(1) I ask if Titia, the daughter of a patron, should allege that her father Titius had written a letter to her before his death, in which he said that he had been badly treated by his freedman, and if relying upon this letter, she accused the freedman after the death of her father, whether this excuse would be of any advantage to her.

Paulus answered that she who accused the freedman in accordance with the wishes of the father should not be excluded from praetorian possession of his estate contrary to the provisions of the will, since she relied, not only on her own judgment, but also on that of another.

(2) The son of a patron sent the following letter to his freedman: "Sempronius to his freedman Zoilus, Greeting. I grant you full power to make a will because you deserve it on account of the fidelity which

you have always displayed towards me." I ask whether the freedman should not leave something to the son of his patron. Paulus answered that the freedman in question does not appear to have obtained the full right to make a will by the above-mentioned letter.

(3) Paulus gave it as his opinion that a grandson had a right to demand praetorian possession of the estate of a freedman of his grandfather, contrary to the provisions of the will, even if he had been conceived after the death of his grandfather, who survived the freedman; and that he could be admitted to the succession as the heir at law. For the opinion of Julianus only has reference to a succession on the ground of intestacy, and the demand for praetorian possession of the estate of the grandfather.

(4) Paulus also gave it as his opinion that although sons who have been passed over by the will of a father who was serving in the army are considered as disinherited, still, the silence of their father should not prejudice their rights in such a way that they can be excluded from the estates of the freedman of their grandfather.

The same opinion was given with reference to the estates of the freedmen of the father.

48. *Scasvola, Opinions, Book II.*

I ask what should be decided in the case of one who accused his freedman of the crime of burglary. The answer was that if the offence of which he was accused was such that, if it were proved, the freedman would be sentenced to the mines, the patron should be denied praetorian possession of the estate.

49. *Paulus, Opinions, Book HI.*

Where a freedman is fraudulently arrogated, his patron does not lose his right to his estate.

50. *Tryphoninus, Disputations, Book XVII.*

It makes no difference whether the patron, having been appointed heir, accepts a smaller share of the estate of his freedman than the one he is entitled to by law, or whether he orders his own slave, who was appointed heir, to enter upon the estate, and he retains the same, as he will, in either instance, be excluded from praetorian possession of the estate of his freedman in opposition to the terms of the will.

(1) If, however, he should sell the slave before ordering him to enter upon the estate of the freedman, or manumit him, so that the new freedman himself or the purchaser will become the heir, the patron is not prohibited by the terms of the Edict from accepting praetorian possession of the estate of the freedman contrary to the provisions of the will.

(2) But ought the Praetor to refuse him the action to obtain possession, because he attempted to evade the Edict for the purpose of acquiring praetorian possession contrary to the provisions of the will either by receiving a larger price from the purchaser, or by making a tacit agreement with the slave to gain an undue advantage from his appointment as heir to the estate?

The suspicion is still greater where the patron himself acquires the estate of the freedman through the acceptance of his son, who was appointed heir, even though he was emancipated, as everything which we have we wish to go to our children.

(3) If, however, while the will remains unopened, and the patron is still ignorant of the intentions of his freedman, he commits any of the above-mentioned acts, having reference to the heir who was appointed while under his control, and there is no suspicion of fraud, he can avail himself of his right to obtain praetorian possession of the estate in opposition to the terms of the will.

(4) Where a patron, who is appointed by his freedman heir to the share of his estate to which he is legally entitled, and is charged to transfer the estate to another, alleges that he considers it to be insolvent, and, having been compelled to accept it, although he could retain the share to which he was entitled, transfers the same, he cannot obtain praetorian possession contrary to the testamentary provisions, both because he accepted the will of the freedman, and despised, and, as it were, rejected his right to the possession of his legal share of

the estate.

(5) The case of the son of a patron, whom a freedman has arrogated and appointed heir to a smaller share of his estate than that to which he was entitled, is very different from this, where there is no one else belonging to the family of the patron. For, although he is, by operation of law, the proper heir of the freedman, if he did not interfere with the estate of the latter as belonging to his father, but abstained from doing so in order to retain his right as patron, the son will, nevertheless, be permitted to obtain praetorian possession of the estate contrary to the testamentary provisions.

(6) If a freedman should leave to his patron, who owed him a certain sum of money, a release from liability, and he should avail himself of an exception on the ground of bad faith against an heir demanding payment of the debt, or he is released on account of the legacy, it must be said that he cannot obtain praetorian possession of the estate in opposition to the provisions of the will.

51. *Labeo, Epitomes of Probabilities, By Paulus.*

If you have accused the freedman of your father of a capital crime, and your father has manumitted him, praetorian possession of the estate of the freedman cannot be granted to you under the Edict of the Praetor.

Paulus: The contrary rule will apply if you should bring such an accusation against a slave who afterwards becomes the property of your father, and the latter subsequently manumits him.

TITLE III.

CONCERNING THE FREEDMEN OF MUNICIPALITIES.

1. *Ulpianus, On the Edict, Book XLIX.*

Full rights over the estate of their freedmen and freedwomen is granted to municipalities, that is to say, they have the same rights over them as other patrons have.

(1) Is there, however, any doubt whether they can demand praa-torian possession of the estates of their freedman? There is some difficulty on this point, because they cannot give their consent, still, they can obtain praetorian possession through the agency of another. But, as the Senate decided that estates should be transferred to them under the Trebellian Decree, so, by virtue of another decree, when a municipality has been appointed heir by a freedman, it is permitted to acquire his estate; hence it must be said that it can obtain praetorian possession of the estates of its freedmen.

(2) The time fixed for claiming praetorian possession of the estate of a freedman begins to run against a municipality from the date when it passes an ordinance authorizing the demand. This was also the opinion of Papinianus.

TITLE IV.

CONCERNING THE ASSIGNMENT OF FREEDMEN.

1. *Ulpianus, On Sabinus, Book XIV.*

By a decree of the Senate enacted in the time of the Emperor Claudius, during the Consulate of Velleius Rufus and Osterius Scapula, with reference to the assignment of freedmen, it was provided as follows: "Where anyone has two or more children born in lawful marriage, and has indicated to one of them that he wishes to assign to him or her a certain freedman or freedwoman, whom he designates, the said male or female child, after the death of the person who manumitted the said slave during his lifetime, or by his will, shall become the sole patron or patroness of the said freedman or freedwoman, just as if he or she had been liberated directly by said child. And if either of said children should die without issue, all the rights of

the person who manumitted the slave shall pass to the other children, just as if he who manumitted him or her had made no special provision with reference to them."

(1) Although the Decree of the Senate is expressed in language indicating the singular number, it is, nevertheless, certain that several freedmen can be assigned to several children as well as to one.

(2) A freedman who is in the hands of the enemy can also be assigned.

(3) Moreover, a patron can assign his freedman by any words whatsoever, or by a gesture, or by his will or codicil, or during his lifetime.

(4) He can also annul the assignment by the mere expression of his will.

(5) If, however, anyone should assign the freedman to his son, whom he had disinherited, the assignment will be valid, nor will the reproach of disinheritance prejudice the son, so far as the right of patronage is concerned.

(6) If the son should be disinherited after the assignment, the act of disinheritance does not always annul it, unless it was done with this intention.

(7) Where the child to whom the assignment was made declines to accept it, I think that the better opinion is the one stated by Marcellus, that is, that his brother shall be admitted to the right of patronage.

(8) Where one patron left one son, and another two, and the freedman is assigned to one of the two last, it should be considered into how many shares the estate of the freedman must be divided, whether into three, of which the one to whom the assignment is made will be entitled to two shares, that is to say, his own and that of his brother, or whether there ought to be two equal shares, as the other brother is excluded by the assignment. Julianus, in the Seventy-fifth Book, says that the better opinion is that the one who excludes his brother should have two-thirds of the estate.

This opinion is correct so long as his brother is living, or can become the heir at law of the freedman; but if he should forfeit his civil rights the estate must be divided into two parts.

2. *Pomponius, Decrees of the Senate, Book IV.*

If, however, the child to whom I have made the assignment should die, leaving a son, and his brother, and there should also be a son of another patron, the grandson will be entitled to half of the estate, which my son, who is living, would have if I had not assigned the said freedman.

3. *Ulpianus, On Sabinus, Book XV.*

The same rule will apply where a person who had a son and a grandson assigns the freedman to the grandson, for the latter will be admitted to the succession of the freedman, even if there is a son of another patron. This will occur during the lifetime of his uncle. But if his uncle should no longer be living, the assignment made to the grandson will be of no advantage to him, by diminishing the right of the son of the other patron.

(1) Moreover, it is certain that a freedman can be assigned to a grandson by his grandfather, and it is established that, in this instance, the grandson will take precedence over the son.

(2) Wherefore, it may be asked if the patron should have a son and a grandson, whether he can cause the Decree of the Senate to apply just as if he had both of them under his control. In this case, as it is settled that the assignment can be made to him who will again come under the control of his father, why should we not admit that they are both subject to the authority of the patron?

(3) Again, can a question arise as to whether the grandson, who is under the control of the father, can be admitted as heir at law of the freedman? And as there are many cases under

which a child who is under paternal control can have a freedman, why should it not be conceded in this instance that a father can obtain the benefit of the lawful inheritance of the estate of the freedman through his son?

This opinion is very properly adopted by Pomponius. Sons under paternal control also have freedmen; as, for example, where someone manumits a slave who forms part of his *peculium castrense.*

(4) I also think that the emancipated sons of a person to whom a freedman has been assigned are entitled to the benefit of the Decree of the Senate; not that they may be admitted as the heirs at law of the freedman, but that they may acquire what property they can.

(5) According to this, where a freedman dies after having been appointed heir, since emancipated sons cannot be admitted to the succession as heirs at law, let us see whether the son of the assignor, who remains under his control, can be admitted or not. I think that the emancipated children should be preferred by the Praetor under such circumstances.

(6) By the children of the person to whom the assignment is made we must understand not only his sons, but also his grandsons, and his granddaughters, and his other descendants.

(7) Where anyone assigns a freedman to two children, and one of them dies without issue, and the other does not:

4. *Pomponius, Decrees of the Senate, Book IV.*

Or the one who survives declines to accept the estate of the freedman:

5. *Ulpianus, On Sabinus, Book XIV.*

Shall the share of him who has lost his civil rights, or rejected the estate, revert to the family, or will it rather accrue to him in whose person the assignment continues to exist? Julianus, in the Seventy-fifth Book, says that the assignment will only become operative with respect to the person of the latter, and that he alone should be admitted to the succession; which is correct.

(1) But what if one of the children should die, leaving issue, can the latter be admitted to the succession, if the other child is living? Julianus thinks that he alone should be admitted, but after his death the children of the other will succeed to the estate; and that the right over the freedman will not revert to the family.

(2) But if one of these two children leaves sons, and the other grandsons; shall they be admitted together to the succession of the freedman as heirs at law? I think that the regular order of descent should be preserved between them.

6. *Marcianus, Institutes, Book VII.*

If a slave should be ordered to be free, and afterwards is bequeathed to the son of the testator, and the latter afterwards manumits him, the freedman will belong to the son, just as if he had been assigned to him. This will be the case whether it is either expressly stated, or clearly understood that the slave was not bequeathed as a slave, but assigned as a freedman.

7. *Scsevola, Rules, Book II.*

We can make an assignment absolutely and conditionally, by a letter, in the presence of witnesses, or by means of a written instrument, because the assignment of a freedman is not acquired either as a legacy or under the terms of a trust, nor can it be charged with the execution of a trust.

8. *Modestinus, Differences, Book VII.*

Although the children of a patron are, in many instances, considered to enjoy the same rights as the person who manumitted the slave, still, they cannot assign a freedman of their father to

their own children, even if he has been assigned to them by their parents.

This opinion is adopted by both Julianus and Marcellus.

9. *The Same, Pandects, Book IX.*

Some doubt exists on the point as to whether a patron can only assign a freedman to his son, who is under his control, or to his emancipated son, provided he has at least two others under his control. The better opinion is that he can do so.

10. *Terentius Clemens, On the Lex Julia, et Papia, Book XII.*

Where a freedman is assigned under a condition, or after a certain period, everything will remain unchanged while the condition is pending, or the day has not arrived, just as if the freedman had not been assigned. Therefore, if, in the .meantime, he should die, his estate, both under the Civil Law and the Praetorian Edict, will belong to all the .children.

(1) Where a freedman has been assigned to one child absolutely, and to another conditionally, the one to whom he was assigned absolutely must be said to alone have the right of a patron over him, while the condition is pending.

11. *Papinianus, Opinions, Book XIV.*

I gave it as my opinion that where freedmen have been allotted to children for the purpose of providing them with support, they are not to be considered as assigned to them, as the patron intended to benefit his freedmen in order that they can, the more readily, enjoy the advantages of his will, without violating the requirements of the Common Law.

12. *Pomponius, Epistles, Book II,*

Where one of two patrons assigns the freedman to his son, there is no reason why the other should not retain his rights over him unimpaired.

13. *The Same, Decrees of the Senate, Book IV.*

Anyone can, by his will, manumit a slave, and assign him to one of his children as his freedman.

(1) The Senate refers to children who are under the control of their father. Must it therefore be understood that no provision is made for posthumous children by this decree? I think that the better opinion is that posthumous children are also included.

(2) Where the Decree of the Senate says, "If anyone should lose his civil rights," it refers to a person who has lost them forever, and not to one who has been captured by the enemy, and may return.

(3) An assignment can also be made to begin at a certain date, but it can hardly be made for a certain term, as the Senate itself fixed the limit of the transaction.

TITLE V.

WHERE ANYTHING IS DONE TO DEFRAUD THE PATRON.

1. *Ulpianus, On the Edict, Book XLIV.*

Where a fraudulent act is said to have been committed by a freedman in order to prevent a part of his estate from coming into the hands of those who have the right to obtain possession contrary to the testamentary provisions, the Praetor takes cognizance of the case, and sees whether he made a will or died intestate, and that the patron is not defrauded.

(1) Where an alienation is fraudulently made, we do not inquire whether it was made *mortis causa,* or not, for it is revoked, no matter how it was done. If, however, it was not made with fraudulent intent, but for some other reason, the plaintiff must then prove that the alienation was made *mortis causa.* For if you suppose an alienation to have been made *mortis causa,* we

do not inquire whether or not this was done with fraudulent intent; for it is sufficient to show that it was made *mortis causa.*

This rule is not unreasonable, for donations *mortis causa* are compared to legacies, and, as in the case of legacies, we do not ask whether they were made with fraudulent intent or not, so we should not institute such an inquiry with reference to donations *mortis causa.*

(2) Again, whatever has been given to a son *mortis causa* is not revoked, for, as anyone is at liberty to bequeath to his son as much as he chooses, he is not considered to have defrauded his patron by making the donation.

(3) Everything, however, no matter what it is, that is done in order to defraud a patron, is revoked.

(4) We must understand the term "fraud" to apply to the person who alienates the property, and not to him to whom it is transferred; hence, it happens that where the recipient is not conscious of the fraud or bad faith which has been committed, he must still be deprived of the property which has been alienated, for the purpose of defrauding the patron, even if he thought the freedman was freeborn, and not one who had been manumitted.

(5) The Favian Action will not lie against a fellow-patron who was refused praetorian possession of the estate in opposition to the terms of the will, on account of the donation, where the latter is not more valuable than the share to which the patron was legally entitled. Therefore, if the donation was made *mortis causa,* his fellow-patron will be entitled to his share of the same, just as if one of the patrons had been a legatee.

(6) Moreover, let us consider whether the Favian Action only has reference to the revocation of such alienations-as those by which the freedman diminishes his estate, or does it also have reference to other property which he did not obtain? Julianus, in the Twenty-sixth Book of the Digest, says that the Favian Action will not apply where a freedman, with the intention of defrauding his patron, does not accept an estate, or rejects a legacy which has been bequeathed to him. This appears to me to be true. For, although a legacy is said to belong to us from the time of the death of the testator, unless it should be rer jected, still, when it is rejected, it is clear that it never did belong to us; and the same rule should be adopted with reference to other acts of generosity, where anyone wishes to make a donation to a freedman, and he declines to accept it; as it is sufficient for the patron if his freedman did not alienate any property to his prejudice, and not if he did not acquire the same. Hence, if the legacy was bequeathed to him under a condition, and the freedman should prevent the condition from being fulfilled; or if he should make a stipulation under a condition, and preferred to permit the condition to fail, it must be said that the Favian Law does not apply.

(7) But what if the freedman should voluntarily lose a lawsuit? If he lost it intentionally, or confessed judgment, it must be said that the Favian Law will be applicable; but if he refused to present his claim in such a way as to collect it, in this instance, the matter deserves consideration. I think that, under such circumstances, the freedman has diminished his estate, for he has taken away a right of action from his property, just as if he had permitted the time for bringing the action to elapse.

(8) The patron, however, cannot make use of the Favian Action, where, for instance, the freedman refuses to bring suit to declare the will inofficious, or to bring another action, for example, one for injury, or to institute any legal proceeding of this kind.

(9) But if the freedman has committed some act in order to defraud his patron, the latter can avail himself of the Favian Action.

(10) If, however, the freedman endowed his daughter, he is not considered to have defrauded his patron of the amount which he gave to her by way of dowry, because paternal affection should not be blamed.

(11) If a freedman should make donations to several persons for the purpose of defrauding his patron, either during his lifetime, or *mortis causa,* the patron can bring either the Favian or Calvisian Action against all the parties equally, to recover the share to which he is entitled.

(12) If anyone should either sell, hire, or exchange property, for the purpose of defrauding his patrons, let us see what the decision of the judge should be. Where the property has been sold, the choice should be given to the buyer either to retain the article which has been purchased, at its proper value, or to surrender it, after having received the price which he paid.

We should not absolutely rescind the sale, as if the freedman had no right whatever to sell the property, to avoid causing the purchaser to lose the price which he paid, especially where no fraud is alleged on his part, but only where the fraud of the freedman is to be taken into consideration.

(13) If, however, a freedman should purchase property for the purpose of defrauding a patron, it must also be said that if he purchased it at too high a price, relief should be granted the patron on this account, and he should not be given the choice of annuling the sale, or not; but the vendor should be permitted either to surrender as much of the price as exceeded the true value of the property, or to recover what he sold, and return the price which he received.

We observe the same rule in the exchange, the hiring, and the leasing of property.

(14) If, however, the freedman sold the property in good faith, and ^without showing any partiality, but donated the price which he received to another, it must be considered whether he who purchased the property, or he who received the price as a gift, will be liable to the Favian Action.

Pomponius, in the Eighty-third Book of the Digest, very properly says that the purchaser should not be molested, for the fraud was committed against the patron with reference to the price, and therefore that he who received the price as a gift would be liable under the Favian Law.

(15) Let us, however, see if the patron should allege that, although the property was sold at a just price, it was to his interest, nevertheless, that it should not have been sold at all; and that the fraud consists in the fact that possession was alienated of something to which the patron was attached, either on account of its convenience, or its neighborhood, or the purity of the air, or because he was educated there, or his parents were buried therein, if he desires to have the sale revoked, whether he should be heard. He should not be heard in any case of this kind, for the fraud is understood to involve pecuniary loss.

(16) But if the property was sold for too low a price, and the purchase money should be donated to another, the Favian Action can be brought against both parties, that is to say, against the one who bought the property for less than its true value, and the one who received! the Jprice as a gift. If he who purchased it is willing to surrender it, he will not be compelled to do so, unless he receives the price which he paid. Then what must be done if the purchaser, having been delegated, should pay him to whom the freedman made the gift, would he still be entitled to recover the price? The better opinion is that he would be entitled to recover it, even though it may have come into the hands of a person who is insolvent. For if the freedman squandered the purchase money which he received, we should, nevertheless, hold that he who paid it can recover it, if he is willing to rescind the sale.

(17) Let us see whether the Favian Action will lie, in case a freedman should borrow a sum of money for the purpose of defrauding his patron, and what the remedy would be in this instance. If the freedman gave away the money which he received, the patron can sue the person to whom the freedman gave it, but if he received it and squandered it, he who lent it should not lose it, nor- can he be blamed for having lent it.

(18) It is evident that there will be ground for the Favian Action, if the freedman did not

receive the money, but entered into a stipulation with the person who was to lend it to him.

(19) Let us see whether the Favian Action will lie where a freedman becomes surety for me, or pledges his property to another in order to defraud his patron, and whether relief should not be granted to the patron at my expense. For the freedman did not give anything to me, if he became security for someone who was not solvent; and this is our practice. Therefore, the creditor cannot be sued by the Favian Action, but the debtor can be, as well as by the action on mandate. It is clear that if the action on mandate should fail for the reason that a donation had been made, there will be ground for the Favian Action.

(20) The same rule should be adopted where the freedman directs something to be done for the benefit of another.

(21) Although the Favian Action will only lie with reference to the share of the patron, still, where property cannot be divided, it will lie for the entire amount; as for instance, in the case of a servitude.

(22) If a freedman should give anything to my slave, or a son under my control, for the purpose of defrauding his patron, let us see whether the Favian Action can be brought against me. And it seems to me that it will be sufficient if the action is brought against me as a master or a father, and that when the judge renders his decision, not only that has been done for the benefit of my property, but also anything relating to the *'peculium* should be taken into consideration.

(23) If, however, an agreement has been made with a son, by order of his father, the latter will certainly be liable.

(24) If a freedman should contract with a slave for the purpose of defrauding his patron, and the slave should be manumitted, the question arises whether he will be liable to the Favian Action. As we have already stated, it is only the fraud of the freedman which should be considered, and not that of him with whom he made the agreement; hence the said manumitted slave will not be liable to the Favian Action.

(25) It may also be asked if the manumitted slave should die, or be alienated, must the action be brought within a year? Pomponius says that it must be.

(26) This action is a personal and not a real one, and will lie against the heir and other successors, as well as in favor of the heir and other successors of the patron; and it does not form part of the estate, that is to say, of the property of the freedman; but belongs to the patron personally.

(27) If a freedman should give anything away for the purpose of defrauding his patron, and then the latter should die during the lifetime of the freedman, and the son of the patron should obtain praetorian possession of the estate of the freedman contrary to the provisions of the will, can the Favian Action be employed for the purpose of recovering the property which has been alienated ? It is true, as Pomponius says in the Eighty-third Book, and Papinianus also, in the Fourteenth Book of Questions, that the Favian Action will lie in favor of the son, as it is sufficient if the act was committed for the purpose of evading the right of patronage; for we understand this to be done rather as a fraud against the property than against the person.

(28) The profits obtained after issue has been joined are also included in this action.

2. *Marcianus, Rules, Book III.*

It is very properly held that even the profits which have already been obtained are included in the Favian and Calvisian Actions, since it is the intention of the Praetor to annul every fraudulent act of a freedman.

3. *Ulpianus, On the Edict, Book XLIV.*

If a patron who has been appointed heir to the share of an estate to which he is entitled by law should accept the estate without being aware that the freedman had alienated any property with the intention of defrauding him, let us see whether he can be relieved on account of his ignorance, in order to prevent him from being deceived by the fraudulent conduct of his freedman. Papinianus, in the Fourteenth Book of Questions, gives it as his opinion that the property which was alienated remains in the same condition as before; and therefore the patron should blame himself for not having obtained praetorian possession contrary to the provisions of the will with reference to what was either alienated or donated *mortis causa,* when he could have done so.

(1) This action is granted perpetually, because its object is the recovery of property.

(2) The Praetor permits a patron who has been appointed heir to an entire estate to avail himself of the Favian Action, because it would be unjust for him to be excluded from the benefit of the action, when he did not voluntarily enter upon the estate, and did so only because he was unable to demand praetorian possession contrary to the provisions of the will.

(3) If a freedman should die intestate, the patron, by entering upon the estate can, by means of the Calvisian Action, revoke all alienations fraudulently made, by which, in accordance with the terms of the will, a smaller share of the estate of the freedman will come into the hands of the patron or his children.

This occurs whether praetorian possession of the estate is demanded by the patron on the ground of intestacy, or not.

(4) Where there are several patronesses and patrons, each of them can recover the share to which he or she is legally entitled, or they can bring the Calvisian Action for this purpose.

(5) When a freedman dies intestate, after leaving to his patron the share to which the latter is legally entitled, or something more, and also alienates some of his property, Papinianus, in the Fourteenth Book of Questions, states that none of his dispositions should be revoked. For he can leave something to anyone by his will, provided he bequeaths to the patron the share to which the latter is entitled, and by making any other donation he is not considered to have committed a fraud.

4. *The Same, On the Edict, Book XLlll.*

Everything which was fraudulently alienated by a freedman is revoked by the Favian Action.

(1) Where there are several patrons, each will have an equal share, but if some of them do not claim their shares, they will accrue to the others. What I have stated with reference to patrons also applies to the children of a patron; but they have no right to share at the same time, but only where the patrons are not in existence.

5. *Paulus, On the Edict, Book XLH.*

He also is liable to the Favian Action who himself receives a donation, rather than one who orders what is to be given to himself to be presented to another.

(1) In the Favian Action, if the property is not returned, judgment shall be rendered against the defendant for the amount which the plaintiff swears in court that it was worth.

6. *Julianus, Digest, Book XXVI.*

Where a freedman, with the intention of defrauding his patron, and in violation of the Decree of the Senate, lends money to a son under paternal control, the Favian Action will not be granted him; because, in this instance, the freedman should be understood to have rather donated the property for the purpose of defrauding his patron than to have left the money in violation of the Decree of the Senate.

7. *Scaevola, Questions, Book V.*

Therefore, if the Decree of the Senate does not apply, neither will the Favian Action, as the property can be recovered by another proceeding.

8. *Julianus, Digest, Book XXVI.*

When, however, the freedman lends money to a son under paternal control, who is under twenty-five years of age, after proper cause has been shown relief should be granted to the patron.

9. *The Same, Digest, Book LXIV.*

A freedman can, during his lifetime, legally make donations to his friends who are entitled to them, but he cannot bequeath legacies to such friends, when, by so doing, he diminishes the share of his estate to which his patron is entitled.

10. *Africanus, Questions, Book L*

If the property which was fraudulently alienated by the freedman is no longer in existence, the patron cannot bring the action, just as if the freedman had thrown away the money in order to perpetrate a fraud; nor, even if he who obtained a donation *mortis causa* from the freedman should have sold the property, and a *bona fide* purchaser has acquired it by usucaption.

11. *Paulus, On the Lex ^Elia Sentia, Book HI.*

A patron is not considered to be defrauded by an act to which he consents. Hence, where his freedman makes a donation with the consent of his patron, it cannot be recovered by the Favian Action.

12. *Javolenus, Epistles, Book III.*

A freedman who desired to transfer a tract of land to Seius for the purpose of defrauding his patron took the following course. Seius directed Titius to receive the land in such a way that an obligation of mandate was contracted between Seius and Titius. I ask whether after the death of the freedman, the patron will only be entitled to an action against Seius, who gave the mandate, or against Titius who holds the property, or whether he can proceed against either of them whom he may select. The answer was that the action will be granted against the person who obtained the donation, provided the property came into his hands, since the entire transaction which was carried on with his consent should be embraced in the decision rendered against him.

It cannot be held that he should be forced to deliver property of which another has possession, as he can recover it by an action on mandate, so that he can either himself restore it to the patron, or he can compel him with whom he contracted the mandate to do so. But what shall we say if the party who intervened was in no way guilty of fraud ? We entertain no doubt that an action cannot be brought against him. For he must not be considered guilty of fraud who did a favor for his friend, by which he made an acquisition for another than himself, through the fraudulent act of the freedman.

13. *Paulus, On the Lex Julia et Papia, Book X.*

It is provided by a Constitution of the Divine Pius, which has reference to the adoption of minors under the age of puberty, that, out of the property which the adoptive father possessed at the time of his death, a fourth shall belong to the child who was adopted. The Emperor also ordered any property which he had obtained from his adoptive father to be given him, and if he should be emancipated after proper cause was shown, he will lose his fourth.

Therefore, where property has been alienated for the purpose of defrauding the child, it can be recovered by an action resembling the Calvisian or Favian Action.

TITLE VI.

WHERE NO WILL IS IN EXISTENCE BY WHICH CHILDREN MAY BE BENEFITED.

1. *Ulpianus, On the Edict, Book XLIV.*

The Praetor, after speaking of the possession of the property of those who execute wills, passes to intestate estates, following the same order adopted by the Law of the Twelve Tables; for it is usual to first treat of the wills of testators, and afterwards of intestate succession.

(1) The Prsetor, however, divided intestate succession into four classes. Of the various degrees, the first he establishes is that of children, the second that of heirs at law, the third of cognates, and the fourth of husband and wife.

(2) Praetorian possession of an estate *ab intestato* can only be acquired where no one appears to demand possession in accordance with the provisions of the will, or in opposition thereto.

(3) It is clear that if the prescribed time for demanding praetorian possession of an estate in accordance with the terms of the will has not expired, but possession of the estate has been rejected, it must be said that praetorian possession of the same *ab intestato* may be demanded at once. For he who rejected the estate cannot demand praetorian possession after having done so, and the result will be that he can immediately make the claim for possession on the ground of intestacy.

(4) If, however, possession of an estate is granted under the Car-bonian Edict, the better opinion is for us to hold that praetorian possession on the ground of intestacy can still be demanded, for, as we shall show in its proper place, praetorian possession under the Carbonian Edict does not interfere with that obtained by the Praetorian Edict.

(5) In the case of succession *ab intestato,* the Praetor very properly begins with the descendants; for, just as he grants them (before all others), possession contrary to the provisions of the will, so he calls them first to the succession in case of intestacy.

(6) Moreover, we must understand the term "descendants" to mean those whom we have stated to be entitled to praetorian possession contrary to the provisions of the will; that is to say, natural, as well as adopted children. We admit adopted children, however, only where they were under paternal control, at the time of their father's death. If, however, they were their own masters at that time, we do not permit them to obtain praetorian possession of the estate, because the rights of adoption are extinguished by emancipation.

(7) If anyone adopts his emancipated son, instead of his grandson, and then again emancipates him while he has a grandson by him, the question was raised by Marcellus whether, after the adoption was rescinded, this would be an obstacle to the grandson desiring to obtain praetorian possession on the ground of intestacy. But as the grandson is ordinarily joined with the emancipated father, cannot it be said that, though the latter was adopted and occupied the place of a son, still, he should not stand in the way of his own child? For the reason that he was under paternal control as an adopted, and not as a natural son.

(8) If an appointed heir cannot take advantage of the will, either because it has been erased or cancelled, or because the testator is shown to have changed his mind in some other way, and that he intended to die intestate, it must be said that those who obtain praetorian possession of the estate will be entitled to it on the ground of intestacy.

(9) Where an emancipated son is disinherited, and a son who was under paternal control is passed over in the will, the Praetor should protect the emancipated son who claims possession of the estate on the ground of intestacy under the provision *unde liberi, so* far as half of the estate is concerned, just as if the father had left no will.

2. *Julianus, Digest, Book XXVII.*

Where an emancipated son, who was passed over, does not demand praetorian possession of the estate contrary to the provisions of the will, and the appointed heirs enter upon the estate, he will lose his father's estate by his own fault, for although praetorian possession in accordance with the provisions of the will may not have been demanded, the Praetor still will not protect him so as to enable him to obtain praetorian possession as a descendant. The Praetor is not accustomed to protect a patron who has been passed over in the will against the appointed heirs, if he does not demand praetorian possession of the estate contrary to the provisions of the will, under that Section of the Edict which refers to heirs at law.

3. *Ulpiamis, On Sabinus, Book Vill.*

Praetorian possession of an estate can be demanded on the ground of intestacy, when it is certain that the will has not been signed by at least seven witnesses.

4. *Paulus, On Sabinus, Book II.*

Children, even those who have lost their civil rights, are called to the possession of an estate under the Edict of the Praetor, unless they have been adopted, for the latter lose the name of children after emancipation. If, however, they are natural children, and have been emancipated and adopted, and emancipated a second time, they retain their original character of natural children.

5. *Pomponius, On Sabinus, Book IV.*

Where one of those children to whom the Praetor promises the possession of an estate is not under the control of the parent whose property was in dispute at the time of his death, the possession of that share of the estate to which he would have been entitled if he had remained under paternal control is granted to him, and to his children who were under the control of the deceased, if the estate belonged to him in his own name and they were not specifically disinherited; so that he himself will only have half of said share, and the other half will be given to his children, and he can distribute his own property among them alone, without any restriction.

(1) If a father should emancipate his son and his grandson by the latter, the son alone will be entitled to the possession of his estate on the ground of intestacy, although the loss of civil rights would not be an obstacle to anyone in distributing the estate under the Edict. Moreover, those children who have never been under paternal control, and have not obtained the place of proper heirs, are called to the praetorian possession of the estate of their parents; for if an emancipated son should leave a grandson under the control of his grandfather, praetorian possession of the estate of the emancipated father shall be given to the child who remains under the control of his grandfather; and, if the latter should have been begotten after the emancipation of his father, praetorian possession of the estate of his grandfather will be given to him after his birth; provided the condition of his father offers no obstacle to this being done.

(2) If an emancipated son should not demand praetorian possession of an estate on the ground of intestacy, all of the rights of the grandsons will remain unimpaired, just as if there had been no son; and what the son would have been entitled to if he had demanded praetorian possession of the estate of his father on the ground of intestacy will accrue to the grandsons alone who are descendants of the said son, and not to any others.

6. *Ulpianus, On the Edict, Book XXXIX.*

If a father should emancipate his son, retaining his grandson under his control, and his son should afterwards die, both the equity of the case and the terms of the Edict by which it is provided that praetorian possession of the estate of a father shall be granted to his children, on the ground of intestacy, will have the effect of causing an account to be taken, and the possession of the estate of the intestate father to be delivered; so that the grandfather who will

obtain the benefit of praetorian possession of the estate through his grandson will be compelled to make contribution to a sister who becomes her father's necessary heir; unless the grandfather should not wish to obtain any benefit from the property, and is ready to release his grandson from his control in order that, after his emancipation, he may obtain all the advantages of praetorian possession. Therefore, the sister, who becomes the heir of her father, cannot justly complain of being in this way excluded from the benefit of contribution; since, if her grandfather sliould die intestate, she will be entitled to share equally with her brother in his estate.

7. *Papinianus, Questions, Book XXIX.*

A disinherited son died while the testamentary heir was deliberating whether or not he would accept the estate, and he finally rejected it. The grandson, by the said disinherited son, will be the heir of his grandfather, nor will his father be considered as an obstacle to this, since it was after his death that the estate came to the grandson as heir at law. It cannot be said that the grandson is the heir, but not the direct heir, of his grandfather, because he was never in the first degree ; as he himself was under the control of his grandfather, and his father did not precede him in the succession. And, besides, if he was not a direct heir, under what right will he be the heir, as there was no doubt that he was not an agnate? Moreover, even if the grandson should not be disinherited, the estate can be entered upon by the testamentary heir after the death of the son. Therefore, if the father was no obstacle to the son by the right of intestacy, he will be considered to have been an obstacle under the right conferred by the will.

(1) Parents are not entitled to the estates of their children in the same manner as children are entitled to the estates of their parents. It is only the consideration of compassion which entitles parents to the estates of their children, but children obtain those of their parents on account of the intention of nature, as well as that of their parents.

8. *The Same, Opinions, Book VI.*

A son under paternal control, with the consent of his father, took praetorian possession of an estate as the next of kin to the deceased. Although he should be excluded from the estate by the condition stated in the will, if he remained under the control of his father, still he must be considered to have obtained possession legally. He is not liable to the penalty of the Edict, as he did not obtain possession in accordance with the provisions of the will; as in that way he could not hold the.property, nor was it in his power to comply with the condition, as a father cannot easily be forced to emancipate his son.

9. *Paulus, Opinions, Book XI.*

If a son, after having been emancipated, demands praetorian possession of the estate of his father, and subsequently changes his condition, there is no reason why he should not retain what he has acquired. If, however, he had changed his condition beforehand, he cannot demand praetorian possession of the estate.

TITLE VII. .

CONCERNING PRAETORIAN POSSESSION BY AGNATES.

1. *Julianus, Digest, Book XXVII.*

The following terms of the Edict, "If he who should have been the heir of the testator dies intestate," must be taken in their broadest sense, and understood to have reference to a certain period of time, not to the date of the testator's death, but to that when praetorian possession of his estate is demanded. Hence, if the heir-at-law has lost his civil rights, it is clear that he can be barred from obtaining this kind of praetorian possession of the estate.

2. *Ulpianus, On the Edict, Book XLVI.*

When the proper heirs reject possession of an estate *ab intestato,* we hold that they offer no

obstacle to the heirs-at-law, that is to say, to those to whom the estate can legally pass. The reason for this is because, by rejecting the possession of the estate in the capacity of children, they begin to be entitled to it as heirs-at-law.

(1) Moreover, this kind of praetorian possession not only passes to males, but also to females, and not only to freeborn persons but also to freedmen; and therefore it is common to several. For women may have either blood relatives or agnates, and freedmen may also have patrons and patronesses.

(2) Not only can males obtain praetorian possession of this kind, but females likewise can do so.

(3) Where anyone dies, and it is uncertain whether he is the head of a household or a son under paternal control, for the reason that his father, who has been captured by the enemy, is still living, or because his civil status is in suspense for some other reason, the better opinion is that praetorian possession of his estate cannot be demanded, as it is not apparent that he has died intestate, and it is uncertain whether he can make a will or not. Therefore, when his condition is ascertained beyond a doubt, praetorian possession of his estate can be demanded; not from the time when it began to be positively known that he died intestate, but when it became certain that he was the head of a household when he died.

(4) Moreover, this kind of praetorian possession includes everyone who can succeed to the inheritance on the ground of intestacy, whether the provision of the Twelve Tables, or some other enactment, or a decree of the Senate constitutes him an heir at law. Finally the mother, who is entitled to the succession under the Tertullian Decree of the Senate, and also the children, who, under the Orphitian Decree of the Senate, are admitted to the succession of their mother as her heirs at law, can demand praetorian possession.

3. *Paulus, On the Edict, Book XLIII.*

Hence, generally speaking, it should be remembered that every time that a law or a Decree of the Senate grants an estate to anyone, praetorian possession of the same must be demanded under this Section of the Edict. If the law directs praetorian possession of an estate to be granted it can be demanded, and this can either be done under the Section of the Edict relating to special enactments, or under that Section which is the subject of discussion at present.

4. *Julianus, Digest, Book XXVII.*

If one of two brothers should die after having made a will in accordance with law, and then, while his heir was deliberating with reference to accepting the estate, the other brother should die intestate, and the appointed heir should reject the inheritance, the paternal uncle of the brothers will be entitled to it as heir at law; for that kind of praetorian possession which refers to him "who should be the heir" has reference to the time when the possession of an estate can first be claimed on the ground of intestacy.

5. *Modestinus, Pandects, Book III.*

There is this difference between agnates and cognates: cognates are included among agnates, but agnates are not included among cognates ; for example, the brother of a father, that is, the paternal uncle, is both an agnate and a cognate, but the brother of a mother, that is to say, the maternal uncle, is an agnate, but not a cognate.

(1) As long as there is any hope that a deceased person will have a direct heir, there is no ground for the claim of blood relatives to the estate; for example, where the wife of the deceased is pregnant, or his son is in the hands of the enemy.

6. *Hermogenianus, Epitomes of Law, Book III.*

Children born after the death of their father, or after his captivity or banishment, as well as those who are under his control at the time when he was captured or banished, retain the right

of consanguinity, even though they may not be the heirs of their father, just as is the case with children who are disinherited.

TITLE VIII.

CONCERNING THE PRAETORIAN POSSESSION GRANTED TO COGNATES.

1. *Ulpianus, On the Edict, Book XLVI.*

This kind of praetorian possession depends entirely upon the indulgence of the Praetor, and does not derive its origin from the Civil Law, for he calls those to the possession of an estate who, under the Civil Law, cannot be admitted to the succession, that is to say, cognates.

(1) They are called cognates on account of their having the same birth; or, as Labeo says, because they have a common origin, so far as their birth is concerned.

(2) Moreover, this law refers to such cognate relationship as is not servile, for any cognation can hardly be considered servile.

(3) Again, the praetorian possession which is granted by this Section of the Edict includes six degrees of cognates, and two persons in the seventh, that is, the children of a male or a female cousin.

(4) Adoption also constitutes cognation. For anyone who is adopted becomes the cognate of those persons of whom he becomes the agnate; since whenever the rights of agnates are taken into account, we understand that those who are made cognates by adoption are included. The result is, therefore, that where a person is given in adoption, he will still retain his rights of cognation in the family of his natural father, as well as those which he obtains in his adoptive family; but he will only obtain cognation in the adoptive family with reference to those persons of whom he becomes the agnate; and he will retain the rights of cognation with all the members of his natural family.

(5) Moreover, he who is alone will be understood to be the next of kin among the cognates; although, strictly speaking, the next of kin is referred to as one of several.

(6) It is proper for us to examine the rights of the next of kin among the cognates at the time when praetorian possession of an estate is granted.

(7) Hence, if the nearest cognate should die while the appointed heirs were deliberating whether to accept the estate or not, the next of kin in the succession will take his place; that is to say, whoever is ascertained to have a right to the next place.

(8) If there is any prospect that a cognate who will be the next of kin may be born, the condition is such that it must be said that he offers an obstacle to those who follow him in the line of descent. But if the child should not be born, we must admit to the succession the person who appears to be next of kin to the said unborn child. This rule, however, should only be adopted where the child who is said to be unborn was conceived during the lifetime of him the possession of whose estate is in question; for if he should have been conceived after the death of the latter, he will offer no obstacle to the other, nor will he himself be admitted to the succession; because he was not the cognate next of kin to him in whose lifetime the unborn child was not yet in existence.

(9) If a woman should die while pregnant, and an operation should afterwards be performed to deliver the child, the latter is in such a position that it can obtain praetorian possession of the estate of its mother, as the nearest cognate. Since the passage of the Orphitian Decree of the Senate, the child can demand possession of the estate as heir at law, because it was in its mother's womb at the time of her death.

(10) Moreover, cognates are permitted to obtain praetorian possession in regular gradation, so that those who belong to the first degree are all admitted at once.

(11) If a cognate should be in the hands of the enemy, at the time of the death of the person the praetorian possession of whose estate is in question, it must be said that praetorian possession of the same can be demanded by him.

2. *Gaius, On the Provincial Edict, Book XVI.*

In this Section of the Edict, the proconsul, actuated by sentiments of natural equity, promises praetorian possession to all cognates whom the tie of blood calls to the succession, even though they may not be entitled to it under the Civil Law. Therefore, even the illegitimate children of the mother, as well as the mother of such children, and brothers of this description, can demand praetorian possession of an estate from one another; for the reason that they are cognates, reciprocally.

This rule applies to the extent that where a female slave who was pregnant when she was manumitted has a child, the child subsequently born is the cognate of the mother, and the mother is the cognate of the child, and any children who are afterwards born to her are also cognates of one another.

3. *Julianus, Digest, Book XXVII.*

Rights of cognation acquired by adoption are extinguished by the loss of civil rights. Therefore, for example, if within a hundred days after the death of his adopted brother, an adopted son loses his civil rights, he cannot obtain praetorian possession of the estate of his brother, which would otherwise pass to him as being the next of kin. For it is clear that not only the time of the death, but also the time when possession of the estate was demanded, should be taken into consideration by the Praetor.

4. *Ulpianus, Rules, Book VI.*

If an illegitimate child should die intestate, his property will belong to no one by the right of consanguinity or cognation; because the rights of consanguinity, as well as those of cognation, are derived from the father. However, on the ground of being next of kin, his mother, or his brother by the same mother, can demand praetorian possession of his estate under the terms of the Edict.

5. *Pomponius, On Sabinus, Book IV.*

Praetorian possession based on the right of legal inheritance is not granted to such heirs at law as have lost their civil rights, because their position is not the same as that of children; but such heirs are then called to the succession as belonging to the degree of cognates.

6. *Ulpianus, On the Edict, Book XLV.*

Where cognates accuse one another of crime, such an accusation offers no obstacle to succession to their estates.

7. *Modestinus, Rules, Book VI.*

Anyone who has become a slave in any way whatsoever can, under no circumstances, regain his rights of cognation by manumission.

8. *The Same, Opinions, Book XIV.*

Modestinus stated that grandchildren, even though they are illegitimate, are not, for that reason, excluded from the intestate succession of their maternal grandmother.

9. *Papinianus, Opinions, Book VI.*

Praetorian possession can be obtained by an agnate of the eighth degree, as the heir-at-law, even if he would not have been the true heir, but it is not granted to a cognate who is next of kin, although he would have been the true heir.

(1) A nephew, who had been appointed heir to a part of his paternal uncle's estate, having alleged that his uncle was deaf, and therefore could not make a will, obtained possession of his estate as being the nearest cognate of the deceased. It was decided that the time should be reckoned from the day of his death, for the reason that it did not seem to be probable that anyone so closely related by blood to the deceased could not have been aware of his illness.

10. *Scsevola, Opinions, Book II.*

A woman, dying intestate, left a sister, Septitia, the daughter of another father, and her mother pregnant by a second husband. I ask, if the mother should reject the estate while she is still pregnant, and should afterwards have a daughter named Sempronia, whether the said Sempronia can obtain praetorian possession of the estate of her sister Titia. The answer was that, according to the facts stated, if her mother was excluded from the estate, she who was subsequently born could obtain praetorian possession of the same.

TITLE IX.

CONCERNING THE SUCCESSORY EDICT.

1. *Ulpianus, On the Edict, Book XLIX.*

The Successory Edict was promulgated in order that estates might not remain too long without ownership, and the creditors suffer from too protracted a delay. Therefore, the Praetor thought that a limit should be prescribed for those to whom he granted praetorian possession, and to establish a succession among them, in order that the creditors might sooner ascertain to whom they must apply; whether the estate escheated to the Treasury for want of ownership, or whether they themselves should institute proceedings to obtain praetorian possession, just as if the deceased had died without leaving any successor.

(1) For even one can reject praetorian possession which is granted to himself, but he cannot reject that which is granted to another.

(2) Therefore, my agent cannot reject praetorian possession to which I am entitled, without obtaining my consent to do so.

(3) A master can reject praetorian possession to which he is entitled through a slave.

(4) Let us see whether a guardian can reject praetorian possession of an estate to which his ward is entitled. The better opinion is that he cannot do so, but the ward himself can reject it with the authority of his guardian.

(5) The curator of an insane person can, under no circumstances, reject praetorian possession of an estate to which the latter is entitled because the latter has not yet obtained it.

(6) Where a person has once refused to demand praetorian possession of an estate, he loses his right, even though the prescribed time for doing so had not yet expired; for, when he refused to accept it, possession of the estate had already begun to belong to others, or to escheat to the Treasury.

(7) Let us see whether praetorian possession of an estate authorized by a decree can be rejected. And, indeed, it may be terminated by lapse of time, but it is none the less true that it cannot be rejected, because it was not granted before the decree was issued.

Again, after the decree has been issued, the rejection will be too late, as a right which has once been acquired cannot be rejected.

(8) If the relative first in degree should die within the prescribed hundred days, the one next in succession can immediately demand possession of the estate.

(9) What we have said with reference to demanding praetorian possession within a hundred days must be understood to mean that it can be demanded even on the hundredth day; just as

where an act is to be performed within certain *kalends,* the *kalends* themselves are included.

The same rule applies where some act is to be performed within a hundred days.

(10) Where one of those to whom praetorian possession may be given under the terms of the Edict refuses, or neglects to demand it for himself within the specified time, the other heirs in the next degree can claim praetorian possession of the estate, just as if the one in the first degree had not been included in the number of those entitled to the same.

(11) However, it should be considered whether the one who is excluded in this way can also be admitted to share with the others;

for instance, a son who is under paternal control, where possession of an estate *ab intestato* has been granted to him under the First Section of the Edict relating to children. He is excluded by lapse of time, or by rejection of the estate, and praetorian possession passes to the heirs next in degree. Will he himself succeed by virtue of this Section relating to succession? The better opinion is that he can do so; for he can demand possession of the estate as one of the heirs at law, and after them, in his own degree, under the Section where the cognates, who are next of kin, are called to the succession. This is our practice, so that the son is admitted to the succession in this manner, and therefore, he can succeed himself in accordance with the Second Section of the Edict.

This rule can also be said to apply with reference to praetorian possession in accordance with the provisions of the will; so that if he who can succeed to the praetorian succession on the ground of intestacy does not apply for it in accordance with the terms of the will, he can still in this way succeed himself.

(12) A longer time to demand praetorian possession of an estate is accorded to parents and children on account of the honor attaching to blood, because those who are, so to speak, coming into possession of their own property, should not be too closely restrained. It has, therefore, been determined that they shall be given a year, so that they may be afforded a reasonable time for demanding praetorian possession of the estate, and not be pressed to do so; and that, on the other hand, the property may not remain too long without an owner.

It is true that sometimes when they are interrogated in court by impatient creditors, they must state whether they will demand praetorian possession or not; so that, if they say that they intend to reject it, the creditors may know what they will have to do. If they say that they are still deliberating, they should not be hurried.

(13) When anyone is substituted by his father for his brother, who is under the age of puberty, he must demand praetorian possession of his estate, not within a year, but within a hundred days.

(14) This favor is granted to parents and children, not only where they are themselves directly in the line of succession, but also where a slave of one of the children or parents is appointed an heir; for in this case, praetorian possession can be demanded within a year. For it is the person who demands possession who is entitled to this benefit.

(15) If, however, the father of an emancipated son desires to obtain praetorian possession of his estate in opposition to the provisions of the will, it is settled that he has a year in which to do so.

(16) Julianus says that, generally speaking, praetorian possession can, under all circumstances, be demanded by parents and children within a year.

2. *Papinianus, Opinions, Book VI.*

A cognate of an inferior degree is not entitled to the benefit of the Successory Edict, when one in the first degree has obtained praetorian possession under his own Section of the Edict. Nor will it make

any difference whether the cognate, first in degree, obtained the right of rejection on account of his age. Hence it was decided that the property is legally escheated to the Treasury as being without an owner.

TITLE X.

CONCERNING THE DEGREES OF RELATIONSHIP AND AFFINITY AND THEIR DIFFERENT NAMES.

1. *Gaius, On the Provincial Edict, Book Vill.*

The degrees of relationship are, some of them, in the ascending, and some of them in the descending line, or in the collateral line. Those in the direct ascending line are parents; those in the direct descending line are children; those in the collateral line are brothers and sisters and their children.

(1) Relationship in the direct ascending and descending lines begins with the first degree, but in the collateral line there is no first degree, and therefore it begins with the second. Hence cognates in the first degree of the direct ascending and descending lines can share equally with one another; but no one can do this in the collateral line in this degree, but in the second and third degrees, and in those which follow, the collateral heirs can share with one another, and sometimes even with those of a higher degree.

(2) We should, however, remember, whenever we consider the questions relating to inheritance or to the pratorian possession of an estate, that those who belong to the same degree do not always share equally with one another.

(3) Heirs who are first in the ascending line are the father and the mother; those first in the descending line are' the son and the daughter.

(4) Those first in the second degree of the direct ascending line are the grandfather and the grandmother; those first in the direct descending line are the grandson and the grandfather; those first in the collateral line are the brother and the sister.

(5) Those first in the third degree in the direct ascending line are the great-grandfather and the great-grandmother; those first in the descending line are the great-gj-andson and the great-granddaughter; those first in the collateral line are the son and the daughter of the brother and the sister, and, next in order, the paternal uncle and the paternal aunt, the maternal uncle and the maternal aunt.

(6) In the fourth degree of the direct ascending line are the great-great-grandfather and the great-great-grandmother, in the direct descending line the great-great-grandson and the great-great-granddaughter; in the collateral line the grandson and the granddaughter of the brother and the sister, and, in their order, the great-paternal uncle and the great paternal aunt, that is to say, the brother and sister of the grandfather; the great maternal uncle and the great maternal aunt, that is to say, the brother and sister of the grandmother; likewise, the brothers and sisters of the great maternal uncle, that is to say, children both male and female descended from two brothers; also the children both male and female, born of two sisters; and children of both sexes, the issue of a brother and a sister. All of these are known under the common appellation of first cousins.

(7) In the fifth degree of the direct ascending line are the great-great-great-grandfather and the great-great-great-grandmother; in the direct descending line the great-great-great-grandson and the great-great-great-granddaughter; in the collateral line the great-grandson and the great-granddaughter of the brother and the sister; and, in the same order, the great-great paternal uncle and the great-great paternal aunt, that is to say, the brother and sister of the great-grandfather, and the great-great-maternal uncle and the great-great-maternal aunt, that is to say, the brother and sister of the great-grandmother; also the son and daughter of male cousins, and the son and daughter of female cousins, likewise other male and female cousins

and the sons and daughters of the latter on both sides, and those of both sexes and are next to cousins in degree; these being the sons and daughters of the great paternal uncle and the great paternal aunt and the great maternal uncle and the great maternal aunt:

2. *Ulpianus, On the Edict, Book XLVI.*

That is to say the male and female cousins of the father of him whose relationship is in question, or the children of a father's brother.

3. *Gaius, On the Provincial Edict, Book Vill.*

In the sixth degree, in the direct ascending line, are the great-great-great-great-grandfather and the great-great-great-great-grandmother. In the direct descending line are the great-great-great-great-grandson and the great-great-great-great-granddaughter; and in the collateral line, the great-great-grandson and the great-great-granddaughter of the brother and sister; and in their order, the great-great-paternal uncle and the great-great-paternal aunt, that is to say, the brother and sister of the great-great-grandfather; and the great-great-maternal uncle and great-great-maternal aunt, that is to say, the brother and sister of the great-great-grandmother. Likewise, the grandson and the granddaughter of the great paternal uncle, and the great paternal aunt, and of the great maternal uncle and the great maternal aunt. Also, the grandson and the granddaughter of first cousins of both sexes, and the son and the daughter of the great-paternal uncle and the great-paternal aunt, and of the great-maternal uncle and the great maternal aunt; as well as the children of cousins on both sides who are properly called the issue of first cousins.

(1) It is sufficiently apparent, from what we have said, how many persons there can be in the seventh degree.

(2) We must also remember that the relatives in the ascending and descending lines must always be doubled; because we understand that there is a grandfather and a grandmother on the maternal as well as the paternal side, as well as grandchildren of both sexes, the children of sons as well as daughters; and this order must be followed in all degrees both ascending and descending.

4. *Modestinus, Pandects, Book XII.*

So far as our law is concerned, it is not easy to go beyond the seventh degree, when a question arises with reference to natural relationship, as nature hardly permits the existence of cognates to extend beyond that degree.

(1) The term "cognates" is thought to be derived from the fact that relatives are descended from one ancestor, or have a common origin or birth.

(2) Relationship among the Romans is understood to be two fold, for some connections are derived from the Civil and others from Natural Law, and sometimes both coincide, so that the relationship by the Natural and the Civil Law is united. And, indeed, a natural connection can be understood to exist without the civil one, and this applies to a woman who has illegitimate children. Civil relationship, however, which is said to be legal, arises through adoption without Natural Law. Relationship exists under both laws when a union is made by marriage lawfully contracted. Natural relationship is designated by the term cognation; but civil relationship, although it may very properly be designated by the same name, is more accurately styled agnation, which has reference to relationship derived through males.

(3) As certain special rights exist with reference to persons connected by affinity, it is not foreign to the subject to briefly discuss this connection. Persons related by affinity are the cognates of husband and wife, so called for the reason that two relationships, differing from one another, are joined by marriage, and one is transferred to the other. For affinity is derived from marriage.

(4) The following are the terms of affinity, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepson, and stepdaughter.

(5) There are no degrees of affinity.'

(6) The father of the husband or the wife, is called the father-in-law, and the mother of either of them is called the mother-in-law. Among the Greeks the father of the husband was called ..... and the mother ..... the father of the wife was called *KtvOepos* and the mother *mvdepa.* The wife of the son is called the daughter-in-law, the husband of a daughter the son-in-law. A second wife is called the stepmother of children born of a former one; the husband of a mother having children by a former husband is called the stepfather, and children born of either of them are designated stepsons, and stepdaughters; a father-in-law may also be denned as the father of my wife, and I am his son-in-law. The grandfather of my wife is called my grandfather-in-law, and I am his grandson-in-law; on the other hand, my father is the father-in-law of my wife, and she is his daughter-in-law, and my grandfather is her grandfather-in-law, and she is his granddaughter-in-law; likewise, the grandmother of my wife is my grandmother-in-law, and I am her grandson-in-law; and my mother is the mother-in-law of my wife, and she is her daughter-in-law; and my grandmother is her grandmother-in-law, and my wife is her granddaughter-in-law. The stepson of my wife is the son of her former husband, and I am his stepfather; on the other hand, my wife is said to be the stepmother of children whom I have by a former wife, and my children are her stepchildren. The brother of a husband is the brother-in-law of his wife, and is called by the Greeks *Ba^P,* as is stated by Homer. The sister of the husband is a sister-in-law of the wife called by the Greeks yax^s- The wives of two brothers are called sisters-in-law, designated among the Greeks as «vaTep«, which Homer also mentions.

(7) It is wrong for such persons to contract marriage reciprocally for the reason that, on account of their affinity, they bear the relation of parents and children to one another.

(8) It must be remembered that neither cognation nor affinity can exist unless the marriage which gives rise to affinity is not forbidden by law.

(9) Freedmen and freedwomen can become connected with one another by affinity.

(10) A child given in adoption, or emancipated, retains all the relationship by cognation and affinity which he formerly possessed, but he loses the rights of agnation. But with reference to the family into which he came by adoption, no one is his cognate except his adoptive father, and those to whom he becomes the agnate. No one belonging to the adoptive family is related to him by affinity.

(11) Anyone who has been interdicted from fire and water, or has lost his civil rights in any way, so as to have forfeited his freedom and his citizenship, also loses all his connections of cognation and affinity which he previously had.

5. *Paulus, On Plautius, Book VI.*

If I emancipate my natural son and adopt another, they will not be brothers. Arrianus says that if, after the death of my son, I adopt Titius, he will be considered the brother of the deceased.

6. *Ulpianus, On the Lex Julia et Papia, Book V.*

Labeo says that the wife of my grandson, the son of my daughter, is my granddaughter.

(1) Persons who are betrothed are included in the terms son-in-law and daughter-in-law, likewise the parents of such persons are considered to be included in the terms father-in-law and mother-in-law.

7. *Sc&vola, Rules, Book IV.*

The illegitimate child of a woman whom I afterwards marry is also my stepson, just as is the

case with one whose mother formerly lived in concubinage with some man, and was afterwards married to another.

8. *Pomponius, Enchiridion, Book I.*

Servius very properly says that the terms father-in-law and mother-in-law, son-in-law and daughter-in-law, are also derived from betrothal.

9. *Paulus, Sentences, Book IV.*

The direct line of relationship is divided into two parts, one of which is the ascending and the other the descending. Collateral lines are also derived from the ascending line as well as from the second degree. We have explained more fully in a special Book everything which has reference to all these.

10. *The Same, On Degrees and Affinities and Their Different Names.*

A person learned in the law should be familiar with the degrees of relationship and affinity, because, by the laws, it is customary for estates and guardianships to pass to the next of kin. The Prsetor, however, by his Edict, grants the possession of an estate to the nearest cognate.

Moreover, under a law relating to criminal trials, we cannot be compelled, against our will, to give testimony against persons connected with us by affinity, and cognates.

(1) The term cognation appears to be derived from a Greek word, for the Greeks designated as Suyiei/ek, persons whom we call cognates.

(2) Those are cognates whom the Law of the Twelve Tables styles agnates, but the latter are really such from the same family through the father. Those to whom we are related through women, are only designated cognates.

(3) The next of kin among agnates are called "proper."

(4) The same difference exists between agnates and cognates as exists between genus and species. An agnate is also a cognate, but a cognate is not an agnate; for one of these is a civil, and the other a natural designation.

(5) We make use of this term, that is to say, cognates, even with reference to slaves. Therefore, we speak of the parents, the children, and the brothers of slaves; but cognation is not recognized by servile laws.

(6) The origin of cognation is derived from women alone, for he is a brother who was only born of the same mother; but where persons have the same father, but different mothers, they are agnates.

(7) Ascendants, as far as the great-great-great-great-grandfather, are indicated among the Romans by special names, relatives beyond that degree, who have no particular designation are called ancestors. Likewise, children as far back as the great-great-great-great-grandson have special names, and those who are beyond this degree are styled posterity.

(8) There are also cognates in the collateral degree, as brothers and sisters and their descendants, as well as paternal and maternal aunts.

(9) Whenever a question arises as to the degree of relationship existing between one person and another, we must begin with him whose relationship is in question; and if it is in the superior or inferior degree in the direct ascending or descending line, we can easily ascertain the relationship by following the line up or down, if we enumerate each one who is next of kin through the different degrees. For anyone who is the next of kin to a person who is in the next degree to me is in the second degree to me; and, in like manner, the number increases with each additional person.

The same course should be taken with reference to the degrees in the collateral line. Hence, a

brother is in the second degree, as the father and mother from whom his relationship is derived is counted first.

(10) Degrees are so called from their resemblance to ladders, or places which are sloping, so that we ascend by passing from one to the next, that is, we proceed to one who, as it were, originates from another.

(11) Now let us consider each degree separately.

(12) In the first degree of relationship, in the ascending line, are two persons, the father and the mother; in the direct descending line there are also two, the son and the daughter, who may be several in number.

(13) In the second degree, twelve persons are included, namely, the grandfather, that is to say the father of the father and the mother, and the grandmother, both paternal and maternal. The brother is also understood to belong to one or the other of the parents, either only to the mother, or to the father, or to both. This does not increase the number, however, because there is no difference between him who has the same parents, and him who has only the same father, except that the former has the same paternal and maternal cognates.

Therefore, the result, so far as those who are born of different parents are concerned, is that the brother of my brother may not be my cognate. For suppose that I have a brother only by the same father, and he has one by the same mother, the two are brothers, but the other is not my cognate. The relation of sister is computed in the same way as that of a brother. The relation of grandson is also understood in two ways, for he is the son of a son, or the son of a daughter.

(14) Thirty-two persons are included in the third degree. The term great-grandfather is understood in four different ways, for he is the father of the paternal grandfather or the maternal grandfather, or of the paternal grandmother or of the maternal grandmother; the term great-grandmother also includes four different persons, for she is the mother of either the maternal grandfather or the paternal grandmother, or the mother of the maternal grandfather or of the maternal grandmother.

The term paternal uncle (that is to say, the brother of the father) is also to be understood in a double sense; that is, whether he had the same father or the same mother. My paternal grandmother married your father, and gave birth to you; or your paternal grandmother married my father, and gave birth to me; I am, therefore, your paternal uncle, and you are mine. This happens where two women marry the son of one another, for the male children who are born of them are the paternal uncle of one another, and the female children are the maternal aunts of one another. If a man gives his son in marriage to a woman whose daughter he himself has married, the male children born to the father of the young man will call those born to the mother of the girl their nephews, and the latter will call the others their paternal uncles, and their paternal aunts. A maternal uncle is a brother of the mother, and the same can be said of her which we have stated with reference to the paternal uncle; for if two men should marry each other's daughters, the males born to them will be reciprocally maternal uncles, and the females will be reciprocally maternal aunts. And, under the same rule, if males are born by one marriage and females by another, the males will be the maternal uncles of the females, and the females will be the maternal aunts of the males. The paternal aunt is the sister of the father, and what has been above mentioned will apply to her. The maternal aunt is a sister of the mother, and likewise what has been previously stated will apply to her.

It must be remembered that, while the brothers and sisters of the father and the mother are called paternal uncles and aunts, and maternal uncles and aunts, the sons and daughters of brothers and sisters have no special name to designate their relationship, but they are merely referred to as the sons and daughters of brothers and sisters. It will hereafter be shown that this is also the case with their descendants. The terms great-grandson and great-granddaughter

are also understood in four different ways, for they are either descended from a grandson by his son, or from a grandson by his daughter; or from a granddaughter by her son, or from a granddaughter by her daughter.

(15) Eighty persons are included in the fourth degree. Great-great-grandfather is a term which extends to eight persons, for he is either the father of the paternal great-grandfather, or of the maternal great-grandfather, whom we have stated should each be understood in a double sense; or he is the father of the paternal great-grandmother, or of the maternal great-grandmother, each of which names we also understand to be of twofold signification. The term great-great-grandmother also includes eight persons, for she is the mother of the paternal great-grandfather, or the maternal greatgrandfather; or the mother of the paternal great-grandmother, or of the maternal great-grandmother. The paternal great-uncle is the brother of the grandfather, and he can be understood to be both grandfather and brother in two ways, hence this term includes four persons; as he may be the brother of the paternal or the maternal grandfather, that is to say, he may be descended from the same father, namely, the great-grandfather, or only from the same mother, namely, the great-grandmother. Moreover, he who is my great uncle is the uncle of my father or mother. My paternal great-aunt is the sister of my grandfather, and the term grandfather, as well as that of sister (as we stated above) is interpreted in two different ways, and therefore, in this instance, we understand the term great-aunt to refer to four different persons. In like manner, she who is the paternal aunt of my father or my mother will be my paternal great-aunt. The maternal great-uncle is the brother of the grandmother, and under the same rule, there are four persons embraced in this appellation, and my maternal great-uncle is the maternal uncle of my father or my mother. The maternal great-aunt is the sister of the grandmother, and, in accordance with the same rule, this term is to be understood in four different ways; for she who is the maternal aunt of my father or my mother is my maternal great-aunt. There are also in this degree the children of brothers and sisters or first cousins of both sexes. They are children born to brothers or sisters, and whom certain authorities distinguish as follows: those who are born to brothers being designated paternal first cousins, and those born to a brother or a sister are called *amitini* and *amitinse,* and children of either sex born of two sisters are called cousins on account of their descent. According to Trebatius, many authorities call all of these children cousins. Sixteen different persons are included in this appellation; namely, the son and the daughter of a paternal uncle are designated in a twofold manner, as is stated above; for the brother of my father may, with him, be descended only from a common father, or a common mother. The son and daughter of a paternal aunt, and the son and daughter of a maternal uncle, is the son and daughter of a maternal uncle, and the son and daughter of a maternal aunt, as well as the terms paternal aunt, maternal uncle, and maternal aunt are to be understood as having double signification in accordance with this rule. The grandson and granddaughter of a brother and sister also belong to this degree. But as the terms brother, sister, grandson, and granddaughter are to be understood in a double sense, sixteen persons are included herein; namely, the grandson born to the son and the grandson born to the daughter of a brother, by the same father; the grandson born to the son and the grandson born to the daughter of the brother by the same mother, but by another father; the granddaughter born to a son and the granddaughter born to a daughter of a brother by the same father, and the granddaughter born to a son, or a daughter of a brother by the same mother, but by a different father. Under this rule there are eight persons and another eight will be added if we count the grandsons and the granddaughters born to the sister. Moreover, the grandson and the granddaughter of my brother and sister call me their great-uncle. The grandchildren of my brothers and sisters and my own call each other cousins. A great-great-grandson and a great-great-granddaughter are the son and the daughter of a great-grandson or a great-granddaughter; the grandson or the granddaughter of a grandson or a granddaughter, the great-grandson and the great-granddaughter of the grandson of a son or a daughter; it being understood that the grandson is such for the reason that he is the son of my own son or my daughter, and my granddaughter is such because she is the daughter of my

son, or my daughter; so that we descend by a degree to each person as follows: the son, the grandson, the great-grandson, the great-great-grandson; the son, the grandson, the great-grandson, the great-great-granddaughter; the son, the grandson, the great-granddaughter, the great-great-grandson; the son, the grandson, the great-granddaughter, the great-great-granddaughter; the son, the granddaughter, the great-grandson, the great-great-grandson; the son, the granddaughter, the great-grandson, the great-great-granddaughter; the son, the granddaughter, the great-granddaughter, the great-great-grandson; the son, the granddaughter, the great-granddaughter and the great-great-granddaughter. In calculating the descent from the daughter the same persons are enumerated, and in this way they make sixteen.

(16) A hundred and eighty-four persons are included in the fifth degree, as follows, the great-great-great-grandfather, and the great-great-great-grandmother. The great-great-great-grandfather is the father of the great-great-grandfather, or the great-great-grandmother; the grandfather of the great-grandfather or the great-grandmother; the great-great-grandfather of the father or the mother. This appellation includes sixteen persons, the enumeration being made by males as well as females, in order that we may reach each one thus designated; namely, the father, the grandfather, the great-grandfather, the great-great-grandfather, the great-great-great-grandfather; the father, the grandfather, the great-grandfather, the great-great-grandmother, the great-great-great-grandfather; the father, the grandfather, the great-grandmother, the great-great-grandfather, the great-great-great-grandfather ; the father, the grandfather, the great-grandmother, the great-great-grandmother, the great-great-great-grandfather ; the father, the grandmother, the great-grandfather, the great-great-grandfather, the great-great-great-grandfather; the father, the grandmother, the great-grandfather, the great-great-grandmother, the great-great-great-grandfather; the father, the grandmother, the great-grandmother, the great-great-grandmother, the great-great-greatgrandfather; the father, the grandmother, the great-grandmother, the great-great-grandfather, the great-great-great-grandfather. The enumeration is made in like manner on the mother's side. The term great-great-great-grandmother, according to the same rule, includes the same number of persons, that is to say sixteen. The great-great-paternal uncle is the brother of the great-grandfather, or the great paternal uncle of the father or mother. Under this name eight persons enumerated as follows are included, the father, the grandfather, the great-grandfather, the great-great-grandfather, the brother of the great-grandfather; the father, the grandfather, the great-grandfather, the great-great-grandmother, the brother of the great-grandfather ; the father, the grandmother, the great-grandfather, the great-great-grandfather, the brother of the great-grandfather; the father, the grandmother, the great-grandfather, the great-great-grandmother, the brother of the great-grandfather.

There are the same number of persons in making the calculation from the mother to her great-grandfather. However, before mentioning the brother of the great-grandfather, we place before him the great-great-grandfather for the reason (as we stated above) that we cannot reach him whose relationship is in question, unless we pass through those from whom he has descended, the maternal great-great-uncle, that is the brother of the great-grandmother, maternal great-uncle of the father or mother. By the same method of calculation, we also, in this instance, compute eight persons except that, only with this change, the brother of the great-grandmother is introduced.

The paternal great-great-aunt is the sister of the great-grandfather and the great-aunt of the father or mother. In this case the same enumerations of persons are made as before, except that the sister of the great-grandfather is introduced last. The maternal great-great-aunt is the sister of the great-grandmother, and the maternal great-aunt of the father or mother. In this instance, the number of persons is the same, except that the sister of the great-grandmother is placed last. Certain authorities designate all those whom we have mentioned as descended from the paternal great-uncle as follows, paternal uncle, maternal uncle, paternal aunt, maternal aunt; those whom I designate as such call me the great-grandson of their brother

or sister.

In this degree are also included the son and daughter of the paternal great-uncle, who are the son and daughter of the brother of the grandfather, the grandson and granddaughter of the great-grandson or the great-granddaughter by their sons or daughters, and the first cousin of the father or the mother. In this instance we also compute eight persons; for the reason that the grandfather and the brother (as has already been stated), can exist in this capacity in two ways, and therefore the character of son or daughter of a paternal great-aunt belongs to four persons; the son and the daughter of the paternal great-aunt are the son and the daughter of the sister of the grandfather, and the grandson or the granddaughter by the daughter of the great-grandfather, or the great-grandmother, and cousins of the father or mother; the number of the persons being the same as above stated. The son and the daughter of the maternal great-uncle are the son and daughter of the brother of the grandmother, or the grandson and granddaughter by the son, and the male and female cousins of the father or the mother; and the number is the same as that given above. The son and the daughter of the maternal great-aunt, that is to say, the children of a sister of the grandmother, the grandson and granddaughter by the daughter of the great-grandfather or great-grandmother, and the cousins of the father or mother according to the same computation.

The persons whom we have just enumerated from the son of the paternal great-uncle, concerning whose relationship a question may arise, are properly designated cousins, for, as Massurius says, a person whom anyone calls next in degree to his cousin, who is a cousin of his father or mother, is designated by him as the son or daughter of the cousin. The grandson and granddaughter of the paternal uncle are the great-grandson and the great-granddaughter of the paternal grandfather or the paternal grandmother, descended from a grandson or a granddaughter by a son, and are the children of cousins.

These include eight persons, that is four grandsons and four granddaughters, for the reason that the term paternal uncle is understood to be one of twofold meaning, and the grandson or the granddaughter are doubled, so far as the two kinds of uncles are concerned. The grandson or the granddaughter of the paternal aunt are the great-grandson and the great-granddaughter born to a grandson or a granddaughter of the paternal grandfather or grandmother, and are the sons and daughters of cousins; and the number is the same. The grandson and granddaughter of the maternal uncle are the great-grandson and great-granddaughter of the maternal grandfather or grandmother. The remainder are the same, as in the case of grandson or granddaughter of the paternal uncle (the grandson and granddaughter of the maternal aunt, that is to say, the great-grandson of the great-granddaughter, by a grandson or granddaughter of the maternal grandfather or grandmother; and the number of persons is the same).

All those whom we have just mentioned from the grandson of the paternal uncle, in the case where relationship is in question, are considered next in line to the cousin, for he is the cousin of the father or mother. The great-grandson and the great-granddaughter of a brother: in this degree sixteen persons are included, the term brother being understood in two ways, and the great-grandson and the great-granddaughter each being understood in four ways (as we previously mentioned). The degree of great-grandson and great-granddaughter of the sister likewise includes sixteen persons. The great-great-great-grandson and the great-great-great-granddaughter are the children of the great-great-grandson and the great-great-granddaughter, the grandson and granddaughter of the great-grandson or the great-granddaughter, the great-grandson and the great-granddaughter of the grandson or the granddaughter; the great-great-grandchildren of the son or the daughter. Thirty-two persons are included under this appellation, for the great-great-great-grandson includes sixteen, and the great-great-great-granddaughter the same number.

(17) Four hundred and forty-eight persons are included in the sixth degree, as follows: the great-great-great-great-grandfather, the great-great-great-grandfather of the father, or mother,

the great-great-grandfather, the grandfather or grandmother, the great-grandfather of the great-grandfather or great-grandmother, the grandfather of the great-great-grandfather or the grandmother, and the grandfather of the great-great-grandfather or grandmother, and the father of the great-great-great-grandfather or the great-great-great-grandmother. He is called the grandfather in the third degree. Thirty-two persons are included in this class. For the number to which the great-great-great-grandfather belongs must be doubled, a change being made with reference to each person, so far as the relation of great-great-great-grandfather is concerned; so that there are sixteen ways of being the father of the great-great-great-grandfather, and as many of being the father of the great-great-great-great-grandmother.

The term great-great-great-great-grandmother likewise includes thirty-two persons, the paternal great-great-uncle, that is to say the brother of the great-great-grandfather, the son of the great-great-great-grandfather and mother, the paternal great-great-uncle of the father or mother. The sixteen persons mentioned as included in the term are the following: the father, the grandfather, the great-grandfather, the great-great-grandfather, the great-great-great-grandfather, the brother of the great-great-grandfather; the father, the grandfather, the great-grandfather, the great-great-grandfather, the great-great-great-grandmother, the brother of the great-great-grandfather ; the father, the grandfather, the great-grandmother, the great-great-grandfather, the great-great-great-grandfather, the brother of the great-great-grandfather; the father, the grandfather, the great-grandmother, the great-great-grandfather, the great-great-great-grandmother, the brother of the great-great-grandfather; the father, the grandmother, the great-grandfather, the great-great-grandfather, the great-great-great-grandfather, the brother of the great-greatgrandfather; the father, the grandmother, the great-grandfather, the great - great - grandfather, the great - great - great - grandmother, the brother of the great-great-grandfather; the father, the grandmother, the great-grandmother, the great-great-grandfather, the great-great-great-grandfather, the brother of the great-great-grandfather; the father, the grandmother, the great-grandmother, the great-greatgrandfather, the great-great-great-grandmother, the brother of the great-great-grandfather.

The same number are included on the mother's side. The maternal great-great-uncle, that is to say the brother of the great-great-grand-mother, and the maternal great-uncle of the father or mother. The number in the order of the persons is the same as above mentioned; the only change being that the brother of the great-great-grandmother is introduced instead of the brother of the great-great-grandfather. The paternal great-great-aunt is the sister of the great-great-grandfather, and the maternal great-great-aunt of the mother; and the others proceed in regular order, as in the case of the paternal great-great-uncle, with the exception that the sister of the great-greatgrandfather is substituted instead of the brother of the great-greatgrandfather. The maternal great-great-aunt is the sister of the great-great-grandmother, and the great-aunt of the father or mother, and the other degrees proceed as above, except that, at the last, the sister of the great-great-grandmother is introduced instead of the brother of the great-great-grandmother.

Certain authorities designate by the following specific names all those whom we have traced from the paternal great-great-uncle, the maternal great-great-uncle, the paternal great-great-uncle, the paternal great-great-aunt, and the maternal great-great-aunt; therefore, we use these terms indiscriminately. Those whom I designate by these names call me the great-great-grandson of their brother or their sister. The son and the daughter *of* the paternal great-great-uncle are the son and daughter of the brother of the great-grandfather, and the grandson and granddaughter of the great-great-grandfather or great-great-grandmother, by the great-grandfather through his son. There are sixteen persons in this class, the enumeration being made in the same manner as was done in the fifth degree, when we explained the relation of the paternal great-great-uncle; only adding one more son or daughter, because it is necessary to include as many persons in this class, as in those of the paternal great-great-uncle, that is to say, eight. With reference to the person of the daughter, the number computed is the same as

that mentioned above; the son and the daughter of the paternal great-great-aunt are the children of the sister of the great-grandfather, and the grandson and the granddaughter by the great-great-grandfather or the great-great-grandmother through the great-grandfather by a daughter. In this instance, we compute the persons according to the same rule. The son and daughter of the maternal great-great-uncle are the children of the great-grandfather and the great-grandmother, and the grandchildren of the great-great-great-grandfather, and the great-great-great-grandmother through the great-grandmother by a son. The enumeration, in this case, should be made just as in that of the son and daughter of the paternal great-great-uncle. The son and the daughter of the maternal great-great-aunt are the son and the daughter of the sister of the great-grandmother, and the grandson and granddaughter of the great-great-grandfather and the great-great-grandmother through the great-grandmother by a daughter, the number and definitions of the persons being the same as above.

All of those whom we have mentioned as descended from the son of the paternal great-great-uncle are cousins of the grandfather and grandmother, and the great-uncles and great-aunts of the person whose relationship is in question; and they are also distant cousins of the brothers and sisters of the father or mother on both sides. The grandson and the granddaughter of a paternal great-uncle and a paternal great-aunt, of a maternal great-uncle and a maternal great-aunt, each of which classes includes sixty-four persons. For as the person of the great-uncle has four different significations, that of the grandson has two, the number is doubled in speaking of the grandson, and he who is doubled is also quadrupled.

Where the granddaughter is concerned, the number is also doubled; and we will mention one of these enumerations, by way of example. The father, the grandfather, the great-grandfather, the brother of the grandfather, who is the paternal great-uncle, his son, and his grandson, by a son, and also his granddaughter; the father, the grandfather, the great-grandmother, the brother of the grandfather, who is the paternal great-uncle, his son, his grandson by his son, and his granddaughter; the father, the grandfather, the great-grandfather, the father of the grandfather who is the paternal great-uncle of his daughter, and his grandson by his daughter, likewise, his granddaughter; the father, the grandfather, the great-grandmother, the brother of the grandfather, who is the paternal great-uncle, his daughter, his grandson by his daughter, and also his granddaughter. Under the same rule, there are as many, beginning with the mother, that is to say if we compute the grandsons and granddaughters of the brother of the maternal grandfather. This also applies to the paternal great-aunt; that is to say, where we enumerate the grandchildren of the sister of the grandfather. The same rule also applies to the maternal great-uncle, that is to say, the brother of the grandmother. According to the same rule, the computation is made with reference to the maternal great-aunt, that is to say, the sister of the grandmother; from whom the entire number of sixty-four descendants is derived. All of these are the great-grandsons or great-granddaughters of the great-grandfather or great-grandmother of the person whose relationship is in question, the grandsons or granddaughters of the brother or sister of the same grandfather or grandmother.

And, on the other hand, the grandfather and grandmother, the paternal great-uncle and the paternal great-aunt, the maternal great-uncle and the maternal great-aunt of the same person. There are, in addition, the father and the mother of the same person, and the 'brothers and sisters of both of these in the degree above cousins, and he is their cousin, and they are his.

The great-grandson of the paternal uncle and his granddaughter include eight persons; for there are sixteen of both sexes; namely, 'the father, the grandfather, the paternal uncle, the son of the latter, his grandson by a son, his great-grandson through his son by a grandson, and his great-granddaughter; the father, the grandmother, the paternal uncle, the son of the paternal uncle, his grandson through his son, his great-grandson by a grandson through his son, and his great-granddaughter; the father, the grandfather, the paternal uncle, the daughter of the latter, his grandson by his daughter, his great-grandson by his grandson by his daughter's son, and his great-granddaughter; the father, the grandmother, the paternal uncle, the daughter of the

paternal uncle, his grandson by his daughter, his great-grandson born to his grandson by his daughter, and his great-granddaughter; the father, the grandfather, the paternal uncle, the son of the paternal uncle, the granddaughter by the son of his daughter, the great-grandson born to the son of his daughter, and his great-granddaughter; the father, the grandmother, the great-uncle, the son of the great-uncle, his granddaughter by his son, his great-grandson born to his son through his granddaughter, and also his great-granddaughter; the father, the grandfather, the great-uncle, the daughter of the great-uncle, his granddaughter by his daughter, his great-grandson born to his granddaughter by his daughter, and his great-granddaughter ; the father, the grandmother, the paternal uncle, the daughter of the paternal uncle, his granddaughter by his daughter, his great-grandson by his granddaughter through his daughter, and his granddaughter, the great-grandson and the great-granddaughter of the paternal aunt. Under the same rule this class contains the same num-

ber of persons by substituting the paternal aunt for the paternal uncle. This also applies to the great-grandson and great-granddaughter of the maternal uncle, the latter being introduced instead of the paternal uncle. The great-grandson and great-granddaughter of the paternal aunt, and, in this instance, the maternal aunt is substituted instead of the paternal uncle, and we find the same number of persons. All of these are the grandsons or granddaughters of the cousins of him whose relationship is in question.

The great-great-grandson and the great-great-granddaughter of the brother and sister give rise to sixty-four persons, as appears from what is above stated. The great-great-great-grandson and great-great-great-granddaughter, the great-great-grandson or the great-great-granddaughter of the son of the daughter, and the great-great-grandson and the great-great-granddaughter of the great-grandson, and the great-granddaughter of the great-grandson, or the great-granddaughter of the great-grandson or the great-granddaughter, or the grandson and granddaughter of the great-great-grandson or the great-great-granddaughter, or the son of the daughter of the great-great-grandson or the great-great-granddaughter. These appellations include sixty-four persons, for the grandson in the third degree gives rise to thirty-two, and the granddaughter in the third degree to the same number. For from the great-great-grandson the number is quadrupled, making thirty-two, as the term grandson itself signifies two persons, the great-grandson four, the great-great-grandson eight, the great-great-great-grandson sixteen. To these are added the grandson and the granddaughter in the third degree, one of whom is born to the great-great-great-grandson, and the other to the great-great-great-granddaughter. Moreover, the same duplication is made in each individual degree, for the females are added to the males, from whom each one is derived in regular order, and they are enumerated as follows: the son, the grandson, the great-grandson, the great-great-grandson, the great-great-great-grandson, the great-great-great-great-grandson, and the great-great-great-great-granddaughter; the daughter, the grandson, the great-grandson, the great-great-grandson, the great-great-great-grandson, the great-great-great-great-grandson and the great-great-great-great-granddaughter ; the daughter, the grandson, the great-grandson, the great - great - grandson, the great - great - great - grandson, the great-great-great-great-grandson and the great-great-great-great-granddaughter; the son, the granddaughter, the great-grandson, the great-great-grandson, the great-great-great-grandson, the great-great-great-great-grandson and the great-great-great-great-granddaughter; the daughter, the granddaughter, the great-grandson, the great-great-grandson, the great-great-great grandson, the great-great-great-great grandson and the great-great-great-great-granddaughter; the son, the grandson, the great-grandson, the great-great-grandson, the great-great-great-grandson, the great-great-great-great grandson and the great-great-great-great-granddaughter; the daughter, the grand-son,the great-granddaughter,the great-great-grandson,the great-great-great-grandson, the great-great-great-great-grandson, and the great-great-great-great-granddaughter; the son, the granddaughter, the great-granddaughter, the great-great-grandson, the great-great-great-grandson, the great-great-great-great-grandson, and the great-great-great-great-granddaughter; the daughter, the

granddaughter, the great-granddaughter, the great-great-grandson, the great-great-great-grandson, the great-great-great-great grandson and the great-great-great-great-granddaughter; the son, the grandson, the great-grandson, the great-great-granddaughter, the great-great-great-grandson, the great-great-great-great grandson, and the great-great-great-great-granddaughter ; the daughter, the grandson, the great-grandson, the great-great-granddaughter, the great-great-great-grandson, the great-great-great-great-grandson and the great-great-great-great-granddaughter; the son, the grandson, the great-grandson, the great-granddaughter, the great-great-granddaughter, the great-great-great-grandson, the great-great-great-great-grandson, and the great-great-great-great-granddaughter; the daughter, the grandson, the great-granddaughter, the great-great-granddaughter, the great-great-great-grandson, the great-great-great-great-grandson, and the great-great-great-great-granddaughter; the son, the granddaughter, the great-grandson, the great-great-granddaughter, the great-great-great-grandson, the great-great-great-great-grandson, and the great-great-great-great-granddaughter; the daughter, the granddaughter, the great-grandson, the great-great-granddaughter, the great-great-great-grandson, the great-great-great-great-grandson, and the great-great-great-great-granddaughter; the son, the granddaughter, the great-granddaughter, the great-great-granddaughter, the great-great-great-grandson, the great-great-great-great-grandson, and the great-great-great-great-granddaughter; the daughter, the granddaughter, the great-granddaughter, the great-great-granddaughter, the great-great-great-grandson, the great-great-great-great-grandson and the great-great-great-great-granddaughter ; the son, the grandson, the great-grandson, the great-great-grandson, the great-great-great-granddaughter, and the great-great-great-great-grandson and the great-great-great-great-granddaughter; the daughter, the grandson, the great-grandson, the great-great-grandson, the great-great-great-granddaughter, the great-great-great-great-grandson and the great-great-great-great granddaughter; the son, the granddaughter, the great-grandson, the great-great-grandson, the great-great-great-granddaughter, the great-great-great-great-grandson, and the great-great-great-great-granddaughter; the son, the granddaughter, the great grandson, the great-great-grandson, the great-great-great-granddaughter, the great-great-great -great - grandson and the great - great - great - great - granddaughter ; the daughter, the granddaughter, the great-grandson, the great-great-grandson, the great-great-great-granddaughter, the great-great-great-great-grandson, and the great-great-great-great-granddaughter ; the son, the grandson, the great-granddaughter, the great-great-grandson, the great-great-great-granddaughter, the great-great-great-great-grandson and the great-great-great-great-granddaughter; the daughter, the grandson, the great-granddaughter, the great-great-grandson, the great-great-great-granddaughter, the great-great-great-great-grandson and the great-great-great-great-granddaughter; the son, the granddaughter, the great-granddaughter, the great-great-grandson, the great-great-great-granddaughter, the great-great-great-great-grandson, and the great-great-great-great-granddaughter; the daughter, the granddaughter, the great-granddaughter, the great-great-grandson, the great-great-great-granddaughter, the great-great-great-great-grandson, and the great-great-great-great-granddaughter; the son, the grandson, the great-grandson, the great-great-granddaughter, the great-great-great-granddaughter, the great-great-great-great-grandson, and the great-great-great-great-granddaughter; the daughter, the grandson, the great-grandson, the great-great-granddaughter, the great-great-great-granddaughter, the great-great-great-great-grandson, and the great-great-great-great-granddaughter ; the son, the grandson, the great-granddaughter, the great-great-granddaughter, the great-great-great-granddaughter, the great-great-great-great-grandson and the great-great-great-great-granddaughter; the daughter, the grandson, the great-granddaughter, the great-great-granddaughter, the great-great-great-granddaughter, the great-great-great-great-grandson, and the great-great-great-great-granddaughter; the son, the granddaughter, the great-grandson, the great-great-granddaughter, the great-great-great-granddaughter, the great-great-great-great-grandson and the great-great-great-great-granddaughter ; the daughter, the granddaughter, the great-grandson, the great-great-granddaughter, the great-great-great-granddaughter, the great-

great-great-great-grandson and the great-great-great-great-granddaughter; the son, the granddaughter, the great-granddaughter, the great-great-granddaughter, the great-great-great-granddaughter, the great-great-great-great-grandson and the great-great-great-great-granddaughter; the daughter, the granddaughter, the great-granddaughter, the great-great-granddaughter, the great-great-great-granddaughter, the great-great-great-great-grandson and the great-great-great-great-granddaughter.

(18) One hundred and twenty-four persons are included in the seventh degree, beginning with the father and the mother of the great-great-great-great-grandfather and the great-great-great-great-grandmother. These constitute in all a hundred and twenty-eight persons, for there are as many fathers and mothers of the great-great-great-great-grandfather as of the great-great-great-great-grandmother, and these make sixty-four. The brother and the sister of the great-great-great-grandfather and the great-great-great-grandmother are the son and daughter of the great-great-great-great-grandfather, the paternal and maternal uncle and the paternal and maternal aunt of the great-great-grandfather and the great-great-grandmother; the paternal great-uncle and the maternal great-uncle, the paternal great-aunt and the maternal great-aunt of the great-grandfather and the great-grandmother ; the paternal great-great-uncle, the maternal great-great-uncle, the paternal great-great-aunt, and the maternal great-great-aunt of the grandfather or grandmother; the paternal great-great-uncle, the maternal great-great-uncle, the paternal great-great-aunt and the maternal great-great aunt of the father or mother.

The persons connected with the brother of the great-great-greatgrandfather are thirty-two in number, for there are sixteen derived from the great-great-great-grandfather, and as many more are necessarily added on account of the duplication of the person of the brother. For sixteen brothers of the great-great-great-grandfather are computed as descending from his father, as well as sixteen from his mother. In like manner the sisters of the great-great-great-grandfather are thirty-two in number. This makes sixty-four in all, and as many for the brother and sister of the great-great-great-grandmother must be reckoned. The son and the daughter of the paternal great-great-uncle are the grandson of the great-great-great-grandfather and the granddaughter by his son, the son and daughter of the brother of the great-great-grandfather. The son and the daughter of the paternal great-great-aunt are the grandson of the great-great-great-grandfather and granddaughter by his daughter, the son and the daughter of the sister of the great-great-grandfather. The son and the daughter of the maternal great-great-uncle are the grandson of the great-great-great-great-grandfather and the granddaughter by his son, the son and the daughter of the brother of the great-great-grandmother. The son and the daughter of the maternal great-great-aunt are the grandson and the granddaughter of the great-great-great-grandfather, by his granddaughter by a daughter, the son and daughter of the sister of the great-great-grandmother.

All these persons whom we have mentioned as being descended from the son of the paternal great-great-uncle are the cousins of the greatgrandfather and the great-grandmother whose relationship is in question, one degree above the cousins of his grandfather and grandmother. Each one of these names includes sixteen persons, because when the paternal great-great-uncle gives rise to sixteen, his son and his daughter each gives rise to the enumeration of as many more; and from all those which we trace back to the son of the paternal great-great-uncle by multiplying eight by sixteen, we obtain one hundred and twenty-eight.

The term grandson of the paternal great-uncle includes sixteen persons. For he is the great-grandson of the great-great-grandfather and the great-great-grandmother, and as the great-great-grandfather is counted eight times, the grandsons being counted twice eight times, make up the above-mentioned number. The same rule applies to the granddaughter of the paternal great-uncle.

According to the same rule the grandson and granddaughter of the maternal great-great-uncle include thirty-two persons. The grandson and granddaughter of the paternal great-aunt under

this classification includes the same number. This also applies to the grandson and the granddaughter of a maternal great-aunt, and hence, for all of these, a hundred and twenty-eight persons are obtained. The grandfather and grandmother of the person whose relationship is in question are related in the degree above cousins to the persons herein-before mentioned, namely, the father, the mother and the male and female cousins. He whose degree of relationship is in question is their cousin, but in an inferior degree, and, as Trebatius says, this is done to indicate that they are related; and he gives as the reason for this, that the last degrees of relationship are those of cousins. Therefore, the son of my cousin is very properly called my near relative; and he is also called the son of my cousin. Hence those who are born of cousins call one another near relatives, for they have no special name by which they may be designated.

The great-grandson and the great-granddaughter of the paternal great-uncle, the great-grandson and the great-granddaughter of the maternal great-uncle, the great-grandson and the granddaughter of the paternal great-aunt, the great-grandson and the great-granddaughter of the maternal great-aunt: from all these a hundred and twenty-eight persons are derived, because each of these appellations includes sixteen. For example, the term paternal great-uncle is understood in four different ways, the persons of each paternal great-uncle being quadrupled; the great-grandson and the great-granddaughter include thirty-two persons; and this number multiplied by four makes the entire number above mentioned. The fathers and mothers of these are the cousins of him whose degree of relationship is in question, and he is their cousin.

The great-great-grandson and the great-great-granddaughter of the paternal uncle, the great-great-grandson and the great-great-granddaughter of the maternal uncle, the great-great-grandson and the great-great-granddaughter of the paternal aunt, the great-great-grandson and the great-great-granddaughter of the maternal aunt: each of these terms includes sixteen persons; for example, the great-great-grandson of the paternal uncle is enumerated in such a way that his great-grandson and great-granddaughter shall be counted as four, and their children will amount to sixteen. The same rule applies to the daughter as to the others, and in this way the entire number is brought up to a hundred and twenty-eight. These are the great-grandson and the great-granddaughter of the cousins of him whose degree of relationship is in question; the sons and daughters of the paternal great-great-uncle, the maternal great-great-uncle, the paternal great-great-aunt, and the maternal great-great-aunt, of those whose degree of relationship is in question.

The same rule applies to the cousin of the great-grandfather and the great-grandmother. The great-great-great-grandson and the great-great-great-great-granddaughter of the brother or sister include one hundred and twenty-eight persons. The son and daughter of the great-great-great-great-grandson, and the son and daughter of the great-great-great-great-granddaughter : these also constitute a hundred and twenty-eight persons, because as the great-great-great-great-grandson and the great-great-great-great-granddaughter include sixty-four persons (as we have previously stated), their son and their daughter under the same enumeration will each include as many more.

TITLE XI.

CONCERNING PRAETORIAN POSSESSION WITH REFERENCE TO HUSBAND AND WIFE.

1. *Ulpianus, On the Edict, Book XLVII.*

In order that prsetorian possession of an estate may be demanded in case of the intestacy of either the husband or the wife, there must be a lawful marriage. On the other hand, if the marriage is unlawful, prsetorian possession of the estate cannot be demanded. In like manner, the estate cannot be entered upon under the will, nor can praetorian possession, in accordance

with the terms of the will be claimed; for nothing can be acquired where a marriage is illegal.

(1) In order that prsetorian possession of this kind may be obtained, the woman must be the wife of her husband at the time of his death. If a divorce has occurred, even though the marriage still exists according to law, this succession will not take place. This may happen in certain instances; for example, where a freedwoman is divorced without the consent of her patron; as the *Lex Julia* relating to the marriages of different orders still retains the woman in the matrimonial condition, and forbids her to marry another against the consent of her patron. The *Lex Julia* with reference to adultery renders a divorce void if it is not obtained in a certain way.

TITLE XII.

CONCERNING THE SUCCESSION OF VETERANS AND SOLDIERS.

1. *Macer, On Military Affairs, Book II.*

Paulus and Menander say that a soldier who deserves to suffer the punishment of death should be permitted to make a will; and if he should die intestate, after having been punished, his property will belong to his next of kin; provided he is punished for a military offence, and not for an ordinary crime.

2. *Ulpianus, Opinions, Book XVI.*

The castrensian property of a soldier who died intestate cannot be claimed by the Treasury, if he left a lawful heir, who is within the sixth degree; or one next of kin in the same degree demands praB-torian possession within the prescribed time.

TITLE XIII.

CONCERNING THOSE WHO ARE NOT ENTITLED TO PRAETORIAN POSSESSION OF AN ESTATE.

1. *Julianus, Digest, Book XXVIII,*

If my slave was appointed an heir, and I fraudulently prevented the testator from changing his will, and I afterwards manumitted the slave, the question arises whether actions to recover the estate should be refused to him. I answered, that this case is not included in the terms of the Edict; it is, however, but just, if the master was guilty of fraud, to prevent the will by which a slave was appointed heir from being changed; and he, even though he was manumitted, should accept the estate, the actions should be denied him, as an action is denied an emancipated son, where his father has committed fraud in order to prevent the testator from changing his will.

TITLE XIV.

CONCERNING PRAETORIAN POSSESSION OF PROPERTY GRANTED BY SPECIAL LAWS OR DECREES OF THE SENATE.

1. *Ulpianus, On the Edict, Book XL1X.*

The Praetor says: "I will grant the possession of property, whenever it must be given under the terms of any law or decree of the Senate."

(1) Praetorian possession of property, although obtained under some other Section of the Edict, does not interfere with possession of this kind.

(2) Where anyone is entitled to an estate by the Law of the Twelve Tables, he cannot demand it under this part of the Edict, but under another Section relating to necessary heirs; for, under this Section, praetorian possession is not granted unless a special law provides for it.

TITLE XV.

WHAT ORDER IS To BE OBSERVED IN GRANTING PRAETORIAN POSSESSION.

1. *Modestinus, Pandects, Book VI.*

The following are the degrees of praetorian possession on the ground of intestacy: first, that of the proper heirs; second, that of the heirs at law; third, that of the next of kin; finally that of husband and wife.

(1) Praetorian possession on the ground of intestacy is granted where there is no will, or where there is one and no application is made for possession of the estate either in accordance with the provisions of the will, or in opposition to them.

(2) Praetorian possession of the estate of a father dying intestate is granted to his children; not only to such as were under his control at the time of his death, but also to those who have been emancipated.

2. *Ulpianus, On the Edict, Book XLIX.*

The time for claiming praetorian possession of the estate is an available one. It is designated available, because all the days of which it is composed can be taken advantage of; that is to say, all the days are included on which he who was entitled to the succession had knowledge of, and could have accepted it. There is no doubt, however, that the days on which he did not know of the succession, or could not have demanded it, are not included. Still, it may happen that where the person interested was aware of the facts, or could have claimed possession in the first place, was subsequently misinformed, or thought that he had no right to acquire possession; for instance, if he knew from the beginning that the owner of the property had died intestate, and afterwards doubted whether this was the case, or whether he died testate, or whether he was still living; because a rumor of this kind was afterwards circulated. On the other hand, it may also happen that a person who at first was ignorant that he had a right to the succession may afterwards ascertain that he was entitled to it.

(1) It is clear that while the days prescribed for demanding praetorian possession of an estate are available ones, those during which court is in session are not included, provided the praetorian possession is of such a nature that it can be demanded without ceremony.

But what if the possession is such that it requires an investigation by a tribunal, or a decree of the Praetor ? In this instance, the days of the session of the tribunal during which the Praetor has rendered his decision, and on which nothing has been done by him to prevent possession of the estate from being granted, must be computed.

(2) With reference to the praetorian possession of an estate which is granted in court, inquiry is made whether the Praetor presided in his tribunal, and did not grant possession to the parties demanding it; for it must be said that the time for obtaining possession does not begin to run while the presiding magistrate is occupied with other matters, either those relating to military affairs, or the custody of prisoners, or special investigations.

(3) If the Governor of the province was in the neighboring town, the time required for making the journey must be added to that prescribed by law, that is to say, by allowing twenty thousand paces to a day; nor should we expect the Governor of the province to come to the home of him who claims possession of the estate.

(4) When an unborn child is placed in possession, there is no doubt that the prescribed time for demanding it should not run against those in the next degree, not only during the hundred days, but also for the time during which the child may be born; for it must be remembered that, even if he is born before this time, praetorian possession will be granted him.

(5) Pomponius says that the knowledge which is necessary is not such as is exacted from persons learned in the law, but is what anyone can acquire, either by himself or through

others; that is to say, by taking the advice of persons learned in the law, as the diligent head of the household should do.

3. Paulus, On the Edict, Book XLIV.

The knowledge of the father with reference to praetorian possession will not prejudice the rights of a son in such a way as to make the prescribed time run against him, if he is not informed.

4. *Julianus, Digest, Book XXVIII.*

If you have been substituted for your co-heir, and you obtain possession of an estate, and your co-heir determines not to demand possession of the same, the entire possession will be understood to be given to you, and your co-heir will not even have the power of afterwards claiming possession.

(1) A son is entitled to the term of one year in which to demand [possession, not only where he does so as a son, but where he demands it as an agnate, or a cognate; just as where a father manumits his son, and although he may demand possession of the estate, as having been manumitted, still, he will be entitled to a term of a year in which to do so.

5. *Marcellus, Digest, Book IX.*

Where praetorian possession of an estate is granted to a son under paternal control, the days on which he is unable to notify his father, so that the latter may either direct him to accept possession, or ratify the possession which has already taken place, will not run against him. Suppose that, on the first day when he knew that he was entitled to praetorian possession of the estate he had accepted it, and could not notify his father in order that he might approve of what he had done, the hundred days will not run against him. They will, however, begin to run from the date when his father could have been informed, but, after the hundred days have elapsed, the ratification will be void.

(1) It may be asked if, when a son was able to demand praetorian possession of an estate, his father was absent so that he could not notify him; or if he was insane, and the son should neglect to demand possession, whether he could do so afterwards. But how can it prejudice his rights, if the possession of the estate was not demanded, when, if this had been done, it could not have been obtained unless the father had ratified the act?

(2) If a slave belonging to another is appointed heir, and then is sold by his master, the question arises whether the days prescribed for demanding praetorian possession must be considered to run against the new master. It is settled that the time to which the former master was entitled will run against him.

TITLE XVI.

CONCERNING PROPER HEIRS AND HEIRS AT LAW.

1. *Ulpianus, On Sabinus, Book XII.*

Those are properly called intestates who, having testamentary capacity, did not exert it. Moreover, where a man has made a will and his estate has not been entered upon, or if his will is broken, or void, he is not improperly said to have died intestate. It is clear that anyone who cannot make a will is not correctly styled intestate, as, for example, a minor under the age of puberty, an insane person, or one who is forbidden to have charge of his own property; still, we should also understand such persons to be intestate. He also is regarded as intestate who has been captured by the enemy, since by the Cornelian Law his succession passes to those to whom it would go if he had died in his own country; for his estate is held to be transmitted to his heirs.

(1) It may be asked, if a child conceived by and born of a female slave who has suffered from

delay in the execution of a trust granting her her freedom will be the proper heir of its father. And, as it has been established that it was born free, in accordance with a Rescript of the Divine Marcus and Verus, and Our Emperor Antoninus Augustus, why should not the said female slave be considered as absolutely manumitted, so that, after having been married, she may be able to bring forth a proper heir? It is not strange that a child can be born free whose mother is *a* female slave, as it has been stated in a rescript that a child born of a woman who is a captive is freeborn. Wherefore, I venture to say that if the father of the child was of the same condition as the mother, that is, if he suffered from the delay of the heir in granting his freedom under a trust, the child born to the father would be his heir, just as in the case where his parents are captives, and he returns with them. Therefore, if the father should manumit him, subsequent to the delay, he will receive him under his control. Or if he should die before being manumitted, the child will be born the proper heir.

(2) We understand proper heirs to be children of both sexes, and natural or adopted children.

(3) Sometimes a son who is a proper heir is excluded from the estate of his father, and the Treasury is preferred to him; for example, if his father should after his death be condemned for treason, what must be done in this case? In this case the son would be deprived of the rights of sepulture.

(4) When a son ceases to be a proper heir, all the grandsons and grandchildren born to him will succeed to his share of the estate, where they are under his control. This rule is based on the principles of natural equity. Again, a son ceases to be a proper heir if, through the entire or partial loss of civil rights, he leaves the control'of his father. But if the son is in the hands of the enemy, the grandsons will not succeed him as long as he lives. Hence, if he is ransomed from captivity, they will not succeed him until he has reimbursed the person who ransomed him. If, however, in the meantime, he should die, as it is settled that at the time of his death he had recovered his former condition, he will be an obstacle to the succession of his grandchildren.

(5) If a child does not cease to be under the control of his father, because he has never begun to be under his control, as, for instance, if my son should be taken captive by the enemy during the lifetime of my father, and should die in captivity after I have become my own master, my grandson will be entitled to the succession in his place.

(6) Granddaughters, as well as grandsons, succeed to the place of their parents.

(7) Sometimes, although a father does not cease to be under paternal control, and, indeed, has never begun to be under such control, we, nevertheless, say that his children succeed to him as proper heirs; for instance, where I have arrogated a man whose son has been captured by the enemy, and whose grandson was at home, and the son who was arrogated having died, and the captive who was in the hands of the enemy having also died, the great-grandson of the latter will become my proper heir.

(8) It must, however, be remembered that grandsons and their successors, although their parents may precede them at the time of death, can still sometimes be proper heirs, although succession does not exist among proper heirs. This may take place where the head of a household, having made a will, dies after disinheriting his son, and while the appointed heir is deliberating whether or not he will accept the estate, the son dies, and the appointed heir afterwards rejects the estate. The grandson can then be the proper heir, as Marcellus, in the Tenth Book, also says, since the estate has never passed to the son.

The same rule will apply where the son is appointed heir to the entire estate, under a condition with which it was within his power to comply; or a grandson is appointed under any kind of a condition, and both of them die before it is complied with. For it must be held that those can succeed as proper heirs, provided they were either born, or even had been conceived at the time of the testator's death. This opinion is also adopted by Julianus and Marcellus.

(9) After the proper heirs, the heirs related by blood are called to the succession.

(10) Cassius defines heirs by blood to be those who are united with one another by the tie of consanguinity. It is true that these are heirs by blood, even if they are not the proper heirs of their father; as, for example, where they have been disinherited. But even if their father has been banished, they will, none the less, be related by blood, even though they should not be the proper heirs of their father. Those, also, who have never been under paternal control, will be related to one another by blood; as, for instance, those who are born after the captivity or death of their father.

(11) Moreover, not only natural children, but also those who have been adopted, will also enjoy the rights of consanguinity with such as belong to their family, even where they are yet unborn, or have been born after the death of their father.

2. *The Same, On Sabinus, Book XIII.*

Next in succession to blood-relatives, agnates are admitted, where there are no blood-relatives. This is reasonable, for where there are blood-relatives the estate does not pass to the heirs at law, even if the former do not accept the estate. This should be understood to be the case where no blood-relative is expected to come into existence. Moreover, if a blood-relative can be born, or can return from captivity, the agnates are prevented from claiming the succession.

(1) Again, agnates are cognates of the male sex, descended from the same person. For after my proper heirs and my blood-relatives, the son of my blood-relative is next of kin to me, as I am to him. The same rule applies to the brother of my father, who is called my paternal uncle, as well as to the others in succession, and all who are descended from the same source, ad *infinitum.*

(2) This inheritance passes to the agnate who is the next of kin, namely, him whom no one precedes, and where there are several in the same degree to all of them; that is to say per *capita.* For instance, if I had two brothers, or two paternal uncles, and one of them left one son, and the other two, my estate would be divided into three parts.

(3) It makes little difference, however, whether the agnate referred to acquired that character by birth or by adoption, for one who is adopted becomes the agnate of the same persons to whom his adopted father sustains the same relationship, and he will be entitled to their estates by law, just as they will be to his.

(4) An estate only passes by law to the next agnate. Nor does it make any difference whether there is only one, or several of which one stands first, or where there are two or more of the same degree who precede the others, or are alone; because he is next in succession whom no one precedes, and he is the last whom no one follows; and sometimes the same one is both first and last, for the reason that he happens to be the only one.

(5) Sometimes, we admit to the succession an agnate who is of a more distant degree; as, for instance, where someone, who has a paternal uncle, and that uncle a son, makes a will, and, while the appointed heir is deliberating whether or not he will accept the estate, the uncle dies, after which the appointed heir rejects the estate, then the son of the paternal uncle will be admitted to the succession. Hence he can also demand pratorian possession of the estate.

(6) We do not consider him to be the next of kin who was such at the time that the head of the household died, but he who was such at the time that it is certain that he died intestate. According to this, even if he who was entitled to precedence was the proper heir or a blood-relative, and neither of them was living at the time that the estate was rejected, we consider him to be the next heir who was first in succession at the time when the estate was rejected. Hence, it may be very fairly asked whether we can still grant the succession, even after the rejection of the estate. Suppose that the appointed heir was requested to transfer the estate,

and rejected it; as the Divine Pius stated in a Rescript, he could, nevertheless, be compelled to accept and transfer the estate. Suppose, for example, that he had lived over the hundred days prescribed by law and that, in the meantime, the next heir had died, and that afterwards, he also, who was asked to transfer the estate died. It must be said that the heir in the next degree should be admitted to the succession with the charge of executing the trust.

3. *The Same, On Sabinus, Book XIV.*

When a freedman dies without making a will, it is certain that his estate first passes to his proper heirs, and, if there are none of these, then to his patron.

(1) We should understand a freedman to mean one whom any person has raised from servitude to the dignity of a Roman citizen, either voluntarily or through necessity, having been charged to manumit him, for his patron will also be admitted to the legal succession of the freedman.

(2) If anyone should manumit a dotal slave, he will be considered his patron, and will be entitled to his estate as the heir at law.

(3) It is clear that he whom I have purchased under the condition of manumitting him, even though he may obtain his freedom by the Constitution of the Divine Marcus, still (as is stated in the same Constitution) he will become my freedman, and his estate will pass to me as heir at law.

(4) Where a slave has deserved his freedom under the Decree of the Senate, for detecting the murder of his master, and the Praetor has assigned him to anyone to become his freedman, he will undoubtedly become such, and his estate will belong to his patron as his heir at law; but if the Praetor did not assign him to anyone, he will indeed become a Eoman citizen, but he will be the freedman of him of whom he was recently the slave, and the former will be admitted to his succession as his heir at law, unless he should be excluded from his estate as being unworthy to receive it.

(5) Anyone who compels his freed woman to swear that she will not marry unlawfully does not come within the terms of the *Lex ^llia Sentia.* If, however, he should compel his freedman to swear that he will not marry within a certain time, or marry anyone without the consent of her patron, or her fellow-freedwoman, or a female relative of his patron, it must be said that he will be liable under the *Lex &lia Sentia,* and cannot be admitted, as the heir at law, to the freedman's estate.

(6) If municipal magistrates should manumit a slave of either sex, and he or she should afterwards die intestate, he or she shall be admitted to the succession as heir at law.

(7) A soldier, by manumitting a slave constituting part of his *peculium,* will make him his freedman, and can be admitted to his estate as heir at law.

(8) It is perfectly evident that the Emperor can be admitted to the succession of the estates of his freedmen.

(9) It is also certain that an unborn child will be admitted, as heir at law, to an estate by a provision of the Twelve Tables, if he should afterwards be born; and hence the agnates next in succession to him, and over whom he has preference, must wait, in case he should be born. Hence, he shares with those who are in the same degree; for instance, where there is a brother of the deceased, and the unborn child; or a son of the paternal uncle, and the child who is yet unborn.

(10) Moreover, the question arose in what way a division should be made in this case, for the reason that several children might be born at a single birth. It was decided that if it was absolutely certain that the woman who alleged that she was pregnant was not in that condition, the child who was already born would be the heir to the entire estate, since he

becomes the heir without his knowledge. Wherefore, if in the meantime he should die, he will transmit the estate unimpaired to his own heir.

(11) A child born after ten months is not admitted to the succession as heir at law.

(12) Hippocrates says, and the Divine Pius also stated in a Rescript addressed to the Pontiffs, that a child was considered to have been born within the time prescribed by law, and could not be held to have been conceived in slavery, if its mother had been manumitted before the one hundred and eighty-second day previous to delivery.

4. *Pomponius, On Sabinus, Book IV.*

Children, the civil status of whose father has been altered, retain the right of inheritance, both with reference to other persons and among themselves, and *vice versa.*

5. *Ulpianus, On the Edict, Book XLV1.*

Where anyone, having a brother and a paternal uncle, dies after having made a will, and the brother then dies intestate while a condition imposed upon the appointed heir is still pending, and the condition should not afterwards be complied with, it is settled that the paternal uncle can enter upon the estates of both the deceased brothers.

6. *Julianus, Digest, Book LIX.*

Titius, having disinherited his son, appointed a foreign heir under a condition. The question arose, if after the death of the father and while the condition was pending, the son should marry a wife and have a child, and then should die, and the condition imposed upon the appointed heir should not subsequently be complied with, whether the estate would belong by law to the posthumous grandson, or to the grandfather. The answer was, that a child conceived after the death of its grandfather cannot, as the proper heir, obtain his estate, or, as his cognate, acquire praetorian possession of the same; for the reason that the Law of the Twelve Tables calls to the succession him who was in existence at the time of the death of the person the disposition of whose estate is in question.

7. *Celsus, Digest, Book XXVIIL*

Or, if he had been conceived in his lifetime, because a child who has been conceived is, to a certain extent, considered as being in existence.

8. *Julianus, Digest, Book LIX.*

The Praetor, by his Edict also, on the ground of their being next of kin, promises the possession of an estate to those who were cognates of the deceased at the time of his death. For, although it is customary to call those cognates grandsons who were conceived after the death of their grandfather, this designation is not proper, but susceptible of abuse, as it is based on analogy.

(1) If anyone should leave his wife pregnant, and a mother and a sister, and the mother should die during the lifetime of his wife, and his wife should afterwards have a dead child, the estate will pass to the sister alone, as the heir at law; because it is certain that the mother died at a time when she could not lawfully have acquired the estate.

9. *Marcianus, Institutes, Book V.*

Where some of several heirs at law, having been prevented by death, or by some other cause fail to accept the estate, their shares will accrue to the others who do accept it; and even though the latter may die before this takes place, the right will still pass to their heirs. The case of an appointed heir is different where his co-heir has been substituted for him, as the estate will pass to the other, by virtue of the substitution, if he is living; but if he should die, it will not descend to his heir.

10. *Modestinus, Differences, Book VI.*

If the property of an intestate son passes to his father, who manumitted him, as the heir-at-law, or, if not having manumitted him, he should be entitled to praetorian possession of the same, the mother of the deceased will be excluded.

11. *Pomponius, On Quintus Mucius, Book X.*

The rights of succession by law are extinguished by forfeiture of civil rights, where these are derived from the Twelve Tables, and the forfeiture takes place during the lifetime of anyone entitled to the estate, or before she enters upon it, as he can no longer correctly be styled either the proper heir or an agnate. This rule, however, is by no means applicable to successions regulated by new enactments, or decrees of the Senate.

12. *The Same, On Quintus Mucius, Book XXX.* The son is the nearest agnate of his father.

13. *Gaius, On the Lex Julia et Papia, Book X.* No woman either has proper heirs, or can cease to have them, on account of her loss of civil rights.

14. *The Same, On the Lex Julia et Papia, Book XIII.* Formal acceptance is not necessary for proper heirs, because they immediately become heirs by operation of law.

15. *Papinianus, Questions, Book XXIX.*

When a father dies in the hands of the enemy, we consider that his son, who has already died in his own country, was the head of the household at the time of his death; although, as long as he lived, he was not completely released from paternal authority. Therefore, this son can have an heir, if his father does not return from captivity. If, however, his father should return after the death of his son, he will, under the law of *postliminium,* be entitled to whatever property the former acquired in the meantime; and there is nothing extraordinary in the fact that, in this case, the *peculium* of the deceased son will pass to the father, as the former has always been under his control by the constitution which establishes that the right has only been in abeyance.

16. *The Same, Opinions, Book XII.*

A father inserted into the dotal contract executed at the time of his daughter's marriage that she should receive a dowry, with the understanding that she must expect nothing more from her father's estate. It Was decided that this clause did not change the right of succession, for the contracts of private individuals are not held to supersede the authority of the laws.

TITLE XVII.

ON THE TERTULLIAN AND ORPHITIAN DECREES OF THE SENATE.

1. *Ulpianus, On Sabinus, Book XII.*

Under the Orphitian Decree of the Senate children can be admitted to the succession of their mother whether she is freeborn or manumitted.

(1) When any doubt exists with reference to the condition of the mother, namely, whether she is independent or subject to paternal control (as for instance, where her father is a captive in the hands of the enemy), whenever it is positively established that she was her own mistress when she died, her children will be entitled to her estate. Hence the question arose whether or not, during the intermediate time and while her condition was in suspense, relief should be granted to the children by the Praetor, for fear that if they should die in the interim they might not be able to transmit anything to their heirs. The better opinion is that relief should be granted them, as has been decided in many cases.

(2) Illegitimate children are also admitted to the succession of their mother as heirs at law.

(3) An estate is sometimes granted to a son born in slavery, as heir at law; for example, where

he was born of a female slave while the heir was in default for not granting his mother freedom under the terms of a trust. It is certain that if he was born after the manumission of his mother, he will be entitled to her estate as heir at law, even though he was conceived in slavery; and even if he was conceived while his mother was in the hands of the enemy but was born in captivity, and returned with his, mother, he will have a right to her estate as heir at law, just as an illegitimate child; according to a Rescript of our Emperor and his Divine Father addressed to Ovinius Tertullus.

(4) The estate of a mother is not transmitted to her son as heir at law, who, at the time of her death, was a Roman citizen, and before the estate was entered upon was reduced to slavery; not even if he should afterwards become free, unless he had been made a penal slave and was subsequently restored to his civil rights by the indulgence of the Emperor.

(5) If, however, the son was born after a surgical operation had been performed upon his mother for that purpose, the better opinion is, that he will be entitled to her estate as heir at law. For he can demand pratorian possession, whether he was appointed heir, or his mother died intestate, as belonging to the class of cognates, and, still more, as one of the heirs at law. The proof of which is, that an unborn child is admitted to praetorian possession of the estate under every Section of the Edict.

(6) Anyone who hires his services for the purpose of fighting wild beasts, or who has been condemned for a capital crime and not restored to his civil rights, is not entitled to the estate of his mother under the Orphitian Decree of the Senate; but, on the ground of humanity, it has been held that he can obtain it.

The same rule will apply where the son is under the control of him who is in the above-mentioned condition, for he can be admitted to the succession of his mother under the Orphitian Decree of the Senate.

(7) If a mother, having several children, should make a will and appoint one of them her heir under a condition, and the child should demand pratorian possession of the estate while the condition was still pending, and afterwards, the condition should not be fulfilled, it is but just that the other children should not be deprived of the estate as heirs at law. This Papinianus also stated in the Sixteenth Book of Questions.

(8) The forfeiture of civil rights which takes place in the case of children without affecting their legal position, does not, in any way, prejudice them as heirs at law; for it is only the ancient right of inheritance which passes by the Law of the Twelve Tables that is extinguished by the forfeiture of civil status, but those new rights which are established by special taws or by the decrees of the Senate are not lost under such circumstances. Hence, whether the civil rights of a child were lost before or after it was entitled to its mother's estate, it will still be admitted to the succession as heir at law, unless the greater diminution of civil rights, which deprives a person of citizenship, as, for instance, where he is deported, has taken place.

(9) "Let the ancient law be observed, where none of the children, or none of those who are entitled to the estate as heir at law, desires to obtain the estate." This clause was enacted in order that the ancient law might not apply as long as there was a single child who wished to obtain his mother's estate as heir at law. Hence, if one of two children should accept the estate, and the other should reject it, the share of the latter will accrue to the former. And if the mother should leave a son and a patron, and the son should reject the estate, it will pass to the patron.

(10) If anyone, after having entered upon the estate of his mother, should then reject it and obtain complete restitution, must the ancient law be observed? The terms of the law admit that this can be done, as it says, "Desires to obtain the estate," for, in this instance, he has not this desire, although he had it originally; therefore I hold that the ancient law will be applicable.

(11) Moreover, will the succession pass to him who was at the time the heir at law, or will it go to him who was the heir at law when the estate passed to the son ? Suppose, for instance, that there was a blood-relative of the deceased, as well as her son, and that the said blood-relative died while the son was deliberating whether or not he would accept the estate of his mother, and he should then reject the estate; can the son of her blood-relative be admitted to the succession? Julianus very properly thinks that, by the Tertullian Decree of the Senate, there is ground for the admission of the nearest agnate.

(12) The enactment of the Senate says, "Whatever has been judicially decided is finally settled and terminated, and shall be valid," must be understood to mean a decision rendered by someone who had the right to do so, whether reference is had to a transaction made in good faith, in order to render it valid; or it was ended by consent, or quieted by a long silence.

2. *The Same, On Sabinus, Book XIII.*

A mother is entitled to the benefit of the Tertullian Decree of the Senate, whether she is freeborn, or has been manumitted.

(1) We should understand the law referring to the son or the daughter to apply to either such as are lawfully begotten or illegitimate. Julianus, in the Fifty-ninth Book of the Digest, adopts this opinion with reference to legitimate children.

(2) If the son or the daughter has been manumitted, the mother cannot claim his or her estate as heir at law, for she has ceased to be the mother of children of this kind. This was the opinion of Julianus, and it has also been decided by our Emperor.

(3) Where, however, a woman conceived a child while in slavery, and it was born after she was manumitted, it will be entitled to her estate as her heir at law.

The same rule applies if the slave conceived while serving out a sentence, and the child was born after she was restored to her rights.

This will also be the case where she was free when she conceived, but was serving out a sentence when the child was born, and afterwards was restored to her rights. If, however, she was free when she conceived, and the child was born after she had been reduced to slavery, and she was subsequently liberated, the child will be admitted to the succession as her heir at law. Likewise, it must be said that she will be entitled to the benefit of the law, if she was manumitted while pregnant.

The mother will inherit the estate of her child born in slavery, as its heir at law; for instance, if it was born after the heir was in default in granting her her freedom, in compliance with a trust; or where it was born while she was in the hands of the enemy, and returned with her from captivity; or if it was born after she was ransomed.

(4) When a woman is of infamous reputation, she will, nevertheless, be entitled to the estate of her child as heir at law.

(5) A minor under the age of puberty, for whom his father made a pupillary substitution, certainly dies intestate when his substitutes reject the inheritance. Therefore, if the minor should be arrogated, it must be said that his mother is entitled to the property which he would have left if he had died intestate.

(6) The children of the deceased, whether they are of the male or female sex, or natural or adopted, if they are proper heirs, stand in the way of their mother, and exclude her from succession as heir at law; and those entitled to possession of the estate under the Praetorian Edict also exclude their mother, even if they are not proper heirs, provided they are natural children. Adopted children are also admitted to the succession, after their emancipation, if they belong to the number of natural children; as for instance, a natural grandson adopted by his grandfather; for, even though he may be emancipated, if he obtains praetorian possession,

he will take precedence of his mother.

(7) Where, however, a son is in the hands of the enemy, or is yet unborn, the mother's right remains in suspense until he returns from captivity, or is born.

(8) When there are proper heirs, who, however, are not entitled to the estate, let us see whether the mother can be admitted to the succession ; for instance, when they reject the estate. Africanus and Pub-licius venture to hold that the mother will be admitted if the children do not accept the estate, and will take precedence of her whenever they are entitled to the property, in order that the mere name of proper heir may not prejudice the right of the mother; which opinion is the more equitable one.

(9) Where anyone dies, leaving a daughter whom he had legally given in adoption, and her mother, the Divine Pius decided that the Tertullian Decree of the Senate did not apply to such a case; and that the mother and daughter, as the next of kin, should be entitled to praetorian possession of the estate. Julianus, however, says that the mother cannot be admitted to the succession under the Decree of the Senate, if the daughter should fail to demand possession under the Praetorian Edict; but this is not true, for she succeeds her daughter, and hence it must be held that the other cannot obtain praetorian possession of the estate while the daughter has the right to demand it, as she has the expectation of succeeding as heir at law.

(10) If an emancipated son, after having acquired praetorian possession of the estate, should abstain from taking it, in order to obtain complete restitution, it is true that the Decree of the Senate will apply. If, however, he should again meddle with the estate, the mother must, a second time, refrain from applying for it.

(11) Where one of the children of the deceased, who is yet unborn, is placed in possession of the estate, and is afterwards born, and dies before obtaining actual praetorian possession, let us see whether the rights of the mother of the deceased will be prejudiced as praetorian possessor of the estate. I think that her rights will not be affected, provided the child was not born the proper heir of his father; for if it is not sufficient for him to formally be placed in possession, unless, after his birth, he obtained actual praetorian possession. Therefore, if possession is granted to an insane person by a decree of the Praetor, and he should die before he recovers his senses, and before actually acquiring praetorian possession, he will not interfere so as to exclude his mother.

(12) If a child, whose condition is in controversy, has only obtained Carbonian, praetorian possession, the question arises whether such possession will prejudice the rights of the mother. Under these circumstances, as possession of this description is terminated after a prescribed period, it must be said that, after this period has elapsed, the rights of the mother will not be prejudiced; or if the child should die under the age of puberty, the mother will be entitled to the estate.

(13) When, however, possession has been demanded for an infant by his guardian, even though he may die immediately, it must be said that his mother will be excluded, for this case is not similar to the one where praetorian possession is given to an insane person.

(14) Moreover, the mother is only excluded from the benefit of the Decree of the Senate, where her son enters upon the estate as the heir at law, but if he should fail to do so, his mother will be admitted to the inheritance under the Tertullian Decree. Where, however, this son is not the only heir at law, but there are others who can be admitted with him, the mother will not be called to the succession of their shares by the Decree of the Senate.

(15) The father takes precedence of the mother in the succession of either a son or a daughter, whether he appears as the heir, or is entitled to praetorian possession of the estate. However, neither the grandfather nor the father exclude the mother, under the Tertullian Decree of the Senate, even though they may be charged with a trust. Only the natural, and not the adoptive

father takes precedence of the mother, for the better opinion is that when the adoptive father ceases to be such, he will be excluded by the mother; since he is not entitled to praetorian possession of the estate contrary to the provisions of the will, because he is no longer the father.

(16) However, no matter in what way the natural father may have obtained praetorian possession, whether on the ground of intestacy, or in opposition to the terms of the will, in every instance, he excludes the mother.

(17) If an agnate of the deceased and his mother survive him, and his natural father belongs to an adoptive family, we admit the mother to the succession, as the agnate excludes the father.

(18) If a sister related by blood to the deceased survives him as well as his mother, his father having either been adopted or emancipated, and his sister desires to obtain the estate, it is settled by the Decree of the Senate that the mother can be admitted with the sister, and the father will be excluded. If the sister rejects the estate, the mother cannot be admitted under the Decree of the Senate, because of the father.

Although, under other circumstances, the mother is not required to wait until the sister decides whether or not she will accept the estate; still, in this instance, she should wait, for it is the sister who excludes the father. Therefore, if the sister rejects the estate, the mother will be entitled to prsetorian possession of the same, along with the father, in the capacity of cognates. In this case, she must suffer the delay, and cannot obtain prsetorian possession of the estate before the father himself demands it; since if he fails to do so, she can then succeed under the Decree of the Senate.

(19) But if the mother herself is the sister by blood of the deceased (for example where the father of the mother adopted a grandson by the daughter) and there is also a natural father; the mother who is entitled to the succession as sister will exclude the father; if, however, she rejects the right derived from her sister, or loses it through alteration of her civil status, she cannot be admitted to the succession under the Decree of the Senate, on account of the father, but if he rejects the estate, she can still be admitted under the Decree of the Senate.

(20) If the mother of a son or a daughter does not enter upon the estate under the Tertullian Decree of the Senate, the ancient law with reference to the inheritance of their property must be observed; for the ancient law becomes operative when the preference granted to the mother no longer exists, as will be the case, if she neglects to take advantage of the Decree of the Senate.

(21) If the mother should reject the prsetorian possession, and deliberate as to whether she will enter upon the estate under the provisions of the Civil Law, it must be said that the agnate will not succeed, as it has not yet been announced that the mother will not accept the estate.

(22) We, having said that the ancient law must be observed if the mother does not accept the estate, must consider to whom it will pass, whether to the next of kin at the time, or to the person who was next of kin when it was certain that the son died intestate. For instance, if there was a paternal uncle living at the time he died intestate, and a son of the said paternal uncle living at the time when the mother rejected the succession, the estate will not yet pass to the uncle; and therefore, if the latter should die while the mother is deliberating, his son will be called to the succession.

(23) If the mother did not demand solvent guardians for her children, or if the former ones having been excused or rejected, she did not immediately present the names of others, she will not have the right to claim for herself the property of her intestate children. And, indeed, if she does not apply for guardians, she will be liable to the penalty of the constitution, for it says, "Or not demand." But of whom must this demand be made? The constitution, indeed, mentions the Praetor, but I think that it will also be applicable in the provinces, if she does not

have recourse to the municipal magistrates, since the necessity of making the appointment imposes an obligation upon them.

(24) But what if she did make the demand, only after having been notified to do so by her freedman, or her relatives, would she be liable to the penalty of the Decree of the Senate? I think that she would be, if she allowed herself to be compelled to do so; but not if, after having been notified, she did not delay in making the demand.

(25) What course should be pursued if their father forbade the children to demand a guardian, as he desired their property to be administered by their mother? She will be liable to the penalty, if she does not make the demand, and does not administer the guardianship in a proper manner.

(26) She could be excused if she does not demand guardians for her children, when they are extremely poor.

(27) If, during her absence, she has been anticipated by her freedmen or by others, it must be said that she will not be excluded, unless this has happened after she had refused to make the demand.

(28) She will be punished for not demanding a guardian for her children; but what if she does not demand one for her grandchildren? If she does not demand one for them, she will also be punished.

(29) What if she should not demand curators for .her children? The rescript is silent on this point, but it must be said that if she does not demand curators for such of them as are under the age of puberty, the same rule will apply; but this will not be the case where all of them have reached the age of puberty.

(30) But what if a woman, who is pregnant, does not demand a curator for the property of her unborn child? I say that she will be liable to the penalty, and also where she has a child under the age of puberty, who is in the hands of the enemy.

(31) What if she should not demand a guardian or a curator for her insane son? The better opinion is that she will be liable.

(32) Not only she who does not make the demand, but also she who has done so without using proper care, is punishable (as is set forth in the rescript), for instance, where a guardian is demanded who is exempt by reason of some privilege; or who is already charged with three guardianships; but in such a case she will only be liable to punishment where she has acted designedly.

(33) What must be done if she demanded persons of this kind, and they, nevertheless, accepted or were retained? The mother shall be excused.

(34) But what if she should demand, as guardians, persons who are incompetent, that is to say, not qualified for the guardianship, being perfectly aware that the Praetor would not appoint them? And what must be done if the Praetor should appoint them, in accordance with the demand of the mother ? In this instance, the Prsetor is guilty of the offence; but we also punish the design of the mother.

(35) Hence, if these guardians are either excused or rejected, the mother should apply for the appointment of others without delay.

(36) Therefore, she will be punished if she does not apply for guardians at all, or does not apply for such as are suitable, even if, through the fault of the Prsetor, persons who are incompetent should be appointed.

(37) It may be a matter of doubt whether, by suitable guardians, it is meant that she should demand those who are solvent, or persons of good morals. I think that she can readily be

excused if she applies for the appointment of such as are wealthy.

(38) The mother is also punished if, when the first guardians applied for have been either excused or rejected, she does not immediately present the names of others.

(39) But what if all of them should neither be excused nor rejected; for it must be considered whether she would be to blame for not having demanded the appointment of another, instead of one who was excused ? I think that she would be to blame for not having done so.

(40) What if one of the guardians should die? I think that, although the law makes no provision on this point, the spirit of the constitution will apply.

(41) When we said "Rejected," must we understand this to refer to those who were not appointed by the Prsetor; or to such as have been removed, on account of being suspected; or to those who have been excluded because of negligence or ignorance? It is very properly held that the latter are included among those rejected. Will those who conceal themselves render her liable? This is difficult to decide, for she is not to blame for not having denounced them as suspicious. On the other hand, if they conceal themselves, she can, under the Edict, apply to the Prsetor to order them to appear, and if they do not do so to remove them as being liable to suspicion.

(42) What must be done if she does not compel them to administer the guardianship? As we require the mother to discharge her entire duty, she must be careful to do so, lest something may arise to exclude her from the estate.

(43) The term "Without delay" must be understood to mean as soon as possible, that is to say, as soon as she has an opportunity to appear before the Prsetor who has jurisdiction of the matter; unless she should be prevented by illness, or for any other good reason, which would hinder her from sending someone to apply for the appointment of guardians, provided that she does not exceed the term of a year in doing so. If, however, she should be prevented by the death of her son, she will not be at all responsible.

(44) The following point can very properly be discussed; namely, where a large legacy is left to a minor under the condition that he shall not have any guardians; and, for this reason his mother does not demand any for him, in order that the condition may not fail to be fulfilled; will the condition be applicable to such a case? I think that it will not, if the loss is less than the amount of the legacy.

This question is treated by Tertullianus with reference to municipal magistrates, and he thinks that an action should be granted against them to the extent that the amount of the loss exceeds the value of the legacy, unless someone may think that this condition is, as it were, opposed to the public welfare; and should be remitted, as many other conditions are under different circumstances; or quibbling with reference to the words employed, he may censure the mother for not applying for the appointment of guardians. Suppose, however, that the condition was more clearly expressed, should the mother be excused? Or should she be held responsible for not having petitioned the.Emperor to remit the condition? I think that she ought not to be considered responsible.

(45) I also think that the mother should be excused when she does not apply for a guardian for her insolvent son, since she consults his interest, because, not being defended, he will be subject to less annoyance.

(46) If anyone should appoint his wife, who is the mother of their common son, his heir, and ask that she shall not be obliged to furnish security to transfer the estate to him when he reaches the age of puberty, and that his mother shall not be required to ask that guardians shall be appointed for him; it must be held that the constitution will not apply, as she has carried out the intention of the father, and did not demand guardians for her son, who had no property. If, however, she was not released from giving security, the -contrary rule will apply,

since, on this account, he should have guardians.

But if a minor under the age of puberty should be arrogated after his mother had failed to apply for the appointment of guardians, and should die, it must be said that she will not be entitled to an action under the stipulation, against the arrogator of her son.

(47) When the mother is forbidden to claim her right under the Decree of the Senate, it should be considered whether we shall admit the other relatives, just as if there was no mother; or whether we may say that she herself can become the heir, or adopt any other means, in order to obtain the succession. We, however, refuse all actions to her under such circumstances, and we learn from a Rescript of our Emperor Antoninus Augustus and his Divine Father, addressed to Mammia Maximina, and dated the day before the *Ides* of April, during the second term of the Consulate of Plautianus, that if the mother is excluded, the other relatives will be admitted to the succession just as if there was no mother. Therefore, both the agnates and other relatives will succeed; or, if there are none, the estate will be without ownership.

3. *Modestinus, Rules, Book Vill.*

Most authorities are of the opinion that an adoptive father does not exclude the mother.

4. *The Same, Rules, Book IX.*

It is a rule of law that the property of a mother dying intestate belongs to all the children, even if they are the issue of different marriages.

5. *Paulus, On the Tertullian Decree of the Senate.*

It is considered perfectly just for all the children of the deceased to be preferred to the mother, even if they should be members of another family by adoption.

(1) A grandson, born to an adopted son, will exclude his mother from the succession, according to the terms of the Decree of the Senate.

(2) If the grandfather manumits his grandson by his son, and the former should die leaving his father, his grandfather, and his mother, it may be asked which of these is entitled to the preference? For if the mother excludes the grandfather, who was the emancipator, and who takes precedence of the father, the father of the deceased will then be admitted to the succession, by the Edict of the Praetor. This being the case, the Decree of the Senate will no longer apply, and the grandfather will again be called to the succession. It will, therefore, be more equitable to preserve the right for the grandfather, who is ordinarily entitled to praetorian possession of an estate even against the appointed heir.

6. *The Same, On the Orphitian Decree of the Senate.*

Under the terms of this Decree, the mother of the son is entitled to his estate, even if she is under the control of another.

(1) Let us see whether a son who has stated that he does not wish to accept the estate of his mother, can, by virtue of these words, "If none of them desires to accept the estate," enter upon it after having changed his mind, before a blood-relative or an agnate does so; because these terms have a broader meaning. And, as they have a broad meaning, a year should be granted him in which to change his mind, as he has a year in which to accept praetorian possession of the estate.

7. *The Same, On the Tertullian and Orphitian Decrees of the Senate.*

When anyone dies intestate, leaving a mother, and a brother, or a sister related by blood, although they are such from being arrogated, the same rights will be preserved, so far as the person of the mother is concerned, as in the case where natural children survive.

8. *Gaius, On the Tertullian Decree of the Senate.*

The right of the mother will remain in suspense, if the emancipated son of the deceased deliberates as to whether he will demand praetorian possession of the estate, or not.

9. *The Same, On the Orphitian Decree of the Senate.*

It is provided by a Decree of our Most Holy Emperor that the estate of a mother, dying intestate, belongs to her children, even though they may be under the control of another.

10. *Pomponius, Decrees of the Senate, Book II.*

If a son under paternal control, who is a soldier, does not make a will disposing of the property which he acquired while in the service, let us see whether it will belong to his mother. I do not think that it will, for the privilege of disposing of property of this description is, in fact, granted by military law; and, under such circumstances, sons are, by no means, regarded as the heads of households, so far as such property is concerned.

(1) While the right of a mother remains in suspense, for the purpose of determining whether or not certain persons can exclude her from the succession, and the result is that they cannot do so, the right to which she was entitled during the intermediate time will be unimpaired; for instance, if a son should die intestate, and a posthumous child could have been born to him, but either was not born, or died at birth; or where a son, who was in the hands of the enemy, did not return, so as to take advantage of the law of *postliminium.*

THE DIGEST OR PANDECTS.

BOOK XXXIX.

TITLE I.

CONCERNING THE NOTICE OF A NEW STRUCTURE.

1. *Ulpianus, On the Edict, Book LII.*

It is promised by this Section of the Edict that where a work is either rightfully or wrongfully undertaken, it can be prohibited by a notice; and the prohibition can be removed where the person who forbade the continuance of the work had no right to do so.

(1) Moreover, this Edict, and the remedy of the notice granted on account of a new structure, applies to any that may hereafter be undertaken but does not apply to such as already have been completed; that is to say it can prevent those which have not yet been begun. For where a structure which the person had no right to erect has been finished, the Edict relating to notice to stop the same has no application, and recourse for the purpose of obtaining restitution must be had to the interdict *quod vi et clam;* and when anything has been built in a sacred or religious place, or in a public river, or on the bank of the same, restitution can be obtained under this Edict, if it was done contrary to law.

(2) Notice under this Edict does not require previous application to the Praetor, for anyone can serve such a notice without appearing before him.

(3) We can also serve a notice of this kind in our own name, as well as in that of another.

(4) Such a notice can be served on any day.

(5) This notice operates also against persons who are absent; against such as are unwilling to accept it; and against those who are not aware that a new work has been undertaken.

(6) Moreover, in the service of a notice with reference to a new work, the adversary must be in possession.

(7) Where he upon whom the notice of a new work has been served, began to build it before permission was obtained, and he afterwards attempts to prove that he had a right to do so, the Praetor should refuse to grant him any action, and should allow an interdict against him, to compel him to restore the property fo its former condition.

(8) Again, anyone can serve such a notice, even though he may be ignorant of what kind of a work is to be constructed.

(9) After notice to suspend operations, the parties are subject to the jurisdiction of the Praetor.

(10) Hence it is asked by Celsus, in the Twelfth Book of the Digest, whether an exception, based upon an agreement, should be granted, if you have made a compromise with your adversary, after notice has been served to prevent the erection of the building. And Celsus says that it should be granted, for there is no reason why any contract entered into by private individuals should take precedence of an order of the Praetor; for what else is the duty of the Praetor but to do this, and dispose of such controversies? Where the parties voluntarily settle their dispute, he should ratify their action.

(11) He is considered to undertake a new work, who either by building or by removing anything, changes the original form of the property.

(12) This Edict, however, does not refer to all kinds of building operations, but only to such as are attached to the soil and whose construction or demolition is considered to include some new work.

Hence it has been held that where anyone gathers a harvest, cuts down a tree, or prunes a

vineyard, although he does, work, it will not come within the terms of the Edict, because it only has reference to such labor as interferes with the soil.

(13) If anyone props up an old building, let us see whether we can serve notice upon him to desist. The better opinion is that he cannot do so; for he is not erecting a new structure, but is merely providing a remedy by supporting an old one.

(14) The notice served under this Edict applies to any new structures erected within or without the walls of towns, or in the country, whether the work is performed on private or on public lands.

(15) Now let us see for what reasons such a notice may be served, who can serve it, upon whom it may be served, in what places this may be done, and what is the effect of the notice.

(16) The notice is served either for the purpose of protecting our rights to avert threatened injury, or to maintain the public welfare.

(17) Moreover, we serve this notice for the reason that we have a right to prevent the work either in order to protect ourselves from impending danger through the act of someone who is about to erect a structure in a public or private place, or where something has been • done contrary to the laws and the Edicts of the Emperors, promulgated with reference to the manner of constructing buildings, whether this be done in a sacred, religious, or a public place, or on the bank of a stream; and in cases of this kind interdicts are also granted.

(18) But if anyone constructs a building in the sea or on the shore of the same, although he does not build upon his own land, he renders it his by the Law of Nations. Therefore, if anyone desires to prohibit him from constructing it in such a place, he will have no right to do so, nor can he serve notice upon him not to erect a new structure, unless he is in a position to demand that security against threatened injury be furnished him.

(19) The person to whom the property belongs has the right to serve the notice to suspend any undertaking, for the purpose of preserving his rights, or to avert threatened injury.

(20) An usufructuary, however, cannot serve such a notice in his own name, but he can do so as the agent of the owner; or he can claim his usufruct from the person who constructs the new work, and this claim will obtain for him an amount equal to his interest in not having it constructed.

2. *Julianus, Digest, Book XLIX.*

If, however, the usufructuary should serve the notice upon the owner of the land himself, the service will be void, for he cannot bring an action against the owner, as he can against the neighbor, alleging that he has not built his house any higher against the usufructuary's consent. But if the usufruct become diminished in value through the construction of the new building, he can claim his usufruct.

3. *Ulpianus, On the Edict, Book LI I.*

Where anything is constructed on land in a province a notice to suspend operations can be served.

(1) Where anything of this kind is done on land held in common, a notice can be served against a neighbor. It is clear that if one of us erects a new structure upon ground held in common, I cannot, as a joint-owner, notify the other party not to proceed with it; but I can forbid him by an action for partition of property held in common, or I can do so by applying to the Praetor.

(2) If a joint-owner with myself makes an addition to a house owned by us in common, and I have an adjoining house of my own, which will be injured by his doing so, can I serve notice upon him to stop the work? Labeo thinks that I cannot do so, because I can forbid him to build

by other means, that is to say by applying to the Praetor, or by bringing an action for partition of property owned in common. This opinion is correct.

(3) If I have only a right to the' surface of the land, and a new building is erected by a neighbor, can I serve notice upon him to desist? In this case, there is a difficulty; because I am, as it were, only a tenant. The Praetor, however, will grant me an action *in rem,* and therefore I would also be entitled to an action on the ground of a servitude; hence the right to serve the notice to suspend operations should be given me.

(4) Where a new work is begun in a public place, any citizen has the right to serve notice to suspend it.

4. *Paulus, On the Edict, Book XLV1IL*

For it is to the interest of the State that the greatest number of persons possible should be permitted to protect its property.

5. *Ulpianus, On the Edict, Book LII.*

The question was raised with reference to a ward. Julianus, in the Twelfth Book of the Digest, says that permission to serve notice to suspend the erection of a new work should not be granted to a ward, unless it interferes with his own private convenience; as, for instance, where it shuts off his light, or obstructs his view. Moreover, a notice served by a ward will not be valid unless this is done by the authority of his guardian.

(1) Notice to suspend operations can also be served upon a slave, but he himself cannot serve such a notice, nor, if served by him, will it have any effect.

(2) Again, it must be remembered that the service of a notice of this kind must be made on the property itself; that is to say, in the very place where the work is being done, whether anyone is already building, or has made preparations to build there.

(3) It is not necessary that notice be served upon the owner himself, as it will be sufficient for it to be served on the premises and upon anyone who happens to be present, and this can even be done upon the workmen, or artisans who are performing the labor. And, generally speaking, notice to suspend operations can be served upon all those who are present in the name of the master, or upon the workmen themselves. Nor does it make any difference who he is, or what may be the rank of the person present at the time, for if the notice is served upon a slave, upon a woman, or a boy or a girl, it will be valid; as it is sufficient that service be made of the notice upon the premises in such a way that the owner can be informed of it.

(4) If anyone should serve notice upon the owner of property in a public place, it is perfectly clear that such a notice will be of no force or effect, for it must be served on the land, and I should say almost in the building itself; and this has been decided in order that by means of a notice the work may immediately be suspended. If, however, the notice is served elsewhere, the result will be that the same inconvenience would result as if any structure had been erected through ignorance during the time it took to reach the place, where this was done contrary to the Edict of the Praetor.

(5) Where the property on which a new building is in course of construction belongs to several persons, and notice is served upon one of them, the service is properly made, and it is held that all the owners have been notified. If, however, one of them should continue to build after notice to stop has been served, those who did not continue will not be liable, for the act of another should not prejudice anyone who did nothing.

(6) If the new structure should injure property belonging to several owners, will a notice served by one of the joint-owners be sufficient, or must they all serve it? The better opinion is that a notice by one of them is not sufficient for all, but each of them must serve the notice individually, because it might happen that one of them had the right to serve the notice to

prohibit the construction of the work, and that the others did not have such a right.

(7) Where anyone desires to serve notice upon the Praetor himself with reference to the erection of a new building, he should, in the meantime, show that he cannot serve the notice upon the other party; and if he should do so afterwards, whatever has been built after he notified the Praetor must be destroyed, just as if two notices had been served at different times.

(8) But if anyone should insert beams into my house, or build upon my land, it is only just that I should protect my rights by a notice to stop the erection of the building.

(9) Sextus Pedius very properly remarks that there are three reasons which give rise to a notice to prevent the erection of a new structure, namely, a natural reason, a public reason, or a reason growing out of the imposition of a servitude. A natural reason exists where someone has inserted beams into my building, or erected a structure upon my land. A public reason exists where, by the service of notice to suspend a new work, we protect the execution of the laws, the Decrees of the Senate or the Imperial Constitutions. A reason growing out of the imposition of a servitude exists where anyone, after having diminished his own right, increases that of another; that is to say, after having imposed a servitude upon his own land, he performs some act against the right of him who was entitled to the servitude.

(10) Moreover, it must be remembered that when anyone wishes to erect a building upon our land, to insert beams into our houses, or to project a structure over our property, it is better that he should be prevented from doing so, either by the Praetor or by one's own hand, that is to say, by casting a stone, than by serving notice to desist from the construction of a new work; for, by serving such a notice, we constitute the person upon whom it is served the possessor of the property.' If, however, he should do something upon his own land which may injure us, then the service of a notice to suspend operations will be necessary. And if anyone should continue to build upon our premises, it will be perfectly just for us to make use of the interdict *Quod vi aut clam,* or *Uti possidetis* against him.

(11) Where anyone desires to repair or clean out any watercourses or sewers belonging to him, a notice to suspend operations cannot be served upon him; and this is reasonable, as it is to the interest of the public health and security, that sewers and streams should be cleaned out.

(12) Moreover, generally speaking, the Praetor also excepts other works, when delay in their construction is attended with danger. For, with reference to them, he thinks that a notice to suspend them should not be obeyed. For who can doubt that notice to suspend a new work should not be obeyed, rather than that the construction of some necessary building should be prevented? This Section of the Edict is applicable whenever delay is liable to cause injury.

(13) Hence, where anyone, in a case where danger may be caused by delay, serves notice to stop some new work, for instance, where repairs are being made to the channel of a sewer, or to the walls of the same; we hold that an inquiry should be made in court whether the work is of such a character that a notice to suspend operations should be disregarded. For if it should be apparent that any danger will result from delay in repairing a sewer, or a water-course, or anything of this kind, it must be said that it should not be apprehended that the notice will cause any injury.

(14) He who serves notice to stop a new work must swear that he does not do so for the purpose of annoyance. This oath is tendered by the authority of the Praetor; hence it is not required that he who exacts the oath should first be sworn.

(15) The person who serves the notice must show in what place the new structure to which the notice has reference is situated; in order that he who is notified may know where he can build, and where he must refrain from building. This designation must be made as often as notice has been served with reference to a part of the edifice. If, however, the notice refers to the

entire building, it is not necessary to show this, but merely to mention the fact.

(16) Where the work complained of is being done in several places, will one notice be sufficient, or are several required? Julianus, in the Forty-ninth Book of the Digest, says that, because the notice should be served on the land itself, several notices as well as several withdrawals are necessary.

(17) If he who was notified to suspend operations gives security or promises to indemnify the other party, or if it was not his fault that he did not give security, or promise indemnity, in accordance with the judgment of a good citizen; it is just the same as if the notice had not been served. This remedy is a convenient one, for it prevents the annoyance of appearing before the Praetor, and of making application to have notice issued.

(18) Where the service of notice is made by an agent, and he does not give security that his principal will ratify his act, the notice will be without effect, even though the agent was regularly appointed.

(19) Where anyone, in the name of an absent person, asks for a withdrawal, whether this has reference to a private or a public right, he will be compelled to furnish security, for he takes the part of a defendant. This security, however, does not refer to ratification by the principal, but merely to the notice to suspend the construction of the new work.

(20) Again, if an agent should notify me to stop a new work, and accepts security from me, and I afterwards make use of an interdict against him to prevent him from employing force against me to prevent me from building, he will be obliged to give me security to execute the judgment, because he takes the part of a defendant.

6. *Julianus, Digest, Book XLI.*

Therefore, exceptions based on agency should not be interposed against him, nor should he be compelled to furnish security that his principal will ratify his act.

7. *Ulpianus, On the Edict, Book LII.*

If he should not give security, he can be barred from the construction of the new work, and any actions which he may try to bring in the name of the principal must be refused him.

(1) A guardian and a curator can serve notice to arrest the construction of a new building.

8. *Paulus, On the Edict, Book XLVIII.*

I can not only serve notice upon my nearest neighbor to suspend operations, but also upon one immediately beyond him; for servitudes may exist between two tracts of land which are separated by other property either public or private.

(1) Anyone who serves notice to suspend operations where anything has already been done, must state this in his application, in order that what has been done afterwards may be apparent.

(2) If I cannot legally prevent you from doing something, and I should notify you to suspend operations on a new structure, you will not have the right to proceed with your building unless you give me security.

(3) If I should notify you to erect a building forbidden by the laws in a public place, you must bind yourself by a promise, because I contest your right to construct it not in my own name, but in that of another, and as I am maintaining the right of another, I should be content with a mere promise.

(4) It must be remembered that where notice to suspend a new work has been served, the person notified must desist until he furnishes security, or until a withdrawal of a notice is made; for then, if he has the right to build, he can properly continue to do so.

(5) In order to prove that any building was done after the notice was served, the party who served it must measure the building; and the Praetor ordinarily decrees that the measurement shall be taken and be produced.

(6) Notice is extinguished by the death of the person who served it, or by the alienation of the property; because in these ways the right of preventing the construction of the work is lost.

(7) Where the person on whom notice was served to discontinue a new work dies, or sells the house, the effect of the service of the notice will not be ended. The proof of this is apparent from the fact that mention is made therein of the heir, where a stipulation is entered into with reference to the matter.

9. *Gaius, On the Urban Edict, Under the Title, Concerning Notice to Suspend a New Work.*

A creditor, by whom a tract of land is held in pledge, can legally serve notice to discontinue a new work (that is to say where a servitude is involved), for the right to bring suit to recover the servitude is granted to him.

10. *Ulpianus, On Sabinus, Book XLV.*

Notice to discontinue a new work is a proceeding *in rem* and not *in personam.* Therefore, it can be served upon an insane person, or an infant, and the authority of his guardian is not required.

11. *Paulus, On Sabinus, Book XL*

Notice served upon anyone of ordinary intelligence, for instance upon a laborer, will bind an infant or an insane person.

12. *The Same, On Sabinus, Book XIII.*

If security is furnished with reference to a notice to discontinue a new work, the stipulation becomes operative in accordance with the judgment rendered.

13. *Julianus, Digest, Book XLI.*

When an agent serves notice for a discontinuance of a new work, and gives security that his principal will ratify his act, withdrawal is also granted in the name of the owner.

(1) If the owner serves notice for the discontinuance of a new work within a certain time, which is included in the stipulation made with reference to the notice, the stipulation will become operative; if he should serve the notice after the time has expired it will not become operative. For, after the owner has served notice once, he is not permitted to do so a second time, as long as the stipulation entered into with reference to the notice to discontinue the new work holds.

(2) Where an agent appears with reference to withdrawal, on the part of him who served notice for the discontinuance of a new work, the Praetor should make an investigation to prevent a false agent from prejudicing the rights of the absent party, as it would be intolerable if the benefit granted by the Praetor should be lost by the intervention of anyone else whomsoever.

14. *The Same, Digest, Book XLIX.*

Where a person who is entitled to a right of way serves notice upon someone who has a built a house where he has the right to pass, his act will be void; but he will not be prevented from bringing an action to recover the servitude to which he is entitled.

15. *Africanus, Questions, Book XIX.*

Where suit is brought to prevent a house from being raised to a greater height by a neighbor, before any work has been performed, and the case is not defended by the said neighbor, it has

been held to be the duty of the judge that nothing else shall be done before the party, against whom the action has been brought, shall be ordered to give security that he will not proceed with his building, before establishing his right to raise it higher.

On the other hand, the same rule will apply when anyone brings an action, claiming that he has a right to build his house higher against his adversary's consent, and, in like manner, no defence is made; for it is held to be the duty of the judge to order the adversary to give security that he will not notify him to discontinue the new work, nor employ violence against him to prevent him from building. In this case, also, he who does not defend the action is punished by requiring him to prove his right, for this is, in fact, to take the part of the plaintiff.

16. *Ulpianus, On the Edict, Book XIII.*

If the Praetor should order notice to be served to discontinue a new work, and then should forbid it; an action founded upon the first notice will not lie, as this would be contrary to the ruling of the Praetor.

17. *Paulus, On the Edict, Book LVII.*

If an agent prevents the construction of a new work, the owner will be entitled to the interdict *Quod vi aut clam.*

18. *Papinianus, Questions, Book HI.*

Where notice to discontinue the construction of a new building is served upon one of several joint-owners, if the work is done by the consent of all of them, the notice will bind them all. If, however, some of them are not aware of the construction of the new building, he who has acted in violation of the Praetorian Edict will be individually liable in full.

(1) Nor does it make any difference to whom the land upon which the work is in course of construction belongs, for he alone is considered who is in possession of the property, provided the work is done in his name.

19. *Paulus, Questions, Book Vill.*

It must be remembered that when the prosecution of a new work has been refused by the Prastor, the party interested can still have recourse to his legitimate actions, as the right to them continues to exist in all those cases in which the Prsetor, in the beginning, refuses to permit service for discontinuance of the erection of a new structure.

20. *Ulpianus, On the Edict, Book XVII.*

The Praetor says: "Where anyone has been notified on the ground to discontinue the construction of a new work, the right to proceed with which is in dispute, and he persists in doing so, in the same place, before withdrawal has been granted; or where the circumstances are such that withdrawal should be granted, he shall restore the property to its original condition."

(1) An interdict is granted in the following instances. It is stated in the Edict that no work shall be done, after the service of notice, before withdrawal is granted, or, in lieu of this, security has been furnished to restore the property to its former condition. Therefore, he who proceeds with the work, even though he may have the right to do so, is, nevertheless, considered to have violated the interdict of the Pragtor, and he will be compelled to demolish the structure.

(2) There is ground for this interdict, whether notice has been served upon land which is vacant, or which has been built upon.

(3) The Prsetor says, "He shall restore the property to its original condition." He orders what has been done to be restored, and it makes no difference whether it was done in accordance with law or not, hence, the interdict will be applicable whether the act was legal or illegal.

(4) Again, whatever was done before withdrawal upon notice, or before anything occurred which is considered to take the place of a withdrawal, is held not to have been legally done.

(5) If he who erected the building should be willing to give security, and the plaintiff refuses to enter into a stipulation, this should be considered as a withdrawal; for as this is the plaintiff's fault, it is evident that the circumstances are such that withdrawal ought to be made.

(6) This interdict is granted perpetually, and will lie in favor of the heir and other successors.

(7) There will be ground for the interdict against the person himself who constructed the work, or against him who ratified it after it was finished.

(8) It is clear that this interdict will lie against the heir of him who constructed the work; and where this question arises, it must be noted that Labeo was of the opinion that it should only be granted against the heir where he had obtained some benefit from the structure, or where he had prevented himself, by fraudulent conduct on his part, from obtaining any benefit therefrom. Some authorities hold than an action *in factum* should be granted in addition to the interdict ; which opinion is correct.

(9) The Praetor next says: "Where anyone has been notified, on the premises, not to proceed with the new work, and if security has been given, or it is your fault that it was not given, I forbid force to be employed to prevent the other party from proceeding with the work in that place."

(10) This interdict is prohibitory, as it prohibits interference with anyone, who gives security, from proceeding with his work, for the ornamentation of cities is concerned in not permitting buildings to be abandoned.

(11) Nor does it make any difference whether the person in question is entitled by law to build, or not; as he who notified him to discontinue the new work is safe after security has been furnished him.

(12) This interdict will also lie in favor of the person to whom security was given.

(13) The Prsetor adds, "Or if it is your fault that security was not given." Hence, there will not be ground for the interdict if security is not furnished, but merely a promise for indemnity is made; for a building should not be permitted to be erected in a public place, before it is ascertained by what authority this is done.

(14) If security is given, but should not continue to exist, the interdict will cease to be applicable.

(15) Where it was the fault of the person who served the notice that security was not furnished for a certain time, but it is no longer his fault, the interdict will cease to apply.

(16) This interdict is also available after the lapse of a year, and will lie in favor of the heir and other successors.

21. *The Same, On the Edict, Book LXXX.*

A stipulation is usually entered into with reference to the notice to discontinue the construction of a new work, whenever one neighbor says that he has a right to hinder another from constructing it against his consent.

(1) Moreover, where anyone desires to proceed with impunity, and continue to build after having been notified to stop, he should offer security to the person who served the notice upon him. If he does this, it will be to the advantage of both parties; to that of the one who served the notice, as he has security to restore the premises to their former condition; and to him upon whom the notice was served, because his building is not interfered with. For if he builds at all before furnishing security, he can, by means of a restitutory interdict, be compelled to demolish what he has erected.

(2) Again, this stipulation is dependent upon a condition, and only becomes operative after judgment has been rendered, unless something has happened before this was done, and the case was not defended ; and the clause with reference to bad faith is also added.

(3) We consider a structure to have been completed, not where one or two rows of stone have been laid, but where the work has assumed some form, and has the appearance of a building.

(4) The stipulation becomes operative, and the property must be restored to its former condition in accordance with the judgment of a good citizen, whether a decision has been rendered in the case, or whether no defence is made. If the property is not restored to its former condition, the defendant must pay a sum of money in proportion to the damages sustained, if the plaintiff will consent to this.

(5) Where several joint-owners construct a building, the question arises whether all of them must furnish security. Labeo says that one should do so, because the restoration of the property cannot be partially made.

(6) He also says that even though several owners serve notice, care must be taken that security be given to one of them, if all agree to this; for it is evident that if one should not consent, security must be given to each of them.

(7) He also says that it must be added in the stipulation that an amount equal to the interest of each must be paid; if the parties desire this to be done. If, however, security is furnished to the amount of the value of the property, he says that a doubt will arise whether these words refer to the value of the entire property, or merely to that of the interest of the party who enters into the stipulation. I think that if security for the value of the property is furnished one of the parties, it can be maintained that the stipulation will be sufficient for all of them; since this has reference to the amount of the damages caused by the work.

22. *Marcelli, Digest, Book XV.*

The person upon whom notice was served died before obtaining the withdrawal of the notice. His heir must permit his adversary to demolish the structure, for in a restoration of this kind the penalty must be paid by him who violated the Edict; but the heir does not succeed to the penalty.

23. *Javolenus, Epistles, Book VII.*

A certain man who had been notified to discontinue the construction of a new building sold the land, and the purchaser continued the work; do you think that either the purchaser or the vendor is liable for having violated the Edict? The answer was that if, after notice had been served, the construction of the building was continued, the purchaser, that is to say, the owner of the land, would be liable; because a notice for discontinuance is not personal, and he only is liable who is in possession of the property on which the notice to discontinue the work was served.

TITLE II.

CONCERNING THREATENED INJURY AND THE ENCROACHMENTS AND PROJECTIONS OF A NEIGHBORING HOUSE.

1. *Ulpianus, On the Edict, Book I.*

Where the imminence of threatened injury demands celerity, and delay seems to the Praetor to be dangerous, and, on this account, he reserves jurisdiction for himself, he will act very properly if he delegates his authority to the municipal magistrates of the district.

2. *Gaius, On the Provincial Edict, Book XXVIII.* Threatened injury is such as has not yet taken place, but which we fear may be caused in the future.

3. *Paulus, On the Edict, Book XLVII.*

The terms *damnum* and *damnatio* have reference to the taking away, and, so to speak, the diminution of an estate.

4. *Ulpianus, On the Edict, Book I.*

If the time for furnishing security has elapsed, it is the duty of the Praetor or the Governor, after a hearing, either to hold the party liable, or release him; and, if the latter requires a local investigation, to send the case to the municipal magistrates for a decision.

(1) If security is not furnished within the time fixed by the Praetor, the complainant should be placed in possession of the property, and by the term "property" is understood either all of it, or a portion of the same.

(2) If the other party is unwilling to permit his neighbor to obtain possession, can he be compelled by the magistrate to furnish pledges? I do not think that he can; but he will be liable to an action *in factum,* for if he is not permitted to take possession after having been sent by the Praetor, he should have recourse to the above-named action.

(3) Therefore, the Praetor or the Governor directs municipal magistrates to do two things; namely, to require security, and to grant possession; the other matters he reserves for his own jurisdiction.

(4) If there is a delay in giving security, not the *duumviri* but the Praetor or the Governor should grant permission to take possession (which is usually done where proper cause is shown), and the same rule also applies where, after proper cause has been shown, possession is relinquished.

(5) The Praetor says, "Where the party upon whom notice must be served is absent, I order that the notice shall be left at his residence." He is considered to be absent who does not appear in court; which opinion Pomponius approves. Moreover, the Praetor directs that the notice shall be served without rudeness, and not that the defendant shall be forcibly removed from his house. However, by the words, "The notice must be left at the house where he resides," we must understand that it must be served upon him there, even if he lives in a house belonging to another. When he has no domicile, the notice must be served on the premises, either upon his agent or the tenant.

(6) Whenever the Prsetor requires notice to be served, this means if there is anyone upon whom service can be made. If, however, no such person can be found, for example, because the house belongs to an estate which has not yet been entered upon, or if there is no heir, and the house is not inhabited, this Section of the Edict will not apply. The safer plan, however, is to attach a written notice to the house itself, for it may happen that in this way someone, having been notified, may appear for the defence.

(7) If the judge should neglect any of the matters mentioned above, judgment will be granted against him for the amount of damages sustained through not requiring security to be furnished against threatened injury. This does not have reference to the amount that might have been recovered, but only for the interest that the plaintiff had in obtaining security, and is imposed for the benefit of the latter, and not as a penalty.

(8) Again, this action is dependent upon a certain condition, that is if application was made to the judge, but where this was not done, suit cannot be brought against him. We say that the demand for security is properly made when application is made in court, and not elsewhere.

(9) Where the town in which application is to be made is so near the City of Rome that if the magistrate does not intervene, the Praetor or the Governor can be applied to, it may be said that this action will not lie against the magistrate, for it is just as if the complainant had no interest, since it was in his power to ask to be placed in possession by either the Praetor or Governor.

(10) Moreover, this Section, which has for its object the pursuit of the property, is granted both in favor of and against an heir, and is a perpetual one.

5. *Paulus, On the Edict, Book I.*

It is the duty of the Prsetor, where the plaintiff is placed in possession, to enable him to acquire ownership of the property, after he has held it for a long period of time.

(1) Where there are several joint-owners who should furnish security, and one of them does not do so, the plaintiff shall be placed in possession of his share. And, on the other hand, where there are several persons who desire security to be furnished them, and some have houses more valuable than the others, or where they are all owners of unequal shares of the same house, all, nevertheless, will be placed in possession on an equal footing, and not with reference to the extent of their respective ownership.

(2) If both the owner of the property and the usufructuary demand security against threatened injury, both of them should be heard; for the promisor does not suffer any wrong, because he will only be obliged to pay each one in proportion to the amount of his interest.

6. *Gaius, On the Provincial Edict, Book I.*

It sometimes happens that, where injury has been sustained, we will not be entitled to any action, if security had not previously been given; for instance, when the house of my neighbor, which is in a ruinous condition, falls upon my building. This rule is applicable to such an extent that it has been held by many authorities that he who is to blame can not even be compelled to remove the rubbish, provided he intends to abandon everything upon the ground.

7. *Ulpianus, On the Edict, Book LIII.*

The Praetor says, "In the case of threatened injury, I order every one who appears in his own behalf to promise indemnity, and all others to give security to the other party, who is willing to swear that neither he nor the person for whom he acts makes the demand for the purpose of causing annoyance; and that application may be made until the day which I shall fix for having the case. If it is disputed whether the party who is to give security is the owner of the property, or not, I direct that security shall be given provisionally. Where any structure is erected in a public stream, or on the bank of the same, I shall order security to be furnished for ten years.

"Moreover, I shall order the party to whom security is furnished to take possession of the property, in the name of him who makes the demand for security; and, if just cause is shown, I shall order him to obtain actual possession of the same. I will grant an action against him who refuses to give security, or who does not permit the other party to remain in possession, or to acquire it; in order that he may pay as much as he would have been required to pay if security had been furnished with reference to said property, in accordance with my decree, or with that of a judge having jurisdiction over said property, which is also in my jurisdiction.

"If he to whom I have granted possession in the name of another does not give security against threatened injury, I shall order him to whom security has not been furnished to be placed immediately in actual possession of the said property."

(1) This Edict has reference to injury which has not yet been committed, while other actions which relate to injuries have reference to reparation, as that of the Aquilian Law, and others. Under this Edict nothing is provided with reference to injury already committed, for when animals have caused damage it is not customary to render us liable, except to compel us to surrender them by way of reparation; and there is much more reason for the same rule to be applicable where property destitute of life is considered, as we should not be liable to a greater amount; especially where the animals which committed the damage are still in existence; but the house that caused ruin by falling has ceased to exist.

(2) Therefore, if the house should fall before security has been given, and the owner is not willing to remove the rubbish, and abandons it, the question arises whether an action can be brought against him. Julianus, in a case where a ruinous house had fallen, before a stipulation with reference to threatened injury had been entered into, having been consulted as to what he upon whose premises the rubbish had fallen should do in order to obtain damages, answered that if the owner of the house which had fallen wished to remove the rubbish, he should not be permitted to do so, unless he removed everything; that is to say, even what was worthless, and should also give security, not only with reference to future injury but also with reference to that which had already been sustained.

If the owner of the house which has toppled over does not do anything; an interdict should be granted him upon whose premises the rubbish had fallen by which his neighbor may be compelled either to remove the rubbish, or to abandon the entire house which had been destroyed.

8. *Gaius, On the Edict of the Urban Prs&tor: Title, Concerning Threatened Injury.*

It may then very properly be said that these proceedings should not be taken where the owner of the ruined house failed to furnish security, not through negligence on his part, but on account of some obstacle which prevented him from doing so.

9. *Ulpianus, On the Edict, Book LIII.*

Julianus further says, it may be held that, in this case, the owner of the house can be compelled to give security for the damage which has already taken place; for, as protection can be provided while the building is still intact, it is not inequitable for it to be furnished after it has fallen into ruin. However, while it was intact, anyone can be compelled either to give security against threatened injury, or to abandon the house which he is unwilling to repair.

Finally, he says that if anyone, on account of the shortness of the time required, or because of his absence on business for the State, cannot enter into a stipulation against threatened injury, it is not unjust for the Praetor to provide that the owner of the ruinous house should either repair the damage, or abandon it. Reason approves the opinion of Julianus.

(1) The question arises whether an interdict can be granted with reference to things which have been transported by the current of a river. Trebatius says that when the Tiber becomes swollen, and carries the property of some persons upon the premises of others, an interdict is granted by the Praetor to prevent violence from being employed against the owners of said property to prevent them from removing what belongs to them; provided they promise indemnity against threatened injury.

(2) Alfenus says that if a portion of your land falls upon mine, and you claim it, an action will be granted against you for injury already committed. This opinion is approved by Labeo; for the injury which I already have sustained cannot be left to the decision of the judge before whom the recovery of the earth which has fallen is demanded; nor should an action be granted unless everything which has fallen is removed. Alfenus also says that the earth which has fallen can only be claimed where it has not become united with, and constitutes a part of my land. Nor can a tree, which, having been carried into my field and has taken root in my soil, be claimed by you. Nor can I bring an action against you on the ground that you had no right to your part of the land deposited on mine, if it was already united with mine, for the reason that it then becomes my property.

(3) Neratius, however, says that if your boat is carried upon my land by the force of the stream, you cannot remove it unless you furnish me with security for any injury which I may have sustained.

(4) The question arose, when the land belongs to one person, and the surface of it to another, whether the latter should promise indemnity for threatened injury, or should give security.

Julianus says that whenever a house which stands on the land of another is ruinous, the owner must promise indemnity, not only with reference to the defective condition of the land but also with reference to that of the building; or that he to whom the surface belongs must furnish security both with respect to the land and to the house; and if either one of them fails to do so, the neighbor should be placed in possession of the property.

(5) Celsus very properly holds that if the usufruct of your house belongs to Titia, you, as the owner, must promise indemnity against threatened injury, or Titia must give security. If he to whom security against threatened injury should be furnished is placed in possession of the property, he will prevent the use and enjoyment of the same by Titia. He also says than an usufructuary, who does not repair the property, should be prevented by the owner from enjoying it; and therefore, if the usufructuary does not give security against threatened injury, and the owner is compelled to promise indemnity, the usufructuary should be prevented from enjoying the property.

10. *Paulus, On the Edict, Book XLVIIL*

Cassius says that even if the usufruct is separated from the property, the owner must promise indemnity for future-injury. Unless the owner promises indemnity in full, or the usufructuary furnishes security, the person to whom security is not given must be placed in possession of the property; but if the usufructuary does not give security to the owner, who was promised indemnity, Julianus says that he will not be entitled to an action to recover his usufruct. If, however, the usufructuary should pay anything on account of some defect of the land, the right of ownership should be transferred to him.

11. *Ulpianus, On the Edict, Book LIII.*

What shall we say with reference to a creditor who has received a house by way of pledge? Must he promise indemnity against threatened injury, in order that his rights may be protected; or must he give security because he is not the owner of the property? This point is treated in an opposite sense by Marcellus; for he asks whether

security against threatened injury should be given to a creditor who holds a house by way of pledge. Marcellus says that it is not necessary for him to give security, and adds that the same rule will apply to a person who did not purchase the house from the owner, for the stipulation would have no force, so far as the latter is concerned. I think, however, that it would be perfectly just that the interest of the creditor should be taken into account; that is to say, that he should be secured by means of a stipulation.

12. *Paulus, On the Edict, Book XLVIIL*

The condition of a person to whom security against threatened injury has not been furnished is preferable to that of creditors who have accepted property in pledge, if he should be permitted to take possession of it and acquire it by usucaption, after the lapse of a long period of time.

13. *Ulpianus, On the Edict, Book LHI.*

Let us see whether a purchaser in good faith, who obtained property from one who was not its owner, should promise indemnity against threatened injury, or should give security. The latter opinion is adopted by certain authorities; it, however, is reasonable that the purchaser should rather promise indemnity than give security, since he does so in his own name.

(1) Where a question arises whether the owner of the land or one who has a right in it (as, for instance, a servitude), should furnish security against threatened injury, I think that he should promise indemnity, and not give security, because he acts in his own name and not in that of another.

(2) Where another house, which is in good repair, stands between mine and yours which is ruinous, let us see whether you alone should give security to me, or whether he, whose house

is in good condition, should alone obtain security; or whether I can require it of both of you. The better opinion is that both should furnish security; because it is possible that the ruinous house might injure mine by falling upon the one which is in good condition, although it may be said that this did not take place through any defect in the building, which was in good repair, if the other, by falling upon it, causes me damage. But, as the owner of the intervening house could have protected himself by obtaining security against threatened injury, it is but reasonable that he should be liable to an action.

(3) Where anyone demands that security against threatened injury be given him, he must, in the first place, swear that this is not done for the purpose of annoyance. Therefore, anyone who is willing to take an oath to this effect shall be permitted to enter into a stipulation, and no inquiry will be made whether he has any interest in the property, or whether he has an adjoining house, or not; for the entire matter must be submitted to the decision of the Praetor, who shall determine to whom security must be given, and who is not entitled to it.

(4) But security should not be given to anyone who has a right to cross my land, or to wash thereon, or to lodge in my house.

(5) Labeo says that it is clear that security should be given by the owner of a building, which is not in good repair, not only to the neighbors, their tenants and their wives, but also to those who reside with them.

(6) The question arises whether the owner of the house should give security to his tenants. Sabinus says that security should not be given to the tenants, for they either rented the house which was ruinous in the beginning, and it is their own fault that they did so; or the house has subsequently become ruinous and they can bring an action under the lease.

This opinion is the more correct one.

(7) Where anyone builds a house near a monument, or suffers a monument to be erected near his house, security against threatened injury should not be given to him afterwards, because he allowed an unlawful act to be committed. In other cases, however, where a building injures a monument, and the person to whom the right to the monument belongs is not to blame, security must be furnished the latter.

(8) It is now settled that persons who have the right to the surface and the usufruct of land can enter into a stipulation providing against threatened injury.

(9) Marcellus, however, says that he who, in good faith, purchases property from someone who is not the owner of the same, cannot enter into a stipulation with reference to threatened injury.

(10) Where anyone serves notice for the discontinuance of a new work, Julianus discusses the question as to whether security against threatened injury should, nevertheless, be furnished him; and he is inclined to the belief that this ought to be done. Julianus also says that security should be given to a person entitled to the interdict *Quod vi et clam* against his adversary; because the security has no reference to any defects in a building or to any injury which may result from the work.

(11) Where anyone is placed in possession of a house for the reason that security was not given him, and afterwards the person to whom the house belonged, who has other buildings adjoining the former, demands that security against threatened injury on account of the ruinous house should be furnished him by the complainant who has been placed in possession of the same; let us see whether the latter should be compelled to furnish security, or whether the other party should be heard. Julianus holds that the person who has surrendered the ruinous house and retained those which were in good condition acts very dishonorably in demanding security from him who has just taken possession of the one in bad repair, when he himself lost possession of it because he refused to furnish security against threatened injury.

And, indeed, he can with little propriety demand security to protect himself on account of a building for which he neglected to furnish security. This opinion is correct.

(12) Where anyone, about to enter into a stipulation, was sworn, but failed to conclude the agreement, let us see if he should again be sworn if he afterwards desires to enter into it. I think that he should be sworn a second time, for the reason that it is possible that either at first, or at present, he may have intended to cause annoyance.

(13) If I demand that security be furnished me against threatened injury, in the name of another, I must swear that he in whose name I demand security does not do so for the purpose of causing annoyance.

(14) If, however, I make the demand in the name of a person who, if he did so in his own proper person, would not be compelled to be sworn, as for instance, a patron, or a parent, it must be held that there is no ground for an oath; as in a case where the principal need not be sworn, he who acts for him should "not make oath in a stipulation of this kind.

(15) In this stipulation a certain term should be prescribed, within which the bond will become operative if any injury is sustained, for the person giving security should not perpetually be liable under the stipulation. Therefore, the Praetor himself prescribes the term for the stipulation, the circumstances of the case being taken into account, as well as the nature of the injury which it is apprehended may result.

14. *Paulus, On the Edict, Book XIV.*

In investigating the circumstances of the case, the distance separating the two pieces of property, and the dimensions of the structure should be considered,

15. *Ulpianus, On the Edict, Book LIII.*

If the time prescribed by the bond has passed, new security can be furnished by a decree of the Praetor.

(1) When a stipulation is entered into without fixing any time, or where, by an agreement of the parties, the stipulation was to become operative when the injury was done; or if the omission was made through mistake, and the time has expired which it is customary to prescribe in such cases; the party who furnished the security can apply to the Praetor to be released.

(2) The Praetor next says, "With reference to any structure erected in a public stream, or on the bank of the same, I shall order security to be given for ten years." A bond is necessary in this instance, and a time must be prescribed for the expiration of the stipulation; and this is done because the structure is erected in a public place. Moreover, where this is done upon the property of another, the Praetor requires a bond to be furnished.

(3) It must be remembered that security is given not only on account of defects in the soil, but also with reference to the structure itself; and, even though the latter is erected upon private ground, the security applies both to the soil and to the building itself. Where, however, the land is public property, it is not necessary for security against threatened injury to be furnished with reference to anything but defects in the construction of the building.

(4) Any damage which may occur within ten years is therefore included in this stipulation.

(5) Where the Prsetor says, "With reference to any work," we must understand this to refer to any damage resulting from a structure erected on public land.

(6) Where anything is built on a public highway, security must be given for the reason that it is erected on the land of another.

(7) The Praetor, however, after investigation, will fix the time in accordance with the nature of the work.

(8) Where anyone performs labor to protect a highway, or does any other work with reference to the same, security should be furnished to prevent damage being sustained by private persons.

(9) Nothing is expressly provided with reference to other public places, but, on account of the general clause referring to structures erected upon the premises of others, security against threatened injury should be furnished.

(10) Where a public place is repaired by public labor; Labeo very properly holds that the rule that security against threatened injury shall not be given applies, where any injury may result from either a defect in the land or the work; but the work should be performed in such a way that no injury or damage may be sustained by the neighbors.

(11) Under the terms of this Edict, if security is not furnished, the plaintiff is placed by the Praetor in possession of that part of the building which seems to be in a ruinous condition.

(12) Let us see whether he should be placed in possession of the whole house. An opinion of Sabinus is extant which says that he should be placed in complete possession; otherwise, he says if damage is apprehended only on account of the building, the Edict cannot be carried into effect, nor will it benefit him to be placed in possession which he cannot legally hold, or which will be of no advantage to him. This opinion of Sabinus is the better one.

(13) Where a building is divided into several parts, let us see whether the plaintiff should be placed in possession of a portion of the same, or of all of it. If it is so large that spaces exist between the part which is ruinous and that which is in good repair, it must be said that the plaintiff should be placed in possession of the ruinous portion alone; but if the entire building is closely united, he should be placed in complete possession of it. Therefore, in houses of great extent, the better opinion is that the plaintiff should be placed in possession of the part which is contiguous to that which is in a ruinous condition. If, however, but a very small portion of a house of great extent is in a ruinous state, how can it be held that the person to whom security against threatened injury has not been given should be directed to take possession of the entire building, when it is of such vast dimensions.

(14) Again, what shall we say if an addition to the house is in a ruinous condition? Shall the plaintiff be placed in possession of the addition, or of the entire building? The better opinion is that he should not be placed in possession of the entire building, but only in possession of the addition to the same.

(15) Where several persons demand that security shall be given to them, it is customary for all of them to be placed in possession. Labeo adopts this opinion, where one has already been placed in possession, and another desires this to be done; for we shall not consider the order in which they appear, but both of them will be entitled to possession. Where, however, one has already been directed to take possession, and another demands that security against threatened injury be furnished; then, unless this is done, the second one shall be placed in possession.

(16) Julianus says that where anyone is placed in possession on account of threatened injury, he cannot acquire the title to the property by lapse of time, unless he is made the owner by a second decree of the Praetor.

(17) If another has also been placed in possession before this decree was issued, both of the parties will become joint-owners of the house; that is to say, if they were ordered to take possession of the same. If, however, the one who is first placed in possession has become the owner, and Titius should demand that security against threatened injury be given him, and the first should refuse to furnish it, Titius alone will remain in possession.

(18) Where several persons are placed in possession, they are all on the same footing, and the amount of damage which may affect each one is not considered; and this is reasonable, for when one person is placed in possession this is not done with reference to the proportion of

damage which he may apprehend, but it is done for the benefit of all. Hence, where several are placed in possession, all of them equally obtain complete possession, and their shares are regulated by contribution.

(19) If, however, anyone who is placed in possession should incur expense, and should afterwards be ordered to take possession by a second decree, can he recover the expense, and if he can, by what proceeding? It is established that he can recover the expense he has incurred by an action in partition.

(20) Where, however, a person is placed in possession, but has not yet been ordered to take complete possession by a second decree, let us see whether the owner of the property is obliged to relinquish possession. Labeo says that he is obliged to do so, as is the case where neither creditors nor legatees are placed in possession. This opinion is correct.

(21) When the Praetor places anyone in possession of property, he does not grant them complete possession at once, but only after proper cause is shown. Therefore, a certain interval of time should elapse, in order to show that the owner, by a long silence, considers the house as abandoned, or where a person has been placed in possession, and, after he has remained there for some time, no one furnishes security.

(22) If the owner should happen to be absent on business for the State, or for any other good reason, or if he should be of an age which entitles him to relief, the rule should be adopted that the Praetor ought not to use undue haste in promulgating the decree to place the party in complete possession of the property. And even if he should issue such a decree, there is no doubt that complete restitution will be granted the party interested.

(23) Where anyone is ordered to take complete possession, the owner should be compelled to relinquish it.

(24) Where any rights are due to the parties who have been able to give security against threatened injury, the assertion of those rights cannot be made against the person who has been placed in possession. Labeo approves this opinion.

(25) In the case of a creditor who holds a ruinous house in pledge, the question arises whether he can assert his rights to the pledge against anyone who has been ordered to take complete possession by virtue of the second decree of the Praetor. The better opinion is that he will be refused the right to claim his pledge, if the debtor should not promise indemnity, or the creditor furnish security. Celsus very properly holds that this rule also applies to the case of an usufructuary.

(26) Where a house is held under a perpetual lease, we are of the opinion that a person can be placed in possession, but cannot be authorized to obtain complete possession by a second decree of the Praetor; for the ownership of the property can never be acquired by possession. A decree should, however, be issued to the effect that the tenant will be in the same position as he who refused to give security, after which decree he can avail himself of the proper action for this purpose under his lease.

(27) With reference to land leased by a municipality, however, if the authorities do not give security, it must be said that ownership can be acquired by lapse of time.

(28) If the damage apprehended should occur whiie the Praetor is deliberating as to whether the stipulation should be granted or not, the following nice question has arisen; namely, whether the plaintiff can be indemnified. And, indeed, the placing in possession will not become operative. The Praetor should, nevertheless, decree that any damage which may have occurred shall also be included in that covered by the bond; or if he thinks that it would be proper for him to grant an action, he can issue a decree to that effect.

(29) Where a ward has no guardian by whose authority he can promise indemnity for threatened injury, the plaintiff can be placed in possession, just as in the case where no

defence was made.

(30) Where anyone is placed in possession on account of threatened injury, some authorities hold that he should prop up and repair the building in question, and that he is responsible for negligence, as in the case of a person who receives a pledge. We, however, make use of another rule; for as he is only placed in possession instead of receiving security, he will not be to blame if he does not make repairs.

(31) If security is offered him after he has been placed in possession, let us see whether he should be obliged to vacate the premises, unless security is also furnished him for any damage which may have been committed after he was placed in possession. This opinion, indeed, is the better one. Therefore, the time prescribed should be stated twice in the promise for indemnity; and, moreover, security must be furnished him for any expense which he may have incurred.

(32) The question arises from what date the account of the damage must be estimated, whether from the time when the plaintiff obtained possession, or from the time when the Prator decreed that he should enter into possession. Labeo says that it should be from the time that the decree was issued; and Sabinus holds that it should date from the time when the plaintiff obtained possession.

I think that the adoption of one or the other of these opinions depends upon the circumstances of the case; for it is customary to come to the relief of one who has been directed to take possession, and for some reason did not do so, or who obtained possession too late.

(33) However, after anyone has been ordered by the Praetor to take complete possession by the right of ownership, there is no ground for the tender of security. Labeo adopts this opinion, for he says that, otherwise, the case would never be terminated. This is perfectly correct, except where the parties are entitled to relief, either on account of their age, or for some other good reason.

(34) Where a house has already fallen down, let us see whether the person to whom security has not been given should still be placed in possession of the ruins, or of the land. The better opinion is that this should be done. Labeo concurs in this, but he adds that it should be adopted only where the house had fallen after the Praetor had issued a decree placing the plaintiff in possession. I think that the opinion of Labeo is correct. Hence, if the plaintiff makes any repairs, it should be held that he is not compelled to depart before he has been paid for them, and security has been furnished for damage previously sustained. He can, however, recover what he has expended by an action *in factum,* but he cannot recover more than ought to have been expended in accordance with the judgment of a good citizen.

The same rule applies where someone else has incurred expense by my order or request, without fraudulent intent; and a decision has been rendered against me on this account, or I have paid the amount in good faith.

(35) Where anyone relinquishes possession of a house through fear that it will fall, and he does so when he cannot prevent it, Labeo says that his right will remain unimpaired, just as if he had continued in possession; because, if he preferred to abandon the house when its condition could be remedied, he will lose the benefit of the decision of the Praetor, and he should not be heard if he afterwards applies for relief.

Cassius, however, says that if he withdrew through fear that the house would fall, and not with the intention of abandoning it, he should be restored to possession. He also says that where the person placed in possession does not appear, and the building collapses, he will lose the benefit of the decree of the Praetor. This should be understood to mean if he neglected to take possession, and not where the house fell after he had come with the intention of taking possession of it.

(36) Where anyone has been sent by the Praetor to take possession under this Edict, and is not permitted to do so, he can avail himself of an action *in factum,* and ask that as much shall be paid to him as would have been required to be paid if security with reference to the property had been furnished. This action extends to the time when the damage was committed.

16. *Paulus, On the Edict, Booh LX.*

Before the damage is done the act of him who refused to promise indemnity, or to permit the plaintiff to take possession, will remain unpunished, provided that, before the damage was committed, he either gave security, or relinquished possession of the property.

17. *Ulpianus, On the Edict, Book LIII.*

Where anyone, who is under the control of another, refuses to admit the person who was placed in possession, many authorities hold that a noxal action on this ground will lie.

(1) What course must be pursued if an agent should prevent him from taking possession? Shall we grant an action against him, or against his principal? The better opinion is that the action should be granted against the agent.

(2) The same rule will apply to the agent of a municipality, a guardian, and those who appear for others.

(3) This action, which is *in factum,* is granted perpetually, and passes to and against the heir, as well as to and against other persons.

(4) The judge who has jurisdiction in a case of threatened injury, and also where a tract of land has been alienated by the party against whom suit was brought, ordinarily makes an estimate of all the damage which has been sustained before judgment is rendered.

18. *Paulus, On the Edict, Book XLVIH.*

The stipulation with reference to threatened injury can be given not only to the person who owns the property, but also to him who is responsible for the same.

(1) Where, however, the promisor has, by doing some work, obtained ownership of the property by usucaption, Pomponius says that he will not be liable on this ground, for the reason that he did not acquire the property through any defect of the land or on account of the work, but by the operation of public law.

(2) It is not necessary for security to be given to the person who has an usufruct in a house which is in bad repair, even though he may be the owner of other adjoining buildings, because he can make repairs; for he who should use property as becomes the careful head of a household has also the power to repair it. Therefore the owner of the house should not be heard if he desires security to be given him by the usufructuary for the protection of other houses which are near the one subject to the usufruct, since he has a right of action against the usufructuary to compel him to enjoy the property as a good citizen should do.

(3) I must, however, give security against threatened injury to my tenant, if he has houses near the one which he occupies, and which is in bad condition.

(4) The owner of the ground is not compelled to furnish security with reference to any injury which may be caused by the condition of the ground to a man who has erected a house on the said land, after having leased it; and, on the other hand, the latter is not obliged to give security to the owner, because each of them is entitled to actions under the lease, and in these proceedings nothing but negligence is considered. More, however, is included in a stipulation having reference to threatened injury, because, in this case, the bad repair of the property is said to be involved.

(5) If a person who has a house should enter into a stipulation, and then should purchase another neighboring house, the question arises whether the promisor will be bound with

reference to the house which he purchased after the stipulation was entered into. Julianus says that it should be considered whether he who gave security is only liable for the condition of the house with reference to which the contract was entered into between him and the promisor, in the first place. The result of this would seem to be that where two joint-owners enter into a stipulation concerning a house held in common, security should only be given against any injury which might be sustained by either of the said joint-owners, with reference to his share in the building. Therefore, whether one of them purchased the share of the other, or the house was adjudged to him by the court, the obligation of the promise is not increased. Pomponius, in reporting this opinion of Julianus, says that he approves it.

(6) If, however, the stipulator brought any personal property into the house after the stipulation was concluded, and the said personal property was destroyed by the ruin of the neighboring building, he can bring an action under the stipulation, even though at the time when it was entered into the said property was not in the house.

(7) If the purchaser of a tract of land entered into a stipulation before delivery, he will be secured against any damage which may take place after the property has been transferred.

(8) The vendor of a house must, however, stipulate before he gives possession, because he gives security for any damage to the property through negligence.

(9) But what must be done, where the vendor was unable to stipulate for security, through no fault of his, and the purchaser himself has stipulated for it? Must not the purchaser suffer the damage? As this damage has happened to property belonging to another, would it riot fall upon the purchaser, because he has no right of action based on the sale? A stipulation of this kind is of no benefit whatever, unless the damage occurred after the transfer of the property; because, as long as the vendor is charged with its custody, he should stipulate that he will be responsible to the purchaser for the exercise of the greatest diligence; and whatever the purchaser can obtain by means of another action should not, under any circumstances, be included in the stipulation providing against threatened injury.

(10) If the vendor should make the stipulation, any damage which may happen after delivery of the property to the purchaser will be included therein. Aristo says that this is extremely unjust, since, if the purchaser had himself stipulated with reference to threatened injury, the promisor would be liable to two persons on the same ground, unless, perhaps, the contrary might occur; because, in this instance, the stipulation was made with reference to the interest of the stipulator, so that it might be held that the vendor had no longer any interest, after the stipulation with reference to threatened injury had been entered into.

(11) The opinion of Sabinus is correct, who held that if, while I was building a house, a neighboring building should, within the time fixed by the stipulation, fall upon my wall, and damage it, and even though it should fall after the time fixed by the stipulation has passed, I can still bring an action, because I sustained the damage at the time when the wall was in bad condition; nor is there anything to prevent the bringing of an action even before it falls; and if it is so shaken that it cannot be repaired, and therefore must be taken down, the estimate of the damage made in court should not be less than if the wall had fallen.

(12) If you and I have adjoining houses, and we desire security against threatened injury to be reciprocally furnished, there is no reason why I should not be placed in possession of your house, and you be placed in possession of mine.

(13) If a ward prevents anyone from taking possession on account of threatened injury, it is held that an action *in factum* can immediately be brought against him.

(14) If another person, acting under my direction, prevents a person from taking possession, this action can be brought against me.

(15) The Prsetor not only punishes the person who was in possession at the time when the

first decree was issued, but also him who will not permit possession to be obtained under the second decree; as otherwise, he who has begun to obtain possession under the second decree, and to acquire ownership by means of his possession, is either not permitted to enter upon the premises, or is ejected, he will be entitled to an interdict on the ground of violence, or to the Publician Action.

If, however, he should bring an action *in factum,* he cannot avail himself of the other, as the Praetor permits this in order to prevent the plaintiff from causing any injury by which he may profit.

(16) Where my agent enters into a stipulation with reference to threatened injury, I will be entitled to an action based on the stipulation, where proper cause is shown.

19. *Gams, On the Edict of the Urban Prsetor: Title, Concerning Threatened Injury.*

In a stipulation for indemnity against threatened injury, the rights of those who are absent in good faith are not prejudiced; if, after their return, power is granted them to give security which is only just, whether they are the owners of the property, or have any rights therein, either as creditors, usufructuaries, or ground lessees.

(1) If any damage is apprehended through the bad condition of a house, or any other structure, which may happen with reference to a building situated either in the city or in the country, or in a private or a public place, the Prsetor must see that security is furnished to the person who fears that such damage will occur.

20. *The Same, On the Provincial Edict, Book XIX.*

Security against threatened injury takes place between the usufructuary and the owner of the property when the usufructuary demands that it be given him on account of bad condition of the ground, and the owner of the property on account of some defect of the work, when the usufructuary is constructing something, for neither of them can demand security from the other on account of a house which was in danger of falling; the usufructuary, because he is not responsible for the repair of the house, and the owner, for the reason that a stipulation is usually entered into by them, under which the usufructuary gives security to repair the property, a provision which applies to this case.

21. *Paulus, On Plautius, Book Vill.*

Where a son under paternal control is a tenant, let us see whether he can be placed in possession of a neighboring house on account of threatened injury; for the question arises whether a son under paternal control is not considered to sustain damage, when his property consists of his *peculium,* and his father can enter into a stipulation to provide against any damage which he may suffer. It is established that both of them should be placed in possession, unless the son, when he rented the house, agreed that it should be at his risk; for then, as he alone is liable under the lease, it is very properly held that he himself should be placed in possession, if security is not given him.

22. *The Same, On Plautius, Book X.*

If the owner of the property promises indemnity against threatened injury, or has paid something on this account; or, on the other hand, the usufructuary has paid something, it is only just that one of them should enjoy the use of the house, or that the other should retain the ownership of the same without any risk. If the owner has paid anything on this account, the usufructuary should not be permitted to use the property unless he contributes his proportion. This also applies to the usufructuary, and the owner of the property will be compelled to contribute his share. Hence if the house should fall, the usufructuary can hold the ground until he is reimbursed for the damage, so that what the neighbor would have been entitled to, if he had been placed in possession, the usufructuary, who reimbursed him for the damage, should have.

The same rule applies where even a very small amount is paid for damage sustained.

(1) Plautius: I demand security from a person whom I deny to be the owner of certain property, under the exception, "If he should not be the owner," and I say that another, whom I consider to be the owner, must simply promise me indemnity.

It has been settled that I cannot obtain both of these demands, but that I must choose which one of the parties I prefer to furnish me security.

23. *Ulpianus, On the Edict,.Book LXIII.*

In a stipulation relating to security against threatened injury, which is entered into on account of a house, the plaintiff shall be placed in possession, unless the bond covers everything.

24. *The Same, On the Edict, Book LXXXI.*

The use of public streams is common, as well as that of public highways, and the sea-shore; therefore anyone whosoever can build in such places, and tear down what he has constructed, provided this can be done without causing others inconvenience. For this reason a bond with sureties is only given with reference to the structure itself, and no provision is made for the bad condition of the ground; that is to say, the rule only applies to the work which anyone performs.

If, however, there is any apprehension of threatened injury on account of the bad condition of the ground, it can, by nd means, be said that it is necessary to enter into a stipulation with reference to threatened injury, for who can doubt that there is no one from whom the stipulation can be obtained; since, if no one should build anything, suppose the public place aforesaid causes some damage on account of its nature. Therefore, the stipulation only has reference to such structures as are built by private individuals.

What rule, then, will apply, if a public work is built, and what conclusion shall we come to with reference to any defect in its construction ? It is clear that recourse must be had to the Emperor; or, if the structure was erected in the province, to the Governor of the latter. However, what has been said with reference to defects in the erection of a building must be understood to relate not only to the time when the work was done, but also to a case where any damage results subsequently; for what if the house should fall because it had been improperly constructed?

(1) The names of the heirs or successors, and of all other persons who have an interest in the property, are included in this stipulation; and the term "successors" not only has reference to those who succeed to all of it, but also to such as only succeed to a certain portion of the same.

(2) Any damage which may result to the house, the ground, or the work, on account of its bad condition, or its defective construction, is provided for by a stipulation without security, and this refers not only to the entire house, but also to a portion of the same.

Labeo says that the bad condition of the house or the ground includes anything which, arising from an external source, renders either less durable. No one, however, can say that a stipulation will become operative on the assumption that the ground is in bad condition, where it is either marshy or sandy; because these are natural defects, and therefore the stipulation does not apply to such a case, and, even if it has been entered into, it will not become operative on this account.

(3) The question arises whether this stipulation only refers to damage resulting from injury, or whether it also includes all damage arising from an outside source. Labeo says that proceedings cannot be instituted where damage has been sustained, if it occurred through an earthquake, an inundation, or any other fortuitous event.

(4) Servius, also, says that where tiles, blown off by the wind, have fallen from the house of

the promisor upon that of his neighbor, the former will only be liable if this occurred through some defect in his building, and was not caused merely by the violence of the storm, or by any other catastrophe due to Divine agency. Labeo gives as a reason for this that injustice would be done if this rule were not adopted; for where could a house be found strong enough to sustain the force of a river, or of the sea, or of a tempest, or of ruin, or of fire, or of an earthquake?

(5) Servius also thinks that if the violence of a stream should overwhelm an island, and the buildings of the stipulator should fall, he can recover nothing under the stipulation, because the occurrence cannot be attributed to any defect of the buildings, or to the bad condition of the ground. If, however, the water should undermine the foundation of a building, and it should be ruined in consequence, he says that the stipulation would become operative; for it makes a great deal of difference where a structure which is substantially built is instantly overthrown by the force of the stream, and where it has previously become decayed, and afterwards falls.

Labeo, also, approves this opinion, for this case by.no means resembles that provided for by the Aquilian Law, where anyone kills a slave who is sound, or one who has become infirm.

(6) Moreover, although the stipulation becomes operative when damage results through some defect of construction, still, if the work had been done by someone whom the promisor could not interfere with, the stipulation will not become operative. It is clear that it will become operative, if he could have prevented him from building. Where, however, anyone constructs the edifice in the name of the promisor, or in the name of him for whose benefit indemnity has been promised, or of anyone else who can be prevented from doing the work, this stipulation will become effective.

(7) If security should have been furnished to provide against injury resulting from the construction of an oven, and the damage should result from the negligence of the person having charge of the same, it is held by many authorities that this case will not come within the terms of this stipulation.

(8) Cassius, also, says that where damage resulted from some cause against which there was no means of making provision, the stipulation will not apply.

(9) The following case is mentioned by Vivianus. If the trees standing on the land of my neighbor are broken by the force of a storm, and fall in my field, and my vines or crops are injured thereby, or they demolish my buildings, a stipulation which contained the clause, "If any damage should result from trees being in bad condition," will have no effect; because the damage did not result from any defect of the trees, but was caused by the force of the wind. It is clear that if the damage resulted from the age of the trees, we can say that the accident occurred through their defect.

(10) He also says that if I should promise you indemnity on account of threatened injury caused by my house, and it should be thrown upon your building by the force of a storm, and destroy it, nothing will be payable under the stipulation; because you sustained no damage through any defect in my house, unless it was so badly out of repair that it would have fallen under the force of even the smallest storm. All of which is true.

(11) What Labeo thinks is also true, for it makes a difference whether a building is overthrown by the rising of a river, or whether it falls after having gradually been weakened.

(12) Now let us see when the damage should be held to be sustained; for the stipulation refers to damage caused by defects in the building, the land, or the construction. For instance, I dig a well in my premises, and, by doing so, I intercept the sources of your well; will I be liable? Trebatius says that I will not be liable on the ground of threatened injury, for there was no reason to believe that I caused you damage through any defect of my work, where I was only

making use of a right tp which I was entitled. If, however, I should make an excavation on my land so deep that your wall cannot stand, the stipulation of indemnity against threatened injury will become operative.

25. *Paulus, On the Edict, Book LXXVIII.*

Trebatius says that he also sustains damage who has the lights of his house cut off.

26. *Ulpianus, On the Edict, Book LXXXI.*

Proculus says^that when anyone erects a building On his own land, which he has a right to erect there, even though he has promised indemnity for threatened injury to his neighbor, he will still not be liable under this stipulation; for example, if you have a building adjoining mine, and you raise it higher than you have a right to do; or if you turn my water-course into your field by means of a canal or a ditch. For although, in this instance, you divert my water and, in the former one, you intercept my light, I will, nevertheless, not be able to sue you under the stipulation, because he should not be considered to have committed an injury who prevents another from enjoying some benefit, which, up to that time, he had been accustomed to enjoy; and it makes a great deal of difference whether anyone causes damage, or whether he prevents another from enjoying a benefit which he had hitherto been accustomed to enjoy. The opinion of Proculus appears to me to be correct.

27. *Paulus, On the Edict, Book LXXVIII.*

Joint-owners of the same house should each one stipulate for indemnity, without mentioning his individual share in the property, for the reason that each one stipulates with reference to the injury which he himself may sustain. Moreover, if mention is made of each share, it would be just as if each stipulated only for the half.

On the other hand, where there are several owners of a house which is in bad condition, each one must promise indemnity with reference to his own share of the same, in order to prevent each from being individually liable for the entire amount.

28. *Ulpianus, On the Edict, Book LXXXI.*

The amount of the interest of the person demanding it is included in this stipulation. Hence Cassius says that if he who stipulated for indemnity against threatened injury should prop up the building on account of which he obtained security because he feared that it would fall, he can recover the expenses of doing so under the stipulation.

The same rule of law applies where anyone who has obtained security for threatened injury on account of the defects of a party-wall props up his own building for the purpose of diminishing the burden sustained by the wall. The damage suffered because of the removal of tenants influenced by fear of accident is included in the same category. Aristo, moreover, very properly adds (as Cassius requires in this instance), that, if there was good ground for the fear which caused the tenants to depart, Cassius should also have added with reference to the person who propped up the building, that he was compelled to do so through a reasonable fear that it would collapse.

29. *Gaius, On the Provincial Edict, Book XXVIII.*

The same rule applies where no one is willing to rent the house on account of it being out of repair.

30. *Ulpianus, On the Edict, Book LXXXI.*

The stipulation for indemnity against threatened injury is also applicable, where I sustain any damage through a defect in the work done by my neighbor on my land for the purpose of conducting water on his own premises. For it is usual for work to be performed by anyone upon the land of another, when it is done under the right of a servitude in his favor with which

the land of the latter is charged.

(1) In a case of this kind, let us see whether a person should merely promise indemnity, or should give security. A difficulty arises because he does the work on the premises of another, and anyone who gives security for work performed under such circumstances must furnish sureties; but where he does the work on his own land, he merely promises indemnity. Wherefore Labeo thinks that he who does any work on the land of his neighbor, which has reference to water-courses, or canals, must furnish security, because the work is performed on the premises of another. Where, however, a stipulation is required with reference to something which is already constructed, the result is that a promise of indemnity will be sufficient; for, in this instance, the person, to a certain extent, gives security with reference to his own property.

(2) What has been said with reference to conducting water has only been stated by way of example, but this stipulation is applicable to all kinds of labor.

31. *Paulus, On the Edict, Book LXXVIII.*

Those who repair public highways should do so without causing any damage to their neighbors.

(1) If a dispute should arise whether the person from whom security is required is, or is not, the owner of the property, he must furnish security with the reservation of his rights.

32. *Gaius, On the Provincial Edict, Book XXVIII.*

If a house which belongs to yourself and me in common adjoins another, which is my property, the question arises whether, if the house owned in common threatens to cause me any damage, you should furnish me security against the injury which may be sustained by my own building; that is to say, for that portion of the said house of which you are the owner. This opinion is adopted by several authorities. I, however, perceive a difficulty because I myself can repair my own house, and I can recover, in an action of partnership or one in partition, any expenses incurred for a portion of the same. For if I have a building in common with you, which is in bad condition, and you are in default in repairing the same, our instructors deny that you should be compelled to give security, because I myself can make the repairs and will be entitled to recover by an action on partnership, or in partition a proportionate share of the expenses which I have incurred; and therefore the giving of a bond would be of no use, because I can be reimbursed for any loss in another way.

It is clear that the opinion of our instructors was, that we should consider a stipulation provided for indemnity in the case of threatened injury to be useless, where one can be indemnified for his loss by another action; which rule is understood to be applicable to the case above mentioned.

33. *Ulpianus, On Sabinus, Book XLII.*

An action under a bond of indemnity for threatened injury is not granted to a tenant, because he can proceed under his lease, if the owner of the property should prevent him from leaving;

34. *Paulus, On Sabinus, .Book X.*

Provided always, that he is ready to give security for any rent which may have accrued; otherwise, the owner could justly retain his property by way of pledge. But even if he should retain it by way of pledge, and it should be destroyed by the fall of a neighboring house, it may be said that the owner would be liable to the tenant in an action on pledge, if he could have deposited the property in a safer place.

35. *Ulpianus, On Sabinus, Book XLII.*

In case of the demolition of a party-wall, inquiry must be made whether or not it was fitted to

support the weight placed upon it.

36. *Paulus, On Sabinus, Book X.*

Several authorities hold that a party-wall, to be suitable, must be able to support the weights of both the houses which may legally be placed thereon.

37. *Ulpianus, On Sabinus, Book XLII.*

For, if it was not capable of sustaining these weights, it should be demolished. He who demolishes it should not be liable, if any damage results for this reason, unless he builds a new wall which is either too expensive, or not good enough for the purpose. If the wall which was demolished was a suitable one, the plaintiff will be entitled to an action under the stipulation for indemnity, to the amount of his interest in having the wall remain. This is reasonable, for if it ought not to have been demolished, he shall rebuild it at his own expense.

Moreover, Sabinus says that if anyone lost any income on account of the demolition of the wall, it should be repaid to him. If the tenants leave the house, or cannot be so conveniently lodged, the builder of the new wall shall be responsible.

38. *Paulus, On Sabinus, Book X.*

The purchaser of a house cannot properly stipulate for indemnity before possession has been delivered to him; for the reason that the vendor is bound to exercise strict diligence with reference to the property, so far as the rights of the purchaser are concerned. It is certain that such a stipulation can be made, where the vendor is in no way to blame; for instance, if he permitted the purchaser to remain in the house under a precarious title, and when about to depart, he gave him the custody of the same.

(1) If security is not furnished with reference to a field, the plaintiff should be placed in possession of that part of it where some damage is apprehended. The reason for this is, that in the case of buildings, the portions which are in good repair may be pulled down by those which are ruinous, and this is not true of vacant land. It must, however, be said that, with reference to very large houses, the Praetor should sometimes determine, after investigation, in which part of the building the person, to whom security has not been given, should be placed in possession.

(2) Where a new wall is erected, the expense should be calculated after having deducted the cost of the old one to ascertain whether there is any excess; or if any of the old wall was used in the construction of the new one the value of it should be deducted in making the estimate.

39. *Pomponius, On Sabinus, Book XXI.*

Where there is a party-wall between two houses, it is customary to stipulate against threatened injury with reference to the house belonging to each individual owner; but security is not necessary, except where one of them alone builds, and damage is feared on account of the work, or where one of them has a more valuable house than the other, and will sustain greater damage if the wall should fall. Otherwise, where the risk is equal on both sides, the same amount of security given by one of them to his neighbor should also be exacted from the former.

(1) Where the title to a building is in dispute, the burden of furnishing security against threatened injury rests upon the party in possession, as he can recover from the owner of the land whatever he may be compelled to pay out for this purpose. If, however, he should not furnish security, possession shall be given to the plaintiff, who demanded security against threatened injury; for it would be unjust for the stipulator to be compelled to abandon the land, which he fears may be damaged, in order to search for the owner.

(2) The stipulation with reference to threatened injury has a very broad application. Hence this stipulation is advantageous to one whose house, built upon the land of another, is damaged. It

is also advantageous to the owner of the land, in case the latter is injured in such a way that the entire surface is removed, for he will then lose the income which he would otherwise have received.

(3) It is lawful to stipulate in the name of another that any damage which may be sustained by the owner shall be included. He, however, who stipulates should give security that the owner will ratify the transaction, and the exception referring to the agent should be inserted in the stipulation, as in the case of those relating to legacies. If security is not furnished him, the agent should, by all means, be placed in possession, so that the exception relative to his agency may not prejudice him.

(4) In making the estimate for the new wall, an account must be taken of the expense, which should not exceed a reasonable sum; and the ornamentation of the old wall ought to be considered, provided the expense is not increased too much by doing so.

40. *Ulpianus, On Sabinus, Book XLIII.*

In entering into a stipulation for indemnity against threatened injury, an indefinite or extravagant valuation should not be made, as, for example, for stucco-work, or mural paintings; for even though great expense may have been incurred for these things, still, a moderate estimate should be made in the stipulation providing against threatened injury, because a just medium should be observed, and the extravagant luxury of anyone should not be encouraged.

(1) Whenever injury results from a defect in a party-wall, one of the joint-owners will not be liable for any damage sustained by the other, for the reason that it was caused by defective property owned in common. If, however, the damage resulted from one of them plac* ing too great a weight against it, or upon it, it must be said that he alone will be responsible for the damage which was caused by an attempt to benefit himself.

If the wall should collapse on account of too great a burden having been imposed upon it by both parties, Sabinus very properly says that both of them will be liable. But if one of them loses more property, or property of greater value than the other, it is best to hold that neither of them will be entitled to an action against the other, because both placed the same burden on the party-wall.

(2) Whenever several persons bring an action on a bond given to provide against threatened injury, for the reason that they have sustained damage with reference to the same property, for instance, a house, each of them should not sue for the entire amount, but in proportion to his share, because the damage which all are entitled to recover has not been sustained by each one in full, but merely for a part; hence Julianus says that an action only for a part will be in favor of each one of them.

(3) Likewise, if a house which is in bad condition, and threatens to fall, belongs to several persons, can an action be brought against each of them for the entire amount, or only for a part ? Julianus says, and Sabinus approves his opinion, that they should be sued for the interest which each one has in the property.

(4) Where several owners of a house demand security against threatened injury and no one furnishes it, all of them should be placed in possession on the same footing; although they may have different shares in the ownership of the property. This is also stated by Pomponius.

41. *Pomponius, On Sabinus, Book XXI.*

Where a party-wall is to be repaired, that owner should have the opportunity to do the work who can perform it in the most suitable manner. It must also be said that this rule will apply where the same road or water-course is to be repaired by two or more persons.

42. *Julianus, Digest, Book LVIH.*

If a slave owned in common enters into a stipulation providing against threatened injury, it is considered the same as if his master had stipulated orally with reference to their respective shares.

43. *Alfenus Varus, Digest, Book II.*

A certain man promised indemnity against threatened injury to his neighbor. Tiles from his building were thrown by the wind upon those of his neighbor and broke them. The question arose whether any damages were to be paid. The answer was that this should be done if the accident resulted from any defect or weakness of the building, but if the force of the wind was such that it could even have demolished buildings that were strongly constructed, no damages could be collected. And even though it were provided in the stipulation that damages would be payable even if anything should fall, nothing would be considered to have fallen, where anything was thrown down either by the violence of the wind, or by any other external force, but only what fell of itself.

(1) A man who desired to rebuild a party-wall which he owned in common with his neighbor, before he demolished it, gave him security against threatened injury, and obtained the same from him. After the wall was removed, the lodgers in the rooms of the neighbor left, and the latter attempted to recover from the other joint-owner of the wall the rent which the lodgers had not paid. The question arose whether he could lawfully make such a demand. The answer was that, as the party-wall was being rebuilt, it was not necessary for the joint-owners of the same to give security to one another, nor could either of them, under any circumstances, be compelled to do so by the other; but if they did give security, they still could not give it for more than the half owned by each, for neither of them should give security, even to a stranger, for any more than this, when he intended to rebuild the party-wall. As, however, both had given security for the entire amount, the one who built the wall must be responsible for any damage sustained by his neighbor on account of the loss of his rent.

(2) The same neighbor applied for advice as to whether he could not recover what he had paid on this account, for the reason that it had been agreed by his neighbor that he would reimburse him for any loss which he might have incurred on account of what he had built, and he had lost the money which he had paid on account of the work which he had done. The answer was that he could not do so, because the loss which he had sustained was not due to any defect of construction, but by virtue of the stipulation.

44. *Africanus, Questions, Book IX.*

I demanded that you give me a bond of indemnity against threatened injury and you refused to do so. Before I applied to the Praetor, your building fell down and caused me damage. It. was held that the Prsetor should not render any decision in this case, and that I suffered the damage through my own Tault, because I began to institute proceedings too late. If, however, the Prsetor decided that you should furnish me security, and you did not do so, and he then ordered me to take possession, and your building should collapse before I arrived, it was held that the same rule should be observed as if the injury had been sustained after I had come into possession of the property.

(1) Having been placed in possession of property on the ground of threatened injury, I obtained the ownership of the same through possession under the second decree of the Praetor. A creditor afterwards desired to prosecute his claim to the house which was hypothecated to him. It was held, and not without reason, that if I had incurred some expense in repairing the house, and the creditor was not willing to reimburse me for the same, he would not be permitted to bring suit against me. Why then should not this right also be conceded to a purchaser, if he had bought a house which had been hypothecated ? These two cases cannot justly be compared with one another, since he who purchased the house entered into the transaction voluntarily, and therefore he could and should have been more diligent,

and should have compelled the vendor to furnish him with security; but this cannot be said of him who failed to furnish indemnity against threatened injury.

45. *Scaevola, Questions, Book XII.*

You built a house, and I bring an action against you on the ground that you have no title to the same. You do not set up any defence. Possession should be granted me, but not in order that the house may be immediately demolished, for it would be unjust for this to take place at once, but it should be done within a certain time, unless you prove that you had the right to build it.

46. *Paulus, Sentences, Book I.*

It is the duty of the agent of a municipality to see that houses which have fallen into ruin are rebuilt by the owners.

(1) Where a house has been rebuilt at the public expense, and the owner of the same refuses to pay the money disbursed for that purpose, with interest to a certain date, the town can legally sell the house.

47. *Neratius, Parchments, Book VI.*

If the owner of two houses restricts the use of a passage which had been common to both of them, to one alone, it will only belong to the house to whose use it has been restricted, not only where the timbers by which it is supported form part of it, but even where they all rest upon the walls of another building.

Moreover, Labeo, in his Last Works, says, where the owner of two houses built a portico attached to both of them, and made an opening to one of the houses from said portico, and then sold the other house, after imposing upon it the servitude of supporting the portico, that the entire portico will belong to the house which the vendor retained; even though it may extend the entire length of both houses, and is crossed by timbers supported on both sides by the walls of the house which was sold.

He, however, says that this rule will not apply when the upper part of the building, which is not joined to the portico, and has no other entrance, belongs to another house than the one by which the portico is supported.

48. *Marcianus, On Informers.*

Where anyone is proved to have sold a house or a part of the same for the purpose of demolishing it and selling the materials, it has been decided that the purchaser and the vendor should each be liable for the amount for which the house was sold. If, however, he should dispose of the marbles or columns of his house to be used in some public work, he can legally do so.

TITLE III.

CONCERNING THE RIGHT TO COMPEL A NEIGHBOR TO TAKE CAKE OF WATER AND RAIN-WATER.

1. *Ulpianus, On the Edict, Book XLIII.*

Where rain-water causes damage to anyone, he will be entitled to an action to compel his neighbor to divert it from his premises. By rainwater we mean that which falls from the heavens, and increases after a heavy rain, whether it does the damage of itself, or, as Tubero says, is mixed with other water.

(1) This action can be brought before the damage has been sustained, and after some building has been constructed, on account of which damage is apprehended. It will lie whenever water will probably result in injury through human agency, that is to say, whenever anyone does

something which will cause the water to flow in some other way than it is naturally accustomed to do, that is, if by allowing it to run, he causes the amount to become greater, or the current to become more rapid, or stronger, or if, by confining it, he causes it to overflow. If, however, the water, by its nature, should cause damage, it cannot give rise to an action.

(2) Neratius says a certain man constructed a levee to exclude the water which ordinarily flowed from a marsh upon the land; if the marsh should be filled with rain-water, and it, having been turned aside by the levee which he constructed, should damage the field of his neighbor, he can be compelled to remove it by an action brought for that purpose.

(3) Quintus Mucius says that this action will not lie with reference to work performed with a plow, for the purpose of cultivating land. Trebatius, moreover, only allows this exception where the work done with the plow is only performed for the purpose of obtaining a better crop of grain, and not merely for the benefit of the land.

(4) Where ditches are dug for the purpose of draining fields, Mucius says that this is done for the sake of cultivation, but it must not cause the water to flow in a single stream; for a man has a right to improve his land, but he must not do so by damaging that of his neighbor.

(5) Moreover, if anyone can plow and sow his fields without making furrows for drainage, he will be liable if he makes any, even though he may be held to have done so for the purpose of cultivating his land. But if he could not sow his seed without opening furrows to carry off the water, he will not be liable. Ofilius, however, says that a person has a right to dig ditches for the purpose of cultivating his land, provided they all follow the same course.

(6) It is said by the authors on Servius, that if anyone has planted willows, and the flow of the water is arrested by them, and damages a neighbor, the latter can bring an action on this account.

(7) Labeo, also, says that this action does not apply to anything which is done for the purpose of gathering grain and fruit, and it makes no difference what kind of crops are to be gathered by means of the work performed.

(8) Both Sabinus and Cassius hold that this action is applicable to any work performed by the hand of man, unless it is done for the purpose of cultivating the soil.

(9) They also say that a party will be liable to this action if he makes any water-course on his land which the Greeks call €AiχΕs.

(10) The same authorities say that an action to control rain-water will not lie where the water flows naturally, but if by means of any work it is turned back, or falls on land below, suit can be brought.

(11) They also say that everyone has the right to retain rainwater on his own premises, or to use for his own benefit any which flows from those of his neighbor, provided he performs no work on the land of another; for no one is forbidden to profit by anything so long as he does not injure some one else, nor can anyone be held liable on this ground.

(12) In conclusion, Marcellus says that when anyone, while excavating upon his own land, diverts a vein of water belonging to his neighbor, no action can be brought against him, not even one on the ground of malice. And it is evident that he should not have such a right of action, where his neighbor did not intend to injure him, but did the work for the purpose of improving his own property.

(13) It must be remembered that this action can be brought by one owning land situated above against one owning land situated below, to prevent water which flows naturally from running over his fields as the result of some work which has been constructed, and by the owner of the land below to prevent him from diverting the water from its natural course.

(14) It should also be noted that this action will never lie where the nature of the ground causes the damage. For (properly speaking) , it is not the water, but the nature of the ground which causes it.

(15) In short, I think that this action will only lie where the rainwater itself causes the damage, or where, having been allowed to collect it is the source of injury, and this occurs not naturally, but through human agency; unless the work is done for the purpose of cultivating the soil.

(16) Water is said to be increased by the rain, when it changes its color, or the quantity is greatly augmented.

(17) It must also be remembered that this action will not lie except where the water causes'some injury to land, for it cannot be brought if it injures *a* building, or a house in a town; as, in the latter instance, suit can be brought on the ground that the neighbor has not the right to let the water drip or flow upon our premises. Therefore, Labeo and Cascellius say that an action of this kind is a special one, and that which has reference to canals and the dripping of water is one of general application, and can be brought everywhere. Hence, when water injures land, the party who is responsible can be sued to compel him to retain the water in its proper channel.

(18) We do not inquire from what source the water is derived; for if it has its origin in a public or a sacred place, and runs through the land of a neighbor, and he, by some means, diverts it upon my premises, Labeo says he will be liable to this action.

(19) Cassius also says that if water from a building in a city injures either land or a building in the country, an action must be brought under the law having reference to canals and the dripping of water.

(20) Moreover, I find it stated by Labeo that if water flowing from my field injures land situated between two buildings, an action cannot be brought against me to compel me to take care of the rainwater.

This action, however, can be brought where the water flows from a place of this kind upon my land and damages it.

(21) Moreover, as where any work that is performed in such a way that rain-water causes me damage, this action can be brought; so, on the other hand, the question arises whether an action of this kind will lie if my neighbor should do some work to prevent the water from running over my land, and which is a benefit to him. Ofilius and Labeo hold that it cannot be brought, even if it was to my interest that I should have access to the water, because it will only lie where rain-water causes damage, and not where it is a benefit.

(22) If a neighbor should remove the structure which he had erected, and, after its removal, the water following its natural course should injure the field belonging to the owner below, Labeo thinks that this action cannot be brought; since it is a perpetual servitude enjoyed by land situated below to receive water pursuing its natural course. Labeo, however, acknowledges that it is evident if, on account of the work having been removed, the water should flow more rapidly, or collect in its channel, an action of this description can be brought.

(23) Finally, he says that certain laws have been enacted with reference to the different conditions of land; so that if on certain tracts there are large accumulations of water, I may be permitted to build levees or excavate ditches on your ground, for my own protection.

Where, however, there is no condition mentioned with reference to land, the natural condition of the same must be preserved, and the lower tract will always be subject to the upper one; and this inconvenience must be naturally endured by the one situated below, for

the benefit of the upper tract, and should be compensated for by other advantages; for, as all the fertile soil of the upper tract is carried upon the lower, so, also, the inconvenience of the water flowing upon it must be tolerated. But if no special law relating to the tract of land in question can be found, ancient custom is held to take the place of law. For, indeed, with reference to servitudes, we follow this rule that where a servitude is not found to have been imposed, and one has been enjoyed for a long time without force, or by a precarious title, or clandestinely, the servitude is held to have been created by a long-established custom, or by law. Therefore, we cannot compel a neighbor to build levees, but we ourselves can build them on his land, and to obtain the enjoyment of this species of servitude we are entitled to either a praetorian action or an interdict.

2. *Paulus, On the Edict, Book XLIX.*

In short, there are three causes by which a lower tract of land may be subject to an upper one; namely, a law, the nature of the ground, and ancient custom, which is always regarded as law, that is to say, for the purpose of terminating disputes.

(1) The following case was suggested by Labeo. An old ditch was in existence for the purpose of draining certain fields, and no one remembered when it was made. The neighbor below did not clean it out, and, for this reason, the water, being obstructed in its course, injured our land. Hence Labeo says that suit can be brought against the person owning the land below, to compel him to clean out the ditch himself, or to permit you to restore it to its former condition.

(2) Again, if the ditch is on the boundary line, and the neighbor does not permit the part which is on your side to be cleaned out, Labeo says that you can bring this action against him.

(3) Cassius states that if any works are constructed by public authority for the purpose of conducting water, this action will not lie; and that matters will be in the same condition as where ancient usage transcends the memory of man.

(4) It is, however, stated by Ateius that the neighbor above can be compelled to clean out a ditch by which the water flows upon the land of the neighbor below, whether the memory of its construction survives or not. I myself think that this opinion should be approved.

(5) Varus says the force of the current has broken the levee on the land of a neighbor, and the result is that the rain-water causes me damage. He holds that if the levee was a natural one, that I cannot bring this action against him to compel him to repair the levee, or to permit it to be repaired. He also holds that if the levee was built by human agency, and it is remembered when this was done, the neighbor will be liable to this action.

Labeo, also, says that if the levee was built by the hand of man, the action can be brought to compel it to be restored, even if it should notbe remembered when it was constructed; for no one can be compelled by this proceeding to do something to benefit his neighbor, but only to prevent him from injuring him, or to force him to permit us to do what can be done by law. Although the action to compel him to take care of the rain-water cannot be brought, still I am of the opinion that I will be entitled to a praetorian action or an interdict against my neighbor, if I desire the levee to be rebuilt upon his land, which, if done, will be of advantage to me and at the same time will not cause him any injury. This course is suggested by equity, although we have no law which authorizes it.

(6) It is said by Namusa that, if water flowing through its regular channel is obstructed by a deposit of soil, and on account of being arrested injures land situated above, an action can be brought against the owner of the land below, to compel him to permit the channel to be cleaned out; for this action is not only available in the case of work performed by human agency, but also has reference to all obstacles which do not owe their existence to our will.

Labeo does not agree with Namusa, for he says that the nature of land can be changed by

itself; and therefore where the nature of a field is changed in this manner, both parties should endure it with equanimity, whether their condition is improved, or made worse. Hence, if the nature of the ground is changed by an earthquake, or by the force of a tempest, no one can be compelled to permit the land to be restored to its former condition.

We also adopt the principles of equity in a case of this kind.

(7) Labeo adds that if the accumulation of water excavates a hole on your land, an action to divert the water cannot be brought against you by your neighbor. It is, however, clear that if a channel has been dug in accordance with law, or the right to it has been established by custom beyond the memory of man, an action of this kind can be brought against you to compel you to make repairs.

(8) Labeo also says that when inquiry is made to ascertain whether the work was constructed within the memory of man, the exact date and the Consulate should not be required, but it will be sufficient if anyone knows when the work was constructed, that is to say, if there is no doubt on the subject; nor is it necessary that the persons who remembered it should be living, but only that others should have heard those who remembered its construction state the fact.

(9) Labeo also says that if a neighbor turns aside a torrent to prevent the water from reaching him and, by doing so, his neighbor is injured, an action cannot be brought against him for diverting the water from its course; since, in order to divert it, it must be prevented from flowing upon his premises.

This opinion is perfectly true, provided he did'not act with the intention of injuring you, but to prevent injury to himself.

(10) I also think that the opinion of Ofilius is correct, namely, if your land owes that of your neighbor a servitude, on account of which it receives its water, this action will not lie unless the damage sustained is excessive. The result of this is, and it coincides with the opinion of Labeo, that if anyone should transfer to his neighbor the right to allow water to flow upon his land, he cannot bring an action of this kind against him.

3. *Ulpianus, On the Edict, Book LIII.*

It is related by Trebatius that a certain person, on whose land there was a spring, established the business of a fuller near the said spring, and permitted the water, after being used in this way, to flow upon the land of his neighbor. He says that he would not be liable to an action of this kind brought by his neighbor, but many authorities hold that if he confines the water to a channel or throws any filth into it, he can be prevented from doing so.

(1) Trebatius also thinks that where anyone is damaged by a flow of warm water, he can bring a suit of this kind against his neighbor, but this is not true, for warm water is not rain-water.

(2) If a neighbor who was accustomed to irrigate a field during a certain season of the year should make a meadow of it, and by constant irrigation should cause his neighbor damage, Ofilius says that he will not be liable to an action on the ground of threatened injury, or for the diversion of rain-water, unless he has levelled the ground so that, in this way, the water will be carried more rapidly upon the land of his neighbor.

(3) It has been established, and we adopt the rule, that a person is not liable to this action, except when he does the work, which causes the damage, upon his own land. Therefore, if anyone performs any work upon public land, this action will not lie; and he who did not provide against threatened injury by obtaining the execution of a bond has no one to blame but himself. If, however, the work is performed upon private premises, as well as upon public land, Labeo says that an action of this kind can be brought for everything.

(4) An usufructuary cannot bring this action, nor can it be brought against him.

4. *The Same, On the Edict, Book LIII.*

Moreover, although this action can only be brought against the owner of the work, still Labeo says that if anyone builds a sepulchre, and the water from it injures a neighbor, it is preferable to adopt the rule that the owner will be liable to this action, even if he had ceased to be such because of the ground having become religious, for he was the owner at the time when the structure was erected. If he should be compelled by order of court to restore the work to its former condition, an action for the violation of the sepulchre will not lie.

(1) Julianus also said that, if after proceedings had been instituted to compel him to take care of the rain-water, and he against whom suit had been brought for damages previously sustained, and for the restoration of the property to its original condition, should alienate the land, the judge must render the same decision which he would have done if no alienation had taken place; for, after the land had been alienated, the case remains the same, and the account of the damage should include any which had been suffered after the alienation took place.

(2) Julianus also says that this action cannot be brought against anyone but the owner of the property, and therefore, if a tenant should erect any structure without the owner of the land being aware of it, the latter is not compelled to do anything except to suffer the structure to be destroyed. The tenant, however, can, by the interdict *Quod vi OMt clam,* be compelled to restore the property to its former condition, and to pay any damages which may have been sustained. If, however, the owner should wish to obtain security against threatened injury from the owner of the land, it would be perfectly just for it to be given him.

(3) If, however, I did not construct such a work, but my agent did, and my neighbor is injured by the water, the action can be brought against me, just as it can be against the tenant. The agent, however, can, according to the opinion of Julianus, have proceedings instituted against him under the interdict *Quod vi aut clam,* even after the property has been restored to its former condition.

5. *Paulus, On the Edict, Book XLIX.*

If a tenant, without the knowledge of the owner, should construct a work by means of which the water injures a neighbor, Labeo gives it as his opinion that the tenant will be liable under the interdict *Quod vi aut clam,* and that the action relating to the care of rain-water can be brought against the owner of the land, because he alone can restore the property to its original condition; but, in this instance, he can only be compelled to allow it to be restored where a bond of indemnity providing against threatened injury has been obtained by a stipulation.

If he should incur any expense in restoring the property to its former condition, he can recover it from the tenant in an action on lease, unless someone should decide that he cannot do so, because it was not necessary for him to restore it. If, however, he acted by the direction of the owner of the land, the latter will also be liable to the interdict.

6. *Ulpianus, On the Edict, Book LIII.*

If the neighbor next above the one adjoining me constructs a work by which the water, running over the land of my nearest neighbor, causes me damage, Sabinus says that I can bring an action either against the one immediately above me, or against the one above him, if the former fails to do so. This opinion is correct.

(1) If the water flowing from land owned by several persons causes damage, or if it injures land belonging to several persons, it has been decided, and we adopt the same rule, that where it belongs to several owners, suit can be brought by each one in accordance with his interest, and judgment can be rendered proportionally; or where the action is brought against several persons, judgment shall be rendered against them individually in proportion to their respective shares.

(2) Hence the question arises, if water from your land should cause damage to a field held in common by yourself and me, whether this action can be brought. I think that it can, in such a

way, however, that only a portion of the damage shall be paid by the party who loses the case.

(3) On the other hand, where the water from a field held by joint-owners damages land owned by one of them, an action of this kind can be brought, but the party who brings it can only obtain damages in proportion to his share.

(4) If anyone, before instituting proceedings, should transfer the ownership of the land to another, he will cease to have a right to bring this action, and it will pass to the person to whom the field belongs, for the action has reference to injury which may, in the future, be sustained the owner; although the work may have been done when the land belonged to the former proprietor.

(5) It must be remembered that this action is not a real, but a personal one.

(6) It is the duty of the judge, in a case of this kind, where any work has been done by a neighbor, to order him to restore the property to its former condition, and to pay all damages sustained after issue has been joined. If, however, any damage was caused before issue was joined, he should only compel him to restore the property to its original condition, and not to pay any damages.

(7) Celsus says, that if I build anything by which rain-water may cause you any damage, I can be compelled to remove it at my own expense. If anyone else, over whom I have no authority, should do this, it will be sufficient if I permit you to remove the structure. But if my slave, or anyone whose heir I am, should do the work, I will be obliged to surrender the slave by way of reparation; but if the person whose heir I am, did it, it is just the same as if I myself had erected the building.

(8) The judge must estimate the damage in accordance with the truth of the matter; that is to say, according to the amount of damage which appears to have been sustained.

7. *Paulus, On the Edict, Book XVIII.*

He against whom suit is brought to compel him to take care of rain-water, and who has performed the work*rendering him liable to such an action, will be compelled to join issue in the case, even if he is ready to abandon it, since he is sued personally in his own name to compel him to remove the structure.

(1) The case is different with a *bona fide* purchaser, for he can only be compelled to permit the destruction of the work; and therefore if he abandons the property he should be heard, for he offers to do more than is required of him.

8. *Ulpianus, On the Edict, Book LIII.*

In granting the right to conduct water, the consent, not only of those on whose ground the source of the water is situated, but also of those who have the use of the same, must be obtained; that is to

say, the consent of the persons to whom the servitude of said water is due. This is not unreasonable, for their right is diminished, and hence their consent is required. Generally speaking, it is held that the consent of all those who have any right to the water itself, or any interest in the land through which it flows, or on which its source is situated, must be obtained.

9. *Paulus, On the Edict, Book XLIX.*

In the case of the conditional sale of land, the consent of both the purchaser and the vendor must be obtained; so that it may be certain that the transfer of-the right to the water is made with the permission of the owner, whether the property remains in the hands of the purchaser, or is returned to the vendor.

(1) Therefore, consent is required to prevent the owner from being injured without his

knowledge, for he who has once given his consent cannot be considered to have sustained any injury.

(2) In the transfer of the right to use water, the consent not only of him to whom the right to the water belongs, but also that of the owner of the land is required, even though the latter cannot at present make use of the water, because the right to do so may afterwards revert to him absolutely.

10. *Ulpianus, On the Edict, Book LIII.*

When there are several owners of the same land in which a stream of water has its source, there is no doubt that the consent of all of them must be obtained; for it would be unjust if the consent of one who is the owner of, perhaps, a very small share, should prejudice the rights of the other joint-owners.

(1) Let us see whether subsequent consent can be obtained. It is established that it makes no difference whether the consent precedes or follows the conducting of the water, because the Praetor must also take into consideration consent afterwards given.

(2) Labeo says that, if a river is navigable, the Praetor must not grant permission for enough water to be taken from it to render it less navigable. The same rule applies where another river is rendered navigable by means of the water of the one in question.

11. *Paulus, On the Edict, Book XLIX.*

An aqueduct cannot legally be constructed so as to interfere with a right of way. Nor can a person who is entitled to a right of way legally build a bridge for the purpose of enjoying his right. But if, for this purpose, he should conduct the water by means of a covered, and not an open canal, the water will become deteriorated, because it remains under ground, and the stream will dry up.

(1) Cassius says that if water flowing from a tract of land owned in common, or upon one owned in common, causes any damage, one of the joint-owners can bring an action against one of the proprietors of the other tract, or can sue each of them separately; or, on the other hand, each of them can sue one of their number, or they can all individually sue one another. If one of them brings suit, and the damage is estimated and paid in court, the right of action of the others is extinguished. Likewise, where one of them is sued and makes payment, the others will be released from liability, and whatever has been paid by him for the benefit of his fellow joint-owners can be recovered by an action in partition. The action, however, cannot be brought by the person who did the work against his fellow joint-owners, as he who was responsible for it must make restitution for all damages sustained.

(2) Proculus says it is stated by Ferox that if an action of this kind is brought against one of several joint-owners, who did not himself do the work, he must be reimbursed for his expenses, because he is entitled to an action in partition. He, however, holds that this joint-owner can only be compelled to allow the land to be restored to its former condition, because it was the fault of the plaintiff that he did not sue the person by whom the work had been performed, and it is unjust for him who did not perform it to be compelled to restore the land to its former condition, as he has a right to bring an action in partition. But what course must be pursued if his fellow joint-owner should not be solvent?

(3) Julianus says that he is in doubt as to what course should be pursued by the judge, where the structure to which the injury is attributed belongs to two joint-owners, and the land damaged by the water belongs to one alone. If the land on which the work was done belongs to several persons, and suit is brought against one of them, shall judgment be rendered against all on account of any damage sustained after issue has been joined, and restoration of the property to its original condition has been refused; just as in the case of a slave owned in common, where a noxal action is brought against one of his owners, and judgment is rendered

against both of them, since whatever one of them paid he can recover from his fellow joint-owner?

Or shall we say that the owner who is sued on account of his share, and has judgment rendered against him for damages sustained and failure to restore the land to its original condition, as is done in an action for threatened injury where several persons own the land which it is feared will be damaged, and only one of them is sued, even though the work from which damage is apprehended is indivisible, and neither the building itself nor the ground can partially cause damage, the owner against whom the action is brought can, nevertheless, have judgment rendered against him in proportion to his share of the property? Julianus thinks that the same course should be pursued in an action to compel anyone to take care of rain-water, as is done to provide against threatened injury; because, in both instances, proceedings are instituted, not with reference to damage which has already been sustained, but on account of that which is apprehended.

(4) If the land injured by rain-water belongs to several persons, each one of them can bring suit against his neighbor; but he can not, after issue has been joined, obtain damages on account of injury sustained for an amount greater than his share. Moreover, if the land is not restored to its former condition, judgment must not be rendered against each one of the joint-owners for a larger sum than the value of his interest in the property.

(5) Ofilius says that one joint-owner can bring an action against another, where water is conveyed from the private premises of one of them upon land belonging to both in common.

(6) Trebatius thinks that if suit is brought on account of work due to human agency, the land must by all means be restored to its original condition by the party against whom the suit was brought. If, however, the land should be injured by the force of the water, or the ditches should be filled with gravel, or soil, then the owner of the land will only be compelled to permit this to be removed.

12. *The Same, On Sabinus, Book XVI.*

The purchaser, as well as the other successors (unless the sale is a fictitious one), must either restore the property to its original condition, if they are willing to do so, or must permit this to be done; for it is clear that the plaintiff will be prejudiced by delay. The joint-owner of the person who performed the work is in the same position if he himself had nothing to do with it.

The same rule also applies where land is acquired by donation or devise.

13. *Gaius, On the Edict of the Urban Prsetor; Title, The Action Having Reference to Taking Care of Rain-water.*

The vendor, or the donor, however, will be liable for damages sustained as well as for expenses incurred by the plaintiff through the interdict *Quod vi aut clam.*

14. *Paulus, On the Edict, Book XLIX.*

Ateius says that if anyone, after having constructed a work which causes damage, should sell .the land to a more powerful person in order to cease to be the owner of the same, proceedings may be instituted against him under the interdict *Quod vi aut clam,* and after the expiration of a year, an action based on fraud can be granted against him.

(1) When an action is brought to compel another to take care of rain-water, the question arises whether or not the injury results from some act already performed; and hence, if through some defect in the ground a part of the soil has settled, even though on this account damage may be caused by rain-water to a neighbor below, the action will not lie. The same rule will also apply where anything attributable to human agency is deposited upon the land.

(2) In this action, as well as in that relating to threatened injury, anticipated damage is taken

into consideration; while in almost all others payment is made for damages already sustained.

(3) With reference to damage caused before the action was brought, proceedings should be instituted under the interdict *Quod vi aut cla/m;* and with regard to that which may occur after the decision has been rendered, security against threatened injury must be furnished, or the property must be placed in such a condition that there will be no longer any danger of injury.

(4) A new action must be brought where a work has been constructed after issue has been joined in the case.

15. *The Same, On Sabinus, Book XVI.*

Sometimes the work which has been constructed after issue has been joined is removed, where that which was constructed before it cannot be removed without destroying the other.

16. *Pomponius, On Sabinus, Book XX.*

After the sale and transfer of land which has been injured, before judgment has been rendered in an action of this kind, the vendor can still obtain damages under the judgment; not because he has sustained any injury, but because the property has been damaged, and he must pay anything which he may recover to the purchaser.

If, however, the party who was sued should sell the land before any damage was done, suit must either immediately be brought against the purchaser, or within a year against the person who sold the land, if he did so for the purpose of avoiding a judgment.

17. *Paulus, On Plautius, Book XV.*

If the servitude to draw water at night should be granted me, and afterwards, by another transfer, I should also obtain the privilege of drawing water by day, and, during the time prescribed by law, I should only make use of my privilege at night, I will lose the servitude to draw water during the day, for the reason that in this instance there are two servitudes derived from different causes.

(1) It has been very properly decided that water cannot be conducted by means of stone aqueducts, unless this was included in the grant of the servitude, for it is not customary for a person who has water to conduct it through a channel made of stone. However, what is customary in cases of this kind can be done, as, for instance, water can be conducted through pipes, even if nothing on this point was stated in the grant of the servitude, provided always that no damage is caused to the owner of the land by doing so.

(2) It has been decided that the servitude of drawing water can be granted where there is a public highway between two tracts of land; and this is true. This is not only the case where there is a public highway between the two tracts, but also where they are divided by a public stream, in case the servitude of driving or of passage can be established, notwithstanding that the public stream divides the two tracts of land, that is to say, where the width of the stream does not prevent it from being crossed.

(3) The rule is the same where my neighbor owes a servitude to my land, which does not join his but joins another belonging to me, as I can bring an action against him, and maintain my right to pass through his premises to my land beyond, although I may not have a servitude attaching to my intermediate tract; just as where a public road, or river which can be crossed by fording, lies between two separate tracts of land.

None of these servitudes, however, can be imposed where the intervening tract is sacred, religious, or holy, and cannot be used.

(4) If there is an intermediate tract of land which belongs to a third party between your premises and mine, I can impose the servitude for drawing water upon your land if the owner of the intermediate tract grants me the right of way through his premises; just as when I wish

to obtain the perpetual right to take water from a public stream which forms the boundary of your land you can grant me a right of way to the stream.

18. *Javolenus, On Cassius, Book X.*

If the work which causes damage by rain-water is erected in a public place, the action cannot be brought; but where the two tracts are separated by a public place, it can be. The reason for this is that the owner alone is liable under this action.

(1) Water cannot be conducted across a public highway without the consent of the Emperor.

19. *Pomponius, On Quintus Mucius, Book XIV.*

Labeo says that if I construct any work and my neighbor does not object, and in consequence he suffers damage from rain-water, I will not be liable to an action of this kind.

20. *The Same, On Sabinus, Book XXXIV.*

This, however, only applies where he is not deceived through mistake or ignorance, for anyone who makes a mistake does not give consent.

21. *The Same, On Quintus Mucius, Book XXXII.*

If water which has its source on your land rushes with great force upon mine, and you intercept its course, so that it ceases to flow upon my premises, you will not be considered to have acted with violence, if I was not entitled to any servitude for the use of the water; nor will you be liable to an interdict *Quod vi aut clam.*

22. *The Same, Various Passages, Book X.*

If the usufruct of land is bequeathed, the action to compel care to be taken of the rain-water will lie for, as well as against the heir of him to whom the property belonged. If the usufructuary should suffer any inconvenience on account of some work which has been performed, he can sometimes avail himself of the interdict *Quod vi aut clam.*

If the action cannot be brought by the usufructuary, the question arises whether equitable action should be granted him, as the owner,

to compel the water to be taken care of; or whether he can also maintain that he has the right to enjoy the property. The better opinion, however, is that an equitable action to compel care to be taken of the rain-water should be granted.

(1) He who constructs a new work will not be considered to have restored the property to its former condition, unless he intercepts the course of the water of which complaint is made.

(2) But even if the usufructuary should construct the work by which the rain-water may cause damage to anyone, the legal action against the owner of the property will lie; but the question arises whether an equitable action to compel the water to be taken care of should not be granted against the usufructuary. The better opinion is that it should be granted.

23. *Paulus, On Sabinus, Book XVI.*

Any work which is performed by order of the Emperor, or the Senate, or by those persons who have first rendered the land capable of cultivation, is not included in this action.

(1) This action is also available with reference to lands owned and leased by the State.

(2) Levees made upon private lands along the banks of streams are also the object of this action, even though they cause damage on the other side of the stream, provided they have been constructed within the memory of man, and there was no right to make them.

24. *Alfenus, Epitomes of the Digest by Paulus, Book IV.*

A man who owned a field situated above that of another plowed it in such a way that the

water was carried by the furrows and ridges upon the land of his neighbor below. The question arose whether he could be compelled by an action requiring him to take care of the rainwater, to plow in a different direction, so that the furrows would not be turned toward the premises of the neighbor. The answer was that he could not do anything to interfere with his neighbor plowing in any way that the latter desired.

(1) If, however, anyone plows across a water-course, and by means of the furrows, the water should be diverted upon the land of a neighbor, in such a way as to obstruct the water-course, he can be compelled to open it by means of this action.

(2) But if he should dig ditches by which the rain-water could injure a neighbor, he can be compelled by the court to fill them up, if it appears that the rain-water might afterwards cause damage, and judgment could be rendered against him, unless he did so; even though, before a decision was rendered, the water had not yet begun to flow through the ditches.

(3) When lakes either rise or fall, the neighbors have no right to do anything to affect either the increase or the diminution of the water.

25. *Julianus, On Minicius, Book V.*

Where a right of way is imposed upon the land of anyone, the person entitled to it can bring an action to compel care to be taken of rain-water for the benefit of the land, because by damaging the right of way the land also will be injured.

26. *Scssvola, Opinions, Book IV.*

Scaevola gave it as his opinion that those who have the right to render judicial decisions are accustomed to authorize the continuance of aqueducts, whose use has been confirmed by time, although the legal right by which they exist cannot be established.

TITLE IV.

CONCERNING FARMERS OF THE PUBLIC REVENUE, LEASES OF PUBLIC LANDS, AND FORFEITURES.

1. *Ulpianus, On the Edict, Book LV.*

The Praetor says: "If a farmer of the public revenue, or anyone belonging to the family of a farmer of the public revenue, takes anything by force in his name, and it is not restored to the owner, I will grant an action for double its value, and if suit is brought after a year has elapsed, I will grant one for its simple value. Moreover, I will grant an action, if any damage has been sustained, or any theft is said to have been committed. If the parties concerned in the matter are not produced, I will grant an action against the masters, without the privilege of surrendering their slaves by way of reparation."

(1) This Title has reference to farmers of the public revenue. Those are farmers of the revenue who handle the public funds, and they bear this name whether they pay a certain percentage to the Treasury, or collect tribute. Those, also, who lease property from the Treasury are properly called farmers of the revenue.

(2) Someone may ask, of what benefit is the Edict in question, just as if the Praetor had not elsewhere made provision for thefts, injuries, and robbery wifh violence. The Praetor, however, thought that, under the circumstances, it was best to issue a special Edict against farmers of the revenue.

(3) The penalty inflicted by this Edict is, in some respects, less severe, as damages are given for double the amount; whereas in the case of robbery with violence, they are quadrupled, as they also are in the case of manifest theft.

(4) Moreover, the farmer of the revenue is granted the power to restore property taken by violence, and if he does so, he will be released from all responsibility, and will not be liable to

a penal action under this Section of the Edict. Hence, the question arises, if anyone desires to bring an action against a farmer of the revenue, not under this Edict, but under the general law relating to taking property by violence, unlawful damage, or theft, can he do so? It is established that he can, and Pomponius also holds the same opinion, for it would be absurd for the legal position of a farmer of the public revenue to be considered better than that of other persons.

(5) The term "family," mentioned in the Edict, not only refers to the slaves of farmers of the revenue, but also to all those included in their households. Therefore, whether their own children or the slaves of others are employed in the collection of taxes, they will be included in this Edict. Hence, if the slave of a farmer of the revenue commits robbery with violence, but is not among the number of those who are employed in the collection of taxes, this Edict will not apply.

(6) What the Praetor says in the last place, namely, "If they are not produced, I will grant an action against their masters, without the privilege of surrendering them by way of reparation," is a special provision of this Edict, because if the slaves are not produced, an action will be granted without the privilege of surrendering them by way of reparation, whether the masters have them in their power or not; and whether they can produce them or not.

2. *Gaius, On the Provincial Edict, Book XXI.*

A master shall not be allowed to defend his absent slave.

3. *Ulpianus, On the Edict, Book LV.*

If the slave should not be produced by the master, the noxal action should be brought against him. Therefore, what makes the condition of the farmers of the revenue so trying is that they must select good slaves for this employment.

(1) Where the Praetor says, "Against the masters," we must understand this to mean against the associates of the collectors of taxes, although they may not be their masters.

(2) The plaintiff must mention beforehand the person or persons whom he may desire to be produced, so that, if this is not done, he will have a right of action. Even if he should say, "Produce all the parties, in order that I may recognize the one who is guilty," I think that he ought to be heard.

(3) Where several slaves have committed the theft or the damage, the rule ought to be observed that if the farmer of the revenue pays as large a sum as if a freeman had perpetrated the offence, he should be released from liability.

4. *Paulus, On the Edict, Book LIL*

If a farmer of the revenue, who removed the property by force should die, Labeo says that the action should be granted against his heir who profited by the act.

(1) The Divine Hadrian, in a Rescript addressed to the Governors of Gaul, stated with reference to property which the Governors were accustomed to have transported for their use, that when anyone sends for the purpose of making purchases for the benefit of those who command armies or govern provinces, or for that of their agents, he shall sign an order with his own hand, and send the same to the farmer of the revenue, so that if the latter should transfer anything more than he had been ordered to do, he must make it good.

(2) In the collection of all revenues, the custom of the neighborhood is usually considered; and this is provided by the Imperial Constitutions.

5. *Gaius, On the Edict of the Urban Praetor, Title: Farmers of the Revenue.*

It is provided by this Edict that if the property should be restored before issue has been joined, the right of action will be extinguished; still, after this, suit for the penalty can be brought. If,

however, Ihe farmer of the revenue is ready to make restitution even after issue has been joined, he should be released from liability.

(1) We may ask whether the payment of double damages provided by the Edict is entirely a penalty, and suit can afterwards be brought for the recovery of the property; or whether the recovery of the property is included in the double damages, so that the penalty is only simple. The weight of opinion is that the property is included in the double damages.

6. *Modestinus, On Penalties, Book II.*

Where several farmers of the revenue have unlawfully exacted something, the action to recover double damages is not multiplied, but all of them must pay their shares, and what cannot be paid by one shall be collected from another, as the Divine Severus and Antoninus stated in a Rescript; for they held that there was a great difference between persons who perpetrated a crime, and those who participated in the commission of a fraud.

7. *Papirius Justus, On Constitutions, Book II.*

The Emperors Antoninus and Verus stated in a Rescript that in the case of the taxes on public lands, the lands themselves, and not the persons holding them, should be made the subject of the action, and therefore that the possessors must pay any tax which was due, even for time which had passed before they obtained possession; and that, in a case of this kind, if they were not aware that any tax was due, they would be entitled to an action.

(1) It was also stated in the Rescript that a ward would be released from liability to the penalty of confiscation, if he paid the tax within thirty days.

8. *Papinianus, Opinions, Book XIII.*

The offence of evading taxation by fraud is transmitted to the heir of the person who committed the fraud, to the extent of causing confiscation of the property.

(1) Where one of several heirs for the purpose of evading the tax removes any of the property held in common, the others will not be deprived of their shares.

9. *Paulus, Sentences, Book V.*

If the heat of competition should induce a bidder desiring to obtain the farming of public revenues to raise his offer above the ordinary amount, it must be accepted, if he who makes the highest bid is ready to furnish sufficient security.

(1) No one can be compelled, against his consent, to lease the collection of taxes; and therefore when the time of the lease had expired, a new contract must be made.

(2) Farmers of the revenue, who have not made a settlement for the taxes collected by them, and who wish to enter into a new contract, shall not be permitted to do so before paying what is due under the former one.

(3) The debtors of the Treasury, as well as those of a city, are forbidden to contract to collect taxes, in order that their responsibilities may not be increased from another cause, unless they offer sureties who are able to satisfy their obligations.

(4) Where partners in collecting the revenue administer their office separately, one of them can legally petition to have the share of another who is less fitted for the place transferred to himself.

(5) Where anything has been unlawfully exacted, either from the public, or from private individuals, double the amount shall be paid to those who suffered the injury; anything, however, which has been extorted by violence shall be refunded together with a triple penalty, and, in addition to this, they will be liable to extraordinary prosecution; for, in the first instance, the right of private individuals, and in the second, the interest of the public demands

it.

(6) Taxes on property on which no tax has ever been paid cannot be collected. If the indulgence of the farmer of the revenue should release property from taxation, on which it has been customary to pay, another is not forbidden to make the collection.

(7) It has been established that property for the use of the army is not liable to taxation.

(8) The Treasury is exempt from the payment of any tax. Merchants, however, who are accustomed to deal in goods purchased with funds belonging to the Treasury cannot enjoy immunity from the payment of taxes.

10. *Hermogenianus, Epitomes, Book V.*

Neither the Governors of provinces, the agents of municipalities, nor assemblies of the people are permitted to impose taxes, or to modify, add to, or diminish those already imposed, without the authority of the Emperor.

(1) Where farmers of the revenue have not paid what they owe to the Treasury, they cannot be discharged, even if the terms of their leases have expired; but interest can be collected from them when they are in default.

11. *Paulus, Opinions, Book V.*

It is not permitted, under penalty of death, to sell to enemies flints used for striking fire, iron, wheat, or salt.

(1) Public lands, which are held under a perpetual lease, cannot be taken from the lessee by an agent of the government without the authority of the Emperor.

(2) If either the owner of a ship, or any of the passengers, should unlawfully bring any merchandise on board, the ship as well as the merchandise can be confiscated by the Treasury. If anything of this kind is done in the absence of the owner, by the master, the helmsman, the pilot, or any sailor, he shall be put to death, and the merchandise shall be confiscated, but the vessel must be restored to the owner.

(3) Prosecution for dealing in contraband merchandise also extends to the heir of the guilty party.

(4) The owner of property which has been confiscated is not forbidden to purchase the same either himself, or through others whom' he has directed to do so.

(5) Persons who have profited greatly from the farming of the public revenues are compelled to take them on the same terms on which they formerly held them, if the same amount cannot be obtained from others.

12. *Ulpianus, On the Edict, Book XXXVIII.*;

There is no one who is not aware of the audacity and insolence of farmers of the revenue, and therefore the Prastor promulgated this Edict for the purpose of controlling them.

(1) "If anyone belonging to the household of a farmer of the revenue is accused of having committed theft, or has caused unlawful injury, and the property in question is not produced, I shall grant an action against the master, without the privilege of surrendering the slave by way of reparation."

(2) It must be noted that, in this instance, the slaves of the farmer of the revenue are meant by the term "household." If, however, a slave belonging to another should be in the service of the farmer of the revenue, in good faith, he will also be included.

Perhaps this would also be the case where he served him in bad faith, for wandering and fugitive slaves are often employed in work of this kind by persons who know who they are.

Hence, if a freeman is serving in good faith as a slave, this Edict will also apply to' him.

(3) Those also are called farmers of the revenue who lease the income from public lands.

13. *Gaius, On the Provincial Edict, Book XIII.*

They also are included under the term farmers of the revenue who lease the income from salt pits, quarries, and mines belonging to the State.

(1) This Edict also applies to one who leases from the govern-[1] ment the collection of taxes from a municipality.

(2) He who has a number of seditious slaves employed will be liable for the acts of one of them, if he should sell or manumit him, or even if the slave should take to flight.

(3) But what must be done if the slave should die? Let us see whether the farmer of the revenue will be responsible, as for his own act. I think that he should be released from liability, as he had not the power of producing the slave, and was not guilty of fraud.

(4) We grant this action as perpetual, and it will pass to the heir and other successors.

14. *Ulpianus, Disputations, Book Vill.*

The confiscation of property on the ground of non-payment of taxes also extends to the heir, for what is confiscated immediately ceases to belong to the party who committed the crime, and the ownership of the same is acquired by the Treasury. Therefore, proceedings for confiscation can be instituted against the heir, just as against any possessor whomsoever.

15. *Alfenus Varus, Digest, Book VII.*

When the Emperor leased the quarries of the island of Crete, he inserted the following clause in the lease: "No one except the farmer of the revenue shall make an excavation, or remove, or take out a single stone from the quarries of the Island of Crete, after the *Ides* of March." A ship belonging to a certain individual, which was loaded with flints, having departed from the harbor of Crete before the *Ides* of March, was driven back into the harbor by the wind and departed the second time after the *Ides* of March.

Advice was asked whether the flints should be held to have been removed contrary to law after the *Ides* of March. The answer was that although the harbors, which themselves were parts of the island, should all be considered as belonging to it, still, as the vessel, having left the port before the *Ides* of March, was driven back to the island by a storm, and afterwards departed, it should not be held to have done so in violation of law; especially as the flints must be considered to have been removed before the time prescribed, since the ship had already left the harbor.

16. *Marcianus, On Informers.*

Sometimes a slave, who has been confiscated, should not be sold, but his appraised value should be paid by his owner, instead. For the Divine Severus and Antoninus stated in a Rescript that where a slave, who was said to have transacted the business of his master, is confiscated, he should not be sold; but his appraised value should be paid in accordance with the judgment of a good citizen.

(1) The same Emperors stated in this Rescript that if the slave should fail to file a proper account, and was proved to have rendered himself liable to confiscation, or was alleged to have corrupted the wife of his master, or had committed any other serious offence, the deputy of the Emperor should take cognizance of the matter, and if the slave is found to be guilty, his value should be appraised, and he must be delivered up to his master to be punished.

(2) The Divine Severus and Antoninus also stated in a Rescript, that where slaves have made themselves liable to confiscation, their *peculium* is not included unless property forming part

of it should itself have become subject to forfeiture.

(3) Where anyone does not declare, as liable to taxation, slaves whom he is transporting either to be sold, or employed, he will incur the penalty of confiscation; still, this applies only to newly acquired slaves, and not to such as are old. Old slaves are those who have been in servitude for an entire year, in a town; new ones, however, are understood to be such as have not yet been in servitude for a year.

(4) Slaves, who are in flight, are not liable to confiscation, as they went away without the consent of their masters. This has been expressly provided by the Imperial Constitutions, as the Divine Pius frequently stated in Rescripts that it was not in the power of slaves to escape the control of their masters by taking to flight, if the latter were unwilling, or were not aware of the fact.

(5) The Divine Hadrian decided that, although a person may allege ignorance, he will, nevertheless, be liable to the penalty of confiscation.

(6) The Divine Marcus and Commodus also stated in a Rescript that a farmer of the revenue was not to blame for not instructing those who violated the law, but that he must be careful that those who were willing to declare their property for taxation should not be deceived.

(7) Merchandise subject to duty is as follows: cinnamon, long pepper, white pepper, pentaspherum, Barbary leaf, costum, costamo-mum, nard, Turian cassia, the wood of the cassia tree, myrrh, amo-mum, ginger, malabathrun, Indian spice, chalbane, benzoin, assafoetida, aloes, wood, Arabian onyx, cardamon, cinnamon wood, flax, Babylonian furs, Parthian furs, ivory, Indian iron, linen, all precious stones, pearls, sardonyx, crystals, hyacinths, emeralds, diamonds, sapphires, beryls, callaini, Indian drugs, Sarmation cloth, silk and muslin, painted hangings, fine fabrics, silk goods, eunuchs, Indian lions and lionesses, male and female panthers, leopards, purple, wool, crimson dye and Indian hair.

(8) The Divine Brothers stated in a Rescript that if a cargo was unavoidably exposed to bad weather it should not, on this account, be confiscated.

(9) The Divine Pius stated in a Rescript that where a person, said to .be a minor under twenty-five years of age, declared that his slaves were for his own use, and he made a mistake, merely in the return of said slaves, he should be excused.

(10) The Divine Brothers also stated in a Rescript that where the slaves of anyone became liable to confiscation, not through fraud, but through mistake, the farmers of the revenue should remain content with double the amount of the tax, and should restore the slaves to the owner.

(11) The great Antoninus stated in a Rescript that if a tenant, or his own slaves, should unlawfully have a manufactory of arms on the land of the owner, without his knowledge, he would not be liable to any penalty.

(12) If anyone should make a declaration to a farmer of the revenue, and does not pay the tax, and it should be remitted by the farmer of the revenue (as is customary at times), the Divine Severus and Antoninus stated in a Rescript that the property should not be confiscated; for they say that there is no ground for confiscation after the declaration has been made, as what is due to the Treasury can be collected from the property of the farmers of the revenue, or from that of their sureties.

(13) Penalties cannot be collected from heirs where proceedings were not instituted during the lifetime of the person who was delinquent. This rule, as is the case with other penalties, is also applicable to those relating to taxation.

(14) The Divine Severus and Antoninus stated in a Rescript that if a farmer of the revenue, through the mistake of the person making payment, receives more than is due, he must refund

it.

TITLE V.

CONCERNING DONATIONS.

1. *Julianus, Digest, Book XVII.*

There are several kinds of donations. A person makes a donation with the understanding that the property will at once belong to the person who receives it, and will, under no circumstances, revert to himself, and he does this for no other reason than to display his liberality and munificence. This is what is properly called a donation.

Another gives something with the understanding that it will only become the property of the person who receives it, if something else takes place. This is not properly styled a donation, for it is a conditional gift. Likewise, when anyone gives something with the intention that it will immediately become the property of the person who receives it, but if something either happens, or does not happen, he wishes it to be returned to him; this is not properly called a donation, but it is merely a gift, which is dependent upon a condition; as, for instance, a donation *mortis causa.*

(1) Therefore, when we may say that a donation between betrothed persons is valid, we use the term in its correct sense, and we understand by it anything given by a person who bestows it for the sake of liberality in order that it may immediately become the property of the one who receives it, and that, under no circumstances, he desires it to be returned to him. And when we say that a man gives a donation to his betrothed with the understanding that, if the marriage should not take place, the gift may be returned, we do not contradict what was previously stated, but we mean that a donation can be made between such persons, and may become void under a certain condition.

2. *The Same, Digest, Book LX.*

When a son under paternal control desires to make a donation of money, he promises it by the order of his father, and the donation will be just as valid as if he had furnished a surety.

(1) If, however, the father, being about to donate the money to Titius, should order his son to promise it to him, it may be said that there is a difference if the son is indebted to his father, and if he is not. For where he owes his father a sum equal to what he promises, the donation is considered valid, just as if the father had ordered any other debtor to promise the money.

(2) If, however, I am about to donate money to Titius, and I order you who intend to give me an equal sum, to promise it to Titius, the donation is complete, as far as all the persons are concerned.

(3) A different rule of law will apply if, by your order, I promise to pay to someone, to whom you wish to make a donation, the money which I think that I owe you, for I can protect myself by an exception on the ground of fraud; and, moreover, I can compel the stipulator, by means of the proceeding called *incerti,* to give me a release from the obligation.

(4) In like manner, if I, by your order, promise to pay a certain sum of money, which I think that I owe you, to a third party whom you believe to be your creditor, I can bar the person making the demand by an exception on the ground of fraud; and, in addition to this, by availing myself of the proceeding called *incerti* against the stipulator, I can compel him to release me from the stipulation.

(5) If Titius should pay me a sum of money without any stipulation, but on the condition that it will only belong to me when Seius becomes Consul, the money will become mine when Seius obtains the consulship, even though the person who made the donation should be insane or dead at that time.

(6) If anyone, desiring to make a donation of money to me, gives it to someone else to bring to me, and he should die before he does so, it is settled that the ownership of the money does not pass to me.

(7) I gave Titius the sum of ten *aurei* on the condition that he would purchase Stichus with it. I ask, if the slave should die before he was purchased, whether I can recover the ten *aurei* by any action. The answer was that this is rather a question of fact than of law, for if I gave the ten *aurei* to Titius in order that he might purchase Stichus, and I would not have given them to him otherwise, and Stichus should die, I can recover the amount by an action. If, however, I had the intention of giving the ten *aurei* to Titius, in any event, and, in the meantime, he proposed to purchase Stichus, and I stated that I gave him the money in order that he might purchase him, what I have said should be considered rather a reason for the donation than the condition upon which the money was paid, and if Stichus should die, the money will remain in the hands of Titius.

3. *Ulpianus, On the Edict, Book LXVII.*

And, generally speaking, this question must be considered in making donations, for there is a great deal of difference whether there was a cause for making the donation, and whether a condition upon which it is dependent was imposed. If there was a cause, the property cannot be recovered; if a condition was imposed, there will be ground for its recovery.

4. *Paulus, On Sabinus, Book LXXII.*

A donation can be completed even by a party who intervenes.

5. *Ulpianus, On Sabinus, Book XXXII.*

Neither honorable nor dishonorable donations are prohibited, where they are made on account of affection. They are honorable where they are given to deserving friends or relatives; dishonorable, where they are given to harlots.

6. *The Same, On Sabinus, Book XL1I.*

Where anyone permits me, by way of donation, to remove stone from his property, as soon as the stone is taken out it will be mine, and he cannot prevent me from having it by forbidding its removal, because it becomes mine, as it were, by delivery. It is clear that if someone, who had been employed by me, should quarry the stone, he quarries it for me.

If, however, anyone purchases the stone from me, or leases it for a consideration, in such a way that I can permit him to quarry for himself, and, before he does so, I change my mind, the stone will continue to belong to me. If I should change my mind afterwards I cannot revoke his act, as delivery is presumed to have been made when he quarried the stone with the consent of the owner. What applies to the stone should also be considered to apply where a tree is cut down, or is taken out by the roots, under similar circumstances.

7. *The Same, On Sabinus, Book XLIV.*

A son under paternal control cannot make a donation even if he has free administration of his *peculium,* for this is not granted him in order that he may lose his property.

(1) But what if, induced by some good reason, he makes a donation? Can it be said that there is legal ground for making it? The latter is the better opinion.

(2) Again, let us see if anyone should grant a son under paternal control the free administration of his *peculium,* and should add specifically that this is done to enable him to make a donation; will the donation be valid? I do not doubt that he can make a valid donation under such circumstances.

(3) Sometimes the power to make a donation may be inferred from the rank of the person; for suppose that the son was of senatorial rank, or had been promoted to some other portion, why

can it not be said that his father, when he gave him the free administration of his *peculium,* granted him also the privilege of making a donation of it, unless he expressly deprived him of the power of doing so?

(4) For the same reason that a son under paternal control is forbidden to make a donation *inter vivos,* he is also forbidden to make one *mortis causa.* For although he can make a donation *mortis causa* with the consent of his father, he is prohibited doing so if his consent is not given.

(5) It must, however, be remembered that if anyone is permitted to make a donation without it being specified that he can make one *mortis causa,* he cannot do so.

(6) All these regulations apply to persons in civil life. Where, however, soldiers have a *castrense* or a *quasi castrense peculium,* they are in such a position that they can make a donation *mortis causa* as well as a donation *inter vivos,* since they have testamentary capacity.

8. *Paulus, On Sabinus, Book XV.*

Money paid by freedmen in order to obtain their liberty is not a donation, for a consideration is given for it.

9. *Pomponius, On Sabinus, Book XXXIII.*

When permission is given anyone to lodge without payment in the house of another, it is considered a donation; for he who has the lodging is held to obtain as a gift the rent which he does not pay. A donation can also be valid without the delivery of the property; as, for instance, where, by way of donation I make an agreement with my debtor that I will not demand payment of him before a certain time has elapsed.

(1) The income from property which is donated is not included as part of the donation. If, however, I should give you, not the ownership of a tract of land, but the right to gather the crops, this will be held to constitute a donation.

(2) If a son under paternal control makes a donation by the order, or with the consent of his father, it is the same as if the father himself had made it, or if you should make a donation to Titius of my property with my consent in your own name.

(3) No one can make a donation, unless what is given becomes the property of the person to whom it is made.

10. *Paulus, On Sabinus, Book XV.*

A donation can properly be made to a person who is absent, whether you send someone to take it to him, or whether you direct him to keep something which he has in his possession. If, however, he does not know that the property which is in his possession is given to him, or if, after it is sent to him, he should not accept it, he will not become the owner of the article designated, even if it has been sent to him by his own slave; unless it was given to the latter with the intention that it should instantly become the property of his master.

11. *Gaius, On the Edict of the Urban Prsetor Concerning Legacies.*

When a dispute arises with reference to the amount of the donation, neither the children of female slaves, crops, rents, nor wages are held to be included.

12. *Ulpianus, Disputations, Book III.*

Anyone who binds himself to make a donation can, according to a Rescript of the Divine Pius, only be sued for an amount which he is able to pay, for what he owes to his creditors must first be deducted; but what he is bound to give in the same manner to others should not be deducted.

13. *The Same, Disputations, Book VII.*

A certain person, who desired to make a donation to me, delivered the property to a slave jointly owned by Titius and myself, and the slave received it as an acquisition for my fellow joint owner, or did so on behalf of both of us. The question arose, what should be done? It was decided that although the slave accepted the property with the intention of acquiring it for my fellow joint owner, or for both himself and me, he, nevertheless, acquired it for me alone. For if he delivered it to my agent, with the intention that he should acquire it for me, and he accepted it in order to obtain it for himself, this will have no effect so far as he is concerned, but he will acquire the property for me.

14. *Julianus, Digest, Book XVII.*

Anyone who cultivates the land of another, by way of making a donation, cannot reserve anything on account of expenses which he may incur, because he immediately transfers to the owner the right to any implements which he takes upon the land.

15. *Marcianus, Institutes, Book III.*

According to a Constitution of the Divine Severus and Antoninus, donations made after the accusation of a capital crime are valid, unless the defendant is convicted.

16. *Ulpianus, Opinions, Book II.*

By the following clause, "Let my heirs take notice that my entire wardrobe, and any other property which I had in my possession at the time of my death, has been given to So-and-So and So-and-So, my freedmen," the ownership of the property will, by a liberal interpretation, belong to the said freedmen.

17. *The Same, On the Edict, Book LVIIL*

Where property awarded by a judicial decision has been included in a new stipulation, and a release had been made of the latter for the purpose of making a donation, it must be said that the release will be valid.

18. *The Same, On the Edict, Book LXXI.*

Aristo says that when any other transaction is mixed with a donation, an obligation growing out of the former is not contracted with reference to the donation. Pomponius also says that he holds the same opinion.

(1) He also says that Aristo thinks that if I deliver to you a slave on condition that you manumit him after five years, you cannot act before the five years have elapsed, because a species of donation is considered to be included in the transaction. He, however, states that it will be otherwise if I deliver the slave to you in order that you may manumit him immediately; for, in this instance, there is no donation, and hence the obligation exists.

Pomponius, however, says that in the first instance the intention of the parties should be ascertained, for the term of five years may not have been prescribed with a view to making a donation.

(2) Aristo also says, that if a slave is delivered for the purpose of making a donation on condition that he shall be manumitted after five years have elapsed, and the slave belongs to another, a doubt may arise whether the slave can be acquired by usucaption, because a species of donation exists in this case.

Pomponius says that this question also applies to donations *mortis causa,* and he is inclined to think that if the slave was donated under the condition that he be manumitted after five years, it may be held that he can be acquired by usucaption.

(3) Labeo says that if anyone should give me property belonging to another, and I should incur considerable expense on account of it, and then it should be evicted, I will not be entitled to any action on this account against the donor; but it is evident that I will be entitled

to one against him on the ground of fraud, if he acted in bad faith.

19. *The Same, On the Edict, Book LXXVI.*

It is our practice where, in public matters, a question arises with reference to a donation, to only ascertain whether the donor made a promise to the city for some just cause, or not; since if he did so in consideration of some office which he received, he will be liable; otherwise, he will not.

(1) Labeo says that compensation for services of this kind is not included in donations; for example, if they are made conditionally as follows, "If I come to your aid; if I give security for you; if you make use of my services, or influence in the transaction."

(2) A donation cannot be acquired by anyone who is unwilling to accept it.

(3) Where a man le'nds money to Titius to be paid to Seius, to whom he desires it to be donated, and Titius does not pay it to Seius until after the death of the donor; the result will be that it can be said that the money will belong to Seius, whether he who paid it knew that the donor was dead, or was not aware of that fact; because the money still belonged to the latter.

If he did not know that the donor was dead, he will be released from his obligation, if he borrowed the money to be paid to Seius. If, however, I should direct you to pay a certain sum of money to Titius, to whom I intend to donate it, and you not being aware that I was dead should do so, you will be entitled to an action on mandate against my heirs; but if you knew it, you will not be entitled to this action.

(4) If anyone lends money to a slave, and the slave, having afterwards become free, makes a new promise to pay it, this will not be a donation, but the acknowledgment of a debt. The same rule applies to the case of a ward, who becomes indebted without the authority of his guardian, if he afterwards, with the consent of his guardian, contracts a new obligation.

(5) Stipulations which are entered into for a valid consideration are not held to be donations.

(6) In conclusion, Pegasus thinks that if I promise you a hundred *aurei,* under the condition that you swear to bear my name, this will not be a donation, because the promise was made for a consideration, and a consideration was paid.

20. *Marcellus, Digest, Book XXII.*

If a patron is appointed heir to the share of an estate to which he is legally entitled, and his freedman charges him to pay a certain sum of money to someone, and he promises to do so in the presence of the beneficiary of the trust, he will not be compelled to pay it, for fear that the share due to him as patron under the law may be diminished. (1) A doubt may arise with reference to an heir who, in accordance with the will of the testator, promises to pay a legatee what he would have a right to retain under the Falcidian Law, but the better opinion is that he cannot violate his obligation. For if he does make payment, he will be considered to have exactly complied with the wishes of the testator, and no suit for recovery will be granted him; just as where he had made a previous stipulation, and acted contrary to the wishes of the testator, which he already had acknowledged, his claim will, with good reason, be barred.

21. *Celsus, Digest, Book XXVIH.*

In order to make me a donation you bound yourself to my creditor, to whom I delegated you. The act is valid, for the creditor receives what he is entitled to.

(1) If, however, I order my debtor to bind himself to you for the purpose of making you a donation greater than that authorized by law, the question arises whether or not you can be barred by an exception upon the ground of the donation. My debtor cannot avail himself of the exception against you, if you bring an action, because I am in the same position as if I had given you the amount, after having collected it from my debtor, and you had lent it to him.

If the money has not been paid by my debtor, I will be entitled to an action against him to annul anything which he has promised you above the amount authorized by law, so that he will only remain liable to you for the balance. If, however, you have already collected the entire amount from my debtor, I will be entitled to an action against you to recover the excess of what the law prescribes.

22. *Modestinus, Differences, Book Vill.*

It is perfectly equitable that he who has promised a sum of money, or anything else, for the purpose of making a donation, shall not be liable for interest on account of delay in paying the money; and this is especially the case where the donation is not included in the class of *bona fide* contracts.

23. *The Same, Opinions, Book XV.*

Modestinus gives it as his opinion that a creditor can, by mere agreement, entirely remit or diminish the amount of interest to be due hereafter, without affecting the validity of the donation on the ground that the amount is illegal.

(1) It is the opinion of Modestinus that a person whose mind is affected cannot make a donation.

24. *Javolenus, On Cassius, Book XIV.*

An exception should be granted to the surety of him who, for the purpose of making a donation, promised a sum of money greater than that authorized by law, even against the consent of the principal; for if the latter should not be solvent, the surety will lose the money.

25. *The Same, Epistles, Book VI.*

If I give you something in order that you may donate it to Titius, in my name, and you give it to him in yours, do you think that it becomes his property? The answer was that if I give you something for you to give to Titius in my name, and you give it to him in your own name, so far as the technicality of the law is concerned, it does not become the property of the person who receives it, and you will be liable for theft; but the more liberal construction is that if I bring an action against the person who has received the property, I can be barred by an exception on the ground of fraud.

26. *Pomponius, On Quintus Mucius, Book IV.*

A simple statement in an account does not render anyone a debtor; for instance, if we wish to make a donation to a freeman, we can make the statement in our account that we owe it, but no donation is understood to be made.

27. *Papinianus, Questions, Book XXIX.*

A young man named Aquilius Regulus wrote to Nicostratus, his teacher of rhetoric, as follows: "Because you have always remained with my father, and have benefited me by your eloquence and your care, I give, and permit you to lodge in and make use of, such-and-such an apartment." Regulus having died, the right of Nicostratus to the apartment was disputed; and when he consulted me, I told him that the act of Regulus could not be maintained to be a mere donation, but that he had remunerated him for his services, and granted him this privilege by way of compensation, and therefore, that the donation should not be held to be void for the time following the death of Regulus.

If Nicostratus had been ejected, he could have gone into court and protected himself by an interdict, in the same way in which an usufructuary could have done, as he obtained the use of the apartment through having been given possession of the same.

28. *The Same, Opinions, Book III.*

A father donated an estate, which had been left to him, to his daughter, who had become her own mistress. The daughter must satisfy the creditors of the estate, and if she should not do so, and the creditors should have recourse to her father, she can be compelled by an action *prsescriptis verbis* to defend her father against the creditors.

29. *The Same, Opinions, Book XII.*

A donation is held to be made if property is given when the donor is not compelled to do so by any law.

(1) A certain person, having been interrogated in court, answered that the heirs of his guardian did not owe him anything. I gave it as my opinion that, by doing so, he had lost his right of action, for although these words may be understood to indicate not a business transaction, but a donation, still, he who has made an admission in court cannot contradict it.

(2) It has been settled that where anyone makes a donation of a portion of the estate of his next of kin, who is still living, it is void.

But it was held that if he who made the donation afterwards succeeded to the estate under the praetorian law, all suits arising from it should be refused him, because his acting in such haste was contrary both to good morals and the Law of Nations.

30. *Marcianus, On Informers.*

For he should be deprived of the estate as being unworthy of it.

31. *Papinianus, Opinions, Book XIII.*

It is established that donations made to a concubine cannot be revoked, for not even if marriage should afterwards be contracted by the parties, will what formerly was valid by law become of no force or effect? But where the question was asked if marital honor and affection did not already exist, I answered that this should be determined by considering the character of the persons and the nature of their union in life, for a mere written contract does not constitute marriage.

(1) Where certain property was given by a mother to the husband of her daughter, in addition to the dowry, I gave it as my opinion that it should be considered to have been given to the daughter, who herself was present, and delivered it to her husband; and that the mother, who was offended, had no right to recover the property, nor could she under the law bring a personal action to do so, because the husband had specifically provided that the said property should be given to him for the benefit of the girl, in addition to her dowry; since by this statement, not only was the character of the donation indicated, and it was clear that the property was not separated from the use of the same, but it also showed that it was a *peculium* separate and distinct from the dowry.

The magistrate, however, should determine whether the mother should recover the property if she was justly offended with her daughter, and he must render a decision with proper regard to the respect to be manifested toward a mother, and one which will coincide with the judgment of a good citizen.

(2) A father who gave certain slaves to his daughter, who was under his control, and did not deprive her of her *peculium* when he emancipated her, is held to have perfected the donation by his subsequent act.

(3) I gave it as my opinion, that where property was deposited in a temple under the condition that he alone could remove it who left it there, or JSlius Speratus, after the death of the owner, it would not be considered as a donation.

(4) Donations cannot be valid after the crime of treason has been committed, as the heir is also liable, even though the guilty party should die before having been convicted.

32. *Scaevola, Opinions, Book V.*

Lucius Titius sent the following letter: "So-and-So to So-and-So, Greeting. You can make use of such-and-such an apartment and all the rooms above it, gratuitously; and I notify you by means of this letter that you can do so with my consent."

I ask whether the heirs of the writer can forbid the use of the apartment? The answer was that, according to the facts stated, the heirs of the person who wrote the letter can change the intention of the latter.

33. *Hermogenianus, Epitomes of Law, Book VI.*

Anyone who has made a new promise to pay, after having entered into an agreement to make a donation, can be sued in an action based on the promise, not for the entire amount, but only for what he is able to pay; for it has been settled that the cause and origin of the promise to make payment, and not the authority of the judge, must be considered. He, however, who has had judgment rendered against him on account of a donation, and an action is brought against him to enforce the judgment, can very properly ask that he only be sued to the extent of his pecuniary resources.

(1) Where money has been paid to Titius as a donation, under the condition that he will immediately lend it to the donor, the transfer of ownership is not prevented; and for this reason where the same money is lent to the donor, a new ownership of it is acquired.

(2) Persons who are dumb and deaf are not prohibited from making donations.

(3) When anyone desires to make a donation to you, and you intend to donate the same article to another, the donation will be perfected if the first promises, with your consent, to give it to the second; and because the first gave nothing to the second, by whom he can be sued, he can have judgment rendered against him for the entire amount, and not for as much as he is able to pay.

The same rule is observed where he who is to receive the donation has delegated the donor to his creditor; for, in this instance, the creditor is merely transacting his own business.

34. *Paulus, Decisions, Book V.*

If a father should lend money at interest in the name of his emancipated son, with the intention of giving it to him as a donation, and the son makes a stipulation with reference to said money, there is no doubt that the donation is perfected by operation of law.

(1) If anyone should rescue a person from the hands of robbers, or enemies, and receive something from him as a reward for doing so, a donation of this kind is irrevocable, and should not be designated a reward for an eminent service rendered; as it has been decided that no limit should be fixed to an act performed for the purpose of saving life.

35. *Scsevola, Digest, Book LI.*

A man wrote to a slave whom he had manumitted, as follows: "Titius to Stichus, his freedman, Greeting. After having manumitted you I notify you by this letter, written by my own hand, that I give to you everything which you have in credits, in movable property, and in money." He also made the same freedman heir to two-thirds of his estate by will, and Sempronius his heir to the remaining third; but he did not bequeath to Stichus his *peculium,* nor did he direct that he should have the rights of action growing out of the same.

The question arose whether an action should be granted to Stichus for the entire amount of the credits, including his *peculium;* or whether it should be granted to both of the heirs in proportion to their respective shares of the estate. The answer was that, in accordance with the facts stated, the action should be granted to both of them in proportion to their respective shares of the estate.

(1) Lucius Titius gave to Msevia a tract of land, by way of a donation, and a few days afterwards before delivering the same, he pledged the land to Seius, and then, within thirty days, gave Msevia possession of the said land. I ask whether the donation was perfected or not. The answer was that, in accordance with the facts stated, it was perfected, but that the creditor was undoubtedly entitled to his right in the land under the pledge.

(2) A grandmother lent money, in the name of Labeo, her grandson, and always collected the interest, and the evidences of indebted-* ness were received by Labeo, and were afterwards found among the assets of his estate. I ask whether the donation should be considered to have been perfected. The answer was that, as the debtors were liable to Labeo, the donation was perfected.

TITLE VI.

CONCERNING DONATIONS AND OTHER ACQUISITIONS MORTIS CAUSA.

1. *Marcianus, Institutes, Book IX.*

A donation *mortis causa* is one where the party wishes to retain the property himself instead of transferring it to him to whom he donates it, but prefers that the donee shall have it rather than his heir.

(1) Telemachus gives a donation of this kind to Piraeus, in Homer.

2. *Ulpianus, On Sabinus, Book XXXII.*

Julianus, in the Seventeenth Book of the Digest, says that there were three kinds of donations *mortis causa.* The first, where the donor, who is under no apprehension of impending death, makes a donation solely with a view to his decease. He says another kind of donation *mortis causa* is where anyone is disturbed by the immediate prospect of death and makes a donation, so that the article immediately becomes the property of the person who receives it. He says that the third kind of donation is where a man, apprehensive of death, does not give the property so that its ownership will immediately vest in the person entitled to it, but provides that it shall belong to him after the death of the donor.

3. *Paulus, On Sabinus, Book VII.*

It is lawful to make a donation *mortis causa* not only when a person is induced to do so by failing health, but also because of the danger of impending death, either at the hands of enemies, or robbers; or on account of the cruelty or hatred of some powerful man, or when anyone about to undertake a sea voyage;

4. *Gaius, Diurnal or Golden Matters.* Or travel through dangerous places,

5. *Ulpianus, Institutes, Book II.*

Or where one is exhausted by old age:

6. *Paulus, On Sabinus, Book VII.*

For all these conditions indicate impending danger.

7. *Ulpianus, On Sabinus, Book XXXII.*

If anyone convicted of a capital crime should make a donation *mortis causa,* the donation will be annulled as imperfect; although other donations made by him previous to the suspicion that he was liable to such a penalty may be valid.

8. *The Same, On Sabinus, Book VII.*

Where anyone, having received a sum of money, rejects an estate, whether it passes to a substitute, or whether an heir succeeds to it on the ground of intestacy, he is considered to have obtained the money *mortis causa;* for whatever is acquired on account of the death of

anyone is obtained *mortis causa.*

Julianus adopts this opinion, and we make use of it. For where anything is received by a slave, who is to be free under a certain condition, for the purpose of complying with the condition; or anything is obtained by a legatee *mortis causa;* or where a father gives anything on account of the death of his son, or of a relative; Julianus states that it is acquired *mortis causa.*

(1) Hence, he says that a donation can be made in such a way that it will revert to the donor, if the sick person should recover.

9. *Paulus, On Sabinus, Book HI.*

Everyone is permitted to acquire a donation *mortis causa* who has the right to receive a legacy.

10. *Ulpianus, On Sabinus, Book XXIV.*

It is settled that he to whom a donation *mortis causa* is made can be substituted in such a way that he can promise the property to someone else, if the latter cannot himself acquire it, or cannot do so under some other condition.

11. *The Same, On Sabinus, Book XIII.*

A father can legally make a donation on account of the death of his son, even during the existence of his son's marriage.

12. *The Same, On Sabinus, Book XLIV.*

Where a woman fraudulently asks to be placed in possession of an estate in the name of her unborn child, and receives money on this account, in order to favor a substitute, or to exclude the appointed heir, for some reason or other, Julianus frequently stated that she obtained this money *mortis causa.*

13. *Julianus, Digest, Book XVII.*

If I give property belonging to another as a donation *mortis causa,* and it should afterwards be acquired by usucaption, the true owner cannot recover it, but I can do so, if I regain my health.

(1) Marcellus says that questions of fact may arise with reference to donations *mortis causa,* for the donation may be made in such a way that if the donor should die of his illness, it shall not be returned; or that it shall be returned if the donor, having changed his mind, desires it to be restored to him, even if he should die of the same illness.

A donation of this kind can also be made subject to the provision that it shall not be returned unless the person who is to receive it dies first. A donation *mortis causa* can be made in such a way that the property shall not be returned in any event; that is to say, not even if the donor should recover his health.

14. *Julianus, Digest, Book XVIII.*

Where a tract of land is donated *mortis causa,* and necessary and useful expenses are incurred with reference to it, parties bringing an action to recover the land can be barred by an exception on the ground of fraud, unless they reimburse the donee for the said expenses.

15. *The Same, Digest, Book XXVII.*

Marcellus says that where sons under paternal control, who are serving in the army, have obtained the unrestricted right to dispose of their property by will to anyone whom they may select, it may be held that they are also released from the observance of the ordinary formalities required in the case of donations *mortis causa.* Paulus says, with reference to this, that it is established by the Imperial Constitutions that donations *mortis causa* can be revoked

in the same way as legacies.

16. *Julianus, Digest, Book XXIX.*

A donation *mortis causa* can be revoked even while it is yet uncertain whether or not the donor can recover his health or not.

17. *The Same, Digest, Book XLVII.*

Even if a debtor may not have had the intention to defraud his creditors, his donee can be deprived of property given to him *mortis causa;* for, as legacies bequeathed by the will of a person who is insolvent are absolutely void, it can be held that donations *mortis causa* made under such circumstances should also be annulled because they resemble legacies.

18. *The Same, Digest, Book LX.*

We obtain a donation *mortis causa* not only when anyone gives it to us on account of his death, but also where he makes the donation dependent on the death of another, as, for instance, if anyone should give to Msevius a donation in case of the death of his son, or his brother, under the condition that if either of them should recover from his illness, the property shall be restored to him, but if either of them should die, it will belong to Msevius.

(1) If you should make a donation *mortis causa* to me, by directing your debtor to pay my creditor, I shall, in any event, be held to be entitled to as much money as will release me from liability to my creditor. If, however, I should make a stipulation with your debtor, I will be considered to be entitled to only as much as the debtor is able to pay. For even if you, being the creditor, should recover your health, and the donor should do the same, you can only bring an action for recovery, or one *in factum* for an amount equal to the obligation of the debtor.

(2) Titia, desiring to donate to her debtors Septitius and Msevius their promissory notes, gave them to Ageria, and asked her to give them to the said debtors, if she, Titia, should die, but if she should be restored to health, to return them to her. She, having died, Msevia, the daughter of Titia, became her heir; but Ageria gave the notes to the above-mentioned Septitius and Msevius, as she had been requested to do. The question arises if Msevia, the heir, brought an action to recover the sum due on the above-mentioned notes, or one to recover the notes themselves, whether she could be barred by an exception. The answer was that Msevia could be barred by an exception based on the execution of the contract, or by one on the ground of fraud.

(3) Where anyone has received a slave by way of satisfaction for damages caused by him, or for some other liability, as a donation *mortis causa,* he is understood to have only acquired as much as the slave can be sold for.

The same rule should be observed with reference to a tract of land which is encumbered, in order to ascertain the value of what is donated.

19. *The Same, Digest, Book LXXX.*

Where property is donated *mortis causa* to a son under paternal control, and the donor is restored to health, he can bring an action *De peculio* against his father. But if the head of the household receives the donation *mortis causa,* and then gives himself in adoption, the property given can be recovered by the donor.

This case is not similar to that where he who receives a donation *mortis causa* gives it to another, for the donor cannot recover from him the property itself, but only its value.

20. *The Same, On Urseius Ferox, Book I.*

A tract of land is devised to a person who cannot legally acquire but a portion of it, under the condition that he will pay ten *aurei* to the heir. He is not required to pay the entire sum in order to obtain his share of the land, but only an amount in proportion to the legacy which he

is entitled to receive.

21. *The Same, On Urseius Ferox, Book II.*

Several authorities, and among them Priscus, have held that a person who receives a sum of money to induce him to accept an estate obtains the money *mortis causa.*

22. *Africanus, Questions, Book I.*

In the case of a donation *mortis causa,* where the capacity of anyone to receive the property is the subject of investigation, the time of death, and not that of the donation should be considered.

23. *The Same, Questions, Book II.*

Where a donation *mortis causa* is made to a son under paternal control, and he dies during the lifetime of the donor, but his father survives, the question arises, what is the rule of law in a case of this kind? The answer was that, by the death of the son, an action to recover the property will lie; provided the donor had the intention of giving it to the son rather than to the father. Otherwise, if the agency of the son was only employed for the benefit of his father, then the death of the father must be taken into consideration.

The same rule will apply where a question arises with reference to the person of a slave.

24. *The Same, Questions, Book IX.*

When a release is given to a debtor as a donation *mortis causa,* and the donor recovers his health, he can collect the debt, even if the debtor has been released by lapse of time; for, by the release, the creditor has renounced his claim under the prior obligation, and it has been merged in the right to recover the donation.

25. *Marcianus, Institutes, Book IX.*

A donation *mortis causa* can be made whether the party executes a will or not.

(1) A son under paternal control, who cannot make a will even with the consent of his father, can, nevertheless, make a donation *mortis causa,* if his father permits him to do so.

26. *The Same, Rules, Book II.*

Where two persons make reciprocal donations, *mortis causa,* of the same property, and both of them die, the heir of neither can recover the property, for the reason that neither one survives the other.

The same rule of law will apply, if a husband and wife should make reciprocal donations.

27. *The Same, Rules, Book V.*

Where a donation *mortis causa* is made in such a way that it cannot be revoked under any circumstances, it is rather a donation *inter vivos* than one *mortis causa.* Hence it should be considered as any other donation *inter vivos,* and will be void as between husband and wife; and the Falcidian Law will not apply, as it does in the case of donations *mortis causa.*

28. *Marcellus, Opinions.*

A nephew, desiring to make a donation *mortis causa* to his uncle of the amount which he owed him, made the following statement in writing, "I wish any registers or notes of mine, wherever they may be found, to be void, and that my uncle shall not be obliged to pay them." I ask, if the heirs bring suit to recover the money from the uncle of the deceased, whether they can be barred by an exception on the ground of fraud. Marcellus answered that they can be, for the heirs most assuredly are making a demand upon the uncle contrary to the wishes of the deceased.

29. *Ulpianus, On the Edict, Book XVII.*

Where property is donated *mortis causa,* and the donor recovers his health, let us see whether he will be entitled to an action *in rem.* If anyone should make a donation under the condition that, in case of death, the property should belong to the person to whom it was given, there is no doub: that the donor can recover it, and if he should die, he to whom.it was given can do so.

If the condition was that the donee should immediately have the property as his own, but should return it if the donor recovered his health, or returned after a battle or a long journey, it can be maintained that the donor will be entitled to an action *in rem,* if any of these events take place; but, in the meantime, the property will belong to the person to whom it was donated. If, however, he to whom the donation was made, should predecease the donor, it may be held that the latter will be entitled to an action *in rem.*

30. *The Same, On the Edict, Book XXI.*

Anyone who makes a donation *mortis causa,* and afterwards changes his mind, will be entitled to either an action to recover the property or to an equitable action.

31. *Gaius, On the Provincial Edict, Book Vill.*

Property is acquired *mortis causa* when an occasion arises for obtaining it on account of the death of anyone, except in such instances as have a particular designation; for it is certain that anyone who acquires property by hereditary right, or as a legatee or the beneficiary of a trust acquires it, on account of the death of another, but for the reason that these methods of acquiring property are designated by specific names, they are distinguished from the one in question.

(1) It is held by Julianus that, although the debtor who has been released may not be solvent, the donation will still be considered to have been made *mortis causa.*

(2) Property can also be acquired without a donation; as, for instance, where a slave or a legatee pays a sum of money for the purpose of complying with some condition, whether the person who receives it is a stranger, or an heir. The case is similar where anyone receives money to accept or reject an estate, or to refuse a legacy which has been bequeathed to him. Even a dowry which has been stipulated for and will belong to the husband if his wife should die, is evidently acquired *mortis causa,* and dowries of this kind are designated as returnable.

Again, anything which is donated *mortis causa,* or is given while in imminent danger of death, or with the expectation of mortality, for the reason that we understand that we will die sooner or later, is included in this category.

(3) If, with the intention of making a donation *mortis causa,* you should direct your debtor to make a new promise to my creditor to pay ten *aurei,* the question arises, what would be the rule of law if the debtor should not prove solvent? Julianus says that if I stipulate in this way, I shall be held to have obtained as much money as your debtor is able to pay; for he says if the donor recovers his health, he will only be entitled to obtain the new obligation of the debtor. If, however, my creditor should enter into the stipulation, I will be held to have received only as much money as I would have the right to be released from payment of to my creditor.

(4) When a debtor, who is poor, is released from his indebtedness by way of a donation, he is considered to have obtained all the money from the payment of which he was released.

32. *Ulpianus, On the Edict, Book LXXVI.*

A donation made *mortis causa* is not considered to be perfect until after the death of the donor.

33. *Paulus, On Plautius, Book IV.*

Where anyone acquires by usucaption property belonging to another which was donated

mortis causa, he is not considered to have obtained it from the party to whom the property belongs, but from him who gave him the opportunity for usucaption.

34. *Marcellus, Digest, Book XXVIII.*

A donation *mortis causa* can also be made, even if it can be proved that the donee stipulated for payment every year, as long as he lived; that is to say, that collection should begin after the death of the promisor.

35. *Paulus, On the Lex Julia et Pajna, Book VI.*

The Senate decreed that where donations *mortis causa* were made to those whom the law forbade to receive them, they are in the same position as persons to whom legacies are bequeathed by will, and who are not permitted by law to accept them. A great variety of questions have arisen under this Decree of the Senate, a few of which we shall mention.

(1) The word "donation" is derived from *donum,* meaning "presented with a gift." It is taken from the Greek, for the Greeks say *&apov \<ii Btapfo/Mu,* that is to say, "a gift and to give."

(2) A donation *mortis causa,* however, differs greatly from a genuine and absolute gift, which is made in such a way that it can, under no circumstances, be revoked; and where he who makes it would rather that the donee should have the property than he himself. On the other hand, he who makes a donation *mortis causa* thinks of himself and, through his love of life, prefers to keep the property, rather than to give it away. This is the reason why it is commonly said that the donor would rather have the property than allow him to whom he gives it to have it, but that he would rather that he should have it, than that it should pass to his heir.

(3) Therefore, he who makes a donation *mortis causa,* so far as his thoughts of himself are concerned, concludes a business transaction; that is to say, he imposes the condition that the property shall be returned to him if he is restored to health. The followers of Cassius entertained no doubt that the property could be recovered, as in the case of an unfinished transaction; for the reason that, where anything is given, it is done either that you may perform some act, or that I may perform one, or that Lucius Titius may do so, or in case some event takes place; and in all these instances, the property may be recovered by an action.

(4) A donation *mortis causa* is made in several different ways. Sometimes it is made by a man who is well and has no anticipation of immediate death, who enjoys excellent health, but who reflects that

man is liable to die. Sometimes it is made through the fear of death, either on account of present or future danger. For the danger of death may be apprehended on land and sea, in peace and in war, at home as well as in the army.

A donation may also be made under the condition that if the donor should die of his illness, the property shall not, under any circumstances, be returned; or that it shall be returned if he should change his mind, and desire it to be restored to him, even before he died of the same illness. A donation can also be made under the condition that it shall not be returned unless the person entitled to it dies before the donor. A donation *mortis causa* can also be made in such a way that it cannot be recovered in any event, that is, not even if the donor should recover his health.

(5) If anyone should form a partnership with another for the purpose of making a donation *mortis causa,* it must be said that the partnership is void.

(6) When a creditor wishes to make a donation *mortis causa* to two of his debtors, of what they owe him, and releases one of them from liability, and regains his health, he can sue either one of them that he may select.

(7) He who stipulates for the payment of a sum of money annually as a donation *mortis causa* does not resemble the person to whom a legacy, payable annually, has been bequeathed; for

although there are many legacies, still there is only one stipulation, and the status of him to whom the promise was made must always be considered.

36. *Ulpianus, On the Lex Julia et Papia, Book Vill.*

Where anything is given for the purpose of complying with a condition, although it may not be derived from the estate of the deceased, still, he whom the law says shall only receive a certain amount cannot receive a larger sum than that fixed by law. It is certain that where a sum of money is paid by a slave for the purpose of complying with the condition, the amount will be regulated in accordance with that which the legatee is legally entitled to receive, provided the slave had that much in his *peculium* at the time of his death. If, however, the sum was acquired after his death, or if another person gave it for him, as it did form part of the property which the testator had when he died, the case will be the same as where charges are imposed on legatees.

37. *The Same, On the Lex Julia et Papia, Book XV.*

Generally speaking, it must be remembered that donations *mortis causa* are comparable to legacies. Therefore, any rule of law which applies to legacies must be understood also to apply to donations *mortis causa.*

(1) Julianus says that if anyone should during the lifetime of the donor sell a slave given to him as a donation *mortis causa,* the latter will be entitled to a personal action to recover the price, if he should regain his health, and choose to do so; otherwise, the donee will be compelled to return the slave himself.

38. *Marcellus, On the Lex Julia et Papia, Book I.*

The following difference exists between a donation *mortis causa* and other ways by which anyone acquires property by reason of death. A donation *mortis causa* is made when both parties are present, and anything not included in this kind of a donation, it is understood, may be obtained on account of death. For when a testator, by his will, directs his slave Pamphilus to be free under the condition that he pays me ten *aurei,* he is not considered to have made me a donation; and nevertheless, if I accept the ten *aurei* from the slave, it is established that I accept them *mortis causa.*

The same thing happens where an heir is appointed on condition that he pay me ten *aurei;* as, by accepting the money from him who is appointed heir, I acquire it *mortis causa,* for the purpose of complying with the condition.

39. *Paulus, On Plautius, Book XVII.*

If he to whom a slave has been donated *mortis causa* manumits him, he will be liable to an action to recover the value of the slave, as he knows that he can be sued if the donor should regain his health.

40. *Papinianus, Questions, Book XXIX.*

If a donation *mortis causa* made between husband and wife takes effect, the donation is referred to the time when it was made.

41. *The Same, Opinions, Book II.*

Where a slave, who is to be free under the condition of paying a certain sum out of his *peculium* to one of the heirs to the estate, does so, he must account for that sum as well by reason of the Falcidian Law, as where suit is brought for the estate, and also where restitution is made under the Trebellian Decree of the Senate. What the slave received as a donation, and paid, is considered to have been given out of his *peculium,* and if it was paid by another in his presence, and in his name, it is understood as having been paid by himself.

42. *The Same, Opinions, Book XXXII.*

Seia, having transferred her property to her relative Titius, by way of donation, reserved the usufruct of the same for herself; and it was agreed that if Titius should die before she did, the said property should go to him, and if she died during the lifetime of the children of Titius, it should then belong .to them. Hence, if the heirs of Lucius Titius should claim the property, they could not ineffectually be opposed by an exception on the ground of bad faith. However, suit having been brought in good faith, it was asked whether the woman was not obliged to promise to give the property to the children of Titius when he died. Some doubt arose on the point that the donation should not be extorted, where title to it had not yet vested in the children; still, might it not be said that, on account of the security given, the first donation which was perfected by the delivery of the property, and which, being actually given in the beginning, should be perpetuated; and not the second one which was merely promised? Therefore, was the donation made under a certain condition, and should it be so considered, or was it made on account of death? It cannot be denied that it should be considered to have been made *mortis causa.*

The result is that the first donation having been annulled, the second one should be held to have been extorted, as Seia survived Titius. Finally, after the death of the woman, if the children of Titius had accepted the bond with her consent, they would be liable to contribute to the Falcidian portion in proportion to their respective shares.

(1) Where a father, at the point of death, gave certain property to his emancipated son, without imposing upon him the condition of returning the same, and his brothers and co-heirs desired contribution to be made out of the property, on account of the Falcidian Law, I gave it as my opinion that the ancient rule should be observed, as the new constitution had nothing to do with the other donations, which were made under positive conditions, and, in the case of death, there should be a deduction from the property of the estate, without the heirs having the hope of retaining it; for he who made the gift absolutely did so when dying, rather than as a donation *mortis causa.*

43. *Neratius, Opinions, Book I.*

Fulcinius: A donation *mortis causa* can be made between husband and wife, if the donor has an exceedingly well-founded apprehension of death.

Neratius: It is sufficient if the donor has a belief of this kind, and thinks that he is going to die, and no inquiry should be made whether his opinion was well grounded or not. This rule should be observed.

44. *Paulus, Manuals, Book I.*

Where a donation *mortis causa* is made to a slave, let us see whose death must be taken into consideration, that is to say, the death of the master, or that of the slave himself, in order that there may be ground for a personal action to recover the property. The better opinion is that the death of the person to whom the donation was made should be considered; still, the donation does not follow the manumitted slave after the death of his master, before the will is opened.