THIRD COMMENTARY.

(1) By the Law of the Twelve Tables, the estates of persons dying intestate belong to their proper heirs.

(2) Children who were under the control of the deceased at the time of his death are held to be proper heirs, as for instance, a son or a daughter; a grandson or a granddaughter by a son; a great-grandson or a great-granddaughter by a grandson; nor does it make any difference whether these children are natural or adopted. Provided, however, that a grandson or a granddaughter, and a great-grandson or a great-granddaughter, are to be classed as proper heirs only when the party in the preceding degree has ceased to be under the control of his parent, either by the death of the latter, or for some other reason, for instance, emancipation; for if the son was in the power of the deceased at the time of his death, the grandson by that son cannot be a proper heir; and we understand that the same rule applies to all other descendants.

(3) A wife who is in the hand of her husband is a proper heir because she occupies the position of his daughter; as well as a daughter-in-law who is in the hand of his son, for she occupies the place of a granddaughter; she will, however, only be a proper heir if the son in whose hand she is was not under the control of the father at the time of his death. We also say that the same rule applies to her who is in the hand of a grandson on account of marriage, for the reason that she occupies the place of granddaughter.

(4) Posthumous children also, who if born during the lifetime of their parent would have been under his control, are proper heirs.

(5) The same rule of law is applicable to those in whose cases proof of error has been established after the death of the father under the provisions of the *Lex Ælia Sentia*, or the Decree of the Senate; for, if the error had been proved during the lifetime of the father, they would have been under his control.

(6) We understand that the same rule also applies to a son who, having been mancipated once or twice, is manumitted after the death of his father.

(7) Therefore, when a son or a daughter, and grandchildren of both sexes by another son, are equally called to the succession, the one who is nearest in degree does not exclude the one who is more remote; for it seems to be just that grandchildren should succeed to the place and share of their father. Under the same rule, if there is a grandson or a granddaughter by a son, and great-grandchildren by a grandson, they are all called at once to the succession.

(8) And, as it was decided that grandchildren and great-grandchildren of both sexes should succeed to the place of their father, it seems to be proper that the estate should be divided not *per capita* but *per stirpes;* so that the son should have half of the estate, and that two or more grandchildren by another son the remaining half; and if there should be one or two children by one son, and three or four by the other, half of the estate should belong to the two grandchildren by the son, and the other half to the three or four grandchildren by the other.

(9) If there is no proper heir, then the estate by the same Law of the Twelve Tables belongs to the agnates.

(10) Those are called agnates who are connected by lawful relationship. Lawful relationship is that which unites persons through the male sex. Therefore, brothers by the same father are agnates to those who are of the same blood, and it is not even required that they should have the same mother. Hence a paternal uncle is the agnate of the son of a brother, and *vice versa*. The sons of brothers are included in the same category, that is to say, those who are descended from two brothers and are usually called cousins, according to which rule also we can compute several degrees of agnates.

(11) The Law of the Twelve Tables does not grant an estate to all agnates at once, but only to those who are the nearest in degree at the time when it is certain that the deceased died intestate.

(12) Succession does not exist under this right of descent; therefore, if the agnates nearest in degree should fail to accept the estate, or should die before entering on it, the agnates next in degree will not legally be entitled to it.

(13) Moreover, we require that agnates should be the next in degree, not at the time of death, but when it became certain that the party died intestate, because if anyone should die after having made a will, it seemed to be better to accept the agnate next in degree, when it is certain that no one will be an heir under the will.

(14) With reference to women, however, it has been decided that one rule applies to the taking of estates left by them, and another to the taking of the estates of others by them. For the estates of women pass to us by the right of agnation, just as do those of males; but our estates do not belong to females who are beyond the degree of sisters by the same father. Therefore, the sister of a brother by the same father is his heir-at-law, but a father's sister and a brother's daughter cannot be the heir-at-law of one who occupies the place of a sister. A mother, or a stepmother, who passes into the hand of a father by marriage, is entitled to the same rights as a daughter.

(15) If the deceased leaves a brother and the son of another brother, as was previously stated, the brother is to be preferred, for the reason that he is nearest in degree; but another interpretation of the law is made in the case of proper heirs.

(16) If, however, no brother should survive the deceased, but there are children of more than one brother, the estate will belong to all of them; but the question arose if they were unequal in number, and one of the brothers left one or two, and the other three or four children, whether the estate shall be divided *per stirpes*, as is the rule among proper heirs, or *per capita*. It has, however, been long since decided that the estate shall be divided *per capita*; and therefore the estate shall be divided into as many portions as there are persons on both sides, so that each individual may have an equal share of the same.

(17) If there is no agnate, the same Law of the Twelve Tables calls *gentiles* to the inheritance. Who *gentiles* are we explained in the First Commentary, and as we called attention to the fact that the entire law relating to *gentiles* had fallen into disuse, it would be superfluous in this place to discuss the point with any degree of minuteness.

(18) The rules prescribed by the Law of the Twelve Tables with reference to the succession of intestate estates end here, and it is easy to understand how strict they were.

(19) For as soon as children were emancipated, they had no right to the estate of their parents under this law, as they had ceased to be proper heirs.

(20) The same rule applies to children who are not under the control of their father, for the reason that they, together with their father, had received Roman citizenship, and had not again been brought under his authority by the Emperor.

(21) Likewise, agnates who have suffered a loss of civil rights are, under this law, not admitted to the estate, for the reason that title by agnation is extinguished by the forfeiture of civil rights.

(22) Again, if the agnate next in degree should not enter on the estate, the one nearest to him is not legally admitted to the succession.

(23) Females agnates who are beyond the degree of sisters by the same father, have no right to succession under this law.

(24) In like manner, cognates who trace their relationship through persons of the female sex are not admitted; and, to such an extent does this rule apply, that even a mother and a son or daughter have no right reciprocally to an estate, unless by the mother having been placed in the hand of the husband by marriage, the rights of consanguinity should thereby have been established between them.

(25) But these unjust provisions of the law are now corrected by the Edict of the Prætor.

(26) For he calls to the succession all children whose legal title is defective, just as if they had been under the control of their father at the time of his death, whether they are alone, or there are also proper heirs; that is to say, they also come in with children who are under the control of their father.

(27) He does not, however, call agnates who have suffered a loss of civil rights and are not in the second degree after proper heirs; that is, he does not call them in the same degree in which they would be called by the law if they had not forfeited their civil rights, but in the third degree of proximity; for, although by forfeiture of civil rights they have lost their legal title, they certainly retain their rights of cognation. Hence, if there is anyone else who has an unimpaired right of agnation, he will be preferred, even though he may be in a more remote degree.

(28) The same rule applies, as some authorities hold, to the agnate who, if the next of kin should fail to accept the estate, would, nevertheless, be entitled to it by law. There are others, however, who hold that he should be called by the Prætor in the same order by which an estate is given to agnates under the law.

(29) It is certain that female agnates, who are beyond the degree of sisters, are called in the third degree; that is to say, where there is no proper heir, nor any other agnate.

(30) Those are also called in the same degree who are related through persons of the female sex.

(31) Also, children belonging to an adoptive family are called to the succession of their natural parents in this same order.

(32) Moreover, those whom the Prætor calls to a succession do not indeed become heirs by law, for the Prætor has no power to make heirs, and they become such only by some law, or some enactment which resembles a law; for example, by a Decree of the Senate, or an Imperial Constitution. When, however, the Prætor grants them possession of an estate they are placed in the position of heirs.

(33) In granting possession of an estate, the Prætor also takes cognizance of several other degrees, and he does this in order that no one may die without leaving a successor. We purposely do not treat of this matter in these Commentaries, as we have discussed this entire right in other Commentaries specially devoted to the subject.

(33a) It will be sufficient only to note the fact that, as we have already stated in the distribution of estates by law, cognation alone, as established by the Twelve Tables, would be of no advantage in taking an estate; and, therefore, unless a mother, in obtaining the estate of her children, has acquired the rights of consanguinity by being in the hand of her husband through marriage, she will have no right whatever under the law.

(34) Sometimes, however, the Prætor promises possession of an estate neither for the purpose of correcting or opposing the ancient law, but for the sake of confirming it; as he also grants possession of an estate in accordance with the provisions of the will to those persons who have been appointed heirs under a properly executed testament.

He also calls the proper heirs and agnates to the possession of an estate *ab intestato*. In this instance, the only benefit derived from his act is that he who, in this way, demands prætorian

possession of the estate, can avail himself of the interdict which begins with the words: "Whatever portion of the property"; and the advantage of this interdict we shall explain in its proper place. On the other hand, if prætorian possession of the estate is not granted, it will belong to the said parties by the Civil Law.

(35) Moreover, possession of an estate is often granted to persons in such a way that they will not be able to obtain it, and possession of this kind is said to be inoperative.

(36) For example, if an heir is appointed by a properly executed will, and declares his acceptance of the estate, but refuses to demand prætorian possession of the same in accordance with the provisions of the will, being content with the fact that he is the heir under the Civil Law; still, those who, if a will had not been made, would have been entitled to the estate of the party who died intestate, can demand possession of the property, but the grant will be inoperative, as the testamentary heir can evict the estate.

(37) The same rule applies where a person having died intestate, his proper heir refuses to demand prætorian possession, being content with his title of heir-at-law, for an agnate will have a right to obtain possession of the estate; but the grant will be inoperative because the estate can be evicted by the proper heir. In like manner, if the estate should belong to an agnate by the Civil Law, and he should enter upon the same, but should fail to demand prætorian possession, a cognate in the nearest degree can demand it; but his possession of the estate will be inoperative for the same reason.

(38) There are other similar cases, some of which we have discussed in the preceding Commentaries.

(39) Let us now consider the estates of freedmen.

(40) Formerly, a freedman was permitted to pass over his patron in his will, with impunity, for the Law of the Twelve Tables only called a patron to the estate of his freedman, when the latter died intestate without leaving any heirs. Hence, if the freedman died intestate but left a proper heir, the patron was not entitled to any of his estate, but if he left a proper heir who was one of his natural children, no complaint could be made on this account. If, however, the proper heir was an adopted son or daughter, or a wife who was in his hand, it was evidently unjust that the patron should have no right to the estate.

(41) For this reason, this injustice of the law was afterwards corrected by the Edict of the Prætor, for if a freedman made a will, he is ordered to do so in such a way as to leave half of his estate to his patron; and if he left him either nothing, or less than half, the possession of half the estate is granted to the patron in opposition to the provisions of the will. If, however, the freedman died intestate, leaving as his heir an adopted son, or a wife who was in his own hand, or a daughter-in-law who was in the hand of his son; possession of half the estate is also granted to the patron as against these proper heirs. The fact that he has natural children will, however, permit the freedman to exclude his patron from the succession, not only with reference to the children whom he has under his control at the time of his death, but also those that have been emancipated, or given in adoption; provided any of them have been appointed to shares of the estate under the will, or if, having been passed over, they have, under the Edict, demanded prætorian possession contrary to the provisions of the will; for if they have been disinherited they do not, by any means, exclude the patron.

(42) Subsequently, by the *Lex Papia*, the rights of patrons were increased, so far as the wealthier freedmen were concerned; for it is provided by this law that where a freedman left an estate of a hundred thousand sesterces, or more, and had less than three children, an equal share of his estate was due to the patron, whether he made a will or died intestate. Therefore, if a freedman should leave but one son or daughter, his patron will be entitled to half his estate, just as if he had died without leaving either a son or a daughter; and if he should leave two sons or two daughters, a third part of his estate will be due to the patron; but if he left

three children, the patron will be excluded from the succession.

(43) By the ancient law, patrons suffered no injury so far as the estate of freedwomen were concerned; for, as the latter were under the legal guardianship of their patron, they could not make a will without the consent of their patron; and, therefore, if he agreed to the execution of the will, he would either be appointed the heir, or if he was not, it was his own fault; for, if he did not consent to the will being made and the freedwoman should die intestate, he would obtain her property, because a woman cannot have proper heirs; and formerly no other heir could exclude a patron from the estate of his freedwoman.

(44) Afterwards, however, by the *Lex Papia*, the birth of four children released the freedwoman from the guardianship of her patron; and, for this reason, she was permitted to make a will without the consent of her guardian; and the law provided that a share equal to that of each of the children whom the freedwoman had at the time of her death, should be due to her patron. Therefore, if a freedwoman left four children and no more, a fifth part of her estate — if she died before they did — belonged to her patron, and if any of her children died before her, the share of the patron would be proportionally greater; and if all of them died, her entire estate would pass to him at her death.

(45) What we have stated with reference to a patron we understand to apply as well to his son, and also to his grandson by a son, as well as to a great-grandson born to the grandson by a son.

(46) The daughter of a patron, a granddaughter by a son, and a great-granddaughter by a grandson, were entitled to the same rights as the patron, under the Law of the Twelve Tables. Children of the male sex, however, are only called by the Edict to the succession, but the daughter of a patron can demand the possession of half the property of the estate of a f reedman contrary to the provisions of the will; or in case of intestacy, against an adoptive son, or wife or daughter-in-law who was in the hand of the deceased; and this was conceded by the *Lex Papia* on account of the woman having three children, otherwise the daughter would not have this right.

(47) But where a freedwoman who had four children died testate, a daughter of the patron was entitled to an equal share with each child; this rule was not, as some authorities hold, established on account of the children, but the words of the *Lex Papia* state that she is entitled to an equal portion, even if the freedwoman should die intestate. If, however, a freedwoman dies after having made a will, the same right is granted the daughter of the patron as would be granted contrary to the provisions of the will of a f reedman; that is, that the male children of patrons shall be entitled to possession of half the estate in opposition to the provisions of the will; although this part of the law has been written with very little care.

(48) From these observations it is apparent that the foreign heirs of patrons are far removed from the rights to which a patron is entitled, either with reference to the property of intestate children, or with reference to prætorian possession in opposition to the provisions of the will.

(49) Formerly, before the enactment of the *Lex Papia*, patronesses had only that right to the estates of their freedmen which was conferred upon patrons by the Law of the Twelve Tables; for they could not demand possession of half the estate of an ungrateful freedman contrary to the provisions of the will, or on the ground of intestacy, against an adopted son, a wife, or a daughter-in-law, which right was granted by the Prætor in the case of a patron and his children.

(50) The *Lex Papia* granted almost the same rights to a freeborn patroness, who had two children, and to a freedwoman who had three, which male patrons enjoy under the Edict of the Prætor. And the same rights were granted to a freeborn patroness if she had three children, as were conferred upon a male patron by the same law, but it did not bestow the same advantage upon a patroness who was a freedwoman.

(51) The *Lex Papia*, however, does not confer any new advantage upon a patroness on account of her children, so far as the estates of freedwomen are concerned, even if they should die intestate. Therefore, if neither the patroness herself, nor the freedwoman, has suffered a loss of civil rights, the estate will belong to her by the Law of the Twelve Tables, and the children of the freedwoman will be excluded, and this rule applies even if the patroness should have no children, for, as we stated above, women can never have a proper heir.

But, on the other hand, if either of them has suffered a loss of civil rights, the children of the freedwoman will exclude the patroness, for the reason that her title is legally destroyed on account of the forfeiture of civil rights, so that the children of the freedwoman obtain the preference by the right of relationship.

(52) Moreover, when a freedwoman dies after having made a will, a patroness, who has no right through children, cannot claim possession contrary to the provisions of the will of the freedman; but one who is entitled through her children, has the same right conferred on her by the *Lex Papia* as a patron has under the Edict in opposition to the provisions of the will of his freedman.

(53) The same law bestows upon the son of a patroness almost the same rights as upon a patron; but in this instance a single son or daughter is sufficient to authorize the privilege.

(54) All that relates to this subject appears to have been sufficiently discussed up to this point; and a more minute explanation will be found in my Commentaries devoted to this subject.

(55) Let us in the next place examine the estates of Latin freedmen.

(56) In order that this branch of the law may become more clear, we should remember what we have stated elsewhere, namely, that those who are now styled *Latini Juniani* were formerly slaves under quiritarian right, but by the aid of the Prætor had been placed in a position of apparent freedom, so that their property belonged to their patron by the right of *peculium*. Afterwards, however, by the *Lex Junia*, all of those whom the Prætor had protected while in nominal freedom became actually free, and were styled *Latini Juniani; Latini*, because the law intended them to be free just as those Roman citizens were who, having left the City of Rome for Latin colonies, became Latin colonists; *Juniani*, because they were free under the *Lex Junia*, even though they did become Roman citizens. Hence the author of the *Lex Junia* understood that the result would be that by this fiction, the property of deceased *Latini* would no longer belong to their patrons, for the reason that, as they did not die slaves, their estates could not belong to their patrons by the right of *peculium*; nor could the property of a Latin freedman belong to his patron by the right of manumission, and he considered it necessary, in order to prevent the benefit granted to freedmen from becoming an injury to their patrons, to provide that their property should belong to those who manumitted them, just as if this law had not been enacted; and, therefore, the property of Latins by this law belongs as it were by the right of *peculium* to those who manumit them.

(57) Hence it happens that the title to the property of Latins under the *Lex Junia*, and that to the estates of freedmen who are Roman citizens, differ greatly.

(58) For the estate of a freedman who is a Roman citizen will, by no means, belong to the heirs of his patron; but it will belong absolutely to the son of the patron, and to his grandsons by a son, and to his great-grandsons by a grandson; even though they may have been disinherited by their father. Moreover, the estates of Latins will pass to the foreign heirs of a patron in the same way as the *peculium* of slaves, and will not belong to the children of the person who manumitted them, if they are disinherited.

(59) Likewise, the estate of a freedman who is a Roman citizen belongs in equal parts to two or more patrons; although they may have had unequal shares in said slave, if they were his owners; but the estate of a Latin belongs to his patrons, according to the shares which each one owned in him when he was his master.

(60) Also, with reference to the estate of a freedman who is a Roman citizen, one patron would exclude the son of another, and the son of one patron will exclude the grandson of another; but the estates of Latins belong jointly to a patron and the heir of another patron, in proportion to the share which would have belonged to the person who manumitted the slave.

(61) Likewise, if one patron leaves three children, and another one, the estate of a freedman, who is a Roman citizen, is divided *per capita*, that is to say, the three brothers will take three shares, and the other heir the fourth share. The estate of a Latin, however, belongs to his successors in the same proportion as it would have belonged to the person who himself manumitted the slave.

(62) Again, if one of the patrons rejects his share to the estate of a freedman who is a Roman citizen, or dies before he formally accepts it, the entire estate will belong to the other; but the property of a Latin will belong to the people, so far as the share of the patron who refuses to accept it is concerned.

(63) Subsequently, during the Consulate of Lupus and Largus, the Senate decreed that the estate of Latins should belong, in the first place, to the party who manumitted them; and next to the children of the latter, who were not disinherited by name, according to their proximity; and then, by the ancient law, to the heirs of those who manumitted them.

(64) Certain authorities hold that, under this Decree of the Senate, the same rule applies to the estates of Latins as to those of freedmen, who are Roman citizens; and this was the opinion of Pegasus. This doctrine, however, is evidently incorrect, for the estate of a freedman who is a Roman citizen never belongs to the foreign heirs of his patron; while the estate of a Latin citizen under this very Decree of the Senate, where the party who manumitted him left no children, will belong to his foreign heirs. Likewise, with reference to the estate of a freedman who is a Roman citizen, disinheritance does not in any way injure the children of the party who manumitted them; while in the case of the property of Latins, it is set forth in the said Decree of the Senate that where disinheritance is specifically made, they will be injured.

Hence, the only actual effect of this Decree of the Senate is, that the children of the party who manumitted the slave, and who are not disinherited by name, are preferred to foreign heirs.

(65) Therefore, an emancipated son of the patron who has been passed over, although he may not demand prætorian possession of his father's estate, in opposition to the provisions of the will, is still preferred to foreign heirs, so far as the estates of Latins are concerned.

(66) Moreover, a daughter and other proper heirs, although they may have been disinherited with others under the Civil Law, and entirely excluded from sharing in the estate of their father; still, in the case of the estates of Latins, unless they have been specifically disinherited by their father, they will be preferred to foreign heirs.

(67) Again, the estates of Latins will, nevertheless, belong to children who have refused to accept the estate of their father, for they also can not, by any means, be said to have been disinherited, any more than those who have been passed over in silence in a will.

(68) From all these examples, it is perfectly clear that if he who makes a Latin . . . .

(69) It also seems to be settled that if a patron has appointed his children his sole heirs to unequal shares of his estate, the property of a Latin belongs to them in the same relative proportions, for the reason that where there is no foreign heir, the Decree of the Senate becomes inoperative.

(70) If a patron should appoint a foreign heir along with his children, Cælius Sabinus says that the entire estate will belong to the children of the deceased in equal shares; because when a foreign heir appears, the *Lex Junia* does not apply, but the Decree of the Senate does. Javolenus, however, holds that the children of the patron will, under the Decree of the Senate, only be entitled to equal shares in that portion of the property to which foreign heirs would

have been entitled under the *Lex Junia*, before the enactment of the Decree of the Senate; and that the remaining shares will belong to them in proportion to their interest in the estate of their father.

(71) Again, the question arises whether this Decree of the Senate refers to those children of a patron who are born of a daughter or granddaughter; that is to say, whether my grandson by my daughter will have a better right to the estate of my Latin than a foreign heir. The question also arises, whether this Decree of the Senate applies to Latins who belong to a mother; that is, whether, in the distribution of the estate of a Latin who belongs to a mother, the son of a patroness shall be preferred to the foreign heir of the mother. It was held by Cassius that, in both instances, there was ground for the application of the Decree of the Senate, but most authorities reject his opinion, for the reason that the Senate did not have in mind the children of female patrons who belong to another family, and this is evident from the fact that it excludes such as have been expressly disinherited; for it seems to have had in view those who are usually disinherited by their parent if they are not appointed heirs. For it is not necessary for a mother to disinherit her son or daughter, nor a maternal grandfather his grandson or granddaughter, if he or she did not appoint them heirs; whether we consult the Civil Law or the Edict of the Prætor, by which the possession of an estate is granted to children who are passed over contrary to the provisions of the will.

(72) Sometimes, however, a freedman who is a Roman citizen dies as a Latin; for example, where a Latin has obtained the right of Roman citizenship from the Emperor, with the reservation of the rights of his patron. For the Divine Trajan decided in a case of this kind that if a Latin obtained the right of Roman citizenship from the Emperor without the knowledge or consent of his patron, the said freedman resembles other Roman citizens, and can beget lawful children; but he will die a Latin, and his children cannot become his heirs, and also that he can only make a will in such a way as to appoint his patron his heir, and substitute another for him if he should refuse to accept the estate.

(73) And for the reason that the effect of this Constitution seems to be that men of this kind never die as Roman citizens, even though they may subsequently have acquired the right of Roman citizenship under the *Lex Ælia, Sentia* or the Decree of the Senate. The Divine Hadrian, induced by the injustice of this law, caused a Decree of the Senate to be enacted providing that freedmen who had obtained the right of Roman citizenship from the Emperor without the knowledge, or against the will, of their patrons, and afterwards availed themselves of the right by which, under the *Lex Ælia, Sentia* or the Decree of the Senate, they would have obtained Roman citizenship if they had remained Latins, should be considered to occupy the same position as if they had acquired Roman citizenship under the provisions of the *Lex Ælia Sentia*, or the Decree of the Senate.

(74) Moreover, the estates of those whom the *Lex Ælia Sentia* places in the class of *dediticii*, belong to their patrons, sometimes as if they were freedmen and Roman citizens, and sometimes as if they were Latins.

(75) For the estates of those who, had it not been for some offence which they perpetrated after having been manumitted, would have become Roman citizens, are granted by this same law to their patrons, just as the estates of those who have become Roman citizens, for they have not the power to make a will; and this opinion was not unreasonably held by the greater number of authorities, for it seems incredible that the legislator intended to grant the right to make a will to men belonging to the lowest rank of freedmen.

(76) The estates of those who, if they had not committed some offence, would, after their manumission, have become Latins, are granted to their patrons, just as if they had died Latins. It has not escaped my observation, however, that the legislator did not express his intention in this manner in a way which is sufficiently clear.

(77) Let us now consider the succession to which we are entitled by the purchaser of property.

(78) The property of debtors may be sold either during their lifetime, or after their death. For example, it is sold during their lifetime when they conceal themselves for the purpose of defrauding their creditors, and are not defended while absent; and the same rule applies to those who surrender their property under the *Lex Julia*, or when judgment has been rendered against them after the time has elapsed which has been fixed for the payment of a debt, partly by the Law of the Twelve Tables, and partly by the Edict of the Prætor. The property of a debtor is sold after his death, for example, when it is certain that he has left no heirs, or persons entitled to prætorian possession, or any other legal successor.

(79) If the property of an insolvent debtor is sold during his lifetime, the Prætor orders it to be taken into possession and advertised for thirty consecutive days; but for fifteen days if he is dead. He afterwards orders the creditors to assemble, and select one of their number as their representative, that is, one by whom the estate may be sold. Therefore, where the property of a living debtor is sold, the Prætor orders the sale to take place within ten days, or if he is dead, within five days. If the debtor be living, he orders thirty days to be added, and if he is dead he orders twenty. The reason why he orders a longer time to elapse before the sale of the property of a living debtor, is for the purpose of showing more care for the interests of the living by preventing too easy a sale of his estate.

(80) Moreover, the ownership of property under prætorian possession, or of the property of a debtor which is sold, is not absolute, but only provisional. Ownership under quiritarian right is only acquired by usucaption. Sometimes, however, it happens that ownership by usucaption can not be acquired by purchasers of the property of a debtor, for example, when an alien is the purchaser. . . . .

(81) Again, debts due to, or by the party from whom property is obtained, are not owed to, or by the prætorian possessor, or the purchaser of the property of the debtor; but can be collected by means of equitable actions, which we will explain in a subsequent Commentary.

(82) There are successions of other kinds which were not established by the Law of the Twelve Tables or by the Edict of the Prætor, but have been adopted by common consent.

(83) For when the head of a household gives himself in adoption, or a woman places herself in the hand of another, all their property, incorporeal and corporeal, as well as all debts due to them, are acquired by the adoptive father, or the purchaser, with the exception of those that are extinguished by the forfeiture of civil rights; as, for instance, usufructs, the obligation of the services of freedmen which is contracted by oath, and claims in legal actions where issue has been joined.

(84) On the other hand, any debt owed by the party who gave himself in adoption, or who came into the hand of another, does not pass to the purchaser or to the adoptive father, unless the indebtedness was hereditary; for then, because the adoptive father or the purchaser becomes the heir, they are directly liable; but he who gave himself in adoption, and the woman who came into the hand of another, cease to be heirs. But if the persons referred to are indebted in their own names, although neither the adoptive father nor the purchaser becomes liable, nor does he who gave himself in adoption, nor the woman who came into the hand of another remain bound, for the reason that they are released from liability by their loss of civil rights; still an equitable action is granted against both, on the ground that their forfeiture of civil rights has been rescinded, and if no defence is made to this action, the Prætor will permit all the property to be sold by the creditors which would have belonged to them, if they had not been subjected to the authority of another.

(85) Likewise, if an heir, before he declares his acceptance of the estate of an intestate, or acts as heir to the same, surrenders the estate in court, he to whom it was surrendered becomes the heir absolutely, just as if he himself had been legally called to the succession. If, however, the

heir should surrender the estate after having accepted it, he will still remain the heir, and for this reason he will be liable to the creditors, and he must transfer the corporeal property belonging to the estate just as if he had surrendered the separate articles in court; but the debts are extinguished, and in this way the debtors to the estate profit by the transaction.

(86) The same rule of law applies where a testamentary heir accepts the estate, and then surrenders it in court; but if he surrenders the estate before entering on it, his act will be of no force or effect.

(87) The question arises whether a proper and necessary heir, by surrendering an estate in court, performs an act which is valid. Our preceptors hold that such an act is void; authorities of the other school, however, think that the same effect is produced as that caused by other heirs after the estate had been entered on; for it makes no difference whether a party becomes an heir either by declaring his acceptance, or as acting in the capacity of heir, or whether he is compelled by law to accept the estate.

(88) Let us now pass to other obligations, the principal division of which is into two classes, for every obligation either arises from a contract, or from an offence.

(89) And first, let us examine those which arise from contracts, of which there are four different kinds; for an obligation is contracted either by delivery of property, verbally, by writing, or by consent.

(90) An obligation by the delivery of property is contracted, for example, in the case of a loan for consumption. This generally takes place with reference to articles which are susceptible of being weighed, counted, or measured; such as money, wine, oil, grain, bronze, silver, and gold. This kind of property we transfer either by counting, measuring or weighing it with the understanding that it shall belong to him who receives it, and that, at some time or other, not the same article, but another of the same nature, shall be returned to us, and therefore an obligation of this kind is called *mutuum*, because what was given to you by me, from being mine becomes yours.

(91) He also who received something that was not due from a person who paid him through mistake, is liable under a contract of this description, for a personal action can be brought against him under the formula, "If it appears that he was required to give"; just as if he had received the property as a loan for consumption. Hence certain authorities hold that a ward or a woman to whom payment was made of something which was not due, through mistake, and without the authority of his or her guardian, is not liable to a personal action; any more than they are for a loan for consumption. This species of obligation does not, however, appear to arise from a contract, for a party who gives with the intention of paying a debt, rather desires to discharge an obligation than to incur one.

(92) An obligation is verbally contracted by question and answer, as for instance: "Do you solemnly agree to give it to me?" "I do solemnly agree." "Will you give it?" "I will give it." "Do you promise?" "I do promise." "Do you pledge your faith?" "I do pledge my faith." "Do you guarantee?" "I do guarantee." "Will you do this?" "I will do it."

(93) The verbal obligation contracted by the expressions, "Do you solemnly agree to give?" "I do solemnly agree to give," is peculiar to Roman citizens; the others belong to the Law of Nations, and therefore they are valid among all men, whether they are Roman citizens or aliens. And even if they are uttered in the Greek language they are still valid, so far as Roman citizens are concerned, if they understand Greek; and on the other hand, although they may be stated in Latin, they will, nevertheless, be binding on foreigners, provided they are familiar with the Latin language. The obligation contracted by the words, "Do you solemnly agree to give?" "I do solemnly agree to give," is so peculiar to Roman citizens, that it cannot properly be expressed in the Greek language, although it is said to have been derived from the Greek.

(94) Therefore, it is said that there is one instance in which an alien may be bound by this phrase, that is to say, when our Emperor interrogates the ruler of a foreign people with reference to concluding peace, as follows: "Do you solemnly agree that peace shall exist?" or where the Emperor himself is interrogated in the same manner. This, however, is said to be too subtle a refinement, for if anything should be done to violate a treaty, an action is not brought under the stipulation, but the property is claimed by the law of war.

(95) It may be doubted if anyone . . . .

(95a) .... a debtor, by the order of his wife, provided her guardian consents, may make a statement of the amount of dowry which he owes. Another, however, cannot be bound in this way, and therefore if any other person promises a dowry to the husband in behalf of his wife, he will be liable under the common law, provided the husband had previously stipulated.

(96) An obligation is likewise contracted by one of the parties speaking and promising the other without being interrogated; as where a freedman swears that he will give a present, or perform some labor or service for the benefit of his patron; and this is the sole instance in which an obligation is contracted by oath, for in no other are men rendered liable on account of having been sworn, as will be apparent if the Roman law is examined; although if we ascertain what the law is among aliens by searching the records of other states we might come to a different conclusion.

(97) If we stipulate that something shall be given to us which cannot be transferred, the stipulation is void; for example, if anyone stipulates for the transfer of a freeman whom he thinks to be a slave; or of a dead slave whom he believes to be living; or of a sacred or religious place which he supposes to be subject to human law.

(97a) Likewise, if anyone stipulates for something which cannot, in the nature of things, exist, as for instance, a hippocentaur, such a stipulation also is void.

(98) Moreover, if anyone stipulates under a condition which cannot take place, for example, if he should touch the sky with his finger, the stipulation is void. Our preceptors however, were of the opinion that a legacy bequeathed under an impossible condition should be paid, just as if it had been left unconditionally; but the authorities of the other school hold that a legacy is just as invalid as a stipulation, under such circumstances, and, indeed, no good reason can be given for establishing a distinction.

(99) Moreover, a stipulation is void if anyone ignorantly agrees that his own property shall be transferred to himself; as what already belongs to a person cannot be given to him. Finally, a stipulation is void where anyone stipulates as follows: "Do you solemnly agree to pay after my death?" or "Do you solemnly agree to give after your death?" The stipulation, however, is valid if anyone stipulates as follows, "Do you solemnly agree to give at the time of my death?" or "Do you solemnly agree to give when you die?" that is, the obligation is valid as it relates to the last moment of the life of the stipulator or promisor, for it has been considered contrary to legal principle to make the obligation attach to the person of the heir.

(100) Again, we cannot stipulate as follows, namely: "Do you solemnly agree to pay on the day before I die, or on the day before you die?" for the expression: "On the day before anyone dies," can only be ascertained after death has taken place; and, moreover, where death has occurred the stipulation becomes retrospective, and means the same as, "Do you solemnly agree to pay to my heir?" which is clearly void.

(101) What we have stated with reference to death must also be understood to apply to the loss of civil rights.

(102) A stipulation is also void when anyone does not answer the question which he was asked; for instance, if I stipulated for ten sesterces to be paid by you, and you promise five; or if I stipulate absolutely, and you promise conditionally.

(103) Moreover, a stipulation is void if we stipulate to pay a party to whose authority we are not subject. Hence the question arose to what extent the stipulation would be valid if a person should agree to pay one to whose authority he is not subject. Our preceptors are of the opinion that it would be valid for the entire amount, and that he who stipulated would be entitled to all of it, just as if he had not added the name of a stranger. The authorities of the other school, however, think that only half is due to him, and that the stipulation is void so far as the other half is concerned.

(103a) The case is different where, for instance, I stipulate as follows: "Do you solemnly agree to pay my slave or my son who is under my control?" for then it is settled that the entire amount is due, and that I can collect it from the promisor and the result is the same when I only stipulate for payment to my son who is under my control.

(104) Again, the stipulation is void where I stipulate with one who is under my control, and also if he should stipulate with me. Still, a slave belonging to the household, a daughter under paternal authority, and a woman in the hand of her husband, cannot only not bind themselves to the persons to whose authority they are subject, but they cannot bind themselves to anyone else.

(105) It is clear that a dumb person can neither stipulate nor promise; and the same rule applies to one who is deaf, because he who stipulates must hear the words of the promisor, and he who promises must hear those of the stipulator.

(106) An insane person cannot transact any business, because he does not understand what he is doing.

(107) A ward can transact all kinds of business, provided, however, that, as the authority of his guardian is necessary it be granted, just as if he himself was bound; for he can render another liable to himself even without the authority of his guardian.

(108) The same rule of law applies to women who are under guardianship.

(109) Still, what we have stated with reference to a ward is only true of one who has some intelligence; for an infant, and a child who is almost an infant, do not differ greatly from an insane person, because minors of this age have no judgment; but in the case of such minors a more indulgent interpretation of the law is made on account of the benefit resulting to them.

(110) Although, as we have already stated, a party not subject to our authority cannot stipulate for us, we can associate another with us in the stipulation which we make, who also stipulates for the same thing, and who is commonly called a joint stipulator.

(111) He, also, has a right of action as well as ourselves, and payment can be made to him as well as to us, but he can be compelled by the action of mandate to transfer to us anything which he may recover.

(112) Again a joint stipulator can also make use of other words than those which we employ. Hence, for example, if I stipulate, as follows: "Do you solemnly agree to pay?" the joint stipulator may say,

"Do you pledge your faith for the same?" or "Do you guarantee the same?" or *vice versa*.

(113) Likewise, he may stipulate for less, but not for more, than the stipulator. Therefore, if I stipulate for ten sesterces, he can stipulate for five; but, on the other hand, he cannot stipulate for more. Moreover, if I stipulate absolutely, he can stipulate under a condition, but not *vice versa*. The term "more or less," is understood not only to refer to quantity, but also to time, for to make payment immediately is more, and to do so after a certain period is less.

(114) To this rule there are certain exceptions, for the heir of a joint stipulator has no right of action. Likewise, the act of a slave as joint stipulator is void, although in all other cases he acquires property for his master by a stipulation. The better opinion is, that, the same rule

applies to a slave in domestic servitude, because he occupies the place of a slave. Moreover, a son who is under the control of his father can act as a joint stipulator, but he does not acquire anything for his father; although, under all other circumstances, by stipulating he makes acquisitions for his benefit. Nor will he be entitled to any right of action unless he has been released from paternal control without the forfeiture of civil rights; as, for instance, by the death of his father, or because he himself has been installed a priest of Jupiter. We understand that the same rule applies to a daughter under the control of her father, and a woman in the hand of her husband.

(115) Others are usually liable for the party who promises, some of whom we call sponsors, others guarantors, and others still, sureties.

(116) A sponsor is interrogated as follows: "Do you solemnly agree to pay the same?" a guarantor as follows: "Do you guarantee the same?" and a surety as follows, "Do you pledge your faith for the same?" We shall see what names should be properly applied to those who are interrogated, as follows, namely: "Will you give the same?" "Do you promise the same?" "Will you do the same?"

(117) We often accept sponsors, guarantors, and sureties, when we desire to be provided with additional security; and we rarely make use of a joint stipulator, except when we stipulate that something shall be paid after our death. If we make such a stipulation ourselves, our act is void, and hence the joint stipulator is employed so that he may bring suit after our death; but if he should recover anything, he will be liable by an action of mandate to deliver it to our heir.

(118) The positions of a sponsor and a guarantor are similar, that of a surety is extremely unlike the others.

(119) For the former can enter into no obligations except verbal ones, although sometimes the party who promises is not bound, as for instance, where a ward or a woman without the authority of his or her guardian, promises to make a payment after his or her death. It is a question, however, if a slave or an alien should promise, whether his sponsor or guarantor will be liable.

A surety can enter into every kind of obligation, that is to say, whether it is contracted either by words, or by writing, or by consent, and it makes no difference whether the obligation be a civil or natural one. To such an extent is this true, that he is also liable for a slave, whether it be a stranger who accepts him as security for the slave, or whether .it be the master himself who does so for a debt which is due to him.

(120) Moreover, the heir of a sponsor and a guarantor is not liable, unless we have reference to the heir of an alien guarantor, in whose State another rule than ours prevails; but the heir of a surety is also liable.

(121) Likewise, a sponsor and a guarantor are released by the *Lex Furia* from liability at the expiration of two years; and no matter what may be the number of the sureties at the time when the debt can be collected the obligation is divided into as many parts as there were sureties at that time, and each one of them is only liable for his respective share. Sureties, however, are perpetually liable, and no matter what may be their number, each of them is bound for the entire amount of the debt; and therefore the creditor is at liberty to collect the whole debt from any one of them whom he may select. But, now, according to a letter of the Divine Hadrian, a creditor is compelled to collect the proportionate part of the debt from each of the sureties who is solvent at the time. Hence, this letter differs from the *Lex Furia* in that if any one of the sponsors or guarantors should not be solvent, this does not increase the liability of the others; but if even only one of the sureties is solvent, the entire burden of all the others is imposed upon him.

But, as the *Lex Furia* only applies to Italy, the result is that in the other provinces both sponsors and guarantors, like "sureties, are perpetually liable; and each one of them is bound

for the entire amount of the debt, unless they are, to a certain extent, relieved by the letter of the Divine Hadrian.

(122) Moreover the *Lex Apuleia*, introduces a certain partnership between sponsors and guarantors; for if any of them should pay more than his share he will have a right of action against the others to recover the surplus. This law was enacted before the *Lex Furia*, and therefore the question arises whether, after the passage of the *Lex Furia*, the benefit of the *Lex Apuleia* still remains. This is certainly the case outside of Italy, for the *Lex Furia* is in force only in Italy, while the *Lex Apuleia* embraces also the other provinces; but whether the benefit of the *Lex Apuleia* still continues to exist in Italy, *is* a question. But the *Lex Apuleia* does not apply to sureties, and therefore, if a creditor recovers his entire debt from one surety the latter alone must suffer the loss, that is to say, if the party for whom he became surety is not solvent. But, as appears from what has been already stated, he whom a creditor sues for the entire amount of the debt can, under the letter of the Divine Hadrian, petition for the action to be brought against him only for his proportionate share.

(123) Moreover, it is provided by the *Lex Cicereia*, that a creditor who accepts sponsors or guarantors, must previously publish and declare the amount of the claim for which he receives security, and the number of sponsors or guarantors that he will accept as sureties for the obligation; and unless he does so, the sponsors and guarantors are permitted within the term of thirty days to demand a preliminary trial, by which it may be ascertained whether the declaration required under this law had been made, and if it should be decided that it had not been made, they shall be released from liability. No mention of sureties was made in this law, but it is customary when we receive sureties to make this statement.

(124) Moreover, the benefit of the *Lex Cornelia* is common to all, and by its provisions the same person is forbidden to become a surety for the same debtor to the same creditor, during the same year, for a larger sum of money than twenty thousand sesterces; and although sponsors or guarantors may bind themselves for a larger amount, for example, for a hundred thousand sesterces, they will still only be liable for twenty thousand. Again, we say that money which is lent under this law includes not only that which was actually loaned, but all certain to be due at the time that the obligation was contracted; that is to say, whatever is unconditionally included in the obligation, and therefore the money which we stipulate to be paid on a certain day comes under this provision, for the reason that it is certain that it will be due, although it cannot be collected until after the time has elapsed. All kinds of property are comprehended in this law under the term "money," and therefore, if we stipulate for wine, grain, land, or a slave, this law must be observed.

(125) In some cases, however, the law permits security to be taken to an indefinite amount; as for instance, for the purpose of dowry, or for what may be due to you under a will. Security may also be taken by an order of court. It is also provided by the *Lex Julia*, which imposes a tax of one twentieth on estates, that the *Lex Cornelia* shall not apply to the securities referred to in this law.

(126) Under this rule, also, the condition of all sponsors, guarantors, and sureties is the same, in that they cannot be liable for more than their principal owes; on the other hand, however, they may be liable for less, as we have stated with reference to a joint stipulator; for as is in his case, their liability is also accessory to the obligation of the principal, and the liability of the accessory cannot be greater than that of the principal.

(127) A further similarity exists between them in that, if the sureties should pay anything for the principal debtor, they will have a right to the action of mandate against him to recover it. Sponsors also, under the *Lex Publilia* are entitled to still another remedy, as they have a right to bring an action for double the amount, which is called the action to recover money expended.

(128) An obligation contracted by writing is made, for instance, by the entry of claims on an account book. Entries of this description are of two kinds; either from a thing to a person, or from a person to a person.

(129) The record from a thing to a person is made, for example, where what you owe me on account of a purchase, a lease, or a partnership, is entered upon my book as having been paid to you.

(130) The record of a claim from a person to a person is made, for instance, when the amount that Titius owes me is charged to you on my book; that is to say as if Titius had substituted you for himself to me.

(131) The case of those claims which are designated as cash is different, as the obligation for them has reference to the thing itself, and not to a charge in writing; although they are not valid unless the money has been actually paid; for the payment of money makes the obligation a legal one. For which reason we very properly say that the entry of a claim as cash does not constitute an obligation, but is merely evidence that the obligation has been contracted.

(132) Hence, it is not proper to say that aliens are also bound by claims as cash, because their liability does not depend upon the entry of the claim, but upon the payment of the money; and this kind of an obligation belongs to the Law of Nations.

(133) A reasonable doubt has arisen as to whether aliens are bound by claims which have been entered on an account book; for an obligation of this kind is, to a certain extent, one contracted under the Civil Law, which was the opinion of Nerva. It was, however, held by Sabinus and Cassius that if the entry was made as from a thing to a person, aliens would also be liable; but if it was entered as from a person to a person, this would not be the case.

(134) Moreover, an obligation by writing is considered to be created by written evidences of debt, or promises to pay; that is to say, where anyone states in writing that he owes a debt, or will make payment in such a way, of course, that a stipulation is not entered into on this account. This kind of obligation is peculiar to aliens.

(135) Obligations are created by consent, in purchase and sale, leasing and hiring, partnership and agency.

(136) Moreover, we say that obligations are contracted by consent in these different ways, because no form of words or writing is required, but it is sufficient for the parties to the transaction to have consented. Therefore, agreements of this kind can be entered into by persons who are absent, as for instance, by letter or by messenger; while, on the other hand, verbal obligations cannot be created between absent persons.

(137) Likewise, in contracts of this description the parties are reciprocally liable, because each is liable to the other to perform what is proper and just; while, on the other hand, in the case of verbal obligations one party stipulates and the other promises; and in the entry of claims one party creates an obligation by doing so, and the other becomes liable.

(138) An absent person can be charged in writing with the disbursement of money although a verbal obligation cannot be contracted with one who is absent.

(139) Purchase and sale are contracted as soon as the price is agreed upon, although the price may not have been paid, or any earnest money given; for what is given by way of earnest money is only a proof of the conclusion of a contract of purchase and a sale.

(140) Moreover, the price must be certain; for, otherwise, if we agree that property shall be purchased for the amount at which Titius may estimate its value, Labeo denies that a transaction of this kind has any force or effect; and Cassius agrees with him. Ofilius holds that it is a purchase and sale, and Proculus adopts his opinion.

(141) Moreover, the price must consist of money, for it is seriously questioned whether it can consist of any other property, as for instance, a slave, a robe, or a tract of land. Our preceptors think that a price can consist of other property, and hence is derived the common opinion that purchase and sale are contracted by exchange of articles, and that this kind of purchase and sale is of the highest antiquity, and in proof of their contention, they adduce the statement of the Greek poet Homer, who somewhere says:

"Here landed Achæan ships in search of wine. They purchased it with copper and with iron; With hides, with horned cattle, and with slaves."

Authorities belonging to the other school dissent from this, and think that the exchange of articles is one thing, and purchase and sale another, as where property is exchanged it cannot be determined what is sold and what is given by way of price; and, on the other hand, it is absurd to consider that both articles are sold, and at the same time given by way of price. Cælius Sabinus says that if you have some property for sale, for example land, and I receive it, and give you a slave by way of price, the land should be considered to have been sold, and the slave given by way of price, as the land is what is received.

(142) Moreover, leasing and hiring are governed by similar rules, for, unless the amount paid is certain, the contract of leasing and hiring is not considered to have been concluded.

(143) Hence, if the price is left to the judgment of another, for instance, at the amount that Titius may deem proper, the question arises whether the contract of leasing and hiring has been made. Therefore, if I give clothing to a fuller to be cleaned and taken care of, or to a tailor to be repaired, and the price was not stated at the time, but I was to pay the amount afterwards agreed upon between us, the question arises whether a contract for leasing and hiring has been entered into.

(144) Likewise, if I lend an article to you to be used, and I receive, in turn, another article to be used by myself, the question arises whether a contract of leasing and hiring has been made.

(145) Purchase and sale and leasing and hiring are considered to be so nearly related to one another that in certain cases the question arises whether the contract is one of purchase and sale, or one of leasing and hiring. For instance, if land is perpetually leased — which happens in the case of real property belonging to municipalities — under the condition that, as long as the rent is paid, neither the lessee nor his heir shall be deprived of the land; the better opinion is that this is a contract of leasing and hiring.

(146) Again, if I deliver gladiators to you under the condition that twenty *denarii* shall be paid to me for the exertions of every one who issues safe and sound from the arena; and a thousand *denarii* for every one who is killed or disabled; the question arises whether a contract of purchase and sale, or one of leasing and hiring has been made. The better opinion is that, in the case of those who come forth safe and sound, a contract of leasing and hiring was concluded; but so far as those who have been killed or disabled are concerned the contract is one of purchase and sale, for it is apparent that the contract depends upon circumstances taking place as it were under a condition; a contract of sale or hiring having been entered into with reference to each gladiator, for there is no doubt now that property can be sold or leased conditionally.

(147) Likewise, where it is agreed upon between a goldsmith and myself that he shall make me a number of rings of a certain weight and style out of his own gold, and shall receive, for example, two hundred *denarii;* the question arises whether a contract of purchase and sale, or one of leasing and hiring is made. Cassius says that the material is the object of purchase and sale, but that the labor depends upon a contract of leasing and hiring; still, the greater number of authorities are of the opinion that the contract is one of purchase and sale. But if I furnish him with my own gold, and the price of the work is agreed upon, it is settled that the contract is one of leasing and hiring.

(148) We are accustomed to form a partnership either of all the property of the partners, or with reference to one certain business, for example, the purchase and sale of slaves.

(149) An important discussion arose, however, as to whether a partnership could be formed in such a way that one partner would have a greater share in the profits and be liable for a smaller amount of the losses. Quintus Mucius held that this was contrary to the nature of a partnership, but Servius Sulpicius, whose opinion has prevailed, thought that a partnership could be formed in such a way that one of the partners should not be liable for any of the losses, and be entitled to a part of the profits, provided that his services were so valuable as to make it just for him to be admitted into the partnership under such an agreement. For it is settled that a partnership can be formed in such a way that one partner shall furnish all the money and that the other shall not furnish any, and the profits nevertheless be equally divided among them; for frequently the services of a person are worth as much as money.

(150) It is certain, however, that if no agreement concerning the division of profit and loss should be made among the parties, the benefit and the disadvantage shall be equally shared between them. If the share of each should be stated, so far as the profit is concerned, but omitted with reference to the loss, the loss must be shared in the same way as the profit.

(151) Moreover, a partnership continues to exist as long as the partners give their consent, and when any one of them renounces the partnership, it is dissolved. It is clear, however, if a person renounces a partnership in order that he alone may obtain some pecuniary advantage, for instance, if a partner of mine in the entire property should be left an heir by anyone, and should renounce the partnership in order that he alone may profit by the estate, he can be compelled to share this gain with his partners. If, however, he obtains any profit, without intending to do so, it shall belong to him alone, and I will only be entitled to whatever may be acquired by him after he renounces the partnership.

(152) A partnership is also dissolved by the death of a partner, for he who enters into one selects a certain person for his associate.

(153) It is also said that a partnership is dissolved by forfeiture of civil rights, for the reason that under the rule of the Civil Law loss of civil rights is considered as equivalent to death; but if the partners still consent to the continuance of the partnership a new one is considered to be formed.

(154) Likewise, a partnership is dissolved if the property of one of the partners is disposed of at either public or private sale. The kind of partnership, of which we are speaking, however, that is one which is formed by mere consent, belongs to the Law of Nations, and therefore continues to exist according to natural reason among all men.

(155) Agency is established whether we direct it to take place for our own benefit or for that of another; and hence whether I direct you to transact my business or that of another, the obligation of mandate is contracted, so that both of us will reciprocally be liable, for whatever you must do for me, or I must do for you, in good faith.

(156) If, however, I direct you to perform some act for your own benefit, the mandate will be to no purpose, for what you are about to do for your own advantage should depend on your own judgment, and not be done on account of my mandate. Therefore, if you have some idle money at home, and I advise you to lend it at interest, and you lend it to a party from whom you cannot collect it, you will not be entitled to an action of mandate against me. Again, if I advise you to purchase some article, even though it will not be to your advantage to do so, I will still not be liable to you in an action of mandate.

These rules have been so well established that the question arose whether a party is liable in an action of mandate who advised you to lend money to Titius. Servius denied that liability is incurred, and thought that an obligation could not arise in this instance, any more than in one where a person is generally advised to lend his money at interest. We, however, adopt the

contrary opinion of Sabinus, for the reason, that you would not have lent money to Titius if you had not been advised to do so.

(157) It is evident that, where anyone directs an act to be done which is contrary to good morals, an obligation will not be contracted; for instance, if I direct you to commit a theft, or some injury against Titius.

(158) In like manner if I should be directed to perform some act after my death the mandate is void, for the reason that it has been generally decided that an obligation cannot begin to take place with an heir.

(159) Where a mandate was properly given and while the matter still remained unchanged was revoked, it is annulled.

(160) Again, if before a mandate was begun to be executed, the death of either of the parties should take place, that is the death of him who gave the mandate, or of him who received it, the mandate is annulled. However, for the sake of convenience, the rule has been adopted that if the party who gave me the mandate should be dead, and I, being ignorant of his death, should execute the mandate, an action of mandate can be brought against me; otherwise a just and natural want of information would occasion me loss. Similarly to this, it has been decided by the greater number of authorities that if my debtor should, through ignorance, pay my steward who has been manumitted, he will be released from liability; although, otherwise, he could not be released under the strict rule of law, because he paid another than the one whom he should have paid.

(161) If the person to whom I gave a proper mandate exceeds his authority, I will be entitled to an action of mandate against him for the amount of my interest in having the mandate executed, provided he was able to execute it; but he cannot bring an action against me. Hence, for example, if I should direct you to purchase a tract of land for me for a hundred thousand sesterces, and you purchase it for a hundred and fifty thousand, you cannot bring an action of mandate against me, even though you are willing to convey the land to me for the price for which I directed you to purchase it; and this opinion was held by Sabinus and Cassius. If, however, you should purchase it for a smaller sum, you will certainly be entitled to an action against me; for anyone who directs land to be bought for a hundred thousand sesterces is understood also to direct that it be bought for less if this can be done.

(162) In conclusion, it must be remembered that when I give any material to be manufactured gratuitously, in which case, if I had fixed a price for the work performed, a contract for leasing and hiring would be made, an action of mandate will lie; for instance, when I give clothing to a fuller to be cleaned or pressed, or to a tailor to be repaired.

(163) Having explained the different kinds of obligations which arise from contracts, we should observe that obligations can not only be acquired by us by what we do ourselves, but also through those persons who are subject to our authority, or are in our hand, or under our control by mancipation.

(164) Obligations are also acquired by us through freemen, and the slaves of others of whom we have possession in good faith; but only in two instances, that is, where they acquire anything by their own labor, or by means of our property.

(165) An obligation is also acquired by us in the two cases above mentioned through a slave in whom we have the usufruct.

(166) Anyone, however, who has the mere quiritarian right in a slave, although he may be his owner, is still understood to have less right to what he may acquire than an usufructuary, or a *bona fide* possessor, for it is established that, under no circumstances, can the slave acquire anything for himself; and to such an extent is this the rule, that even if the slave should expressly stipulate for something to be given to him, or should accept something in

mancipation, in his name, some authorities hold that nothing is acquired for him.

(167) It is certain that a slave owned in common can acquire for his masters in proportion to their respective shares, except where by stipulating, or by accepting in mancipation expressly for one of them, he acquires for him alone. For example, if he should stipulate as follows: "Do you solemnly agree to pay to Titius, my master?" Or when he received by mancipation in the following manner: "I declare that this property belongs to my master Lucius Titius by quiritarian right, and let it be purchased for him with this piece of bronze and this bronze balance."

(167a) The question arises whether the addition of the name of one the masters, or the order of one of them, produces the same effect. Our preceptors hold that he alone will acquire who gave the order, just as if the slave had expressly stipulated, or had accepted in mancipation for the single master who was expressly mentioned. The authorities of the other school think that the acquisition will be made by all, as if no order had been given.

(168) An obligation is extinguished principally by the payment of what was due. Wherefore, the question arises that if anyone should pay something for another with the consent of his creditor, whether he would be released from liability by operation of law, and this opinion was held by our preceptors; or whether he remains bound by operation of law, but should defend himself by an exception on the ground of fraud against his creditor who brings the suit, which opinion was adopted by the authorities of the other school.

(169) An obligation is also extinguished by means of a release. A release is, as it were, a fictitious payment, for if I owe you something under a verbal obligation and you are willing to discharge me from liability, this can be done by permitting me to question you as follows: "Have you received what I promised you?" And you reply, "I have received it."

(170) In this manner, as we have already stated, only those obligations are discharged which have been contracted verbally, but no others; for it seems to be consistent that an obligation verbally contracted should be released by other words. Anything which is due for some other reason can be changed into a stipulation, and then be discharged by a release.

(171) But although we have stated that a release takes place by a fictitious payment, still a woman cannot make one without the authority of her guardian; while, on the other hand, payment can be made to her without her guardian's authority.

(172) Likewise, a portion of what is due may be legally paid; but it is doubtful whether it can be partially released when paid.

(173) There is another kind of imaginary payment which is effected by bronze and balance; but this is used only in certain cases; as, for instance, where something is due on the ground that there has been a transaction by bronze and balance, or for the reason that something is due on account of a judgment.

(174) This transaction takes place as follows: Not less than five witnesses and a balance-holder must be present, and then the party who is to be released must say, "For the reason that I have been condemned to pay you so many thousand sesterces, I pay and discharge this amount by means of this piece of bronze and this bronze balance; and this is the first and last pound of bronze that I pay you in accordance with public law." Then he strikes the balance with the pound of bronze, and gives it to the party by whom he is released as if by payment.

(175) In the same way a legatee releases an heir from liability for a legacy which was left him by condemnation, except that, as the party against whom judgment was rendered mentions that he has been condemned; so the heir states that he has been charged by the terms of the will to pay the legacy. An heir, however, can only be released from liability in this way where the property constituting the legacy can be weighed or counted, and where the amount is certain. Some authorities hold that the same rule applies to articles which can be measured.

(176) Moreover, an obligation is extinguished by novation, for instance, if I stipulate that what you owe me shall be paid by Titius; for *a* new obligation arises by the intervention of a new person, and the first obligation is annulled by being changed into the second one. To such an extent is this the case, that sometimes, although the subsequent stipulation may be void, still the first one is disposed of by novation; for example, if you owe me something and I stipulate that it shall be paid by Titius after his death, or by a woman, or a ward, without the authority of his or her guardian; in which case I lose my claim, for the first debtor is released from liability, and the subsequent obligation is void. The same rule of law does not apply if I stipulate with a slave, for then the former debtor remains liable, just as if I had not afterwards stipulated with anyone else.

(177) When, however, I subsequently stipulate with the same person, novation only takes place where something new is contained in the subsequent stipulation, that is to say, if some condition, date, or sponsor should be either added or omitted.

(178) What we have stated with reference to a sponsor has, however, not been absolutely settled; for it has been held by authorities of the other school that neither the addition or omission of a sponsor has the effect of causing novation.

(179) Moreover, what we stated with reference to the introduction of a condition effecting novation, must be understood to mean that a novation would take place if the condition should be fulfilled; but if it should fail, the former obligation will continue to be operative. But let us see, whether a party who brings an action in a case of this kind can be barred on the ground of fraud, or informal agreement; for it seems to have been agreed upon by the parties that suit could only be brought for the recovery of the property if the condition of the subsequent stipulation should be fulfilled. Nevertheless, Servius Sulpicius thought that a novation took place immediately, while the condition was in suspense, and if it should fail that there would be no cause of action on either ground, and in this way that the claim would be extinguished. In consequence of this, he gave it as his opinion that if anyone should stipulate with a slave for a debt which Lucius Titius owed to him, a novation would be created, and the claim would be lost; because an action could not be brought against the slave. In both these instances, however, we make use of another rule; and novation is not produced under these circumstances any more than if I should stipulate for what you owe me with an alien, who is not allowed to participate as a sponsor, by using the expression, "Do you solemnly agree?"

(180) An obligation is also extinguished by a joinder of issue, provided the action brought is authorized by law; for then the original obligation is dissolved, and the defendant begins to be held liable by the joinder of issue. But if judgment is rendered against him, the obligation produced by the joinder of issue is disposed of, and he becomes liable under the judgment. This is the reason why it was stated by the ancient authorities that a debtor is compelled to make payment before issue has been joined; for, after this has been done, he will be liable if judgment should be rendered against him, and if he is condemned, he will be compelled to satisfy the judgment.

(181) Hence, if I bring a legally authorized action for the collection of a debt, I cannot afterwards, under the strict rule of law, sue a second time, as the statement that the defendant is required to pay me something will be without effect; for the reason that by joinder of issue he ceases to be obliged to make payment. The case is different if in the first place I brought an action derived from the authority of a magistrate; for then the obligation will still continue to exist, and, therefore, by the strict rule of law, I can bring another action; but I can be barred by an exception grounded on a previous judgment, or on a former joinder of issue. We shall explain in a subsequent Commentary what actions are authorized by law, and what are derived from the authority of a magistrate.

(182) Let us now pass to obligations which arise from the commission of crime; for instance, where anyone perpetrates a theft or robbery, or damages property, or commits any injury; and

the obligation growing out of all these matters is of one kind, while obligations arising from contracts are divided into four classes, as we already have explained.

(183) Servius Sulpicius and Masurius Sabinus state that there are four kinds of theft, manifest, non-manifest, the receiving of stolen property, and the delivery of stolen property to another. Labeo says that there are two, namely, manifest and non-manifest theft, for the receiving of stolen goods and their delivery to another rather give ground to actions connected with theft than are different kinds of theft, and this seems to be the more correct opinion, as will appear hereafter.

(184) Some authorities hold that manifest theft is "committed when the culprit is taken in the act; others, however, go further and say that it occurs when he is taken in the place where the theft was perpetrated, for instance, where olives are stolen from an olive orchard, or grapes from a vineyard, while the thief is in the olive orchard or the vineyard; or, if the theft was committed in a house, as long as the thief remains therein. Others go still further, and hold that manifest theft is committed until the thief has carried the stolen property to the place where he intends to leave it.

Others go even further, and say that theft was committed as long as the thief holds the property. This last view has not been adopted, and the opinion of those who hold that if the thief is taken before he has conveyed the stolen property to the place where he intends to leave it, it is manifest theft, should not be accepted; for the reason that great uncertainty may arise whether the time for his detection should be limited to one day or to several. This doubt arises because thieves often intend to transport stolen property to other cities or into other provinces. Therefore, the first and second opinions have been generally approved, and the greater number of authorities accept the second one.

(185) From what we have already said it will be understood what non-manifest theft is, for what does not belong to this class belongs to the other.

(186) The receiving of stolen property takes place when it is sought for and found in the possession of anyone, in the presence of witnesses; for even though the party may not be the thief, a special action can be brought against him which is called a suit for the recovery of stolen property.

(187) Delivery of stolen goods is said to take place when the stolen property is offered to you by anyone in order that it may be found in your possession, and is given to you with the intention that it should be discovered on your premises rather than upon those of him who gave it to you. If the property should be found on your premises an action will lie in your favor against the party who gave it to you, even though he may not be the thief, which is called an action on account of the delivery of stolen property.

(188) An action for preventing the search for stolen goods may be brought against him who hinders anyone from searching for stolen property on his premises.

(189) The penalty for manifest theft was capital under the Law of the Twelve Tables, for a freeman, after having been scourged, was delivered up to the party against whom he committed the theft; and whether he became his slave by this proceeding, or was placed in the position of one against whom judgment had been rendered for a debt, was a matter of dispute among the ancient lawyers. The punishment of scourging was also inflicted upon a slave, but the harshness of the penalty was subsequently disapproved of, and in the case of a slave, as well as of that of a freeman, an action for fourfold damages was established by the Edict of the Prætor.

(190) The penalty for non-manifest theft was double damages by the Law of the Twelve Tables, and this the Prætor has preserved.

(191) The penalty for the concealment or delivery of stolen goods imposed by the Law of the Twelve Tables was triple damages, and this, in like manner, has been preserved by the Prætor.

(192) The action for preventing search, introduced by the Edict of the Prætor, requires the payment of fourfold damages. The ancient law, however, did not impose any penalty for this offence; but only prescribed that whoever desired to make search should do so naked, wearing a girdle, and carrying a dish; and if he found anything, it ordered that this should be considered manifest theft.

(193) The nature of the girdle was a matter of controversy, but the better opinion is that it was some kind of cloth by which the private parts were concealed. This entire rule is ridiculous, for anyone who would prevent a person from searching when clothed, would also do so if he were naked; and especially because, if anything were found under such circumstances he would be subjected to a more severe penalty. Then, whether he was ordered to have a dish in his hands for the reason that they being occupied, he might bring nothing secretly into the house; or whether if he found anything, he might place it in the dish; neither of these provisions would have any effect if the property sought for was of such a size or description that it could neither be brought into the house or be placed in the dish. There is no doubt whatever that the requirements of the law were satisfied, no matter what material the dish consisted of.

(194) For the reason that the law, in a case of this kind, declared such an offence to be manifest theft, there are some writers who hold that manifest theft may be either that defined by law, or that established by nature; that defined by law being what we are discussing, and that established by nature being what we have previously explained. The better opinion, however, is that manifest theft should be understood to be that which has been actually committed, for the law cannot cause a non-manifest thief to become a manifest one, any more than it can cause one who is not a thief at all, to become a thief, or anyone who is not an adulterer, or a homicide, to become an adulterer, or a homicide. The law, however, can cause anyone to be liable to a penalty, just as if he had committed theft, adultery, or homicide, even though he had not been guilty of any of these crimes.

(195) Again, theft is committed not only when a person removes the property of another with the intention of appropriating it, but, generally speaking, when anyone handles the property of another without the consent of the owner.

(196) Therefore, if anyone makes use of property deposited with him for safe keeping, he commits theft, and if having received an article for the purpose of using it, he employs it for some other purpose, he becomes liable for theft; for example, if anyone being about to invite friends to supper borrows silver plate and takes it away with him to a distance; or if anyone borrows a horse to carry him to a certain place, and takes it much further away, or, as the ancient lawyers stated by way of example, if he takes the horse into battle.

(197) It was decided, however, that those who use property for another purpose than that for which they received it, commit theft, provided they know that they do this contrary to the will of the owner, and that he, if he knew of it, would not allow it; but if they believe that he would permit them to do so, this should not be considered theft. And the distinction is perfectly proper, as theft is not committed without unlawful intent.

(198) If anyone thinks that he is handling an article contrary to the will of the owner, but the owner is in fact willing for him to do so this is said not to be theft; and hence the question arose and was discussed, whether if Titius should solicit my slave to steal certain property belonging to me, and deliver it to him; and the slave should notify me, and I, desiring to detect Titius in the crime, should permit my slave to take the property to him, whether Titius would be liable to me in the action of theft, or in the one for corrupting a slave, or whether he would be liable in neither. The answer is that he would be liable in neither action, for he would not be liable in the action of theft, for the reason that he did not handle the property contrary to my

will; and he would not be liable in the action for corrupting the slave, for the reason that the slave was not rendered any worse.

(199) Sometimes, however, a theft of persons who are free is committed, for example where anyone of my children who is under my control, or a wife in my hand, or a judgment debtor, or a gladiator whom I have hired is secretly taken away.

(200) Anyone may even commit a theft of his own property, as for instance, where a debtor secretly removes an article which he has pledged to his creditor, or where I surreptitiously abstract my own property from a *bona fide* possessor of the same; and hence it has been decided that he who conceals the fact that a slave who is held by a *bona fide* possessor has returned to him, commits theft.

(201) Again, on the other hand, it is sometimes permitted to seize and acquire by usucaption property which belongs to another; and in such cases theft is not held to have been committed; as for instance, where property belonging to an estate of which the heir has not taken possession is seized, unless there is a necessary heir; for when there is a necessary heir, it has been decided that usucaption cannot take place in favor of a party acting as the heir. Likewise, in accordance with what we have stated in a former Commentary, a debtor who has transferred property to his creditor by mancipation or surrendered it in court on account of a trust, can take possession of the property, and acquire it by usucaption, without being guilty of theft.

(202) Sometimes a person is liable for theft who did not himself commit the offence; as is the case with one by whose aid and advice a theft has been perpetrated. To this class belongs a person who knocks money out of your hand in order that another may pick it up; or places himself in your way in order that another may seize it; or puts your sheep or oxen to flight in order that another may catch them, as in the example given by the ancient authorities, where a person put a herd of cattle to flight by means of a red cloth. If, however, this were done merely for the sake of amusement, and not for the purpose of committing a theft, we will examine whether an equitable action should be granted, as by the *Lex Aquilia*, which was enacted with reference to damages, even negligence may be punished.

(203) The action of theft will lie in favor of the party whose interest it is that the property shall be preserved, even though he may not be the owner; and hence it will not lie in favor of the owner, unless he is interested in the property not being destroyed.

(204) Therefore, it is settled that when an article which was pledged has been stolen, the creditor can bring the action of theft, and to such an extent is this true, that even if the owner himself, that is to say the debtor, steals the property, the action of theft can still be brought by the creditor.

(205) Moreover, if a fuller receives clothes to be cleaned or pressed, or a tailor receives them to be repaired, for a certain compensation, and loses them by theft, he, and not the owner, will be entitled to bring the action; because the owner is not interested in their not being lost; as he can recover the value of the clothing in the action of leasing against the fuller, or tailor, provided the said fuller or tailor has sufficient property to make good the loss; for if he should not be solvent, then, for the reason that the owner is unable to recover what belongs to him, he can himself bring the action of theft, because, in this case, it is to his interest that the property should be saved.

(206) What we have stated with reference to a fuller and a tailor, we can likewise apply to one to whom we lend an article for use, for, as the former, on account of the compensation they received, are liable for the safe keeping of the property, the latter in consideration of the benefit he derives from using the article, also becomes responsible for its safe keeping.

(207) But as he with whom property is deposited for safe keeping is only responsible where he has committed fraud, in like manner, if the property should be stolen from him, for the reason

that he is not required to make restitution by the action of deposit he is not, on that account, interested in its being preserved; and hence he cannot bring the action of theft, but this action will lie in favor of the owner.

(208) In conclusion, it should be noted, that it is a question whether a child under the age of puberty becomes guilty of theft by removing property belonging to another. It is held by the greater number of authorities that, as a theft consists in the intention, a child under the age of puberty is not liable for this offence, unless he is very near puberty, and for this reason can understand that he is committing a crime.

(209) Anyone who seizes the property of another by violence, is also liable for theft; for who handles the property of another more against the consent of the owner than he who seizes it by violence? Therefore, it has been very properly said that he is an impudent thief. The Prætor, however, introduced a peculiar action to be brought in the case of a crime of this kind, which is called the action for robbery with violence; and it may be brought within a year for quadruple damages, and, after a year has elapsed, for simple damages. This action will lie even if the person took only one article, even of the smallest value, with violence.

(210) The action for unlawful damage was established by the *Lex Aquilia* in the first chapter of which it is provided that if anyone unlawfully kills a male or female slave, or any quadruped included in the cattle of another, he shall be required to pay to the owner of the same a sum equal to the highest value of the property during that year.

(211) To unlawfully kill is understood to mean where this happens with malicious intent or through the negligence of another; loss which results without the fault of the party who causes it not being punishable by any law, and therefore, he who occasions damage under any circumstances, without negligence or malicious intent will go unpunished.

(212) It is not only the body of the slave or of the animal which is appraised in the action brought under this law, but if by the death of the slave the owner sustained a greater loss than the value of the said slave amounted to; as for instance, if my slave was appointed heir by someone, and should be killed before he declared his acceptance of the estate by my order, not only his own value is taken into consideration, but also that of the estate which was lost. Likewise, if one of two twins, or one of a company of actors or musicians should be killed, an appraisement is not only made of the one who was killed, but also a computation of the depreciated value of those who remain. The same rule of law applies where one of a pair of mules, or one of a team of four chariot-horses is killed.

(213) Moreover, the person whose slave was killed has the choice either of prosecuting for a capital crime the person who killed him, or of bringing an action for damages against him under this law.

(214) The clause inserted in this law: "The greatest sum which the property was worth during the year," has the following effect. If the slave who was killed was crippled, or blind of an eye, but had been sound within a year, the estimate shall be made not of his value when he was killed, but of his greatest value during that year; the result of which is that sometimes the party will recover a larger amount than that of the loss which he sustained.

(215) By the provisions of the second chapter an action is granted for the amount of the claim against a joint stipulator who fraudulently released the payment of money due to the stipulator.

(216) It is clear that in this section of the law an action was introduced for the recovery of damages, although this provision was not necessary, as the action of mandate would have been sufficient for that purpose; except that under this law a suit for double damages can be brought against the defendant, if he makes a contest.

(217) In the third chapter, provision is made for all other kinds of damage. Therefore, if anyone wounds a slave, or a quadruped included under the head of cattle; or even one which is not so included, as for instance, a dog; or wounds or kills a wild beast, for example, a bear, or a lion; an action is authorized by this chapter. With reference to other animals also, as well as to all property which is destitute of life, damages can be recovered for injury by this section of the law. An action is also provided therein, where anything has been burned, dashed to pieces, or broken, although the single term "broken" is sufficient in all these cases, for it is understood to mean spoiled in any way. Therefore, where anything is burned, dashed to pieces, or broken, and also cut, crushed, spilled, or injured to any extent, or destroyed or deteriorated, it is comprehended in this term.

(218) In this chapter, however, the person who committed the damage is responsible, not only for the value of the property within the past year, but also for what it was worth within the thirty preceding days and the words "highest value" are not added. Therefore, certain authorities hold that it should be in the discretion of the judge to determine whether the estimate of the property ought to be made with reference to its greatest value, or to any inferior value which it may have had within the last thirty days; but it was the opinion of Sabinus that the law should be construed just as if the word "highest" had been inserted; and that the legislator was satisfied because he had used the expression in the first chapter of the law.

(219) Moreover, it was decided that an action will only lie under this law where the party caused the damage by means of his own body, and hence where damage has resulted in some other way, equitable actions should be granted; for instance, where anyone shuts up a slave or a head of cattle belonging to another, and kills him or it by starvation; or where a beast of burden is driven so hard that it perishes; and also where anyone persuades the slave of another to climb a tree, or descend into a well, and, in doing so, he falls, and is either killed or sustains some bodily injury. If, however, anyone pushes a slave off of a bridge or bank into a stream, and he is drowned, the party who pushed him may readily be understood to have caused the damage by means of his body.

(220) Injury is committed, for example, not only where anyone strikes another with his fist, or with a stick or a whip, but where he reviles him in a loud voice, or where well knowing, that nothing is due to himself, he seizes and advertises for sale the property of another as his debtor; or where he writes prose or poetry defaming another; or persistently follows the mother of a family or a boy wearing the *prætexta*; and finally in many other ways.

(221) We consider that injury may be suffered not only by ourselves, but also in the persons of our children who are subject to our authority, as well as by our wives, although they may not be in our hand. Hence if you commit an outrage against my daughter, who is married to Titius, an action for injury can (not) only be brought against you in her name, but also in that of mine, as well as in that of Titius.

(222) It is understood that injury cannot be committed against a slave individually, but his master may be injured through him; not, however, in the same ways in which we are considered to suffer injury through our children or wives, but where some peculiarly atrocious act is committed, which clearly appears to have been perpetrated to insult the owner, for example, if anyone scourges a slave belonging to another; and a rule has been established to meet this case. If, however, anyone reviles a slave, or strikes him with his fist, no rule has been prescribed in this instance, and permission to bring an action would not readily be given.

(223) The penalties for injuries provided by the Law of the Twelve Tables were as follows: "For a broken limb, retaliation; for a bone broken, or crushed, three hundred asses, if the party was a freeman, but if he was a slave a hundred and fifty; and for all other injuries, twenty-five asses." These pecuniary penalties seemed to be sufficient compensation in those times of great indigence.

(224) At present, however, we make use of another rule; for we are permitted by the Prætor to estimate the damages ourselves, and the judge may either condemn the defendant for the amount of which we have estimated it, or for a smaller sum, as he may think proper. The Prætor usually fixes the amount of damages to be paid for an atrocious injury, and when he has once decided in what sum the defendant must give security to appear, he establishes this sum as the limit, and although the judge can render a decree for a smaller amount, still, as a rule, on account of his respect for the authority of the Prætor, he does not venture to do so.

(225) Again, an injury is rendered atrocious either by the act, as when anyone is wounded, beaten with rods, or severely whipped; or by the place, as for instance, where the injury is committed either in the theatre, or in the forum; or on account of the person, for example, where a magistrate is insulted, or an injury is inflicted upon a senator by a person of inferior rank.