THE DIGEST OR PANDECTS.

BOOK I.

TITLE I.

CONCERNING JUSTICE AND LAW.

1. *Ulpianus, Book I, Institutes*.

Those who apply themselves to the study of law should know, in the first place, from whence the science is derived. The law obtains its name from justice; for (as Celsus elegantly says), law is the art of knowing what is good and just.

(1) Anyone may properly call us the priests of this art, for we cultivate justice and profess to know what is good and equitable, dividing right from wrong, and distinguishing what is lawful from what is unlawful; desiring to make men good through fear of punishment, but also by the encouragement of reward; aiming (if I am not mistaken) at a true, and not a pretended philosophy.

(2) Of this subject there are two divisions, public and private law. Public law is that which has reference to the administration of the Roman government; private law is that which concerns the interests of individuals; for there are some things which are useful to the public, and others which are of benefit to private persons. Public law has reference to sacred ceremonies, and to the duties of priests and magistrates. Private law is threefold in its nature, for it is derived either from natural precepts, from those of nations, or from those of the Civil Law.

(3) Natural law is that which nature teaches to all animals, for this law is not peculiar to the human race, but affects all creatures which deduce their origin from the sea or the land, and it is also common to birds. From it proceeds the union of male and female which we designate as marriage; hence also arises the procreation of children and the bringing up of the same; for we see that all animals, and even wild beasts, appear to be acquainted with this law.

(4) The Law of Nations is that used by the human race, and it is easy to understand that it differs from natural law, for the reason that me latter is common to all animals, while the former only concerns men in their relations to one another:

2. *Pomponius, Enchiridion*, For instance, reverence towards God, , and the obedience we owe to parents and country:

3. *Florentinus, Institutes, Book I*, As we resist violence and injury.

For, indeed, it happens under this law what whatever anyone does for the protection of his body is considered to have been done legally; and as Nature has established a certain relationship among us, it follows that it is abominable for one man to lie in ambush for another.

4. *Ulpianus, Institutes, Book I.*

Manumissions also, are part of the Law of Nations, for manumission is dismissal by the hand, that is to say the bestowal of freedom; for as long as anyone is in servitude he is subject to the hand and to authority, but, once manumitted, he is liberated from that authority. This takes its origin from the Law of Nations; since, according to natural law all persons were born free, and manumission was not known, as slavery itself was unknown; but after slavery was admitted by the Law of Nations, the benefit of manumission followed, and while men were designated by one natural name there arose three different kinds under the Law of Nations, that is to say freemen, and, in distinction to them, slaves, and as a third class, freedmen, or those who had ceased to be slaves.

5. *Hermogenianus, Epitomes of Law, Book I.*

By this Law of Nations wars were introduced; races were distinguished; kingdoms founded;

rights of property ascertained; boundaries of land established; buildings constructed; commerce, purchases, sales, leases, rents, obligations created, such being excepted as were introduced by the Civil Law.

6. *Ulpianus, Institutes, Book I.*

The Civil Law is something which is not entirely different from natural law or that of Nations, nor is it in everything subservient to it; and therefore when we add or take anything from the Common Law we constitute a separate law, that is the Civil Law.

(1) This our law then is established either by writing, or without it, as among the Greeks "των νομων οι μεν εγγραφοι οι δε αγραφοι", that is to say, some laws are in writing and others are not.

7. *Papinianus, Definitions, Book II.*

The Civil Law is that which is derived from statutory enactments, plebiscites, decrees of the Senate, edicts of the Emperors, and the authority of learned men.

(1) The prætorian law is that which the Prætors introduced for the purpose of aiding, supplementing, or amending, the Civil Law, for the public welfare; which is also designated honorary law, being so called after the "honor" of the Prætors.

8. *Marcianus, Institutes, Book I.*

For honorary law itself is the living voice of the Civil Law.

9. *Gaius, Institutes, Book I.*

All nations who are ruled by law and customs make use partly of their own law, and partly of that which is common to all men. For

whatever law any people has established for itself is peculiar to that State, and is called the Civil Law, as being the particular law of that State. But whatever natural reason has established among all men is equally observed by all mankind, and is called the Law of Nations, because it is the law which all nations employ.

10. *Ulpianus, Rules, Book I.*

Justice is the constant and perpetual desire to give to every one that to which he is entitled.

(1) The precepts of the law are the following: to live honorably, to injure no one, to give to every one his due.

(2) The science of the law is the acquaintance with Divine and human affairs, the knowledge of what is just and what is unjust.

11. *Paulus, On Sabinus, Book XIV.*

The term "law" is used in several ways. First, whatever is just and good is called law, as is the case with natural law. Second, where anything is useful to all or to the majority in any state, as for instance the Civil Law. Nor is honorary law less justly so designated in Our State, and the Prætor also is said to administer the law even when he decides unjustly; for the term has reference not to what the Prætor actually does, but to that which it is suitable for him to do. Under another signification, the word indicates the place where justice is administered, the name being shifted from the act itself to the locality where it is performed, and this locality may be determined in the following manner; whenever the Prætor may designate a place for the dispensation of justice, that place is properly called the law, provided the dignity of his office and the customs of our ancestors are preserved.

12. *Marcianus, Institutes, Book I.*

Sometimes the term "law" is used to denote a connection, as for instance, "I am connected by

the law of consanguinity or affinity with such-and-such a person".

TITLE II.

CONCERNING THE ORIGIN OF LAW AND OF ALL MAGISTRATES, TOGETHER WITH A SUCCESSION OF JURISTS.

1. *Gaius, On the Law of the Twelve Tables, Book I.*

Being about to give an interpretation of ancient laws, I have thought it necessary, in the first place, to go back to the origin of the City, not because I wish to make extensive commentaries, but for the reason that I notice that that is perfect in all things which is finished in all its parts; and indeed the most important part of anything is the beginning. Then, where causes are argued in the forum, if I should say that it is abominable to state the matter to the judge without making any previous remarks, it would be much more improper for those making an explanation to neglect the beginning and avoid reference to the origin of the case; proceeding with unwashed hands, so to speak, without delay to discuss the question which is to be decided. For, unless I am mistaken, these previous explanations render persons more inclined to examine the question at issue, and when we have approached it, make the comprehension of the subject more clear.

2. *Pomponius, Enchiridion*.

It, therefore, seems necessary to explain the origin of the law itself, as well as its subsequent development.

(1) In fact, at the beginning of our State the people undertook to act at first without any certain statutes or positive law, and all government was conducted by the authority of the Kings.

(2) Afterwards, the State being, to some extent enlarged, it is said that Romulus himself divided the people into thirty parts which he called *curiæ;* because he then exercised care over the Republic in accordance with the decisions of the said parts. Thus he proposed to the people certain laws relating to their assemblies, and subsequent kings also made similar proposals, all of which having been committed to writing, are to be found in the book of Sextus Papirius, who lived in the time of Superbus, the son of Demaratus of Corinth, and who was one of the principal men. This book, as We have stated, is called the Papirian Civil Law, not because Papirius added anything of his own to it, but because he compiled in a single treatise laws which had been passed without observing any order.

(3) The kings having afterwards been expelled by a Tribunitian enactment, all these laws became obsolete, and the Roman people again began to be governed by uncertain laws and customs, rather than by statutes regularly passed, and this state of affairs thus endured for almost twenty years.

(4) Afterwards, in order that this condition might not be continued, it was decided that ten men should be appointed by public authority, through whose agency laws should be applied for to the States of Greece, and that the Commonwealth should be founded upon statutory enactments. Those thus obtained were inscribed upon ivory tablets, and placed before the *Rostra*, so that the laws might be the more clearly understood; and supreme authority in the State was conferred upon said officials for that year, so that they might amend the laws, if it was necessary, and interpret them; and that there should be no appeal from their decisions, as there was from those of other magistrates. They, themselves, observed that something was lacking in these original laws, and therefore during the following year they added two other tablets to them, and for this reason they were called the Laws of the Twelve Tables; and some writers have asserted that a certain Hermodorus, an Ephesian exile in Italy, was responsible for the enactment of the said laws.

(5) These statutes having been passed, it follows as a natural consequence that discussion in the forum became requisite; as a proper interpretation demands the authority of persons

learned in the law. This discussion and this law composed by jurists and which was unwritten, was not designated by any particular name, as were the other parts of the law by their specific appellations, but they are called by the common designation the Civil Law.

(6) Afterwards, at about the same time, certain actions based upon these laws were established, by means of which men might argue their cases; and in order to prevent the people from bringing these actions in any way they might desire, the magistrate required that this should be done in a certain and solemn manner; and this part of the law is called that of statutory actions, that is to say, legal actions. And thus about the same time these three divisions of the law originated; that is, the Laws of the Twelve Tables, and from these arose the Civil Law, and from this source likewise were derived the legal actions. But the knowledge of interpreting all these, and the actions themselves, were assigned to the College of Pontiffs; and it was established which one of them should have jurisdiction over private actions during each year. The people made use of this custom for almost a century.

(7) Afterwards, Appius Claudius arranged these actions and reduced them to a certain form, and Gnæus Flavius, his secretary, the son of a freedman, gave the book to the people after it had been surreptitiously obtained; and so acceptable was that gift that he was made Tribune of the people, Senator, and Curule Ædile. This work which contains the method of bringing actions is called the Flavian Civil Law; just as the former one is called the Papirian Civil Law; for Gnæus Flavius did not add anything of his own to the book. As the commonwealth became enlarged, for the reason that certain methods of procedure were lacking, Sextus Ælius not long afterwards framed other forms of action, and gave the book to the people which is called the Ælian Law.

(8) Then, there being in use in the State the Law of the Twelve Tables, the Civil Law, and that of Statutory Actions, the result was that the *plebs* disagreed with the fathers, and seceded, and enacted laws for itself, which laws are called Plebiscites. Afterwards, when the *plebs* was recalled because much discord arose on account of these plebiscites, it was established by the *Lex Hortensia* that they should be observed as laws, and in consequence of this the distinction between the plebiscites and the other laws existed in the manner of their establishment, but their force and effect were the same.

(9) Then, because it was difficult for the *plebs* any longer to assemble, and much more so for the entire body of the people to be collected in such a crowd of persons; necessity caused the government of the commonwealth to be committed to the Senate. Thus the Senate began to take an active part in legislation, and whatever it decreed was observed, and this law was called a *Senatus-Consultum*.

(10) At the same time there was also magistrates who dispensed justice, and in order that the citizens might know what law was to be applied in any matter and defend themselves accordingly, they proposed edicts, which Edicts of the Prætors constituted the honorary law. It is styled honorary, because it originated from the office of the Prætor.

(11) Finally as it became necessary for the commonwealth that the public welfare should be attended to by one person, for the mode of enacting laws seemed to have progressed little by little as occasion demanded; and since the Senate could not properly direct the affairs of all the provinces, a supreme ruler was selected, and he was given authority, so that whatever he decided should be considered valid.

(12) Thus, in Our commonwealth everything depends either upon statute, that is upon legal enactment; or there exists a peculiar Civil Law which is founded without writing upon the sole interpretation of jurists; or there are the statutory actions which contain the method of procedure; or there is a plebiscite passed without the authority of the fathers; or there is the edict of the magistrate, whence is derived the honorary law; or there is the *Senatus-Consultum*, which is based

upon the action of the Senate alone, without any statute; or there is the Imperial Constitution, that is, that whatever the Emperor himself formulates shall be observed as the law.

(13) After the origin of the law and the procedure have been ascertained, it follows that We should be informed concerning the titles of magistrates and their origin; because, as We have stated, it is through those who preside over the administration of justice that matters are rendered effective; for how much law could there be in a State unless there are persons who can administer it? Next in order after this, We shall speak of the succession of authorities; for law cannot exist unless there are individuals learned in the same, by means of whom it can daily be improved.

(14) As to what concerns magistrates, there is no question but that in the beginning of the commonwealth all power was vested in the kings.

(15) There existed at the same time a *Tribunus Celerum* who commanded the knights, and held the second rank after the king; to which body Junius Brutus, who was responsible for the expulsion of the kings, belonged.

(16) After the kings were expelled two consuls were appointed, and it was established by law that they should be clothed with supreme authority. They were so called from the fact that they specially "consulted" the interests of the republic; but to prevent them from claiming for themselves royal power in all things, it was provided by enactment that an appeal might be taken from their decisions; and that they should not be able, without the order of the people, to punish a Roman citizen with death, and the only thing left to them was the exertion of force and the power of public imprisonment.

(17) Subsequently, when the census occupied much time, and the consuls were not able to discharge this duty, censors were appointed.

(18) Then, the people having increased in numbers, and frequent wars against neighboring tribes having taken place, it sometimes became necessary for a magistrate of superior authority to be appointed, and hence dictators arose, from whose decisions no right of appeal existed; and who were invested with the power of capital punishment. As this magistrate had supreme authority, he was not allowed to retain it for a longer period than six months.

(19) To these dictators Masters of Cavalry were added, who occupied the same place as the *Tribuni Celerum* under the King, whose duties were almost the same as those discharged at present by the Prætorian Prefect; and they were also considered lawful magistrates.

(20) At the time when the *plebs* had seceded from the fathers, about seventeen years after the expulsion of the Kings, they created tribunes for themselves on the Sacred Mount, who were Tribunes of the People; and they were called "tribunes" for the reason that formerly the people were divided into three parts, and one tribune was taken from each one, or because they were created by the votes of the tribes.

(21) Again, that there might be officials who would have charge of the temples in which the people deposited all their statutes, two persons were selected from the *plebs* who were styled ædiles.

(22) Next, when the Public Treasury began to increase in importance, quæstors were appointed to have charge of the same, and to take care of the funds, and they were so called because they were created for the purpose of examining the accounts and preserving the money.

(23) And for the reason (as We have already stated), that the consuls were not permitted by law to inflict capital punishment, without the order of the Roman people; quæstors were also appointed by the people to preside in capital cases, and these were designated *quæstores parricidii,* of whom mention is made in the Laws of the Twelve Tables.

(24) And as it was also determined that laws should be enacted, it was proposed to the people that all magistrates should resign in order that *Decemviri* might be appointed for one year; but as the latter prolonged their term of office, and acted in an unjust manner, and were not willing afterwards to elect the magistrates who were to succeed them, so that they and their faction might retain the commonwealth constantly under their control; they conducted the public affairs in such an arbitrary and violent manner that the army withdrew from the commonwealth. It is said that the cause of the succession was one Virginius, who when he learned that Appius Claudius, in violation of the provision which he himself had transferred from the ancient law of the Twelve Tables, had refused to give him control of his own daughter, but gave it to a man who, instigated by him, claimed her *as* a slave, as he, influenced by love for the girl, had confounded right and wrong; and the said Virginius being indignant that the observance of a law of great antiquity had been violated with reference to the person of his daughter, (just as Brutus who, as the first Consul of Rome had granted temporary freedom to Vindex, a slave of the Vitelli, who had revealed by his testimony a treasonable conspiracy) and thinking the chastity of his daughter should be preferred to her life, having seized a knife from the shop of a butcher, killed her, in order that, by the death of the girl, he might protect her from the disgrace of violation; and immediately after the murder, when still wet with the blood of his daughter, he fled to his fellow soldiers, all of whom deserting their leaders at Algidiun (where the legions were at the time for the purpose of waging war) transferred their standards to the Aventine Hill; and soon all the people of the city at once betook themselves to the same place, and by popular consent some of the *Decemviri* were put to death in prison, and the commonwealth resumed its former condition.

(25) Then, some years after the Twelve Tables had been enacted, a controversy arose between the *plebs* and the fathers, the former wishing to create consuls from their own body and the fathers refusing to consent to this; it was resolved that military tribunes should be created with consular power, partly from the *plebs*, and partly from the fathers. The number of these was different at various times, sometimes there were twenty of them, sometimes more than that, and sometimes less.

(26) Subsequently it was decided that consuls could be taken from the *plebs*, and they began to be appointed from both bodies; but in order that the fathers might have more power, it was determined that two officials should be appointed from the number of the latter, and hence the Curule Ædiles originated.

(27) And as the consuls were called away by distant wars, and there was no one who could dispense justice in the State, it happened that a Prætor also was created, who was styled "Urbanus", because he dispensed justice in the city.

(28) Then, after some years, this Prætor, not being found sufficient because of the great crowd of foreigners who came into the city, another Prætor called "*Peregrinus*" was appointed, for the reason that he usually dispensed justice among foreigners.

(29) Then, as a magistrate was necessary to preside over public sales, *Decemviri* were appointed for deciding cases.

(30) At the same time *Quatuorviri* also were appointed who had supervision of the highways, and *Triumviri*, who had control of the mint, who melted bronze, silver, and gold, and capital *Triumviri*, who had charge of the prisons, so that when it was necessary to inflict punishment it might be done by their agency.

(31) And, for the reason that it was inconvenient for magistrates to appear in public during the evening, *Quinqueviri* were appointed on each side of the Tiber, who could discharge the duties of magistrates.

(32) After Sardinia had been taken, and then Sicily and Spain, and subsequently the Narbonnese province, as many Prætors were created as there were provinces which had come

under the Roman rule; part of whom had jurisdiction over matters in cities, and part over provincial affairs. Next Cornelias Sylla established public investigations, as for instance, those concerning forgery, parricide, and assassins, and added four Prætors. Then Gaius Julius Cæsar appointed two Prætors and two Ædiles, who superintended the distribution of grain, and were called *Cereales,* from Ceres. In this way twelve Prætors and six Ædiles were created. Then the Divine Augustus appointed sixteen Prætors, and afterwards the Divine Claudius added two more who administered justice in matters of trust; one of whom the Divine Titius dispensed with; and the Divine Nerva added another who expounded the law in questions arising between the Treasury and private individuals. Thus eighteen Prætors administered justice in the Commonwealth.

(33) All these regulations are observed as long as the magistrates are at home, but whenever they travel abroad one is left who expounds the law, and he is styled the Prefect of the City. This Prefect was created in former times; he was afterwards appointed on account of the Latin festivals, and this is done every year; but the Prefect of Subsistence and that of the Night Watch are not magistrates, but are extraordinary officials appointed for the public welfare; and also those whom we have mentioned as being appointed for this side of the Tiber, were afterwards created Ædiles by a decree of the Senate.

(34) Therefore, from all these things we learn ten Tribunes of the People, two Consuls, eighteen Prætors, and six Ædiles dispensed justice in the city.

(35) Many distinguished men have been professors of the science of the Civil Law; and of these at present We will mention those who enjoyed the highest esteem among the Roman people; to the end that it may appear from whom these laws have been derived and handed down, and what was their reputation. And, indeed, among all who acquired this knowledge, it is said that no one publicly professed it before Tiberius Coruncanius; others, however, before him attempted to keep the Civil Law secret, and only to give advice to those who consulted them, rather than to instruct such as desired to learn.

(36) Publius Papirius, who compiled the royal laws in one treatise, was in the first rank of those versed in the Royal Statutes; then came Appius Claudius, one of the *Decemviri* who took the most prominent part in the compilation of the Twelve Tables. After him, another Appius Claudius was the possessor of great legal learning, and he was called "Hundred Handed", for he laid out the Appian Way, constructed the Claudian Aqueduct, and gave it as his opinion that Pyrrhus should not be received into the city; it is also said that he drew up forms of action in cases of wrongful occupation of property, which book no longer exists. The same Appius Claudius invented the letter R, from which it resulted that the Valesii became Valerii, and the Fusii became Furii.

(37) After these came Sempronius, a man of preeminent learning, whom the Roman people called σοφος, that is to say, "wise", nor was anyone either before or after him designated by this title. Next in order was Gaius Scipio Nasica, who was styled by the Senate "The Best", to whom a house on the *Via Sacra* was given by the State where he might the more easily be consulted. Then came Quintus Mucius, who was sent as envoy to the Carthaginians, where when two dice were placed before him, one for peace and the other for war, and it was left to his judgment to select whichever he chose and take it to Rome; he took both, and said that the Carthaginians must ask for whichever one they preferred to have.

(38) After these came Tiberius Coruncanius, who, as I have already stated, was the first of the professors of the law, but no work of his is extant; his opinions, however, were very numerous and remarkable. Next in order Sextus Ælius, his brother Publius Ælius, and Publius Atilius had the greatest success in imparting instruction; so that the two Ælii also became consuls and Atilius was the first person invested by the people with the appellation of "The Learned". Ennius praises also Sextus Ælius and a book of his entitled *Tripertita* which still exists and contains, as it were, the cradle of the laws. It is called *Tripertita* because it includes the Law

of the Twelve Tables, to which it added the interpretation of the same, as well as the method of legal procedure. Three other books are also attributed to him of which, however, certain writers deny him the authorship. Cato, to a certain degree, followed these men. Subsequently came Marcus Cato, the head of the Porcian family whose books are extant; but a great many were written by his son, from which still others derive their origin.

(39) After these came Publius Mucius, Brutus, and Manilius, who founded the Civil Law. Among them Publius Mucius left ten works, Brutus seven, and Manilius three; and written volumes of Manilius are also extant. The first two were of consular rank, Brutus was Prætor, and Publius Mucius had been Pontifex Maximus.

(40) After these came Publius Rutilius Rufus, who was Consul at Rome, and Proconsul of Asia, Paulus Virginius, and Quintus Tubero, the Stoic, a pupil of Pansa, who was himself Consul. Sextus Pompeius, the paternal uncle of Gnæus Pompeius, lived at the same time, and Cælius Antipater, who wrote historical works, but paid more attention to eloquence than to the science of the law. There was also Lucius Crassus, the brother of Publius Mucius, who was called Mucianus, and whom Cicero declared to be the best debater of all the jurists.

(41) After these came Quintus Mucius, the son of Publius, the Pontifex Maximus, who first codified the Civil Law by drawing it up under different heads in eighteen books.

(42) The pupils of Mucius were very numerous, but those of most eminent authority were Aquilius Gallus, Balbus Lucilius, Sextus, Papirius, and Gaius Juventius; of whom Servius declared that Gallus had the greatest authority among the people. All of them, however, are mentioned by Servius Sulpicius, but none of their writings are of such a kind as to be generally sought after; and, in fact, their works are not usually found in men's hands at all, though Servius made use of them in his own books, and on this account it is that the memory of them still survives.

(43) Servius, while he held the first place in arguing cases, or, at all events, held it after Marcus Tullius, is said to have applied to Quintus Mucius for advice concerning a matter in which a friend of his was interested, and as he had a very imperfect comprehension of the answer given him concerning the law, questioned Quintus a second time, and when the latter replied and he still did not understand, he was rebuked by Quintus Mucius, who told him that it was a disgrace for him, a patrician, a noble, and an advocate, to be ignorant of the law which was his profession. Servius was so affected by this reproach that he devoted his attention to the Civil Law, and was especially instructed by those of whom We have spoken; having been taught by Balbus Lucilius, and also having received much information from Gallus Aquilius, who resided at Cercina; and for this reason many of his books which are still extant were written there. When Servius died while absent on an embassy, the Roman people erected a statue to him in front of the *Rostra*, and it stands there to-day before the *Rostra* of Augustus. Many volumes of his remain, for he left nearly one hundred and eighty treatises.

(44) After him came many others, among whom nearly all of the following wrote books, namely: Alfenus Varus, Gaius, Aulus Ofilius, Titus Cæsius, Aufidius Tucca, Aufidius Namusa, Flavius Priscus, Gaius Ateius, Pacuvius, Labeo, Antistius, the father of Labeo Antistius, Cinna, and Publicus Gellius. Of ten eight wrote treatises, all of which were digested by Aufidius Namusa in a hundred and forty books. Of these pupils Alfenus Varus and Aulus Ofilius possessed the greatest authority; Varus became Consul, but Ofilius remained in the Equestrian rank; the latter was very intimate with the Emperor, and left many works on the Civil Law, which laid the foundation for the greater part of the same, for he first wrote on the laws of the five per cent tax, and on jurisdiction. He was also the first one to carefully systematize the Edict of the Prætor, although before him Servius had left two extremely short books relating to the Edict, which were addressed to Brutus.

(45) Trebatius, a pupil of Cornelius Maximus, also lived at the same time; and Aulus Cascelius, a pupil of Quintus Mucius Volusius, as well, and, indeed, in honor of his teacher he

left his property to Publius Mucius, the grandson of the latter. He was also of quæstorian rank but he declined promotion, although Augustus offered him the consulship. Among these, Trebatius is said to have been better informed than Cascellius, but Cascellius is claimed to have been more eloquent than Trebatius, but Ofilius was more learned than either. No works of Cascellius are extant, except one of "Good Sayings", there are, however, several of Trebatius, but they are very little used.

(46) After this came Tubero, who studied under Ofilius. He was a patrician and abandoned arguing cases for the study of the Civil Law, principally because he had prosecuted Quintus Ligarius before Gaius Cæsar, and failed. This is the same Quintus Ligarius that, while he was holding the shore of Africa, refused to allow Tubero, who was ill, to land and obtain water, for which reason he accused him, and Cicero defended him. The oration of the latter, a very elegant one, which is entitled "For Quintus Ligarius", is still extant. Tubero was considered to be most learned in both public and private law, and left a great many treatises on both subjects. He had the affectation of writing in ancient language and therefore his works are not popular.

(47) After him the following were of the highest authority, namely, Ateius Capito, who followed Ofilius, and Antistius Labeo, who studied under all of them, he was also taught by Trebatius. Of these Ateius was Consul, but Labeo declined to accept the office which would have made him temporary consul when it was offered to him by Augustus; but he gave great attention to legal studies, and divided up the entire year so that he could be at Rome for six months with his pupils, and might be absent for the remaining six months, and employ his time in writing books. By doing this he left four hundred volumes, of which a great many are still in use. These two founded, as it were, two different schools, for Ateius Capito retained the principles which had been taught him; but Labeo, from the nature of his genius and his reliance upon his own learning, and who had given attention to other branches of knowledge, made many innovations. Massurius Sabinus succeeded Ateius Capito, and Nerva, Labeo; and these still further increased the aforesaid distinction between the schools. Nerva was also very intimate with the Emperor. Massurius Sabinus was of Equestrian rank, and was the first who wrote with public authority, and after this privilege was conceded, it was also granted to him by Tiberius Cæsar. And We may remark, in passing, that prior to the reign of Augustus, the right of giving opinions publicly was not granted by the chiefs of the State, but anyone who had confidence in his own attainments gave answers to those who consulted him, but they did not impress their seals upon the latter, and very frequently wrote to the judges, or to those who had consulted them, to bear witness to their opinions. The Divine Augustus, in order to enable the authority of the law to have greater weight, first decreed that jurists might answer in his name; and from that time, this began to be claimed as a privilege. The result was that the distinguished Emperor Hadrian, when certain men of prætorian rank asked of him leave to deliver opinions, told them in a rescript, "that this permission was not to be asked, but was granted as a right; and therefore if anyone had confidence in his knowledge, he should be delighted, and he might prepare himself for giving opinions to the people".

Therefore, permission was given to Sabinus by Tiberius Cæsar to give opinions to the people. He was already advanced in age when he attained to the Equestrian rank, and indeed was fifty years old, nor was he a man of great pecuniary resources, but was, for the most part, supported by his pupils. He was succeeded by Gaius Cassius Longinus, the son of a daughter of Tubero, who was the granddaughter of Servius Sulpicius; and for this reason he alluded to Servius Sulpicius as his grandfather. He was Consul with Quartinus during the reign of Tiberius, and enjoyed great authority in the State until the Emperor banished him, and having been exiled to Sardinia by the latter, he was recalled by Vespasian to Rome, where he died.

Proculus succeeded Nerva, and there was, at the same time, another Nerva, a son; there was also another Longinus, belonging to the Equestrian order, who afterwards attained to the Prætorship. The authority of Proculus was, however, greater. The adherents of the two schools

were designated respectively, Cassiani and Proculeiani, having derived their origin from Capito and Labeo. Cælius Sabinus, who had greater influence in the time of Vespasian, succeeded Cassius; Pegasus succeeded Proculus, who was prefect of the City during the reign of Vespasian; Priscus Javolenus succeeded Cælius Sabinus; Celsus succeeded Pegasus; the son Celsus and Priscus Neratius, both of whom were consuls, succeeded his father; (Celsus, indeed, was Consul a second time), Aburnus Valens succeeded Javolenus Priscus along with Tuscinaus, as well as Salvius Julianus.

TITLE III.

CONCERNING STATUTES, DECREES OF THE SENATE, AND LONG ESTABLISHED CUSTOMS.

1. *Papinianus, Definitions, Book I.*

A statute is a general precept; a resolution of men learned in the law; a restraint of crimes committed either voluntarily or through ignorance; or a general obligation of the State.

2. *Marcianus, Institutes, Book I.*

The orator Demosthenes thus defined it. "A law is something which it is proper for all men to obey for many reasons, and principally because every law was devised by, and is a gift of God; the decree of learned men; the restraint of those who either voluntarily or involuntarily are guilty of crime; it is also a common obligation of the State, by whose rules all those who reside therein should regulate their lives."

Chrysius, a Stoic philosopher of the greatest erudition, began a book which he wrote as follows: "Law is the queen of all things, Divine and human. It should also be the governor, the leader, the ruler, of both the good and the bad, and, in this way, be the standard of whatever is just and unjust, as well as of those things which are civil by Nature, prescribing what should be done, and prohibiting what should not be done."

3. *Pomponius on Sabinus, Book XXV.*

Laws, as Theophrastus has stated, ought to be established with respect to matters which often occur, and not with reference to such as occur unexpectedly.

4. *Celsus, Digest, Book V.*

Laws are not established concerning matters which can only happen in a single instance.

5. *The Same, Digest, Book XVII.*

For laws ought to be adapted to events which frequently and readily occur, rather than to such as rarely happen.

6. *Paulus, On Plautius, Book XVII.*

In fact, what only happens once or twice, as Theophrastus says, legislators omit.

7. *Modestinus, Rules, Book I.*

The office of the law is to command, to forbid, and to punish.

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

Laws are not established for individuals, but for general purposes.

9. *The Same, On the Edict, Book XVI.*

There is no doubt that the Senate can make law.

10. *Julianus, Digest, Book LIX.*

Neither statutes nor decrees of the Senate can be written in such a way as to include all cases at any time which may arise; but it is sufficient if they include such as frequently occur.

11. *The Same, Digest, Book XC.*

And therefore in those laws which are enacted in the first place, a more certain interpretation or construction must be given by the most excellent Emperor.

12. *The Same, Digest, Book XV.*

All matters cannot be specifically included in the laws or decrees of the Senate; but where their sense is clear in any instance, he who has jurisdiction of the same can apply it to others that are similar, and in this way administer justice.

13. *Ulpianus, On the Edict of the Curule Ædiles, Book I.*

For, as Pedius says, whenever anything has been introduced by law there is a good opportunity for extending it by interpretation or certain construction to other matters, where the same principle is involved.

14. *Publius, On the Edict, Book LIV.*

Where anything contrary to the principles of the Law has been accepted, it must not be applied to its full extent.

15. *Julianus, Digest, Book XXVII.*

In those instances where anything has been established contrary to the principles of the law, we cannot follow this rule of law.

16. *Paulus, Sole Book on Special Law.*

Special law is that which has been introduced by the authority of those establishing it against the tenor of a legal principle, on account of some particular advantage.

17. *Celsus, Digest, Book XXVI.*

To know the laws is not to be familiar with their phraseology, but with their force and effect.

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

Laws should be interpreted liberally, in order that their intention may be preserved.

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

When the terms of the law are ambiguous, that meaning is to be accepted which is without incongruity; especially when the intention of the law can be ascertained therefrom.

20. *Julianus, Digest, Book LV.*

The principle of every law established by our ancestors cannot be stated.

21. *Neratius, Parchments, Book VI.*

Hence it is not necessary to seek for the reasons of those laws which have been established; otherwise many rules which are based upon the same and which are now accepted, will be overthrown.

22. *Ulpianus, On the Edict, Book XXXV.*

When the law pardons anything which is past it forbids it for the future.

23. *Paulus, On Plautius, Book IV.*

Matters which have always had a certain interpretation should, under no circumstances, be changed.

24. *Celsus, Digest, Book IX.*

It is not proper without taking into consideration an entire law either to decide, or give an opinion upon any particular portion of the same.

25. *Modestinus, Opinions, Book VIII.*

No principle of law or indulgent construction of equity permits matters which have been introduced for the welfare of mankind to be interpreted so rigorously as to be productive of hardship to them.

26. *Paulus, Questions, Book IV.*

There is nothing new in the interpretation of recent laws by former ones.

27. *Tertullianus, Questions, Book I.*

Therefore, for the reason that it is the custom to interpret recent laws by former ones, it ought always to be understood that the principles of the laws are applicable to such persons or things as may at any time be of a similar character.

28. *Paulus, On the Lex Julia et Papia, Book V.*

Recent laws are applicable to former ones unless they are opposed to them; and this may be established by many reasons.

29. *The Same, On the Lex Cincia.*

To do what the law prohibits violates the law, and anyone who evades the meaning of the law without disobeying its words, is guilty of fraud against it.

30. *Ulpianus, On the Edict, Book IV.*

Fraud is committed against the law when something is done which the law did not wish to be done, but did not absolutely prohibit; and the difference between fraud against the law and violation of the same is that between speech and opinion.

31. *The Same, On the Lex Julia et Papia.*

The Emperor is free from the operation of the law, and though the Empress is undoubtedly subject to it, still, the Emperors generally confer upon her the same privileges which they themselves enjoy.

32. *Julianus, Digest, Book XCIV.*

In cases where there are no written laws, that should be observed which has been established by usage and custom, and if anything is lacking therein, then whatever is nearest to, and resulting from it should be observed; and if even this does not exist, then the law which is used by the City of Rome must be followed.

(1) An ancient custom is not improperly observed as a law (and this is what is called law established by usage). For as the laws themselves restrain us for no other reason than because they are accepted by the judgment of the people — for it is but proper that what the people have approved without being written should bind all persons — for what difference does it make whether the people have manifested their will by vote, or by acts and deeds? Wherefore the rule has also been most justly adopted that laws shall be abrogated not only by the vote of the legislator, but also through disuse by the silent consent of all.

33. *Ulpianus, Concerning the Office of Proconsul, Book I.*

It is usual for long established custom to be observed as law in those matters which have not come down in writing.

34. *The Same, Book IV.*

When anyone seems to be confident concerning the custom of a city or province, I think it should first be determined whether that custom has been confirmed by a judicial decree after it had been disputed.

35. *Hermogenianus, Epitomes of Law, Book I.*

Those rules which have been approved by long established custom and have been observed for many years, by, as it were, a tacit agreement of citizens, are no less to be obeyed than laws which have been committed to writing.

36. *Paulus, On Sabinus, Book VII.*

And indeed, a law of this kind has greater authority, for the reason that it has been approved to such an extent that it is not necessary to commit it to writing.

37. *Callistratus, Questions, Book I.*

When inquiry is made as to the interpretation of a law, it must in the first place be ascertained what rule the State formerly made use of in cases of the same kind; for custom is the best interpreter of the laws.

38. *The Same, Questions, Book I.*

For our Emperor Severus stated in a Rescript that in questions of doubt arising from statutory enactments, custom, or the authority of decisions which have always been decided in the same manner, should obtain the force of law.

39. *Celsus, Digest, Book XXIII.*

That which has in the first place been introduced, not by any rule but through error, and has afterwards been confirmed by custom, shall not prevail in other similar cases.

40. *Modestinus, Rules, Book I.*

Thus all law has been either made by consent, or established by necessity, or confirmed by custom.

41. *Ulpianus, Institutes, Book II.*

Hence all law consists either in the acquisition, preservation, or diminution of right; for it has reference to the way in which anything becomes the property of a person, or how he can preserve it or his rights, or how he can alienate or lose them.

TITLE IV.

CONCERNING THE CONSTITUTIONS OF THE EMPERORS.

1. *Ulpianus, Institutes, Book I.*

Whatever the Emperor has decreed has the force of law; since by a Royal ordinance which was passed concerning his sovereignty, the people conferred upon him all their own authority and power.

(1) Therefore, everything which the Emperor decrees by a letter over his signature, whether he decided after examining it or did so without judicial consideration or ordered it by means of an edict, has the force of law; and these are what we generally designate constitutions.

(2) Among the latter there are some which are special, and are not to be employed as precedents; for whatever the Emperor has granted to anyone as a reward of merit, or where he inflicts a penalty, or relieves a person in an unusual way, this does not extend beyond the party in question.

2. *Ulpianus, Trusts, Book IV.*

In the enactment of new laws evidence of benefit should manifestly appear to justify departure from a law which has been considered just for a long period of time.

3. *Javolenus, Epistles, Book XIII.*

We should interpret as liberally as possible any favor of the Emperor which in fact proceeds

from his Divine indulgence.

4. *Modestinus, Excuses, Book II.*

Recent constitutions have greater authority than those which have preceded them.

TITLE V.

CONCERNING THE CONDITION OF MEN.

1. *Gaius, Institutes, Book I.*

All the law which We make use of relates either to persons, things, or actions.

2. *Hermogenianus, Epitomes of Law, Book I.*

Therefore, since all law has been established on account of mankind, we shall first speak of the condition of persons, and afterwards of other matters, following the order of the Perpetual Edict, and adding to them the titles as arranged and connected with them, as far as the matter permits.

3. *Gaius, Institutes, Book I.*

The principal division of the law of persons is as follows, namely, that all men are either free or slaves.

4. *Florentinus, Institutes, Book IX.*

Liberty is the natural power of doing whatever anyone wishes to do unless he is prevented in some way, by force or by law.

(1) Slavery is an institution of the Law of Nations by means of which anyone may subject one man to the control of another, contrary to nature.

(2) Slaves are so called for the reason that military commanders were accustomed to sell their captives, and in this manner to preserve them, instead of putting them to death.

(3) They are styled *mancipia*, because they are taken by the hands of their enemies.

5. *Marcianus, Institutes, Book I.*

One condition is common to all slaves; but of persons who are free some are born such, and others are manumitted.

(1) Slaves are brought under our ownership either by the Civil Law or by that of Nations. This is done by the Civil Law where anyone who is over twenty years of age permits himself to be sold for the sake of sharing in his own price. Slaves become our property by the Law of Nations when they are either taken from the enemy, or are born of our female slaves.

(2) Persons are born free who are born from a free mother, and it is sufficient for her to have been free at the time when her child was born, even though she may have been a slave when she conceived; and, on the other hand, if she was free when she conceived, and was a slave when she brought forth, it has been established that her child is born free, nor does it make any difference whether she conceived in a lawful marriage or through promiscuous intercourse; because the misfortune of the mother should not be a source of injury to her unborn child.

(3) Hence the following question arose, where a female slave who was pregnant, has been manumitted, and is afterwards again made a slave, or, after having been expelled from the city, should bring forth a child, whether that child should be free or a slave? It was very properly established that it was born free; and that it is sufficient for a child who is unborn that its mother should have been free during the intermediate time.

6. *Gaius, Institutes, Book I.*

Freedmen are those who are manumitted from lawful slavery.

7. *Paulus, On the Shares Granted to the Children of Condemned Persons.*

A child in its mother's womb is cared for just as if it were in existence, whenever its own advantage is concerned; although it cannot be of any benefit to anyone else before it is born.

8. *Papinianus, Questions, Book HI.*

The Emperor Titius Antoninus stated in a Rescript that the status of children could not be prejudiced on account of the tenor of an improperly drawn instrument.

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

In many parts of our law the condition of women is worse than that of men.

10. *Ulpianus, on Sabinus, Book I.*

The question has been raised to which sex shall we assign an hermaphrodite? And I am of the opinion that its sex should be determined from that which predominates in it.

11. *Paulus, Opinions, Book XVIII.*

Paulus was of the opinion that a child who was conceived during the life of its grandfather, while the latter was ignorant of the connexion of his daughter, even though it was born after the death of its grandfather, was not the lawful son of him by whom it was begotten.

12. *The Same, Opinions, Book XIX.*

It is now generally held upon the authority of that most learned man Hippocrates, that a child perfectly formed may be born in the seventh month; and therefore it is established that a child who is born in lawful marriage after seven months is legitimate.

13. *Hermogenianus, Epitomes of Law, Book I.*

A slave abandoned by his master to fortune in the trial of a capital case does not become free even if he should be acquitted.

14. *Paulus, Sentences, Book IV.*

Those beings are not children who are born formed in some way which is contrary to the likeness of the human race; as, for instance, where a woman brings forth something monstrous or unnatural. A child, however, which has more than the ordinary number of human limbs seems to be, to some extent, completely formed, and therefore may be included among children.

15. *Tryphoninus, Controversies, Book X.*

A slave named Arescusa was declared to be free by will if she brought forth three children; and at her first delivery she had one child, and at her second she had three. The question then arose as to which of the said children were free? The condition on which her freedom pended had to be fulfilled by the woman, and there was no doubt that the last child was born free; for nature does not permit two children to come forth from their mother's womb at the same time, by one movement, so that the order of birth being uncertain, it does not appear which one was born in slavery, and which was born free. Therefore, the condition having been fulfilled at the time the birth began, namely that the child should be born of a free woman, it is the one born last, just as if any other condition imposed on the freedom of the woman had been fulfilled at the moment of her delivery; for example, that she should be manumitted on condition that she gave ten thousand sesterces to the heir, or to Titius; and at the instant when she was delivered she fulfilled the condition through the agency of someone else; it would necessarily be held that she was already a free woman when she brought forth the child.

16. *Ulpianus, Controversies, Book VI.*

The same thing should take place if Arescusa had first brought forth two children, and afterwards brought forth twins; for it must be held that both the latter are not born free, but only the one who was born last. The question, however, is rather one of fact than of law.

17. *The Same, On the Edict, Book XXII.*

According to a Constitution of the Emperor Antoninus, all those who were living in the Roman world were made Roman citizens.

18. *The Same, on Sabinus, Book XXVII.*

The Emperor Hadrian set forth in a Rescript addressed to Publicius Marcellus, that if a free woman after having been condemned to death while pregnant brought forth a child it would be free; and that it was customary to hold her until she was delivered. Also, where a woman who has conceived in lawful marriage is interdicted from fire and water, the child she brings forth is a Roman citizen, and remains under the control of its father.

19. *Celsus, Digest, Book XXIX.*

When children are born in lawful marriage they follow the condition of the father, but one that is conceived in promiscuous intercourse follows the condition of the mother.

20. *Ulpianus, on Sabinus, Book XXXVIII.*

Anyone who becomes insane is considered to retain the position and rank he previously held, and also his magistracy and authority; just as he retains the ownership of his property.

21. *Modestinus, Rules, Book VII.*

Where a freeman sells himself and is afterwards manumitted, he does not recover his former condition of which he deprived himself, but belongs to the class of freedmen.

22. *The Same, Opinions, Book XII.*

Herennius Modestinus held that if a female slave brought forth a child at the time when, according to the terms of the donation which disposed of her, she should be manumitted; since she was free by the Imperial Constitution, the child born of her is freeborn.

23. *The Same, Pandects, Book I.*

The term "conceived in promiscuous intercourse" is applicable to those who cannot show who their father is, or if they can do so, he is not their lawful father, and these are called spurious, from σπορα.

24. *Ulpianus, On Sabinus, Book XXVII.*

The law of nature is that a child born out of lawful matrimony follows the mother, unless a special law provides otherwise.

25. *The Same, On the Lex Julia et Papia, Book I.*

We should consider him to be freeborn who has been legally declared such, even though he is in fact a freedman; for the reason that whatever is judicially determined is accepted as truth.

26. *Julianus, Digest, Book LXIX.*

Those who are unborn are, by almost every provision of the Civil Law, understood to be already in existence; for estates legally descend to them, and if a pregnant woman is taken by the enemy, her child has the right of *postliminium*, and it also follows the condition of the father, or mother. Moreover, if a pregnant female slave is stolen, even after she may have brought forth in the hands of a purchaser in good faith, her child being stolen property is not acquired by use. The result of this is that a manumitted slave, also, as long as a son can be

born to his patron is considered to hold the same position under the law as those who have patrons living.

27. *Ulpianus, Opinions, Book V.*

Where a man admits that he is a freedman, his patron cannot make ' him freeborn even by adopting him.

TITLE VI.

CONCERNING THOSE WHO ARE THEIR OWN MASTERS, AND THOSE THAT ARE UNDER THE CONTROL OF OTHERS.

1. *Gaius, Institutes, Book I.*

Another division of persons follows according to law, some of whom are their own masters, and some are subject to the control of others. We shall now consider those who are subject to the control of others; for if we know who these persons are, we shall at once understand who those are that are their own masters. Let us then examine those who are under the control of others.

(1) Thus, slaves are under the power of their masters, and this power is derived from the Law of Nations, for we may perceive that among nearly all nations masters have the power of life and death over their slaves, and whatever is acquired by a slave is acquired by his master.

(2) But, at present, it is not permitted to any persons living under Roman dominion to be guilty of cruelty to their slaves which is atrocious, or without a cause recognized by the law. For, according to a Constitution of the Divine Antoninus, anyone who kills his slave without a cause shall be punished as severely as one who kills the slave of another; the inordinate severity of masters is also repressed by a Constitution of the same Emperor.

2. *Ulpianus, Concerning the Office of Proconsul, Book VIII.* Where a master is cruel to his slaves and forces them to licentiousness or to disgraceful violation, the course to be taken by the presiding judge is disclosed by a Rescript of the Divine Pius addressed to Julius Marcianus, Proconsul of Bætica. These are the terms of the Rescript: "It is proper that the power of masters over their slaves should remain unimpaired, and that no man should be deprived of his right; but it is to the interest of the masters themselves that relief from cruelty, hunger, or intolerable injury, should not be denied to those who justly implore it. Therefore, take cognizance of the complaints of those slaves of Julius Sabinus who fled for refuge to the Imperial statue; and if you find that they have been treated with greater severity than was proper, or subjected to disgraceful outrage, order them to be sold, under such conditions that they may not be restored to the power of their master; and if he violates this My Constitutions, let him know that he will be more severely punished". The Divine Hadrian also, banished for five years a certain matron named Umbricia, because she had treated her female slaves with atrocious cruelty for very trivial reasons.

3. *Gaius, Institutes, Book I.*

Our children also who are born in lawful marriage are under our control; which is a law peculiar to Roman citizens.

4. *Ulpianus, Institutes, Book I.*

Certain Roman citizens are fathers of families, others are sons of families, some are mothers of families, others again are daughters of families. Those are fathers of families who are their own masters, whether they have arrived at puberty or not; in the same manner those who are under the control of others are either the mothers of families, or the sons or daughters of families. For any child who is born of me and my wife is under my control; also a child born of my son and his wife, that is to say my grandson and granddaughter, are also under my control, as well as my great-grandson and great-granddaughter, and so on with reference to

other descendants.

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

Grandsons, after the death of their paternal grandfather, usually come under the control of his son, that is, of their own father. In like manner, great-grandchildren and other descendants also come under the control of a son, if he is living, and remains in the family; or under that of an ascendant who precedes them in authority. This is also the law not only concerning natural children but also with reference to those who have been adopted.

6. *The Same, On Sabinus, Book IX.*

We define a son to be a male child born of a man and his wife. But if we suppose the husband was absent, for example for the term of ten years, and on his return finds a child a year old in his house, our opinion coincides with that of Julianus, that this is not the son of the husband. Nevertheless, Julianus says, it ought not to be tolerated that a man, who has lived constantly with his wife, should refuse to acknowledge his son as not being his own. It appears to me, however, (and this Scævola also holds), that if it should appear that a husband had not cohabited with his wife for some time, because of disease, or for some other reason, or if he was in such a condition of ill health that he could not procreate, a child born in his house, although this was known to the neighbors, is not his son.

1. The Same, On Sabinus, Book XXV.

Where a father has been condemned to punishment by which he either loses his citizenship, or is subjected to penal servitude, there is no doubt that his grandson takes the place of his son.

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

Where a father is insane, his child, nevertheless, remains under his control. The case is the same with all ascendants who have children subject to their authority, for the right of paternal control having been established by custom, no one can cease to have persons under it except where children are released from the same as they are under certain circumstances, and there is no question whatever that they still remain subject to his authority. For this reason a father not only, retains under his control those children whom he begat before he became insane, but also any who were conceived before his insanity developed, and were born while it existed. Moreover, if his wife conceives while he is insane, it must be considered whether the child is born under his control or not; for although an insane person cannot marry, he can still retain his matrimonial condition; and since this is the case he will have his son under his control.

In like manner, if his wife becomes insane, a child conceived by her previous to her insanity is born under his control; but if it is conceived while she was insane and her husband was not, it undoubtedly is born under his control, for the reason that the marriage still exists. But if both husband and wife are insane, and she then conceives, the child is born under the control of its father; for it is presumed that insane persons still have some will remaining; and, as the marriage relation continues while one or the other is insane, it also does so when both are in that condition.

(1) Moreover, an insane father retains his paternal authority to such an extent that everything acquired by his son belongs to him.

9. *Pomponius, On Quintus Mucius, Book XVI.*

In all matters relating to the public interest the son of a family takes the place of the father of a family; for instance, where he discharges the duty of a magistrate, or is appointed a guardian.

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

Where a judge decides that a child is to be brought up or supported, it should be held that it must be certainly ascertained whether it is his son or not; a ruling as to support cannot prejudice the truth.

11. *Modestinus, Pandects, Book I.*

Illegitimate or emancipated children cannot be brought under paternal authority against their consent.

TITLE VII.

CONCERNING ADOPTIONS AND EMANCIPATIONS, AND OTHER METHODS BY WHICH PATERNAL AUTHORITY IS DISSOLVED.

1. *Modestinus, Rules, Book II.*

Sons of families are not only created by nature but also by adoption.

(1) The term "adoption" is one of general signification, and includes two kinds; one of which is likewise styled adoption, the other arrogation. The sons of families are adopted; those who are their own masters are arrogated.

2. *Gaius, Institutes, Book I.*

Adoption, generally speaking, takes place in two ways, either by the authority of the Emperor, or by the order of a magistrate. We adopt those by the authority of the Emperor who are their own masters; and this kind of adoption is called arrogation, because he who adopts is asked, that is, interrogated, whether he is willing that the party whom he is about to adopt shall be his lawful son; and he who is adopted is asked whether he suffers this to be done, We adopt by the order of a magistrate those who are under paternal control, whether they are in the first degree of children, such as son and daughter, or in one that is more remote, as grandson and granddaughter, and great-grandson and great-granddaughter.

(1) There is one thing common to both kinds of adoption, namely, that those who are incapable of procreation, as for instance, eunuchs, can adopt.

(2) Adoption effected through the Emperor is peculiar in that if anyone who has children under his control gives himself in arrogation, he himself is not only subjected to the authority of his adoptive father, but also his children and grandchildren pass under the control of the former.

3. *Paulus, On Sabinus, Book IV.*

Where the son of a family becomes a consul, or governor, he can be emancipated, or given in adoption before himself.

4. *Modestinus, Rules, Book II.*

It is the opinion of Neratius that a magistrate before whom a legal action can be brought can emancipate his own children, or give them in adoption before himself.

5. *Celsus, Digest, Book XXVIII.*

In adoption, the will of only those parties who are their own masters shall be consulted; but where children are given in adoption by their fathers, the will of both must be taken into consideration, either consent being given, or no opposition being offered.

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

When a person is adopted as grandson just as if he were born to a son, the consent of the son is required; and this opinion Julianus also rendered.

7. *Celsus, Digest, Book XXXIX.*

When an adoption is made, the consent of those who will be connected by agnation is not necessary for that purpose.

8. *Modestinus, Rules, Book II.*

It was formerly held that the authority of a curator could not be interposed in a case of arrogation; but this has been very properly changed by the Divine Claudius.

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

Even a blind man can adopt, and be adopted.

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

When anyone adopts a grandson as if he were born to his own son over whom he has control, with the consent of the latter, he does not become a proper heir of his grandfather; as, after the death of the grandfather he comes, as it were, under the control of his father.

11. *The Same, On Sabinus, Book IV.*

If anyone who has a son adopts a person as a grandson, just as if he was the son of his son, and the latter does not consent; if the grandfather should die, the adopted grandson does not come under the control of the son.

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

He who is released from paternal authority cannot afterwards be honorably subjected to it again, except by adoption.

13. *Papinianus, Questions, Book XXXVI.*

By almost every principle of law, when the power of an adoptive father has once been ended, no vestige of it afterwards remains; and even the paternal dignity obtained by adoption is lost when the relationship is terminated.

14. *Pomponius, On Sabinus, Book V.*

A grandson conceived and born under the control of his adoptive grandfather also loses all his rights by emancipation.

15. *Ulpianus, On Sabinus, Book XXVI.*

When the father of a family is adopted, all the property which belongs to him and all that can be acquired is, by silent operation of law, transferred to his adoptive father; and, moreover, his children who are under his control follow him, as well as those who may return from captivity under the law of *postliminium*, and those who were unborn when he was arrogated are in like manner brought under the control of the arrogator.

(1) Where a man has two sons, and a grandson by one of them, and desires to adopt the grandson as born of the other son, he can do so if he emancipates him and adopts him as if he were born to the other son, for he does this as if he were a stranger, and not his grandfather; and for whatever reason he can adopt anyone born of a stranger he can adopt him as it were born of another son.

(2) In arrogation it must be ascertained whether the arrogator is under sixty years of age, because if he is, he should rather devote himself to the procreation of children; unless, indeed, disease or weakness of any kind, or any other just cause for arrogation exists, as, for instance, if he desires to adopt some person related to himself.

(3) Again, no one should arrogate several children, unless for a good reason. Nor should he adopt the freedman of another, nor anyone older than himself.

16. *Javolenus, On Cassius, Book VI.*

For adoption can only take place with persons between whom the natural relation of father and son might exist.

17. *Ulpianus, On Sabinus, Book XXVI.*

Anyone who administers the office of guardian, or has the curator-ship of another, is not permitted to arrogate him, so long as the minor is less than twenty-five years of age, for fear that he may have arrogated him to avoid rendering an account. Inquiry must also be made as to whether the reason for the arrogation is not an infamous one.

(1) Arrogation of wards is only permitted to those who, induced by natural relationship or great affection adopt them; and it is prohibited to others lest it may be placed in the power of guardians to terminate their trust, and invalidate the substitution made by the parent.

(2) It is necessary, in the first place, to learn the amount of property belonging to the ward, as well as that of the party who desires to adopt him; so that, by comparing the two, an opinion may be formed as to whether an adoption would be advantageous to the ward. Then the mode of life of the party, who desires to bring the ward into his family should be investigated; and third, his age must be considered, so that it may be determined whether he had not better pay attention to the procreation of children, than to bring under his control some one belonging to another family.

(3) Moreover, it should be taken into consideration, whether he who already has one or more children ought to be permitted to adopt another, in order that the expectations of those begotten in lawful marriage may not be diminished, which expectations every child prepares for itself by respectful behavior; or whether the ward thus adopted would obtain less than he was worthy of.

(4) Sometimes the adoption of a child who is more wealthy by a person who is poor is permitted; if the latter is of a thoroughly temperate life, or his affection is honorable and publicly known.

(5) It is, however, customary to give security in cases of this kind.

18. *Marcellus, Digest, Book XXVI.*

For when a man desires to arrogate a ward, if he shows a good reason for doing so in other respects, he can only be heard if he gives a bond to a public slave binding himself, "that he will restore any of the property of his ward that may come into his possession to those persons who would have been entitled to said property, if the arrogated party had remained in his former condition".

19. *Ulpianus, On Sabinus, Book XXVI.*

By these words of the bond which must be furnished by the arrogating party, "to those entitled to said property", there is no doubt that it was intended to include any manumissions made by a second will; and especially where a slave was substituted as heir, and also to protect the interests of legatees.

(1) If this bond is not given, an equitable action will lie against the arrogator.

20. *Marcellus, Digest, Book XXVI.*

This bond becomes operative where the ward dies before reaching the age of puberty.

(1) Although the ward is mentioned as a male, the same proceeding must be taken with reference to a female ward.

21. *Gaius, Rules*.

For women may be arrogated by an Imperial Rescript.

22. *Ulpianus, On Sabinus, Book XXVI.*

Where an arrogator dies leaving an adopted son who is under age, and he dies afterwards before reaching puberty, will the heirs of the arrogator be liable? It must be held that the heirs

also are bound to deliver up the property of the party arrogated, and the fourth part of the estate besides.

(1) The question arises whether the arrogator can substitute another heir to the adopted minor son? I think that the substitution cannot be admitted, unless merely with reference to the fourth part of the estate of his adoptive father to which he is entitled; and that it only extends to the time of puberty. But if he should leave his property in trust to be delivered at a certain time, a trust of this kind should not be admitted; for this share does not vest in him by the will of his father but by an Imperial provision.

(2) All these rules are applicable whether anyone has arrogated a boy under puberty as a son, or as a grandson.

23. *Paulus, On the Edict, Book XXXV.*

When anyone is given in adoption he becomes cognate to all those to whom he becomes agnate, and does not become cognate to those to whom he does not become agnate, for adoption does not impart the

right of blood but the right of agnation; and therefore if I adopt a son my wife does not occupy the place of a mother to him, nor is she related to him by agnation, because she is not his cognate. Again, my mother does not occupy the place of grandmother to him, since he does not become connected by agnation with those who are outside of my own family; but he whom I have adopted becomes the brother of my daughter, since my daughter is a member of my family, and marriage between them is prohibited.

24. *Ulpianus, Controversies, Book I.*

Anyone who is absent, or who does not give his consent cannot be arrogated.

25. *The Same, Opinions, Book V.*

After the death of his daughter who had been living as her own mistress on the ground of having been lawfully emancipated, and who died after appointing heirs by her will, the father is forbidden to institute proceedings against his own act, claiming that the emancipation was not made legally, or in the presence of witnesses.

(1) A party who is absent can neither adopt, nor arrogate, nor carry out by the agency of another any of the formalities which are requisite in such cases.

26. *Julianus, Digest, Book LXX.*

Anyone whom my emancipated son adopts is not my grandson.

27. *The Same, Digest, Book LXXXV.*

The child of an adopted son is considered by the Civil Law to occupy the same place as if he himself were adopted.

28. *Gaius, Institutes, Book I.*

He who has a son and a grandson under his control is at perfect liberty to release his son from his authority, and to retain it over his grandson; or, on the other hand, to retain his son under his control and to manumit his grandson; or to make both of them their own masters. We hold that the same rule applies to a great-grandson.

29. *Callistratus, Institutes, Book II.*

Where the natural father does not possess the power of speech, but can indicate in some other way than verbally his desire to give his son in adoption, that adoption shall be confirmed; just as if it had taken place under the forms prescribed by law.

30. *Paulus, Rules, Book I.*

Those who have no wives can adopt children.

31. *Marcianus, Rules, Book V.*

A son, whether he is natural or adopted, who is under the control of his father, cannot in any way compel him to release him from it.

32. *Papinianus, Questions, Book XXXI.*

However, a boy who is under puberty and has been adopted, should sometimes be heard if, having arrived at puberty, he desires to be emancipated; and this must be determined by the judge after the case has been stated.

(1) The Emperor Titius Antoninus decided in a Rescript that it was permissible for a man to adopt his stepson of whom he was guardian.

33. *Marcianus, Rules, Book V.*

And where the adopted son, having arrived at puberty, proves that it is not advantageous to himself to be brought under the paternal control of the other, it is just that he should be emancipated by his adoptive father, and in this way be reinstated in his former condition.

34. *Paulus, Questions, Book XL*

The question arose where a son is given to you in adoption, for instance under this condition that, "after three years, you will give the same person to me in adoption"; whether any action will lie against you. Labeo thinks that there is no cause of action, for it is not in accordance with our customs for anyone to have a son temporarily.

35. *The Same, Opinions, Book I.*

The rank of a person is not diminished by adoption, but is in fact increased; therefore a senator, if adopted by a plebeian, remains a senator; and, in like manner, a son of the senator still remains such.

36. *The Same; Opinions, Book XVIII.*

It is settled that a son can be emancipated anywhere in order to be released from paternal authority.

(1) It has been decided that manumission and adoption can be performed before a proconsul, even in a province which has not been assigned to him.

37. *The Same, Sentences, Book II.*

Anyone can adopt another as his grandson, even though he has no son.

(1) No one can a second time adopt a person whom he has once adopted and emancipated.

38. *Marcellus, Digest, Book XXVI.*

An adoption not legally made may be confirmed by the Emperor.

39. *Ulpianus, On the Office of Consul, Book HI.*

The Divine Marcus stated in a Rescript to Eutychianus that, "The judges will determine whether you can obtain what you desire, after those who may object have been produced before them, that is to say, those who might be injured by the confirmation of the adoption".

40. *Modestinus, Differences, Book I.*

By the arrogation of the father of a family the children who are under his control become the grandchildren of the arrogator, and at the same time with their father are placed under his authority, which does not also take place in case of adoption; for then the grandchildren

remain under the control of their natural grandfather.

(1) He who adopts, and also he who arrogates, must not only be older than the person whom he makes his son either through arrogation or adoption, but he must be so by the term of complete puberty, that is to say, he must be further advanced in age by eighteen years.

(2) A person who is impotent can obtain a proper heir for himself by arrogation, nor is his corporeal weakness an obstacle to his doing so.

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

When a father emancipates his son by whom he has a grandson under his control and afterwards adopts his son and dies, the grandson does not again come under the authority of his father. Nor does the grandson come under the control of his father if his grandfather retained him in his power when he gave his son in adoption, and readopted him afterwards.

42. *The Same, Pandects, Book I.*

We can even give an infant in adoption.

43. *Pomponius, On Quintus Mucius, Book XX.*

Adoption of sons as well as grandsons can take place so that anyone may seem to be our grandson as through a son, although his birth may be uncertain.

44. *Proculus, Epistles, Book VIII.*

Where anyone who has a grandson by a son adopts another in the place of his grandson, I do not think that when the grandfather dies any bond of consanguinity will exist between the grandsons. But if he adopted him in such a way that he should be his grandson by legal right, for instance, as if he had been the son of Lucius his own son and the lawful wife of the latter, I am of the contrary opinion.

45. *Paulus, On the Lex Julia et Papia, Book III.*

The liabilities of him who was given in adoption are transferred to the adoptive father.

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

A son begotten by me while in slavery can be brought under my authority by the indulgence of the Emperor; still, there is no question that such a son remains in the class of freedmen.

TITLE VIII.

CONCERNING THE DIVISION AND NATURE OP THINGS.

1. *Gaius, Institutes, Book II.*

The principal division of Things is under two heads: for some of them belong to Divine and some to human law. Those which come under Divine law are, for instance, sacred and religious things. Sacred things are, for example, walls and gates, which, to a certain extent, are under Divine law. For what is subject to Divine law is not the property of anyone, and that indeed which belongs to human law is, for the most part, the property of someone, nevertheless, it may belong to none, for things belonging to an estate until an heir appears, are not the property of anyone. Again, those things that are under human law are either public or private. Those which are public are held to be the property of no one, and are considered to belong to the entire community, and those which are private belong to individuals.

(1) Moreover, some things are corporeal, and some are incorporeal. Those are corporeal which are tangible, as for instance land, slaves, clothing, gold, silver, as well as innumerable other articles. Those are incorporeal which cannot be touched as an usufruct, and obligations, in whatever way contracted. It does not matter if corporeal things are included in an estate, for the crops taken from land are corporeal, and whatever is owing to us through the obligation of

another, is for the most part corporeal, as land, slaves, money; still, the right of succession, the right of use and enjoyment, and the right based upon an obligation are all incorporeal. To the same class belong all the rights of urban and rustic estates, which are designated as servitudes.

2. *Marcianus, Institutes, Book HI.*

Certain things are common to all by natural law; some belong to the entire community, some to no one, and the greater number to individuals; these are acquired in various ways respectively.

(1) Again, all the following things are common by natural law, namely the air, running water, the sea, and hence the shores of the sea.

3. *Florentinus, Institutes, Book VI.*

Likewise, precious stones, gems, and other things which we find upon the seashore also at once become ours by natural law.

4. *Marcianus, Institutes, Book III.*

Consequently no one can be forbidden to approach the shore of the sea in order to fish; still, they must avoid interfering with houses, buildings, and monuments, because they are not subject to the Law of Nations, as the sea is; and this the Divine Pius stated in a Rescript addressed to the fisherman of Formiæ and Capena.

(1) Almost all rivers and harbors are also public.

5. *Gaius, Legal Doctrines of Daily Application and Utility. Book II.*

The public use of the banks of rivers is subject to the Law of Nations, just as the rivers themselves are. Therefore, everyone is free to conduct a boat to the bank; to attach ropes to trees growing there; to dry nets, and draw them up from the sea; and to deposit any cargo thereon; just as he can navigate the river itself. The ownership of the banks, however, is vested in those to whose lands they are contiguous; for which reason the trees growing upon them also belong to the latter.

(1) Those who fish in the sea have a right to erect a hut upon the shore in which to shelter themselves.

6. *Marcianus, Institutes, Book III.*

This right exists to such an extent that those who build there actually become the owners of the land, but only as long as the building stands; otherwise, if it falls down, the place reverts to its former condition by the law of *postliminium*, so to speak, and if another party builds a house in the same place, the soil becomes his.

(1) There are some things which, by natural law, belong to the entire community and not to individuals; as, for instance, theatres, racecourses, and other things of this kind, or anything else which is the common property of a city. Therefore, a slave belonging to a city is not understood to be the property of any individual in particular, but of the entire community; and for this reason the Divine Brothers stated in a Rescript that a slave belonging to a city could be put to torture either against a citizen or in his behalf. In consequence of this, also the freedman of a city is not compelled to ask permission under the Edict, if he brings any citizen into court.

(2) Things which are sacred, religious, and holy are not the property of anyone.

(3) Sacred things are those which are publicly and not privately consecrated; and hence if anyone should make anything sacred for himself privately, it is not sacred but profane; where, however, a temple has once been made sacred the place still remains so, even after the edifice has been demolished.

(4) Anyone by his will can render a place religious by burying a corpse on his own premises;

and where a burial-place belongs to several persons, one of the owners can inter a body there, even though the others may be unwilling. An interment can also be made upon the land of another, if the owner consents; and even where he ratifies it afterwards the place where the corpse was buried becomes religious.

(5) Again, the better opinion is that an empty tomb is a religious place, as is stated in Virgil.

7. *Ulpianus, On the Edict, Book XXV.*

Nevertheless, the Divine Brothers published a Rescript to the contrary.

8. *Marcianus, Rules, Book IV.*

A holy place is one which is defended and protected from the injuries of men.

(1) The word "sacred" is said to have been derived from the word *sagmina*, certain plants which were usually carried by the ambassadors of the Roman people to prevent their persons from being violated; just as the Greek Ambassadors carried those which are called κηρυκια.

(2) Cassius states that Sabinus very properly gave the opinion that the walls of a city were holy, and that it was necessary for persons to be prohibited from placing anything against them.

9. *Ulpianus, On the Edict, Book LXVIII.*

Sacred places are those which are dedicated to the public, either in the city or in the country.

(1) It should be understood that a public place can only become sacred when the Emperor has dedicated it, or granted permission for this to be done.

(2) It must be remarked that a sacred place is one thing and a *sacrarium* is another; for a sacred place is one which has been consecrated, and a *sacrarium* is one in which sacred things are deposited, which also may exist in a private house; and when persons desire to divest such a place of its religious character they usually withdraw the sacred things therefrom.

(3) We properly call those things holy which are neither sacred nor profane, but which have been confirmed by some sanction, hence the laws are holy, for the reason that they are based upon a certain sanction; and anything that is supported by a certain sanction also is holy, even though it may not be consecrated to God; and it is even sometimes added in the sanction itself that anyone who is guilty of an offence in that place shall be punished with death.

(4) Moreover, it is not permitted to repair the walls of cities, or to add anything to them, or place anything upon them, without the authority of the Emperor or the governor.

(5) Anything that is sacred is not susceptible of appraisement.

10. *Pomponius, On Plautius, Book VI.*

Aristo declares that just as anything built into the sea becomes private property, so whatever the sea encroaches upon becomes public property.

11. *Pomponius, From Various Passages, Book II.*

Where anyone trespasses upon the walls, he is punished with death; just as where anyone climbs over them by means of ladders, or in any other manner; since Roman citizens are not permitted to leave a city except by the gates; as the former is an act of hostility and abominable. It is said that Remus, the brother of Romulus, was killed because he wished to scale the wall.

TITLE IX.

CONCERNING SENATORS.

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

No one doubts that a man of consular rank should always take precedence of a woman of consular rank, but it is a matter for consideration whether a man of præfectorian rank takes precedence of a woman of consular rank. I think that he does take precedence of her, because greater dignity attaches to the male sex.

(1) We call the wives of consuls women of consular rank, and Saturninus extends this quality to their mothers, but this is not stated anywhere else and it is nowhere admitted.

2. *Marcellus, Digest, Book HI.*

Cassius Longinus is of the opinion that when a man has been expelled from the Senate for infamous behaviour, and has not been reinstated, he should not be permitted to preside in court, or testify as a witness; for the reason that the *Lex Julia* forbids this to be done in cases of extortion.

3. *Modestinus, Rules, Book VI.*

A senator who has been expelled from the Senate does not lose his citizenship; and the Divine Severus and Antoninus even permitted him to live at Rome.

4. *Pomponius, From Various Passages, Book XII.*

Whoever is unworthy of a lower rank is still more unworthy of a higher one.

5. *Ulpianus, On the Lex Julia et Papia, Book I.*

We should understand by the terms "the son of a senator", not only a natural son but also an adopted one, and it does not matter by whom or in what way he has been adopted. Nor does it make any difference whether he was already invested with senatorial rank when he adopted him, or whether this was done subsequently.

6. *Paulus, On the Lex Julia et Papia, Book II.*

A son adopted by a senator continues to be such as long as he remains in his family; but when he is emancipated, then by the emancipation he loses the name of son.

(1) When a son is given in adoption by a senator to a person of inferior rank he is always considered the son of a senator; because the senatorial dignity is not lost by an adoption arising from an inferior station, any more than anyone would cease to be of consular dignity under similar circumstances.

7. *Ulpianus, On the Lex Julia et Papia, Book I.*

It is established that the son of a senator emancipated by his father is always considered a senator's son.

(1) Labeo also declares that a child born after the death of his father who was a senator, shall be considered the son of the senator. Proculus and Pegasus are of the opinion, however, that a child who was conceived and born after the expulsion of its father from the Senate, should not be considered a senator's son.

This opinion is correct, for he whose father has been expelled from the Senate before he was born, cannot properly be called the son of a senator; but where a child has been conceived before its father was expelled from the Senate, and born after his father had lost his rank, the better opinion is that he should be understood to be the son of a senator. It is held by many that the time of conception should only be considered under such circumstances.

(2) Anyone whose father and grandfather have been senators is understood to be both the son and the grandson of a senator; if, however, his father lost his rank before the conception of the former, the question might arise whether he should not be considered the grandson of a senator, even though he was no longer regarded as the son of one? It is the better opinion that he ought to be, so that the rank of his grandfather may be of advantage to him, rather than he

should be injured by the condition of his father.

8. *The Same, Trusts, Book VI.*

Women who are married to persons of illustrious rank are included in the appellation of illustrious persons. The daughters of senators are not known by the name of illustrious women, unless they have obtained husbands of eminent dignity, for their husbands confer illustrious rank upon them; but parents, indeed, do so, so long as they are not connected with plebeian families. Therefore, a woman is of illustrious rank while she is married to a senator or a distinguished man; or, having been separated from him, she has not married a person of inferior station.

9. *Papinianus, Opinions, Book IV*.

When the daughter of a senator marries a freeman, the condition of her father does not make her a wife; since, on the other hand, where her father had been expelled from the Senate, his children should not be deprived of the rank which they have obtained.

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

We should consider the children of senators to be not only their sons, but also all those descended from them or from their children, whether they be the natural or adopted offspring of the senators from whom they are said to have descended; but in the case of a child, born to the daughter of a senator, we must examine the condition of the father.

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

Senators are always considered to have their residence at Rome; still, they are understood to have a residence in the place where they were born, for the reason that the rank of senator is considered rather to give an additional domicile than to change the old one.

12. *Ulpianus, On Registers of the Censor, Book II.*

Women married in the first place to men of consular dignity, and afterwards to men of inferior station, sometimes, though rarely, despite this obtain from the Emperor the privilege of retaining their consular rank; for I know that Antoninus Augustus favored his cousin Julia Mammæ in this respect.

(1) Those are to be considered persons of senatorial rank who are descended from patricians and consuls, or any illustrious men; because these alone have the right to give their opinions in the Senate.

TITLE X.

CONCERNING THE OFFICE OF CONSUL.

1. *Ulpianus, On the Duties of Consul, Book II.* It is the duty of the Consul to appoint a council for those who desire to manumit slaves.

(1) Consuls can manumit together, or alone, but he who has left names with one Consul cannot manumit before another for then the manumissions are separate; and if, for any reason, either through sickness, or through being prevented by any other just cause, one of them cannot manumit, the Senate has decided that his colleague can proceed with the manumission.

(2) There is no doubt that Consuls can manumit their own slaves before themselves, but if it should happen that a Consul is under twenty years of age, he has not the power of manumission in his own tribunal, as he himself is the one who, according to a decree of the Senate, must determine the ground for the appointment of a council. He can, however, do this before his colleague where proper cause has been established.

TITLE XI.

CONCERNING THE OFFICE OF PRÆTORIAN PREFECT.

1. *Aurelius Arcadius Charisius, Master of Requests, On the Duties of Prætorian Prefect.*

It is necessary to state briefly whence the origin of the office of Prætorian Prefect was derived. It has been asserted by some writers that Prætorian Prefects were formerly created instead of Masters of Cavalry; for, as in the time of the ancients the supreme power was occasionally conferred upon dictators, they were accustomed to choose their Masters of Cavalry, who were associated with them in the discharge of their military duties, and held the next rank after them. The government of the republic having been permanently transferred to the Emperors, Prætorian Prefects were chosen by those princes, just as had been done in the case of the Masters of Cavalry, and upon them was conferred greater power for the purpose of promoting public discipline.

(1) The authority of the Prefects having originated in this manner, it was subsequently increased to such an extent that no appeal can be taken from the decision of a Prætorian Prefect; for when formerly a question arose as to whether an appeal could be taken from the decision of a Prætorian Prefect, which, in fact, was allowed by law, and examples of those who did so are extant; afterwards, by an Imperial Decree publicly promulgated, the right of appeal was forbidden. For the Emperor thought that those who were appointed to this high office on account of their eminent industry, after their discernment and integrity had been established, would render judgment not otherwise than he himself would do, the wisdom and enlightenment attaching to their rank being taken into consideration.

(2) Prætorian Prefects also enjoyed an additional privilege; for minors could not obtain restitution after condemnation, from any other magistrates than from the Prætorian Prefects themselves.

TITLE XII.

CONCERNING THE OFFICE OF PREFECT OF THE CITY.

1. *Ulpianus, On the Duties of the Urban Prefect.* An Epistle of the Divine Severus to Fabius Cilo, Prefect of the City, states that he has jurisdiction of all offences of every description, not only those committed within the city, but also those which are committed outside of it, in Italy.

(1) He must hear the complaints of slaves against their masters who have fled for refuge to the Imperial statues, or have been purchased by their own money in order to be manumitted.

(2) He must also hear the complaints of needy patrons concerning their freedmen; especially if they assert that they are ill and wish to be supported by them.

(3) He has authority to relegate and deport persons to an island designated by the Emperor.

(4) In the beginning of the Epistle referred to the following appears: "Since We have confided Our City to your care"; hence whatever is done within the city appears to be under the jurisdiction of the Prefect, and this also applies to any offence committed within the hundredth milestone, but beyond that distance the Prefect of the City has no jurisdiction.

(5) Where anyone accuses a slave of having committed adultery with his wife, the case must be tried before the Prefect of the City.

(6) He can take cognizance of proceedings under the interdicts *Quod vi aut clam*, or *Unde vi*.

(7) It is customary to send guardians or curators before the Prefect of the City, who, having administered their trusts fraudulently, deserve a more severe punishment than the infamy arising from suspicion; for example, when it can be proved that they have bought their guardianships with money, or for a bribe have exerted themselves to prevent a suitable

guardian from being appointed for anyone; or when they, having declared the amount of the property of their wards; purposely diminished it; or where they alienated the said property evidently with fraudulent design.

(8) When it is said that the prefect must hear the complaints of slaves against their masters, we should understand that this does not mean that they can accuse their masters (for a slave is never allowed to do this, unless for specific reasons), but that they may humbly apply to him where their masters treat them with cruelty, harshness, or starve them, or may state to the Prefect of the City that they have been forced to endure indecent attacks. It was also a duty imposed upon the Prefect of the City by the Divine Severus, that he should protect slaves from being prostituted by their masters.

(9) Again, the Prefect of the City should take care that money-brokers conduct everything connected with their business honestly, and refrain from illegal acts.

(10) Where a patron states that he has been treated disrespectfully or been insulted by his freedman; or that he and his children, or his wife, have been abused by him, or brings any similar accusation; it is customary for him to appear before the Prefect of the City, who will punish the freedman according to the complaint, either by warning him, or by having him scourged, or by inflicting a still more severe penalty, for freedmen very often deserve to be punished. And indeed if the patron can prove that he brought a criminal accusation against him, or that he has conspired against him with his enemy, he can be sentenced to labor in the mines.

(11) Supervision of every kind of meat and its sale at a reasonable price is one of the duties of the Prefect, and the hog market is also in his charge, as well as that of other animals, and herds of cattle and flocks of sheep destined for this purpose come under his jurisdiction.

(12) The preservation of public peace and order at exhibitions is held to be one of the duties of the Prefect of the City; and, indeed, he should station soldiers at different points for the purpose of maintaining the public peace, and to report to him whatever takes place in the city.

(13) The Urban Prefect can compel anyone to remain away from the city, as well as from any of the other districts, and forbid him to transact any business, or practice any profession, or act as advocate, either temporarily or for all time. He can also prohibit him from attending exhibitions, and if he exiles him from Italy, can remove him from his native province as well.

(14) The Divine Severus stated in a Rescript that those who are said to have held unlawful assemblies must be prosecuted before the Prefect of the City.

2. *Paulus, On the Duties of the Prefect of the City.*

According to an Epistle of the Divine Hadrian he can be applied to in cases brought by bankers or against them, and pecuniary cases can, for the most part, be tried before him.

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

The Prefect of the City has no jurisdiction beyond the limits of the city, but he can appoint judges outside of it.

TITLE XIII.

CONCERNING THE OFFICE OF QUÆSTOR.

1. *Ulpianus, On the Duties of Quæstor.*

The origin of quæstor is very ancient, more so than that of almost any other magistracy. Gracchanus Julius, in the Seventh Book "On Authorities", relates that Romulus himself, and Numa Pompilius had two quæstors not appointed by themselves, but by the votes of the people; but even if doubt exists whether there was any quæstor during the reigns of Romulus and Numa, it is certain that quæstors existed during that of Tullus Hostilius; and, indeed, it is

the prevalent opinion of ancient writers that Tullus Hostilius was the first to introduce quæstors into the government of the commonwealth.

(1) Junius, Trebatius, and Fenestella deduced the origin of the word quæstor from *quæro* (to seek).

(2) Some of the quæstors were accustomed to draw lots for the provinces assigned by the decree of the Senate, which was also done under the consulate of Decimus Drusus and Porcina. All the quæstors, however, did not obtain their provinces by lot, the candidates of the Emperor being excepted, for these were only employed in reading the Imperial Epistles in the Senate.

(3) At present, quæstors are taken indiscriminately from patricians and plebeians; for the place is an entrance to, and, so to speak, the beginning of other offices, and confers the right to state one's opinion in the Senate.

(4) There are some of these, as We have just stated, who are styled the candidates of the Emperor, and who read his Epistles in the Senate.

TITLE XIV.

CONCERNING THE OFFICE OF THE PRÆTORS.

1. *Ulpianus, On Sabinus, Book XXVI.*

A father can manumit before a son who is under his control, if the son is a prætor.

2. *Paulus, On Sabinus, Book IV.*

It is also settled that he himself can be emancipated or give in adoption in his own tribunal.

3. *Ulpianus, On Sabinus, Book XXXVIII.*

Barbarus Philippus, a fugitive slave, sought the prætorship of Rome, and was appointed Prætor. Pomponius is of the opinion that his condition as a slave was no obstacle to his holding the office of Prætor. It is true that he performed the duties of that office, still, let us consider the case of a slave having kept his condition secret for a long time, while he discharged his duty as Prætor. Will all that he decided or decreed be of no force or effect? What shall We say? Or will it be valid on account of the welfare of those who instituted proceedings before him either under the law, or by virtue of some other legal right? Indeed, I think that none of these things should be rejected; for this is the more humane view to take, since the Roman people had the power to invest a slave with this authority, and if they had known that he was such they would have granted him his freedom. Much more must this right be considered well founded with respect to the Emperor.

4. *The Same, On All Tribunals, Book I.*

A Prætor cannot appoint himself a guardian, or a judge in any special proceeding.

TITLE XV.

CONCERNING THE OFFICE OF PREFECT OF THE NIGHT WATCH.

1. *Paulus, On the Duties of the Prefect of the Night Watch.* Among the ancients three men were appointed for the purpose of providing against fire, who, because they kept watch at night, were styled *Nocturni*. The ædiles and the tribunes of the *plebs* also sometimes took part; and there were, in addition, a detachment of public slaves stationed around the gate and the walls, whence they could be summoned if necessary. There were also certain bodies of private slaves who extinguished fires, either for pay, or gratuitously. Finally, the Divine Augustus preferred to have this duty performed under his own supervision.

2. *Ulpianus, On the Duties of the Prefect of the Night Watch.* Because several fires took place during one day.

3. *Paulus, On the Duties of the Prefect of the Night Watch.*

In fact, Augustus thought that the safety of the Republic could be protected by no one better than by him, and that no one was so equal to the task as the Emperor. Therefore he posted seven cohorts in proper places, in order that each cohort might protect two quarters of the city; these were commanded by tribunes, and above them was a superior officer who was designated the Prefect of the Night Watch.

(1) The Prefect of the Night Watch takes cognizance of incendiaries, burglars, thieves, robbers, and harborers of criminals, unless the culprit is so savage and notorious, that he is turned over to the Prefect of the City. And as, for the most part, fires are caused by the negligence of the inhabitants, he either has those whipped who have been careless in regard to fire, or he remits the whipping, and gives them a severe warning.

(2) Burglaries are generally committed in houses containing many apartments, or in warehouses where men have deposited the most valuable part of their goods; the burglar either breaks open a storeroom, a closet, or a chest, and those who are appointed to guard this property are the ones ordinarily punished. The Divine Antoninus stated this in a Rescript to Erycius Clarus, for he says: "That if his warehouses are broken open, he can put the slaves who were guarding them to torture, even though some of them may belong to the Emperor himself."

(3) It should be noted that the Prefect of the Night Watch must be on guard during the entire night, and should make his rounds properly shod, and provided with hooks and axes.

(4) He must be careful to notify all occupants of houses not to allow any fire to occur through their negligence, and such occupant must be directed to always have water on his upper floor.

(5) He also has supervision over those who, for a compensation, take charge of clothing in the baths; and if while performing this duty they are guilty of any illegal acts he must take cognizance of them.

4. *Ulpianus, On the Duties of the Prefect of the City.*

The Emperors Severus and Antoninus stated the following in a Rescript to Julius Rufmus, Prefect of the Night Watch: "If the occupants of blocks of houses, or others are negligent with regard to their fires, you can order them to be whipped with rods or scourged; and those who are accused of arson you may send to Our friend Fabius Cilo, Prefect of the City; fugitive slaves you must seek out and restore to their masters."

TITLE XVI.

CONCERNING THE OFFICE OF PROCONSUL, AND HIS DEPUTY.

1. *Ulpianus, Controversies, Book I.*

The proconsul bears everywhere the insignia of his rank after he leaves the city; but he does not exercise authority except in the province which has been assigned to him.

2. *Marcianus, Institutes, Book I.*

All proconsuls after having left the city have jurisdiction, provided it is not contentious, but voluntary; for example, the manumissions of children as well as of slaves, and adoptions can take place before them.

(1) No one can manumit, however, before the deputy, for the reason that he has not sufficient jurisdiction.

3. *Ulpianus, On Sabinus, Book XXVI.*

Nor can adoptions take place before him, as in fact no legal action can be brought in his court.

4. *The Same, On the Duties of Proconsul, Book I.*

It is necessary for the proconsul also, to be careful not to oppress his province in the entertainment of officials; as our Emperor, as well as his father stated in a Rescript to Aufidius Severianus.

(1) No proconsul can have his own grooms, but in their stead soldiers should perform their duties in the provinces.

(2) It would also be better for the proconsul to travel without his wife, still, he can bring his wife with him; but he must remember that the Senate, during the consulship of Cotta and Mesalla, decreed, "That in the future if the wives of those travelling to take charge of their offices should commit any offence, an accounting will be required of their husbands and punishment will be inflicted upon them".

(3) Before the proconsul passes the boundaries of the province assigned to him, he should publish an edict announcing his arrival, and containing a recommendation of himself, if he has any acquaintance or connection with the people of the province; and by all means request them not to come to meet him either publicly or privately, it being more suitable that each one should receive him in his own country.

(4) He will also act properly and according to the regular order of proceeding, if he sends a notice to his predecessor indicating the day when he will pass the boundaries of his jurisdiction; for frequently when these things are not certainly known or expected, the people of the province are disturbed, and business transactions are impeded.

(5) It is proper when he enters the province for him to do so in that portion where this is customary; and that whatever city he reaches first he should pay attention to what the Greeks call επιδη μιας, that is "the place of sojourn", or καταπλουν "the port of arrival"; for the provincials attach great importance to the preservation and observance of this custom and of privileges of this description. There are some provinces to which the proconsul goes by sea, as, for instance, Asia; and to such an extent was this carried that our Emperor Antoninus Augustus stated in a Rescript, in reply to a request of the Asiatics, "That the proconsul was absolutely required to proceed to Asia by sea, and to land at Ephesus, before touching at any of the other principal cities".

(6) After having made his entry into the province, he should invest his deputy with his jurisdiction, but he should not do this before,

as it would be absurd for him to confer authority on another which he does not yet himself possess; for he is not entitled to the same until he enters the province. If, however, he should do this before, and after having entered the province should not change his mind, it would probably be decided that the deputy has jurisdiction, not from the time when it had been conferred upon him, but from the day when the proconsul entered the province.

5. *Papinianus, Questions, Book I.*

There are cases in which a proconsul can delegate his jurisdiction, even though he has not yet entered the province; for example, if he had been subjected to some necessary delay during his journey, and his deputy was able to arrive at the province very soon.

6. *Ulpianus, On the Duties of Proconsul, Book I.*

It is customary for him to commit to his deputies cognizance of the offences of prisoners; so that, after having been interrogated, the deputies can send them back, in order that the proconsuls may discharge those who are innocent. This species of delegated power is, however, extraordinary; for no one can transfer to another the right to impose the penalty of death, or that of inflicting any other punishment, which has been conferred upon himself, or even that of discharging prisoners who cannot be prosecuted before him.

(1) As the proconsul has the right to delegate or not to delegate his judicial authority

according to his will, he has also the right to recall it; but he should not do so without consulting the Emperor.

(2) It is not proper for the deputies to consult the Emperor, but they should apply to their own proconsul, and he is compelled to answer their inquiries.

(3) The proconsul should not absolutely refuse to receive presents, but he should act with moderation, so as not rudely to reject them altogether, nor avariciously transcend the bounds of reason in their acceptance; which matter the Divine Severus and the Emperor Antoninus have very properly regulated in an Epistle, the words of which are as follows: "With reference to presents, We are of the opinion stated in an ancient proverb, viz: 'Not all things should be received, nor at all times, nor from all persons'; for, indeed, it is impolite to accept gifts from no one; but, on the other hand it is most despicable, and most avaricious to accept without distinction everything that is given." And as to what is contained in the Imperial Mandates, namely: "That the proconsul himself, or any other person in office shall accept no gift or present, and shall not even purchase anything except for the purpose of daily subsistence"; this has no reference to small gratuities, but to those which exceed the requirements of ordinary support. Nor should such presents be extended to the point of making donations of great value.

7. *The Same, On the Duties of the Proconsul, Book II.* When the proconsul enters any other city which is not a populous one or the capital of the province, he should permit it to be placed un-

der his protection, and listen to the compliments bestowed upon him without evincing any discontent, since the people of the province do this in his honor; and he should also appoint festivals in accordance with the manners and customs which have previously been observed.

(1) He should visit the temples and public monuments, for the purpose of inspecting them, and ascertaining whether they are in good condition, and properly cared for, or whether they need any repairs, and provide for the completion of such as have been begun, as far as the resources of the government permit; and he should appoint with the proper formalities superintendents who are diligent in their work, and also detail soldiers for the purpose of assisting the superintendents, if this should be necessary.

(2) As the proconsul has complete jurisdiction, all the authority of those who dispense justice at Rome either in the capacity of magistrates or through the grant of extraordinary power, is vested in him.

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

Therefore the Proconsul has in his own province greater authority than anyone else except the Emperor.

9. *The Same, On the Duties of Proconsul, Book I.*

Nor can any question arise in his province which he cannot himself dispose of. However, if any matter relating to the affairs of the Treasury arises and which belongs to the jurisdiction of the Imperial Steward, it will be better for him to pass it by.

(1) In cases where a decree is necessary, the Proconsul cannot dispose of the same by means of a notice by the plaintiff, for all things whatsoever which demand judicial investigation cannot be terminated in this way.

(2) The proconsul must hear the advocates with patience and also with discernment, lest he appear contemptible; nor ought he to dissimulate if he ascertains that parties have trumped up cases, or purchased the right to litigation; and he should only suffer those to institute proceedings who are permitted to do so by his Edict.

(3) The Proconsul has power to dispose of the following matters extrajudicially; he can order

persons to show proper respect to their parents, and freedmen to their patrons and the children of the latter; he can also threaten and severely menace a son brought before him by his father and who is said not to be living as he should. He can, in like manner, correct an impudent freedman either by reproof or by castigation.

(4) Hence he should be careful to have a certain order prevail in legal procedure, namely, that the petitions of all persons shall be heard; lest it may happen that if the rank of some is favored, or attention is paid to others as are not worthy, those of moderate pretensions who have no one to appear for them, or having employed advocates of small experience or no standing, may not be able to properly present their claims.

(5) He must also appoint advocates for those who request it, and especially for female wards or persons otherwise incapacitated; as well as for those who are out of their minds, if anyone petitions him to do so for them; and if there is no one to request it, he can grant this at his own instance. He must also appoint an advocate for any person who alleges that he cannot himself find one on account of the influence of his adversary, as it is not just for anyone to be oppressed by the superior power of his adversary; for this, indeed, has a tendency to reflect upon the Governor of the province, where anyone acts with so little self-control that all are afraid to appear as advocates against him.

(6) These rules are applicable to all Governors, and should be observed by them.

10. *The Same, on the Duties of Proconsul, Book X.*

The proconsul must remember that he ought to perform all his duties until the arrival of his successor, for the reason that there is but one Proconsulate, and the welfare of the province requires that there should always be someone through whom the people may transact their business; he should therefore administer justice until the arrival of his successor.

(1) The *Lex Julia* Concerning Extortion and the Rescript of the Emperor Hadrian to Calpurnius Rufus, Proconsul of Achaia, forbids Proconsuls to dismiss their deputies previously to their own departure.

11. *Venuleius Saturninus, On the Duties of Proconsul, Book II.* If there is anything that demands severe punishment, the deputy should send the case to the Proconsul; for he himself has not the right to execute, to imprison, or to scourge with great severity.

12. *Paulus, On the Edict, Book II.*

A deputy on whom jurisdiction has been conferred has the right to appoint judges.

13. *Pomponius, On Quintus Mucius, Book X.*

The deputy of a Proconsul has no jurisdiction of his own where none has been conferred upon him by the Proconsul.

14. *Ulpianus, On the Lex Julia et Papia, Book XX.* Proconsuls are only entitled to six lictors.

15. *Licinius Rufinus, Rules, Book III.*

The deputies of Proconsuls can appoint guardians.

16. *Ulpianus, On the Edict, Book II.*

As soon as the Proconsul enters the gate of Rome, he loses his authority.

TITLE XVII.

CONCERNING THE OFFICE OF AUGUSTAL PREFECT.

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

The Prefect of Egypt does not lay aside his prefectship and the authority granted to him by law under Augustus, as Proconsuls do, before his successor enters the City of Alexandria; even

though he may have already reached the province; and it is so stated in his commission.

TITLE XVIII.

CONCERNING THE OFFICE OF GOVERNOR.

1. *Macer, On the Duties of Governor, Book I.*

The title of Governor is a general one, and hence it is applicable to Proconsuls and Deputies of the Emperor, as well as to all Governors of the provinces, and even to senators. The title of Proconsul is one of special signification.

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

A Governor can adopt before himself, just as he can emancipate a son, or manumit a slave.

3. *Paulus, On Sabinus, Book XIII.*

The Governor of a province has authority only over the inhabitants of his province; and this only as long as he remains therein, for if he departs from it, he becomes a private person. He sometimes has jurisdiction over foreigners, when one actually commits an offence; for it is stated in the Imperial Mandates that he who presides over a province must take care to purge it of bad characters, without any distinction as to where they come from.

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

The Governor of a province has greater authority therein than anyone else except the Emperor.

5. *The Same, On All Tribunals, Book I.*

The Governor of a province cannot appoint himself either a guardian, or a judge in a particular case.

6. *The Same, Opinions, Book I.*

The Governor of a province must suppress illegal exactions, including such as are committed with violence, as well as sales and obligations extorted by fear, and those where the money is not paid down. He must also provide against anyone unjustly obtaining profit, or suffering loss.

(1) The truth is not changed by error, and hence the Governor of *&* province must follow the course which is suitable by taking into consideration facts which have been proved.

(2) It is a matter affecting the honor of the Governor of a province to provide that the more humble shall not be injured by the more powerful, and do not persecute the defenders of the innocent by means of false accusations.

(3) He shall restrain unauthorized parties who, under the pretext of assisting officials, proceed to disturb the people; and take measures to punish them when detected. He must also prevent illegal exactions from being made under the pretence of collecting tribute.

(4) The Governor of a province must make it his especial care that no one shall be prevented from transacting any lawful business, and that nothing prohibited shall be done, and that no punishment shall be inflicted upon the innocent.

(5) The Governor of a province must see that persons of limited resources are not treated unjustly by having their only lamp or small supply of furniture taken from them for the use of others, under the pretext of the arrival of officers or soldiers.

(6) The Government of a province must provide that no partiality shall be shown to soldiers — that is which does not benefit all of them — by certain ones claiming undue advantage for themselves.

(7) The event of death should not be imputed to a physician, but it is also a fact that he is

responsible for anything caused by his lack of skill; for a wrong committed by a person who gives bad advice in a dangerous emergency should not be imputed to human frailty and be considered blameless.

(8) Those who govern entire provinces have the right to inflict the death penalty, and authority is conferred upon them to condemn delinquents to the mines.

(9) The Governor of a province who, after having imposed a fine, ascertains that it cannot be collected from the property of the parties whom he has directed to pay it, must relieve them from the necessity of payment, and repress the unlawful avarice of those who demand it. Where, on account of poverty a fine has been remitted by the provincial authorities, it should not be exacted.

7. *The Same, Opinions, Book III.*

The Governor of a province where buildings have been inspected by him, can compel their owners to repair them when sufficient cause for this exists; and where a refusal is made, he should take proper measures for their reparation.

8. Julianus, Digest, Book I.

I have often heard our Emperor say that where it is set forth in a Rescript that: "You can apply to him who presides over the province", this does not place the Proconsul, or his deputy, or the Governor of the province under the obligation of hearing the case; but he should consider whether he ought to hear it himself, or appoint a judge for that purpose.

9. *Callistratus, On Judicial Inquiries, Book I*,

Generally speaking, whenever the Emperor issues a Rescript referring any matter to the Governor of a province, as for instance, when he says: "You can apply to him who presides over the province," or with this addition, "He will consider what his duty requires", no obligation is imposed upon the Proconsul or his deputy to take cognizance of the case; but even where the words "He will consider what his duty requires" are not added, he must make up his mind whether he will hear it himself or appoint a judge to do so.

10. *Hermogenianus, Epitomes of Law, Book II.*

It is the duty of the Governors of provinces to hear all cases which either the Prefect of the City, the Prætorian Prefect, or the Consuls, Prætors, or other magistrates hear at Rome.

11. *Marcianus, Institutes, Book III.*

All provincial applications which are made to various Judges at Rome come within the jurisdiction of Governors.

12. *Proculus, Epistles, Book IV.*

And although he who governs the province ought to be invested with authority to discharge the duties of all Roman magistrates, still, he should pay attention to what should be done in each case, rather than to what is done at Rome.

13. *Ulpianus, On the Office of Proconsul, Book VII.*

It is proper for every good and worthy Governor to take care that the province over which he presides is peaceable and quiet. This he will accomplish without difficulty if he exerts himself to expel bad men, and diligently seek for them, as he must apprehend all sacrilegious persons, robbers, kidnappers, and thieves, and punish each one in proportion to his crime; he should also restrain those who harbor them, as without their assistance a robber cannot long remain concealed.

(1) In the case of insane persons who cannot be controlled by their relatives, it is the duty of the Governor to apply a remedy, namely, that of confinement in prison, as the Divine Pius

stated in a Rescript. The Divine Brothers were of the opinion that where a man had committed parricide, a personal investigation should be made to learn whether he had perpetrated the deed while simulating insanity, or whether, in fact, he was not in possession of his faculties, for if he was feigning he should be punished, and if he was actually insane, he should be confined in prison.

14. *Macer, On Criminal Trials, Book II.*

The Divine Marcus and Commodus addressed a Rescript to Scapulas Tertullus in the following terms: "If it is positively ascertained by you that Ælius Perseus is to such a degree insane that, through his constant alienation of mind, he is void of all understanding, and no suspicion exists that he was pretending insanity when he killed his mother, you can disregard the manner of his punishment, since he has already been sufficiently punished by his insanity; still, he should be placed under careful restraint, and, if you think proper, even be placed in chains; as this has reference not so much to his punishment as to his own protection and the safety of his neighbors. If, however, as often happens, he has intervals of sounder mind, you must diligently inquire whether he did not commit the crime during one of these periods, so that no indulgence should be given to his affliction; and, if you find that this is the case, notify Us, that We may determine whether he should be punished in proportion to the enormity of his offence, if he committed it at a time when he seemed to know what he was doing.

"But, when *We* are informed by your letter that his condition so far as place and treatment are concerned, is that he remains in charge of his friends, or under guard in his own house; it appears to Us that you will act properly if you summon those who had care of him at that time, and investigate the cause of such great neglect, and decide the case of each one of them, so far as you discover anything tending to excuse or increase his negligence; for keepers are appointed for insane persons, not only to prevent them from injuring themselves, but that they may not be a source of destruction to others; and where this takes place, those very properly should be held responsible who are guilty of negligence in the discharge of their duties."

15. *Marcianus, On Criminal Trials, Book I.*

One thing must be observed, he who governs the province must not pass its boundaries unless for the purpose of fulfilling a vow; and, even then he must not spend a night outside.

16. *Macer, On the Office of Governor, Book I.*

It is provided by a Decree of the Senate "That judicial proceeding must be very sparingly instituted with reference to obligations contracted by those who govern provinces, their attendants, or their freedmen, before they entered the province; for any actions which are not brought for this reason can be filed afterwards when any of the parties have left the province. But where anything occurs against the will of the party, as for instance if he suffers some injury, or is made the victim of theft, proceedings can be instituted to the extent of joining issue, and ordering the production and deposit of the stolen property; or a promise shall be given with security that the party will appear, or that the article in question will be produced."

17. *Celsus, Digest, Book III.*

Where the Governor of a province has manumitted anyone, or appointed a guardian before he was aware of the arrival of his successor, these acts shall be valid.

18. *Modestinus, Rules, Book V.*

It is provided by a plebiscite "That no Governor shall accept a present or a gift, except food or beverages which may be consumed within a few days".

19. *Callistratus, On Judicial Inquiries, Book I.*

He who administers justice must be careful to be easy of access, but not permit anyone to treat him disrespectfully, for which reason it is stated in their directions: "That the Governors of

provinces must not admit provincials to great familiarity with them"; for contempt of rank arises from equality of intercourse.

(1) But, in the trial of cases, it is not proper for an official to become inflamed against those of whom he thinks ill, or be moved to tears by the supplications of the unfortunate; for it is not the part of a resolute and upright judge to let his countenance disclose the emotions of his mind. In a word, he should so administer justice as to increase the authority of his rank by the force of his mental qualities.

20. *Papinianus, Opinions, Book I.*

The Deputy of the Emperor, that is to say the Governor, or the highest official of a province, does not lose his authority by relinquishing his office.

21. *Paulus, On the Office of Assessor*.

When the Governor is trying the case of a slave who has been corrupted, or of a female slave who has been debauched, or of a male slave who has been indecently attacked; if the slave who is said to have been corrupted is the business agent of anyone, or occupies such a place that, without considering the injury to property alone, the destruction and the ruin of the master's entire household is involved, he ought to be punished with the greatest severity.

TITLE XIX.

CONCERNING THE OFFICE OF THE IMPERIAL STEWARD OR ACCOUNTANT.

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

All acts performed by the Imperial Steward are approved by the Emperor, just as if they had been performed by himself.

(1) If the Imperial Steward disposes of any property which belongs to the Emperor as his own, I do not think that the ownership of the same is transferred; for he only makes a legal transfer while he is conducting the business of the Emperor and delivers it with his consent; for if he performs any act for the purpose of effecting a sale, a gift, or an agreement, it is void; as he has no authority to alienate the Emperor's property, but only to diligently administer it.

(2) It is a special function of the Imperial Steward that, by his order, a slave of the Emperor may enter upon an estate, and if the Emperor is appointed heir, the Procurator, by interfering with a rich estate, makes the Emperor the heir.

2. *Paulus, Sentences, Book V*.

If, however, the estate to which the Emperor is appointed heir is not solvent, after this has been learned, the Emperor must be consulted; for the wishes of an heir who has been appointed must be ascertained as to whether he will accept or reject an estate of this kind.

3. *Callistratus, On Judicial Inquiries, Book VI.*

The Imperial Stewards cannot sentence to deportation, for the reason that they have not the right of imposing this penalty.

(1) If, however, they forbid anyone to enter upon the land of the Emperor because his riotous or violent conduct might injure the Imperial tenants, the person is obliged to withdraw; for this the Divine Pius stated in a Rescript to Julius.

(2) Stewards cannot give permission to anyone to return after deportation, and this our Emperors Severus and Antoninus stated in a Rescript in answer to a petition of Hermias.

TITLE XX.

CONCERNING THE OFFICE OF JURIDICUS.

1. *Ulpianus, On Sabinus, Book XXVI.*

Anyone can adopt in the tribunal of the *Juridicus*, because the right of legal action is granted him.

2. *The Same, On Sabinus, Book XXXIX.*

The privilege of appointing guardians was, by a Constitution of the Divine Marcus conferred upon the *Juridicus* who presides at Alexandria.

TITLE XXI.

CONCERNING THE OFFICE OF HIM TO WHOM JURISDICTION IS DELEGATED.

1. *Papinianus, Questions, Book I.*

Whatever authority is specially conferred either by a law, a decree of the Senate, or an Imperial Constitution, is not transferred when delegated, but any powers acquired by the right of magistracy can be delegated. Therefore, those magistrates are in error who, having authority conferred upon them by law or by a decree of the Senate, (such for instance as the *Lex Julia de Adulteriis*, and others of the same kind) to preside in a criminal trial, delegate their jurisdiction. A very strong argument in favor of this is, that in the *Lex Julia de Vi* it is expressly provided: "That he to whom the jurisdiction belongs can delegate it if he departs." He can not delegate it unless he is absent, although any other jurisdiction can be delegated by one who is present. Where a master is said to have been killed by his slaves, the Prætor cannot delegate the right to try them, which was conferred upon him by a decree of the Senate.

(1) He to whom jurisdiction has been delegated possesses none peculiar to himself, but must only exercise that of the magistrate who conferred it upon him; for while it is true that by the custom of our ancestors jurisdiction can be transferred, the authority conferred by law cannot be transferred. For this reason no one says that the deputy of a Proconsul has the right of imposing penalties when jurisdiction has been delegated to him. Paulus states that the authority attaching to jurisdiction is also delegated with it.

2. *Ulpianus, On All Tribunals, Book III.*

Where jurisdiction has been delegated by a Governor, he to whom it is delegated cannot assemble a Council.

(1) Where guardians or curators desire to sell land, the Prætor or Governor can permit this to be done after hearing the case; but if he delegates his jurisdiction he can, under no circumstances, transfer with it the right to conduct the inquiry instituted for this purpose.

3. *Julianus, Digest, Book V.*

He who exercises the jurisdiction of another, even if he is a Prætor, still does not do so by his own authority, but every time he acts he administers justice in the place of him by whom he was appointed.

4. *Macer, On the Office of Governor, Book I.*

Cognizance of the acts of suspected guardians can be delegated, and it is settled that this may occur in the general delegation of jurisdiction, on account of the interest of wards, as follows: "The Emperors Severus and Antoninus to Braduas, Proconsul of Africa. Since you have delegated your jurisdiction to your deputies, it follows that they can take cognizance of the acts of suspected guardians."

(1) Thus power can be delegated to give possession of property, as for instance, when an order is issued to take possession where a bond is not furnished to provide against threatened injury; or for possession in the case of a woman in behalf of her unborn child; or to grant possession to a legatee for the preservation of his legacy.

5. *Paulus, On Plautius, Book XVIII.*

It is evident that anyone to whom jurisdiction has been delegated cannot delegate the same to another.

(1) When jurisdiction is delegated to a private individual, it is held that all magisterial power except that of condemning to death is delegated with it; because there is no jurisdiction which does not include the right to inflict moderate punishment.

TITLE XXII.

CONCERNING THE OFFICE OF ASSESSORS.

1. *Paulus, On the Duties of Assessor.*

The entire office of assessor in which those learned in the law discharge their duties, embraces, for the most part, the following cases: Judicial inquiries, motions, statements of causes of action, edicts, decrees, and epistles.

2. *Marcianus, On Criminal Trials, Book I.*

Freedmen can act as assessors, and although persons who are infamous are not prohibited by law from doing so, still, I am of the opinion that they cannot perform the duties of an assessor; and, indeed, it is said that there is an Imperial Constitution extant upon this subject.

3. *Macer, On the Office of Governor, Book I.*

Where the same province has been divided between two Governors, as for instance, Germany and Mysia, a man born in either can act as assessor in the other and is not considered as acting in his own province.

4. *Papinianus, Opinions, Book IV.*

When an Imperial deputy dies, his attendants have a right to their salaries for the balance of the time for which they were appointed by the deputy; provided they do not act as the attendants of others during that time. The case is different where the deputy retired in favor of a successor before his term of office had expired.

5. *Paulus, Sentences, Book I.*

Assessors are, under no circumstances, permitted to transact business before a tribunal where they are councillors; but they are not forbidden to do so before another tribunal.

6. *Papinianus, Opinions, Book I.*

A citizen of the Republic is not prohibited from acting as assessor in the court of a public official of his own town, because he does not receive a public salary.

THE DIGEST OR PANDECTS.

BOOK II.

TITLE I.

CONCERNING JURISDICTION.

1. *Ulpianus, Rules, Book I.*

The duties of him who has the right of dispensing justice are very extensive; for he can grant the possession of estates, place the parties in possession, appoint guardians for minors who have none, and designate judges for litigants.

2. *Javolenus, On Cassius, Book VI.*

He to whom legal jurisdiction is given is also held to be invested with all the powers necessary for its exercise.

3. *Ulpianus, On the Duties of Quæstor, Book II.*

Official authority is either simple or mixed. Simple authority invests the magistrate with the right of inflicting the death penalty upon persons who are violators of the law, which is also designated "power". Mixed authority, which embraces legal jurisdiction, consists of the right of granting possession of property. Jurisdiction includes the power of appointing a judge.

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

The right to order a bond to be executed by a prætorian stipulation, and to place a party in possession, rather belong to authority than to jurisdiction.

5. *Julianus, Digest, Book I.*

It was established by the custom of our ancestors that he only can delegate jurisdiction who possesses it in his own right, and not through delegation by another.

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

And this is because jurisdiction is not given to him in the first place, and has not been conferred upon him by law, which only confirms that which has already been delegated; and therefore, if anyone who has delegated his jurisdiction should die before the business over which jurisdiction has been delegated to him had begun to be transacted; Labeo says that the delegated authority is abrogated, just as it is in other cases.

7. *Ulpianus, On the Edict, Book HI.*

"If a person maliciously destroys a notice which has been entered in the register of an official, or written on papyrus, or any other substance, and which has reference to the general jurisdiction of the said official and not to any special matter; judgment should be rendered against him for fifty *aurei,* and anyone may bring suit for the same."

(1) Slaves and sons of families also are affected by the terms of this edict; and the Prætor includes both sexes.

(2) If anyone should cause this damage before the notice has been published or while it is being published, the words of the Edict will be without effect; but Pomponius holds that the principle of the Edict is applicable to such a case.

(3) If the offence has been committed by slaves who are not defended by their masters, or by persons who are in poverty, corporeal punishment shall be inflicted.

(4) Malice is mentioned in the words of the Edict, because if anyone should commit such an act through ignorance or stupidity, or by the order of the Prætor himself, or through accident, he will not be liable.

(5) He who removes the document, even though he may not destroy it, is also liable under this Edict which includes both him who performs the act himself and him who orders another to perform it; but if anyone performs it without malice by the direction of another who was actuated by malice, the latter will be liable; and if both of them act maliciously both will be liable; and if several persons commit the act, whether they destroy documents, or order this to be done, all will be liable.

8. *Gaius, On the Provincial Edict, Book I.*

And this applies to such an extent that it will not be sufficient for only one of them to pay the penalty.

9. *Paulus, On the Edict, Book HI.*

If the entire body of slaves belonging to anyone should deface a register, the Edict does not treat this offence as it would a case of theft, where the master who wishes to defend the action pays as much in the name of one slave as a freeman would be compelled to pay, for then no action will lie against the others; the reason for which is perhaps that, in this instance, the offended dignity of the Prætor must be vindicated, and several acts are understood to have been committed; in the same manner as when several slaves have perpetrated a wrong, or have caused damage, because several acts have taken place, and not merely one, as in the case of theft.

Octavenus says that in this instance relief ought to be granted to the master, but this can only be maintained where the slave maliciously brings it about that the register shall be destroyed by another, because then there is only one conspiracy, and not several acts. Pomponius states the same thing in the Tenth Book.

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

He who presides over the administration of justice ought not to render judgment in his own case, or in that of his wife or children, or of his freedmen, or of any others whom he has with him.

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

Where one person brings several actions against another and the amounts of the different claims demanded therein, if taken separately,

are within the jurisdiction of the judge, but the entire sum exceeds it, it was the opinion of Sabinus, Cassius, and Proculus that the actions could be tried before him; and this opinion was confirmed by a Rescript of the Emperor Antoninus.

(1) Where, however, the rights of actions are reciprocal in their character, and one party claims an amount under the limit, and another one over it, he who claims the smaller sum can proceed before the same judge; so that it may not be in the power of my adversary, if he wishes to annoy me, to prevent me from trying the case before the same judge.

(2) Where an action is brought by a number of persons at the same time, as for instance for the partition of an estate, the division of common property, or the establishment of boundaries, should we in • order to ascertain the jurisdiction of the judge who has cognizance of the case, consider the value of the separate shares, which is the opinion of Ofilius and Proculus for the reason that each party is bringing suit for his own share; or should the entire value of the property rather be considered because the whole of it is in court and may perhaps be adjudged to one person? This is the opinion of both Cassius and Pegasus, and in fact it seems the more reasonable one.

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

Municipal magistrates have no authority to inflict severe punishment upon a slave; the right of moderate castigation cannot, however, be denied them.

13. *The Same, On Sabinus, Book LI.*

He who orders anyone to act as judge must be a magistrate.

(1) A magistrate, or he who is invested with any authority, (as for instance, a Proconsul, a Prætor, or any other official who governs a province) cannot appoint a judge on the day on which he becomes a private person.

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

It is an accepted rule which we make use of in law, that if anyone of higher, or of equal rank, submits himself to the jurisdiction of another, the latter can administer justice for and against him.

15. *The Same, On All Tribunals, Book II.*

If, through error, anyone appears before one Prætor while intending to appear before another, none of the proceedings which have been instituted will be valid, for no one is permitted to say that they agreed upon the judge; since, as Julianus stated, those who are in error do not agree. For what is so contrary to agreement as error, which always reveals ignorance?

16. *The Same, On All Tribunals, Book HI.*

The Prætor is accustomed to delegate his jurisdiction, and either delegate all or a portion of the same; while he to whom the right of dispensing justice has been delegated, exercises it in the name of him who appointed him, and not in his own.

17. *The Same, Opinions, Book I.*

As the Prætor can delegate his entire jurisdiction to one person, he can also delegate it to several, or he can do this with reference to a particular case; and especially where he has a good reason, for example, because he appeared as the advocate of one of the parties before becoming a magistrate.

18. *Africanus, Questions, Book VII.*

If it is agreed upon by the parties that another Prætor than the one who had jurisdiction of the case should hear it, and before applying to him one of them should change his mind, there is no doubt that he cannot be compelled to abide by an agreement of this kind.

19. *Ulpianus, Trusts, Book VI.*

In a case where an unmarried woman had undertaken a defence before a competent judge and was defeated, and afterwards married a man who was subject to a different jurisdiction, the question arose whether the judgment of the former court could be executed? I have said that it could, because judgment had been rendered before her marriage; but if this had occurred after the judge had taken cognizance of the case, and before judgment, I hold the same opinion, namely that the decision of the first judge was properly rendered. This rule should be observed generally in all cases of this description.

(1) When the amount is made the subject of inquiry with reference to jurisdiction, the sum claimed must always be considered, and not that which is due.

20. *Paulus, On the Edict, Book I.*

A judge who administers justice beyond his jurisdiction may be disobeyed with impunity. The same rule applies if he wishes to dispense justice where the amount is beyond his jurisdiction.

TITLE II.

EACH ONE MUST HIMSELF USE THE LAW WHICH HE HAS ESTABLISHED FOR OTHERS.

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

The Edict is characterized by the greatest equity and is without just cause of complaint by anyone, for who will refuse to be judged by the same law which he himself applied, or caused to be applied to others?

(1) "If anyone invested with magistracy, or other authority has established a new rule against any party, he must himself be judged by the same, when his adversary demands it. Where anyone has obtained the application of a new law before an official invested with magistracy, or other authority, and subsequently some adversary of his demands it, he shall have his case decided against him by the same law; that is to say, that whatever anyone thinks to be just with reference to another party he must suffer to prevail against himself as well."

(2) Moreover, these words, "What he who administers justice has established", we must accept according to the effect, and not according to the words; and therefore if anyone wishes to render a decision and is prevented from doing so, and his decision should not have any effect, the Edict does not apply, for the word "established" denotes something which has been perfected, a wrong which has been consummated and not merely begun; and therefore if anyone administers justice between parties over whom he has no jurisdiction, since the proceedings are void and his judgment has no force, We think that the Edict does not apply; for what does an attempt amount to when no injury resulted?

2. *Paulus, On the Edict, Book III.*

The malice of the presiding judge is punished by this Edict; for, if through the ignorance of an assessor the law was interpreted in a different manner than it should have been, this should not affect the magistrate, but the assessor himself.

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

When anyone has obtained an unjust decision against another, the same rule shall be applied to the party alone, where this took place on his own motion; but if he did not ask for it, it cannot be enforced against him. But where he obtained it, whether he made use of any rule or merely had permission to avail himself of it, but did not do so, he will be punished under this Edict.

(1) If my procurator made this unjust demand, the question arises to whom this same rule should be applied. Pomponius thinks to me alone, that is if I delegated my authority to him for an especial purpose, or ratified it. Where, however, the guardian or curator of an insane person or of a minor makes such a demand, he himself shall be punished by this Edict. The same rule shall be observed against the procurator if he was appointed in a matter in which he was interested.

(2) This penalty is incurred by all who are included in the provisions of the Edict, not only by the petitioner who was injured by him, but by every one whomsoever who institutes proceedings at any time.

(3) If anyone for whom you are surety has obtained an order of court prohibiting any debtor from filing an exception against him, and you wish to file one in the matter in which you become surety; neither he nor you should obtain the same; although in the meantime you may suffer injury if your debtor is not solvent. But if you yourself come under the terms of the Edict, the principal debtor may plead the exception, but you cannot do so; and the penalty to which you are liable will not affect him, and hence you will have no right of action on mandate against him.

(4) If my son, while a magistrate, should come within the terms of this Edict, will the Edict be applicable in any actions which I may bring in his behalf? I do not think so, as otherwise my condition will become worse on his account.

(5) When the Prætor says: "He must be judged by the same rule", is this penalty transmitted to the heir? Julianus stated that the action should not only be refused to him, but also to his heir.

(6) He also stated, and not without reason, that he was liable to the penalty of the Edict, not only with reference to rights of action in which he was involved when he came within the terms of the Edict, but also with reference to all those which were acquired for him subsequently.

(7) Julianus thinks that money already paid under such circumstances cannot be recovered, as there was still ground for payment under natural law, which prohibits recovery.

4. *Gaius, On the Provincial Edict, Book I.*

The Prætor very properly and justly inserted this exception: "Unless one of the parties has acted unjustly against some one who himself had acted in the same way against another." And, indeed, where a magistrate desires to sustain the Edict, or a litigant wishes to obtain the benefit of it, he might render himself liable and incur the penalty prescribed by the Edict.

TITLE III.

WHERE ANYONE REFUSES OBEDIENCE TO A MAGISTRATE RENDERING JUDGMENT.

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

It is permitted to all magistrates, with the exception only of *Duumviri*, to protect their administration by means of penalties in accordance with their official rights.

(1) He is presumed to refuse obedience to a magistrate having jurisdiction, who declines to execute what has finally been determined; as for example, where he will not allow someone to remove personal property from his possession, but permits it to be taken or carried away; and if he opposes the subsequent proceedings, it is then considered that he does not obey.

(2) If an agent, guardian, or curator refuses to obey a magistrate, he himself is punished, and not the principal or the ward.

(3) Labeo says that not only the defendant, but also the plaintiff, if he does not obey, is liable under this Edict.

(4) This suit is not for a sum which corresponds to the interest of the party who brings it, but is limited to the amount of damages sustained; and as it includes a mere penalty it is extinguished after the lapse of a year, and does not lie against the heir.

TITLE IV.

CONCERNING CITATIONS BEFORE A COURT OF JUSTICE.

1. *Paulus, On the Edict, Book IV.*

To cite anyone before a court of justice is to summon him for the purpose of trying a case.

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

Neither a Consul, a Prefect, a Proconsul, nor any other magistrate who exercises authority, and has the power of restraining others and ordering them to be confined in prison, can be summoned to court; nor can a pontiff be summoned while performing a religious ceremony; nor can those be summoned either, who on account of the sacred character of the place cannot leave it; nor anyone employed in the service of the State who is riding along the public highway upon a horse belonging to the government.

Moreover, a man cannot be summoned who is being married, nor can the woman to whom he is being united, nor a judge while in the exercise of his judicial functions, nor any person who is trying his own case before the Prætor, nor anyone while conducting the funeral rites of a member of his household.

3. *Callistratus, Judicial Inquiries, Book I.*

Nor can those who are attending a funeral be summoned, which appears to be established by a Rescript of the Divine Brothers.

4. *Ulpianus, On the Edict, Book V.*

The same rule applies to those who are obliged to be present in court in some certain place for the purpose of litigation, as well as to insane persons, and infants.

(1) The Prætor says: "That no one without my permission can summon to court his parents, his patron or patroness, or the children or parents of his patron or patroness".

(2) By the word "parent" one must here understand those of both sexes. The question, however, arises whether this term may be indefinitely extended? Some hold that it only applies as far back as the great-great-grandfather, and that other ascendants are called "ancestors". Pomponius stated that this was the opinion of the ancient authorities; but Gaius Cassius says that the term applies to all ascendants without exception; which makes it more honorable, and this rule has very justly been adopted.

(3) Labeo held that those also should be considered parents who have become such in slavery, and not, as Severus said, that the term should only apply to instances where children are legitimate; so that where a son has been begotten in promiscuous intercourse, he cannot bring his mother into court.

5. *Paulus, On the Edict, Book IV.*

This is for the reason that the mother is always certain, although she may have been given to promiscuous intercourse; but the father is he whom the marriage indicates as such.

6. *The Same, Sentences, Book I.*

No one can cite his natural parents into court, for the same reverence must be preserved for all parents.

7. *The Same, On the Edict, Book IV.*

A man can summon with impunity the parents of his adoptive father, as they are not really his parents, since he is only cognate to those to whom he is also agnate.

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

A man cannot summon his adoptive father to court as long as he is under his control, which results rather from the right of paternal authority than from the order of the Prætor; unless the son has *castrense peculium,* and in this instance he can be permitted to do so where proper cause is shown, but he cannot summon his natural father while he is a member of an adoptive family.

(1) The Edict mentions the "patron" or the "patroness". Those are to be considered patrons who have manumitted a slave, or who have detected collusion; as for instance, where someone in a preliminary judicial proceeding had been declared to be a freedman, when in fact he was not; or where I have sworn that the party in question is my freedman; just as, on the other hand, I am not to be considered a patron if judgment is rendered against me; or where, if I tender the oath, the party swears that he is not my freedman.

(2) If, however, I have compelled my freedman or freedwoman to swear not to marry, I can be brought into court; and Celsus indeed says that no right over such a freedman passes to my son during my lifetime.

Julianus, however, holds the contrary, and many adopt his opinion; so that in an instance of this kind it may happen that a patron can be summoned, but his son, being innocent, cannot be.

9. *Paulus, On the Edict, Book IV*.

He, also, who has manumitted a slave under the terms of a trust cannot be brought into court, although he may be summoned to force him to manumit a slave.

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

If, under this rule, I purchase a slave upon the condition that I will manumit him, and he obtains his liberty by the Constitution of the Divine Marcus, I cannot be cited, as I am his patron; but if I purchase him with his own money, and have broken faith with him, I shall not be considered his patron.

(1) Where a female slave is forced to prostitute herself against the condition of her sale, she will have the vendor as her patron if she was sold under the condition that, "She would become free if she were forced to prostitute herself". But if the vendor, who reserved the right to take possession of her by seizing her, himself prostitutes her, since she still obtains her freedom, she does so through him who sold her, but it is not proper that any honor should be shown him, as Marcellus holds in the Sixth Book of the Digest.

(2) We also consider a man a patron, even though he may have forfeited his civil rights, or where his freedman has lost his; as for instance where arrogation took place in a clandestine manner, since, as he must have concealed his status from him by whom he was arrogated, his act does not seem to be such as to entitle him to be considered freeborn.

(3) If, however, he has acquired the right of wearing gold rings, I think he should never fail to manifest respect for his patron, even though he may be qualified to exercise all the functions of a freeborn person. The case is different if he is restored to all the privileges of birth, for the Emperor can make a man free born.

(4) Anyone who is manumitted by an organized body, a corporation, or a city, can summon any member of the same to court, for he is not the freedman of any of them in particular. He must, however, show respect to all collectively; and if he wishes to bring an action against a municipality or a corporation, he must ask permission to do so under the Edict, although he may intend to summon one who has been appointed the agent of the others.

(5) By the terms "the children and parents of the patron and patroness", we must understand persons of both sexes.

(6) Where a patron has been reduced to the condition of a foreigner through the penalty of deportation, Pomponius is of the opinion that his privilege is forfeited; but if he should be reinstated, he will again enjoy the benefit of the Edict.

(7) The adoptive parents of a patron are also excepted, but only so long as the adoption lasts.

(8) If my son has been given in adoption, he cannot be brought into court by my freedman; nor can my grandson, who is born in an adoptive family. But where my emancipated son adopts a son, a grandson of this kind can be summoned, for he is a stranger to me.

(9) According to Cassius, we. may understand that the term "children", like that of "parents", extends beyond the great-great-grandson.

(10) If a freedwoman has a child by her patron, neither she nor her son can bring the other into court.

(11) If the children of a patron have brought a capital accusation against a freedman of their father, or have claimed him as a slave, no honor is due to them.

(12) The prætor says that, "No one can summon them without my permission". It is permitted, however, if the action brought against the patron or his parents is not one involving infamy or shame, for in every instance good cause should be established; as sometimes in an action involving infamy, as Pedius holds, a freedman ought to be allowed to summon his patron, if

he has done the former a serious injury; for example, scourged him.

(13) This respect should always be shown to a patron, even if he appears as the guardian, curator, defender, or agent of another; but where the guardian or curator is interested, he can be summoned with impunity, as Pomponius says, and this opinion is the better one.

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

Although the prætor does not state that he will render judgment for a penalty where proper cause is shown, still Labeo says that his authority must be exercised with moderation; as for instance, if the freedman changes his mind and abandons his suit; or if the patron having been summoned does not appear; or if he has been summoned with his own consent; even though the terms of the Edict do not concede this.

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

If a freedman, in opposition to the Edict of the Prætor, should summon to court the son of his patron whom the patron himself has under his control, it should be held that, if the father is absent, relief should be granted to his son who is under his control, and that a penal action, that is to say one for fifty *aurei*, will lie against the freedman.

13. *Modestinus, Pandects, Book X.*

As, generally speaking, we cannot summon persons to whom respect should be shown, without an order of the prætor.

14. *Papinianus, Opinions, Book I.*

Where a freedman is accused by his patron, and he, being ready to defend himself, has frequently urged the Governor of the province to hear his case; it is not considered that, by so doing, he has summoned his patron who accused him.

15. *Paulus, Questions, Book I.*

A freedman presented a petition against his patron without concealing the fact that he was his freedman; and the question arose whether, if he obtained an Imperial Rescript in accordance with his wishes, the penalty of the Edict would be remitted? I have answered that I do not think that the Edict of the Prætor is applicable in this instance, for the reason that he who presents a petition to the Emperor or to a Governor, is not considered to have summoned his patron to court.

16. *The Same, Opinions, Book II.*

The question has arisen whether a guardian can, in the name of his ward, summon his patroness, without the permission of the prætor? I have answered the question by stating that he can summon his patroness in the name of his ward, without the prætor's consent.

17. *The Same, Sentences, Book I.*

Where anyone has given a bond in court for the appearance of another he is obliged to produce him. Again, where he has promised in an instrument which has been recorded that he will produce the party in question, even though he may not have given a bond in court, he will, nevertheless, be forced to produce him.

18. *Gaius, On the Law of the Twelve Tables, Book I.*

Many authorities have held that it was not lawful to summon anyone to court from his own house; because the house of every individual should be for him a perfectly secure refuge and shelter, and that he who summons a person therefrom, must be considered as having employed violence.

19. *Paulus, On the Edict, Book I.*

It is certain that a party is sufficiently punished if he does not defend his case, and keeps himself concealed, for the reason that his adversary is placed in possession of his property. But Julianus says that if he shows himself, or appears in public, he can be legally summoned.

20. *Gaius, On the Law of the Twelve Tables, Book I.*

There is no doubt that a man can be lawfully summoned from his vineyard, the bath, or the theatre.

21. *Paulus, On the Edict, Book I.*

Although a man who is in his own house may sometimes be summoned to court, still, no one should be forcibly removed from his residence.

22. *Gaius, On the Law of the Twelve Tables, Book I.*

It is not permitted to summon girls who have not arrived at puberty, and who are subject to the control of another.

(1) A man who is summoned should be dismissed in two instances; first, when anyone undertakes his defence; and second, when the controversy has been settled before the parties have come into court.

23. *Marcianus, Institutes, Book III.*

Where a freedman is common, that is to say, has several patrons, he should petition the prætor to permit him to summon anyone of his patrons, or he will be liable under the Prætorian Edict.

24. *Ulpianus, On the Edict, Book V.*

An action for fifty *aurei* can be brought against him who violates these provisions, but it cannot be brought for, or against an heir, nor after a year has elapsed.

25. *Modestinus, On Punishments, Book I.*

Where a freedman has summoned his patron to court without permission being granted under the Edict, on complaint of the patron he will be liable for the above-mentioned penalty, that is to say, for fifty *aurei;* or he may be chastised by the Prefect of the City, as lacking in respect, if it is ascertained that he has no property.

TITLE V.

WHERE ANYONE WHO IS SUMMONED DOES NOT APPEAR, AND WHERE ANYONE SUMMONED A PERSON WHOM, ACCORDING TO THE EDICT, HE SHOULD NOT HAVE SUMMONED.

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

Where anyone who is summoned, gives as a surety for his appearance in court a person not subject to the jurisdiction of the magistrate before whom he himself is summoned; such a surety is held not to have been given, unless he especially renounces his privilege.

2. *Paulus, On the Edict, Book I.*

Anyone who is summoned before the prætor or any other judicial officer in any matter whatsoever, should appear, in order that it may be ascertained whether the magistrate has jurisdiction or not.

(1) Where anyone who has been summoned does not appear, he shall be sentenced to pay a fine in proportion to the authority of the magistrate, where proper cause exists; but allowance must be made for men's ignorance. Again, if the plaintiff has no interest in his adversary appearing in court at that particular time, the prætor can remit the penalty; for example,

because the day was a holiday.

3. *Ulpianus, On Sabinus, Book XLVII.*

Where anyone has promised to appear in court but does not mention the penalty to which he will be liable if he should not appear, it is certain that suit can be brought against him for a sum equal to the plaintiff's interest; and this Celsus also stated.

TITLE VI.

PERSONS WHO ARE SUMMONED MUST EITHER APPEAR, OR GIVE BOND OR SECURITY TO DO SO.

1. *Paulus, On the Edict, Book I.*

It is provided by the Edict, "That where a surety is given that a party will appear in court, the property of the former must be ample, the position of the defendant being taken into consideration, except where the two are closely related, for then it directs that anyone can be accepted"; as, for instance, where a party is offered as surety for his parent or patron.

2. *Callistratus, On the Monitory Edict, Book I.*

The same rule applies to the patroness, or to the children, the wife, or the daughter-in-law of the patron; for anyone of these persons can give a surety who must be accepted; and where the plaintiff refuses to accept him, being aware that the parties are nearly related, an action for fifty *aurei* will lie.

3. *Paulus, On the Edict, Book IV.*

The reason for this is, that where persons are nearly related, any surety is accepted as being sufficiently solvent.

4. *Ulpianus, On the Edict, Book LVIII.*

Where anyone promises to produce two persons in court, and he produces one and not the other, he is held not to have kept his promise, as one of them has not been produced.

TITLE VII.

NO ONE CAN FORCIBLY REMOVE A PERSON WHO HAS BEEN SUMMONED TO COURT.

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

The Prætor published this Edict to restrain by the fear of punishment those who rescue by violence persons who have been summoned to court.

(1) And then Pomponius has stated that where a slave commits an offence, a noxal action should be granted unless he committed it with the knowledge of his master; for in this instance the master must defend the action without being permitted to surrender the slave.

(2) Ofilius is of the opinion that the provisions of the Edict do not apply where the person summoned to court is exempt; as for example, a father, a patron, and the other persons above enumerated. This opinion seems to me to be correct; for, indeed, if he who summoned him was guilty of an illegal act, he who liberated him was not.

2. *Paulus, On the Edict, Book IV.*

For although both parties, the freedman who summoned his patron, and he who liberated him by force, violated the Edict, the condition of the freedman is made worse; because, in an action of this kind he takes the part of plaintiff. The same equitable reason applies to a party who is summoned to a place other than the one to which he should have been summoned. It can, however, be stated more positively that he who had the right to refuse to appear is not held to have been liberated by force.

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

When anyone rescues a slave who has been summoned to court, Pedius thinks that the Edict is not applicable; since the slave is not a person who can be summoned. What then shall be done? Proceedings must be instituted to produce him.

(1) Where anyone liberates a party summoned before a judge of inferior jurisdiction the penalty of the Edict shall not be imposed.

(2) Where the prætor states "He released him by force"; does this mean that the act was committed merely with violence, or with malice also? It is sufficient if the act be perpetrated with violence, even though malice does not exist.

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

The term "liberate" is one of general application, as Pomponius says for to "carry off" is to remove by seizure with the hands; but to "liberate" can be done in any way whatsoever; as for example, if anyone does not remove a party by force, but causes delay to prevent him appearing in court, so that the day set for bringing the action goes by, or the property in question is lost by lapse of time, he is held to have liberated him; even though he did not do so bodily. But, if he retained him in some place, and did not abduct him, he is liable under the provisions of the Edict.

(1) Again, if anyone liberates a party who has been summoned for the purpose of annoyance, he is considered to be liable under the Edict.

(2) The prætor says: "He must not act maliciously to enable him to be released"; for this can be done without malice when there is good cause for liberation.

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

Where anyone has effected a rescue through the agency of another, he is liable under this clause, whether he was present or absent.

(1) An action is granted against anyone who has liberated a party by force, and the amount of damages is not based upon what was actually lost, but the value of the property in dispute is fixed by the plaintiff; and this provision was added, so that it might be apparent that if he brought action without proper grounds, he could still recover this penalty.

(2) The plaintiff must also show that the rescue which was made prevented the defendant from appearing in court, but if he was nevertheless produced, the penalty cannot be imposed, since the words are only applicable where some act was performed.

(3) The action is *in factum*, and is of such a character that where several have committed a wrong it can be brought against each one of them; and the party who was liberated will still remain liable.

(4) The right of action is also granted to heirs if they have any interest in making use of it; it is, however, not granted against an heir, or after the expiration of a year.

6. *The Same, On the Edict, Book XXXV*.

If he who has released a debtor by force makes payment, he does not exempt the latter from liability, because he pays the penalty of his own act.

TITLE VIII.

WHAT PERSONS ARE COMPELLED TO GIVE A SURETY, AND WHO CAN MAKE A PROMISE UNDER OATH, OR BE BOUND BY A MERE PROMISE.

1. *Gaius, On the Provincial Edict, Book V*.

The term "to give a surety" is derived from the same origin as to furnish security, for as "to

satisfy" is said of him whose wish we comply with, so "to give security" has reference to our adversary when he provides for what is desired by us, and when under this name we make him secure by giving sureties.

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

The surety offered for the appearance of a party in court is considered to be a man of property, not only on account of his means, but also with reference to the ease with which he may be sued.

(1) When anyone gives a surety for his appearance in court to a person who is not capable of bringing an action, the giving of the surety is of no effect.

(2) The prætor says: "Where anyone summons to court his father, his patron, his patroness, the children or parents of his patron or patroness, or his own children, or anyone whom he may have under his control, or his wife, or his daughter-in-law, any surety whosoever for their appearance in court shall be accepted".

(3) Where the prætor says: "or his own children"; we understand that those are meant who are descended from the female sex; and we extend this privilege also to the father, not only when he is his own master, but also when he is under anyone's control; and this Pomponius also stated. A son can be given as a surety by his father, even though he may be under the control of someone else. By "daughter-in-law" we must also understand granddaughter-in-law, and so on, for succeeding generations.

(4) Where the prætor says: "Any surety whosoever shall be accepted", this merely relates to his financial resources, that is to say, even if he is not wealthy.

(5) When the prætor grants an action against a surety who promised that a party would appear in court, he does so for the amount of the property in question. But whether this has reference to the actual value of the article, or a definite sum, is something which we must examine. It is the better opinion that a surety is liable for the actual value, unless he became bound for a certain sum.

3. *Gaius, On the Provincial Edict, Book I.*

Whether the action is for double, triple, or fourfold damages, we hold that one and the same surety is liable for the entire amount, for the reason that the property is understood to be worth that much.

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

If the party who gave a surety for his appearance in court should die, the prætor ought not order him to be produced. Still, if he should ignorantly order this to be done, or if the party should die after his order, and before the day set for his appearance, no action can be permitted. If he died after the day set for his appearance, or loses his right of citizenship, a suit can legally be brought against him.

5. *Gaius, On the Provincial Edict, Book I.*

Where anyone becomes the surety for a party who has already been condemned, and afterwards died, or has lost his Roman citizenship, an action can, nevertheless, properly be brought against the surety.

(1) When anyone refuses to accept a sufficient surety for the appearance of another in court, who, it is perfectly evident, is solvent; or if there is any doubt on this point and he is proved to be solvent, an action for injury can be brought against him; for, indeed, it is not an ordinary wrong for a man to be brought into court who can furnish a perfectly solvent surety. The surety who was not accepted can also bring suit for the injury done to himself.

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

Where a bond or an undertaking is given, which is defective, it is held that it is no bond at all.

7. *Ulpianus, On the Edict, Book XIV.*

If the solvency of the surety is not denied, it should be said that he has the privilege of objecting to the jurisdiction of the court, and as the plaintiff may fear that he will make use of his right; we must ascertain what the law is. The Divine Pius, (as Pomponius states in his Book of Epistles, Marcellus in the Third Book of the Digest, and Papinianus in the Third Book of the Questions), set forth in a rescript to Cornelius Proculus, that the plaintiff might justly reject such a surety, but that if he was unable to find any other, he could warn him not to use his privilege, if suit was brought.

(1) When security is required, and the defendant cannot readily obtain it where the action is brought, he can be heard, if he is ready to give security in another city of the same province. Where, however, the security is voluntary, he cannot have recourse elsewhere; for he who has imposed upon himself the necessity for security does not deserve such consideration.

(2) Where security has not been given, and the property for which it is required is personal, and the party is liable to suspicion; the article should be deposited in court if the judge approves of this, or security is furnished, or the suit is brought to an end.

8. *Paulus, On the Edict, Book XIV.*

It is customary for litigants to agree upon the day mentioned in the stipulation, and if this is not done, Pedius thinks that it is in the power of the stipulator to appoint a reasonable time to be determined by the judge.

(1) Where anyone offers a woman as a surety, he is not held to have given a sufficient one; nor can a soldier, or a minor under twenty-five years of age be accepted, unless these persons act as sureties for themselves; as, for instance, where they act as their own agents. Some authorities indeed, think that where dotal land is claimed by a husband, the wife can become a surety on her own account.

(2) Where a person who, before judgment was rendered, offered himself as surety that it would be paid, is ascertained to be a slave; the plaintiff is entitled to relief and a new bond must be executed. The same consideration must be shown to a minor under twenty-five years of age, and probably to a woman, on account of her inexperience.

(3) If the surety for the payment of the judgment becomes the heir of the stipulator, or the stipulator that of the surety, a new bond must be executed.

(4) Guardians and curators who are obliged to give security for the property of their wards, must be sent before the municipal magistrates, because the security is necessary. The same rule applies where property, the usufruct in which has been created, is to be restored to the owner; and also to the case of a legatee, who must give security that, "If he is evicted from the estate, he will restore the legacies and whatever excess he may have received, under the Falcidian Law". The heir also has a right to be heard in a case where he is sent before a municipal magistrate for the purpose of giving security to legatees. It is clear that the heir, if through his own fault a legatee has already been placed in possession and has failed to provide security, petitions for the legatee to surrender possession, stating that he is ready to give security in a municipal town, he shall not be permitted to do so. The case is different, however, if the legatee had already been placed in possession without the negligence or fraud of the heir.

(5) A party is ordered to swear that he is not actuated by feelings of malevolence when he summons his adversary to a municipal town, for fear that perhaps he may have the intention of annoying him when it is possible for him to give security at Rome. Some persons, however,

are excused from taking this oath, as for instance, parents and patrons. He, however, who is sent before the municipal magistrates must swear: "that he cannot give security at Rome, and that he can do so in the place where he asks to be sent, and that he does not do this for the purpose of annoying his adversary". He cannot be compelled to swear, "that he is not able to give security elsewhere than in that place", because if he can not obtain security at Rome and can do so in several other places, he will be forced to perjure himself.

(6) This permission then can be obtained when just cause seems to exist, but what course should be pursued if the party previously refused to give security in the municipal town? In this instance he ought not to obtain permission, since it was his own fault that he did not give security in the place where he now desires to *go*.

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

Where an arbiter is appointed for the examination of sureties and his award appears to be unjust to either party, an appeal can be taken from it, just as it can be done from the decision of a judge.

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

If the sureties are declared to be sufficient by the arbiter, they must be considered as solvent, because otherwise a complaint could be brought before a competent judge.

(1) Where a party, for any reason, rejects sureties approved by the arbiter, or accepts others who have been rejected, much more should he be content with those whom he accepted of his own will. If, in the meantime, any great calamity should befall the sureties, or they should be reduced to great poverty, where proper cause is shown other security must be given.

11. *Ulpianus, On the Edict, Book LXXV.*

Julianus says: "If before I direct you to bring a suit for the recovery of land, and being about to do this, you take sufficient security, and afterwards you begin the suit under my direction, the sureties will be liable".

12. *The Same, On the Edict, Book LXXVII.*

It is agreed by all authorities that where an heir is appointed under a condition, and has possession of the estate during the existence of the condition, he must give security to the substituted heir for the delivery of the estate. If the condition should not be fulfilled, the substituted heir acquiring the estate can claim the same, and if he obtains it, an action can be brought on the bond. The prætor himself, where proper cause is shown, is frequently accustomed to order the stipulation to be made before the condition is fulfilled, and before the day arrives when the petition can be filed.

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

Where several parties are substituted, a bond must be given for each one of them.

14. *The Same, Opinions, Book II.*

The son of a family undertakes the defence of his father during his absence; I ask whether he should give security for the payment of the judgment? Paulus replies that anyone who acts in defence of an absent person, even though he be his son or his father, must furnish security to the party asking it under the terms of the Edict.

15. *Macer, On Appeals, Book I.*

It must be remembered that the possessors of real property are not compelled to give security.

(1) By such a possessor is to be understood one who possesses land either in the country or in the city, either wholly, or in part. He also is understood to be a possessor who holds land subject to the payment of rent to the State, that is, an emphyteutic estate; and he also who has

the mere ownership is considered to be a possessor. Ulpianus, however, stated that he who has only the usufruct, is not a possessor.

(2) A creditor who has accepted a pledge is not a possessor, even though he may have possession of the article, or whether it has been delivered to him, or is held by the debtor at the will of the creditor.

(3) Where real property is given by way of dowry, both the wife and the husband are understood to be possessors on account of their possession of said property.

(4) The case is different with a party who has the right of personal action for the recovery of land.

(5) Guardians, whether their wards or they themselves are in possession, are considered possessors; and the same rule applies where only one of several guardians is in possession.

(6) If you bring suit against me for land of which I am in possession; and judgment is rendered in your favor, and I take an appeal; am I still to be considered the possessor of said land? It may be very properly stated that I am the possessor of the same, because I still hold it; nor does it make any difference that I can subsequently be deprived of my possession.

(7) To ascertain whether a party is, or is not a possessor, the time when a bond was required must be considered; for just as the party is none the worse who has sold his possession after giving a bond, so he who takes possession after a bond has been executed obtains no advantage.

16. *Paulus, On the Edict, Book VI.*

He who has promised under oath to appear in court, is not held to have committed perjury if he fails to do so for some good reason.

TITLE IX.

IN WHAT WAY SECURITY MUST BE GIVEN IN A NOXAL ACTION.

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

Where anyone has promised that a slave on whose account a noxal action is brought, shall be produced in court, the prætor says "that he must produce him in the same condition in which he was at the time when legal proceedings were instituted".

(1) Let us consider what the words "in the same condition" mean. I think, in fact, that he is in the same condition who does not do anything to prejudice the case of the party who brings the suit. Labeo states that if the slave should cease to belong to the party who makes the promise, or the right of action should be lost, he would not be in the same condition; just as where a party was in as good a condition as his adversary, so far as litigation is concerned, is placed; in a word, one on account of either the place, or the party being changed. Therefore, where a slave is sold to someone who cannot be sued in the same court as the party making the promise, or is delivered to someone who is more powerful, he thinks that he cannot be produced in court in the same condition. Where, however, he is surrendered in satisfaction for damage which he has committed, Ofilius thinks that he cannot be produced in the same condition; as, by his surrender for this purpose, he is of the opinion that all noxal actions instituted by others are barred.

2. *Paulus, On the Edict, Book VI.*

We, however, adopt a different rule; for when a slave is surrendered in satisfaction of damages, the right of action is not extinguished on account of any of the reasons previously stated; for the action always follows the slave, just as if he had put in an appearance in the first place.

(1) Where the slave, on account of whom a noxal action can be instituted by anyone, is absent,

and where his master does not deny that he is under his control, Vindius holds that he can be compelled to promise to produce him in court, or to defend him, and if he is unwilling to do this, he must give security to produce him as soon as possible; but if he falsely denies that he is under his control, he will be compelled to defend the suit without the surrender of the slave; and Julianus stated this also, even where the master contrived by fraud that the slave should not be under his control. If the slave is present, and the master is absent, and there is no one to defend the slave, he should be removed by the order of the prætor, but if proper cause be shown, his defense can afterwards be conceded to his master, as Pomponius and Vindius state; nor will the master be prejudiced by his absence. Therefore, the right of action which the plaintiff lost because when the slave was taken away he became his property, can be restored to him.

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

Where a noxal action is brought against a person who has only the usufruct in a slave, and he refuses to defend him, the right to bring suit for the recovery of the usufruct shall be denied him by the prætor.

4. *Gaius, On the Provincial Edict, Book VI.*

Where anyone brings a noxal action against one of two owners of a slave, the question arose whether he shall be obliged to give security with respect to the share of his fellow owner? Sabinus says that he is not obliged to do so because he is defending his own slave, just as if he was wholly his own property; since he is obliged to defend the entire interest, and he shall not be heard if he is prepared to defend only his own share.

5. *Ulpianus, On Sabinus, Book XLVII.*

Where a party has promised to produce a slave in court in the same condition, and he is produced after having been set free; if a capital offence, or one implying the commission of injury is involved, he is not properly produced; because one kind of punishment is inflicted on

slaves by lashes in the case of injury, and another is inflicted upon a freeman, as, for instance, a pecuniary fine. So far, however, as other noxal actions are concerned, he is held to be in a better condition.

6. *Paulus, On Sabinus, Book XL*

Where, however, it was promised to produce a slave who is about to become free, he is held to be in the same condition, even though he may be free when he appears; because the attainment of his freedom was tacitly understood.

TITLE X.

CONCERNING ONE WHO PREVENTS A PERSON FROM APPEARING IN COURT.

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

The prætor has considered it most just to punish the malice of one who prevents the appearance of another in court.

(1) He not only is held to be guilty of malice who detains a party either with his own hands, or through the agency of those in his service, but also he who requests others to detain him or abduct him to prevent his appearing in court, whether they knew, or were ignorant of what he intended to do.

(2) Where any person communicates evil tidings to another on his way to court by means of which he prevents him from appearing, we consider it to be malicious, and he is liable under the Edict; although some authorities are of the opinion that the party who was so credulous would only have himself to blame.

(3) Where a defendant is prevented from appearing through the malice of the plaintiff, he will

not have a right of action against the latter under this Edict, since he must be contented with an exception in case he should be sued for the penalty of his bond because he did not appear in court, but the case is different if he was prevented by another, for then he could bring an action against him.

(4) Where several persons have acted fraudulently, all are liable; but if one of them pays the penalty, the others are released from liability, as the plaintiff has no further interest in the matter.

(5) All authorities are of the opinion that in an instance of this kind, where a slave is concerned, a noxal action must be brought.

(6) The right of action passes to the heir, but not for a longer time than a year; and I think that an action will lie against the heir only to the extent of preventing him from profiting by the fraud of the deceased.

2. *Paulus, On the Edict, Book VI.*

Where the slave of the plaintiff, with the knowledge of his master, commits a fraud to hinder me from appearing in court, and his master does not prevent him when he could do so, Ofilius says that an exception should be granted against his master to prevent him from profiting by the fraud of the slave. But if, in fact, the slave committed the act without the consent of his master; Sabinus says that a noxal action will lie, and that the act of the slave ought not to prejudice his master, except to the extent that he shall lose him when he himself has committed no wrong.

3. *Julianus, Digest, Book II.*

An action will lie under this Edict against a party who, by means of fraud, prevented anyone from appearing in court, for a sum equal to the interest the plaintiff had in his appearance. In a suit of this kind it is ascertained if the plaintiff lost anything on account of this; as, for example, whether the defendant obtained ownership of the property in question by lapse of time, or was freed from liability to be sued.

(1) It is evident that if the party who acted maliciously to prevent the other from appearing in court is not solvent, it will be just to grant a restitutory action against the defendant, lest he may profit and the plaintiff suffer loss on account of the fraud of another.

(2) If the stipulator has been prevented from appearing in court through the fraudulent act of Titius, and the promisor has been prevented by that of Mævius; each of them has a right of action *in factum* against the party by whose fraudulent act he was prevented.

(3) If both the stipulator and the promisor were each prevented from appearing in court by the fraudulent act of the other, the prætor shall come to the relief of neither of them, for the fraud committed by each is mutually set off.

(4) If I stipulate with a surety for fifty *aurei* in case the defendant should not appear, and I am suing the defendant for a hundred *aurei*, and, through the wrongful act of Sempronius, the defendant fails to appear in court, I can recover a hundred *aurei* from Sempronius, for that amount seems to have been my interest in the matter; because if the party had appeared I would have had an action against him for a hundred *aurei*, or one against his heir for the same amount, although the surety had bound himself to me for a smaller sum.

TITLE XI.

WHERE A PARTY WHO HAS GIVEN A BOND TO APPEAR IN COURT DOES NOT DO SO.

1. *Gaius, On the Provincial Edict, Book I.*

The prætor orders that a day shall be granted for every twenty thousand paces in addition to

that on which the bond is executed, as well as that on which the party is bound to appear in court, for, indeed, this enumeration, as applied to the journey, is burdensome to neither of the litigants.

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

We do not require the defendant to appear in court where the matter with reference to which he promised to appear has been settled; but this must take place before the day fixed for him to appear. If, however, the settlement was made afterwards, an exception on the ground of fraud should be interposed; for who would trouble himself concerning the promise of the penalty after the case had been disposed of? For anyone would think that an exception on the ground that the matter had been settled would be valid, because the agreement also included the penalty; unless the contrary had been specially agreed upon by the parties.

(1) Where anyone, by reason of municipal employment, and without any fault of his own, has been prevented from appearing in court in accordance with his promise, it is perfectly just that an exception should be granted him.

(2) In like manner, a party who was called as a witness in some other proceeding, and was not able to appear in court, is also entitled to relief.

(3) Where anyone has promised to appear in court and is unable to do so, having been prevented by illness, a storm, or the power of the current of a river he, not undeservedly, may have the benefit of an exception; for as his presence is required by such a promise, how can he appear who is hindered by illness? Therefore, the Law of the Twelve Tables directs that: "If the judge, or either of the litigants are prevented from being present by a serious illness, the day of the trial shall be postponed".

(4) Where a woman does not appear, not because of illness but because she is pregnant, Labeo declares that she is entitled to an exception. If, however, she remains in bed after delivery, proof must be offered that she was prevented by what is equivalent to sickness.

(5) The same rule applies where anyone is attacked by insanity, for he who is prevented by insanity is prevented by illness.

(6) When I stated that a party was entitled to relief if he does not appear because he has been prevented by a storm, or the power of the current of a river; by the word "storm" a tempest either on land or sea is to be understood. We should understand the storm to be such a one as hinders travel by land or navigation.

(7) The power of the current of a river can also be understood to take place without a storm; for we understand it to be of such a character that its extent offers a hindrance, either because a bridge has been destroyed, or no boat is available.

(8) Where, however, anyone, if he had started on his journey sooner, or had sailed at a more opportune time could have avoided a storm, or the high water of a river thus set bounds to his progress, is he entitled to no benefit for an exception? This, indeed, should be decided after proper investigation, for the rule ought not to be enforced so rigorously that he could be asked: "Why he did not start a long time before the day mentioned in his promise?" Nor, on the other hand, should it be allowed him to allege the storm or the high water of the river as the cause of his non-appearance, when this was his own fault. Suppose, for instance, that a man was at Rome at the time he gave his promise to appear, and that he went to a provincial town, not from urgent necessity but on account of his own pleasure; is he not unworthy of the benefit of this exception? Or, suppose the tempest arose while he was on the sea, but he could have come by land, or have avoided the river by going round it; it may properly be said that he would not always be entitled to the benefit of an exception; unless the ruggedness of the country did not permit him to travel by land, or to go round the river. Where, however, the river had either overflowed its banks so as to cover the entire place where he had to appear, or

some accidental misfortune had overwhelmed that place, or had rendered it dangerous for him to come; an exception should be granted him under such circumstances, in accordance with all that is proper and just.

(9) In like manner, an exception is granted to him who, when he intended to appear in court, was detained by a magistrate without any fault of his own; for if he, himself, tried to have this done, or gave cause for it, he is not entitled to the benefit of the exception, as only his own fraudulent conduct could injure him, and he would not be injured by the act of others who maliciously caused him to be detained. Where, however, a private individual detained him, he is under no circumstances entitled to the benefit of this exception.

3. *Paulus, On the Edict, Book LXIX.*

An action for an amount equal to his interest in the case will lie against the party who detained him.

4. *Ulpianus, On the Edict, Book LXXIV.*

Where anyone who has promised to appear cannot do so because he has been convicted of a capital offence, he is very properly excused. We understand condemnation to capital punishment to mean sentence of death or exile. It might, perhaps, be asked of what value is this exception to a person who has been condemned? To this it may be answered that it is necessary for his sureties, and if he is sent into exile without losing his right of citizenship, this exception will profit anyone charged with his defence.

(1) It should be borne in mind that if he who does not appear because he was accused of a capital crime, was so situated that he could not make use of an exception, as this is only granted to one that is convicted; it is clear that if he did not appear for the reason that he was prevented by being in prison, or in military custody, that he would then be in such a position that he could make use of an exception.

(2) Moreover, if a person does not appear for the reason that he was prevented by a funeral in his family, an exception should be granted him.

(3) Again, if anyone is held in captivity by enemies, and for this reason did not appear in court, he is entitled to the benefit of an exception.

(4) The question has arisen whether an agreement can be made that no exception shall be pleaded, where a party breaks a promise made for the purpose of his appearance in court? Atilicinus is of the opinion that an agreement of this kind is not valid. I think, however, that such an agreement is valid, if the causes of the exception were expressly stated, and the party making the promise voluntarily renounced them.

(5) In like manner, the question arises whether an exception can be granted to the sureties of a party who gave security to appear in court, when he was not obliged to do so? I am of the opinion that the question is whether security was given through mistake, or by agreement; for, if it was done by mistake, an exception should be granted the sureties; but if it is done by agreement, they are by no means entitled to it. Julianus stated that where anyone bound himself for a larger amount than was fixed, and did this through ignorance, he was entitled to an exception, but where he bound himself for such a sum in pursuance of an agreement, Julianus says that the exception is barred by filing a *replicatio*, on the ground of the agreement entered into.

5. *Paulus, On the Edict, Book LXIX.*

Where there are two creditors equally interested, and a debtor promises one of them under a penalty to appear in court, and the other prevents him from so doing, an exception does not lie against the other if they are partners, lest the fraud of one of them may benefit the other on account of the partnership.

(1) In like manner, where there are two debtors jointly liable, and one of them, breaking his promise, does not appear in court, and the plaintiff then demands the property in dispute from one, and the penalty for non-appearance for the other, the suit to recover the penalty will be barred by an exception.

(2) Also, where a promise has been made by a father to appear in court on account of some contract made by his son, and afterwards the plaintiff institutes proceedings against the son; they are barred by the exception if the plaintiff sues his father on account of his promise. On the other hand, the same rule applies if the son promised to appear and the plaintiff brings an action against the father for the *peculium*.

6. *Gaius, On the Law of the Twelve Tables, Book I.*

Where he who has given a surety does not appear because he is absent on public business, it is unjust for the surety to be required to appear on behalf of the other, when the latter is not free to do so.

7. *Paulus, On the Edict, Book LXIX.*

Where anyone promises that a slave, or some other person who is under the control of another shall appear in court, he is entitled to the same exceptions as he would be if he had bound himself for a freeman, or the head of a family; except where the slave is said to be absent on public business, for a slave cannot be absent on public business. Leaving this exception out of consideration, all the others, being generally applicable, can be taken advantage of in the cases of freemen as well as in those of slaves.

8. *Gaius, On the Provincial Edict, Book XXIX.*

If in four, five, or more days after the party promised to appear in court he gives the plaintiff occasion to proceed against him, and the latter is not prejudiced by the delay, it may be stated that in consequence of this, he can defend himself by means of an exception.

9. *Ulpianus, On the Edict, Book LXXVII.*

Where a slave promises to appear in court his agreement is of no force, either with respect to himself or his sureties.

(1) If anyone has promised by a single stipulation to appear in court on behalf of several slaves, Labeo says that the entire penalty can be collected although only one slave does not appear; because it is a fact that all of them were not present. However, if a portion of the penalty is tendered for that one, he can make use of an exception on the ground of fraud if suit is brought on the stipulation.

10. *Paulus, On Plautius, Book I.*

If I promise that a party shall appear in court who already is alleged to have become free by lapse of time, for example, because he was no longer liable to be sued; an action will lie against me either to produce or defend him, that the truth may be ascertained.

(1) Where a promise has been made that a man will appear, and he loses his life through the treachery of the surety before the day fixed for his appearance; we can certainly make use of the rule: "That an action can not be brought for a penalty before the time arrives, for the reason that the entire stipulation is held to refer to a certain day".

(2) A man who was about to bring an action for injury stipulated before issue was joined, that if his adversary should appear in court, and when the time for the fulfillment of the promise had elapsed, he died; it is held that no right of action exists against the heir by reason of the stipulation; for the reason that stipulations of this kind are only entered into on account of the principal action; and although, as a rule, the stipulation entered into to appear in court passes to the heir, still, in this instance, it is not the case; for if the deceased had desired to bring suit on the stipulation after having abandoned that of injury, he would not have been permitted to

do so.

The same rule will apply if the party against whom I desire to bring an action for injury had died after the time stated in the stipulation, for I have no right to bring an action on the stipulation against the heir; and this was the opinion of Julianus. Hence, where sureties have been given, no action whatever will lie against them after the principal is dead. Pomponius holds the same opinion where the party did not die a great while afterwards, for the reason that, if he had appeared in court, his adversary would have been able to join issue with him.

11. *Ulpianus, On Sabinus, Book XLVIL*

Where anyone promises that a party shall appear in court, he ought to see that he does so in the same legal condition. To appear in the same condition means that he shall do so in such a way that the plaintiff will not be any the worse in the prosecution of the case, even if it may be more difficult for him to obtain satisfaction of his claim; and although this may be the case, it can be said that the party is still in the same legal condition; or even if he may have contracted new obligations, or have lost money, he still is held to be in the same legal condition; therefore, when anyone appears after judgment has been obtained against him, he is still held to appear in the same legal condition.

12. *Paulus, On Sabinus, Book XI*.

He, however, who has acquired the right to make use of some new privilege is not held to appear in the same legal condition.

(1) It must be held that any estimate of the interest of the plaintiff should be calculated with reference to the time when he ought to have appeared, and not to that when proceedings were instituted; even though he may have ceased to have any interest in the question at issue.

13. *Julianus, Digest, Book LV*.

When a slave himself promises to appear in court to conduct a case, or this is stipulated by another, the stipulation is of no effect, nor are the sureties liable; because a slave cannot either sue or be sued.

14. *Neratius, Parchments, Book II.*

If one man, as the agent for another, stipulates that he will merely produce him whom he agreed to produce without mentioning a penalty, and he should not appear, a stipulation of this kind can hardly have any weight; because the agent, so far as it relates to himself, has no interest in his appearance. But since, in making the stipulation, he is transacting the business of another, it may be stated that the benefit which must be considered in the matter does not accrue to the agent, but to the party whose business he was transacting; so that if the party does not appear, there should be due to the agent an amount equal to the interest of the principal in the suit in accordance with the terms of the stipulation. The same rule can be said to apply even more strongly, where the agent had stipulated in the following terms: "Whatever compensation is proper"; as we understand these words to have reference not to the benefit of the agent himself, but to that of the principal in the action.

15. *Papinianus, Questions, Book II.*

Where a guardian promises to appear in court and comply with his agreement, and in the meantime his ward becomes of age, or dies, or rejects the estate, an action on the stipulation shall be refused; for if an action had been brought to recover the property itself, and judgment had been rendered against the guardian, and any of the above things had taken place; it has been settled that no action on the judgment could be instituted against him.

TITLE XII.

CONCERNING FESTIVALS, DELAYS, AND DIFFERENT SEASONS.

1. *Ulpianus, On all Tribunals, Book IV.*

It is stated in an Address of the Divine Marcus that no one can compel another to go to trial in the seasons of harvest and vintage; because being occupied in agricultural pursuits, he should not be compelled to appear in court.

(1) If, however, the prætor, either through ignorance or neglect, should continue to summon the parties, and they should voluntarily appear, and he should render judgment in the presence of the litigants, who are here of their own accord, the judgment will be valid, even though he who summoned them acted improperly; but if he should render judgment in their absence, and while they continued to remain away, it follows that it must be held that his judgment is of no effect; for the act of the prætor can not abrogate the law. The judgment therefore becomes void without appeal.

(2) There are, however, certain cases which must be excepted, and in which we may be compelled to appear before the prætor during the seasons of harvest and vintage, namely, where the property in question will be lost by lapse of time; that is to say, where delay will deprive the party of his right of action. And, in fact, when the matter is urgent, we can be forced to appear before the prætor, but this only can be done in order that issue may be joined; and it is so stated in the words of the aforesaid Address, for, after issue has been joined, if either of the parties refuses to proceed, the Address grants him delay.

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

The Divine Marcus in the same Address delivered before the Senate, states that there are other cases in which application may be made to the prætor on holidays, as, for instance, for the appointment of guardians and curators; to admonish persons as to their duties; to hear excuses; to arrange for support; to prove age; to make provision for the possession for unborn children; for the preservation of property for the benefit of either legatees or the beneficiaries of trusts; or where security should be given against unlawful damage; or for the production of wills; or that a curator may be appointed for the property of one who is uncertain whether he will have an heir or not; or for the support of children, parents, or patrons; or for an entry upon an estate which is suspected of being insolvent; or for the examination of an atrocious injury; or for the bestowal of freedom granted under a trust.

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

It is also customary to dispense justice during the season of harvest and vintage in cases where the property is liable to be lost either by time or by death, as for example, in actions for theft, ordinary injury, atrocious injury, and where parties are said to have been guilty of robbery during a fire, the destruction of a house, shipwreck, or the seizure of a boat or a ship and other cases of this kind. The same rule applies where the property may be lost through the lapse of time, or the term within which suit can be brought is about to expire.

(1) Proceedings relating to freedom can be concluded at all times.

(2) Justice can also be dispensed at all times in the case of a person who accepts something contrary to the public welfare under pretence of the right of holding a market.

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

The governors of provinces ordinarily fix the time of harvest and vintage according to the custom of the neighborhood.

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

Magistrates are not accustomed to administer justice, or to exercise their authority at all on the

day before the *Kalends* of January.

6. *The Same, On the Edict, Book LXXVII.*

When judgment is rendered on a holiday, it is provided by law that it shall not be valid except by the consent of the parties; and where judgment is rendered otherwise, in opposition to this rule, no one is obliged to comply with it, or make any payment; nor can any official to whom application has been made under such circumstances compel the party to obey his judgment.

7. *The Same, On the Office of Consul, Book I.*

It is stated in the Address of the Divine Marcus that delay for the production of instruments cannot be granted more than once; but, for the benefit of litigants, where proper cause is shown, a delay can be obtained a second time in the same, or in a different province, according to the rules observed in different localities, and especially where anything unexpected arises. It must be ascertained if the deceased had obtained any delay for the production of documents, and whether this should also be granted to his successor; or, indeed, as it has been granted once, whether it cannot be granted a second time? The better opinion is that it ought to be granted where proper cause is shown.

8. *Paulus, On Sabinus, Book XIII.*

In accordance with the Roman custom, the day begins at midnight, and ends in the middle of the following night; therefore, whatever is done during these twenty-four hours (that is to say during the two halves of the night and the intervening day) is held to have been done during any hour of daylight. I

9. *Ulpianus, On the Office of Proconsul, Book VII.*

The Divine Trajan stated in a Rescript to Minicius Natalus that holidays only cause suspension of judicial business, and that those matters which relate to military discipline can also be transacted on holidays. This also includes the examination of persons who are in prison.

10. *Paulus, Sentences, Book V.*

In pecuniary actions, delay cannot be granted more than once in each case, but in capital cases three continuances may be granted to the defendant, and two to the accuser; but in both instances proper cause must be shown.

TITLE XIII.

CONCERNING THE STATEMENT OF A CASE.

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

Where anyone wishes to bring an action, he must state the grounds for it; as it is most just that the party sued should know whether he ought to submit, or set up a defence, and if he makes up his mind to the latter course, that he may be sufficiently informed to conduct the proceedings by ascertaining the nature of the suit which is brought against him.

(1) To state the case is also to give the other party an opportunity to take a copy of the same, or of what is included in the complaint, either by presenting it to him, or by dictating it. Labeo says that he also makes a statement of his case who conducts his adversary to the register of the prætor, and shows him what he is about to dictate, or by communicating to him the form which he intends to use.

(2) Notices of this kind should be drawn up without mention of the date, or the consul, lest some fraud may be contrived from the employment of the same, and a prior date be inserted in the instrument. The prætor, however, excludes the date and the consul when the document was written, but not that on which payment was to have been made; for the day of payment is, as it were, the principal part of the stipulation. Accounts, however, must be stated with the

date and the consul; as where money is paid and received this cannot otherwise be clear, unless the day and consul are set forth.

(3) All matters must be stated which anyone intends to bring before the court, but a party is not compelled to produce instruments which he does not expect to use.

(4) He is not considered to have given proper notice who does not include the entire stipulation.

(5) Relief shall be granted to those who, on account of their age, ignorance, sex, or for any other good reason, have failed to make proper statements.

2. *Paulus, On the Edict, Book III.*

Where suit is brought for a legacy the prætor does not order the terms of the will to be set forth, probably because the heir usually has a copy of the will.

3. *Mauricianus, On Punishments, Book II.*

The Senate decreed that no one against whom a suit is brought by the Treasury, shall be forced to exhibit any other documents to the informer than those that relate to the case in which the latter has declared himself to be informer.

4. *Ulpianus, On the Edict, Book IV.*

The prætor says: "Those who pursue the business of bankers must exhibit to a depositor the account in which he is interested, in addition to the day and the consul."

(1) The principle of this Edict is perfectly just; for as bankers keep the accounts of individuals, it is but proper that any books or papers relating to business transactions in which I am interested, should be shown to me as being, to a certain extent, my own property.

(2) The son of a family is included in the terms of the Edict, so that he also is compelled to exhibit his accounts; and the question arises is the father likewise compelled to do so? Labeo states that he is not, unless his son conducts the business of a banker with his knowledge; but Sabinus has properly declared that this is not to be admitted, where he reports his profits to his father.

(3) Where a slave carries on a banking business (for he can do so), if, indeed, he acts with the consent of his master, the latter can be compelled to produce his accounts, and an action will lie against him, just as if he, himself, had carried on the business; but, if the slave acts without the knowledge of his master, it will be sufficient if his master swears that he is not in possession of his accounts. Where a slave carries on the business of a banker, with his own private means, the master is liable for the same, or for the amount invested; but where the master has the accounts, and does not produce them, he is liable for the entire amount.

(4) Even a party who has ceased to conduct a banking business can be compelled to produce his books and papers.

(5) A person is compelled to produce his accounts in the place where he has conducted his banking business, and this has been thoroughly established. When he keeps his books in one province, and conducts his business in another, I am of the opinion that he can be compelled to produce them in the place where he carries on his business; for he was to blame in the first place for removing his books elsewhere. If he conducts his business in one place, and he is required to produce his books in another, he is by no means obliged to do so, unless you wish him to furnish you with copies of the same, where legal nroceedings have been instituted, and, of course, at your expense.

5. *Paulus, On the Edict, Book HI.*

Time must be granted him to bring these accounts.

6. *Ulpianus, On the Edict, Book IV*.

Where a banker keeps his books at his residence, or in his warehouse, (as many of them do), he must either conduct you to the place where they are, or give you a copy of the accounts.

(1) The successors of a banker are also obliged to produce accounts. Where there are several heirs, and one of them has possession of the accounts, he alone can be compelled to produce them; but where all have possession of them, and one produces them, all can be compelled to do so. What then must be done if the one who produces them is obscure and entitled to but little consideration, so that doubt may justly arise concerning the good faith of their production? Therefore, in order that the accounts may be compared, the others should also produce theirs; or, indeed, sign those produced by one of them. The same rule will apply where there are several bankers who have been requested to produce their accounts; for where there are several guardians who are discharging a trust together, they must all produce their accounts, or sign that produced by one of them.

(2) Moreover, an oath is exacted from the adversary of the banker, "that he does not demand the production of his accounts for the purpose of annoyance"; in order that he may not require the production of accounts which are superfluous, or of which he already has possession, for the sake of annoying the banker.

(3) Labeo says that an account is a statement of all mutual payments, receipts, credits and debts of the parties; and that no account can begin with the mere payment of a debt. And where the party has received a pledge or a deposit, he cannot be required to disclose the fact, as these are beyond the scope of an account; the banker, however, must furnish a statement where a promise to pay has been made, for this belongs to his business as a banker.

(4) An action will lie under this Edict for the amount of the interest of the plaintiff.

(5) From this it is apparent that the Edict only applies to what concerns the party himself; but it is held that the account concerns me if you merely keep it under my direction; but if my agent directs this to be done, while I am absent, must it be produced by me, on the ground that it concerns me? The better opinion is that it must be produced. I have no doubt that my agent must produce the account which he keeps for me as it concerns him, and he must give security that I will ratify it, if no mandate were given him.

(6) Where a date appears at the beginning of a page under which the account of Titius is set down, and afterwards my own appears without date or consul; the same date and consul must be given to me also, as the day and consul entered at the beginning belong to the entire account.

(7) To exhibit an account is either to dictate it or make a statement of it in writing, or to produce an account book.

(8) The prætor says: "I will order accounts to be produced to a banker, or to anyone who demands it a second time, only where proper cause is shown."

(9) He forbids accounts to be produced to a banker for the reason that he himself can obtain information from the books and papers of his business; and it is absurd that he should ask that books be produced for his benefit, in a case where he himself is obliged to produce them.

Whether an account must be produced for the heir of the banker is a matter for consideration, for if the banker's books and papers have come into his possession, they should not be produced for him; but if not, this can be done where proper cause is shown, as, under such circumstances, the accounts must have been produced for the banker himself, where he proves that the accounts have been lost through shipwreck, the destruction of a house, fire, or any other similar accident; or where they are in a place which is at a great distance, as for instance, beyond sea.

(10) The prætor does not require accounts to be produced for a party demanding it a second time, unless for good cause.

7. *Paulus, On the Edict, Book HI*.

For instance, where he shows that the accounts given in the beginning are in some distant place, or that they are not complete, or that he has lost them through unavoidable accident, and not through negligence, for if he lost them by an accident of this kind for which he should be excused, he shall be ordered to produce them a second time.

(1) This term: "A second time," has two significations, one in which reference is made to the second time which the Greeks call δευτερον, and the other which includes also subsequent times, which the Greeks call παλιν; by which is understood "as often as is necessary"; for it may happen that a party has lost an account which was twice given him, so that the term "a second time" is understood to mean "frequently".

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

When a banker is required to produce his accounts, and, influenced by malice, he does not do so, he is punished; but he is only liable for negligence when it closely resembles malice. He is guilty of malice in producing his accounts who does so with fraudulent intent, or who produces them incomplete.

(1) He who becomes liable under the terms of this Edict is required to pay, by way of damages, a sum equal to the interest I had in having the accounts produced at the time this was ordered by the prætor, and not the interest which I have at present; and, therefore, even if my interest has entirely ceased to exist, or has become less or greater, my right of action will neither be increased nor diminished.

9. *Paulus, On the Edict, Book HI*.

There are some persons who are obliged to produce our accounts, although they are not required to do so by the prætor under this Edict; as, for instance, where an agent transacts our business or keeps our accounts, he is not required to produce his accounts by the prætor, through fear of an action *in factum*, for the reason that we can obtain this by an action on mandate. Also, where a partner has transacted the business of the partnership fraudulently, the prætor cannot proceed against him under this clause, for there is an action in behalf of his partner; nor can the prætor force a guardian to furnish an account to his ward, for it is customary to compel him to do this by an action of guardianship.

(1) It makes no difference whether the successors, the father, or the master of the banker are in the same business; for since they take his place and succeed him in law, they are bound to discharge his obligations. A party to whom a banker has left his accounts does not appear to be included, (since by these words his legal successor is meant) any more than, if he, while living, had presented him with them. Nor will the heir himself be liable, if he has not had possession of them and has not acted fraudulently. If, however, before he delivers them to the legatee, he should be notified not to do so, he will be liable just as if he acted through malice; and he will also be liable so long as he has not surrendered them. If he does not act maliciously, the legatee will be compelled to produce the accounts, where sufficient cause is shown.

(2) Nor is it unjust that money-brokers, as Pomponius says, should be compelled to produce their accounts, because brokers of this kind, as well as bankers, keep accounts, and receive and pay out money at different times; which is principally proved by their entries and account books, and reliance is very frequently placed upon their good faith.

(3) Moreover, the prætor orders accounts to be produced for those who demand it, and who swear that they are not bringing suit for the purpose of annoyance.

(4) Accounts are considered as concerning us, not only when we ourselves have been parties to a contract, or have succeeded someone who has made a contract, but also where a contract has been made by a person under our control.

10. *Gaius, On the Provincial Edict, Book I.*

When a banker is ordered to produce his accounts, it makes no difference whether the controversy has arisen with him or with another party.

(1) The reason why the prætor requires only bankers to produce their accounts, and not others who are transacting business of a different description, is, because their functions and occupations are of a public nature, and their chief duty is to carefully keep accounts of their transactions.

(2) An account is considered to be produced when this is done from the very beginning (for an account cannot be understood unless it is thoroughly examined). This, however, does not signify that the entire account-book, or all the parchments of any person, are to be examined or copied; but that only the portion of the account which is required to give a party the information he desires, is to be examined and copied.

(3) When an action is brought for an amount which is equal to the interest of the plaintiff in having the account produced, it follows that whether he does not obtain what he brought suit for, or whether he is condemned for the reason that he did not have the account with which he could have sustained his case; he can recover by this action whatever he lost in this way. Let us consider whether this is actually true, for if he can prove before the judge who is to decide between him and the banker, that he could have gained his case in the trial in which he was beaten, he must then have been able to prove it; and if he did not do so, or if he did prove it, and the judge did not pay any attention to this fact, he has only the right to complain of himself, or of the judge. This, however, is not the case, for it might happen that he has at present obtained possession of the account from the defendant himself, or in some other way; or be able to prove, by means of other documents, or witnesses, which for some reason or other, he was not able to make use of at the time of the trial, that he could have gained his case. For, under these circumstances, a man has a right of action for theft or for fraudulent alteration of an obligation made for his benefit; as well as an action for unlawful damage, as, although we may not have been able to prove something previously for the reason that an undertaking has been abstracted, and may have lost our case, still, we can prove it now by other documents, or witnesses, which we were unable to make use of in the first place.

11. *Modestimis, Rules, Book HI.*

It has been established that copies of documents may be produced without the signature of the party who exhibits them.

12. *Callistratus, On the Monitory Edict, Book I.*

It is held that women are excluded from conducting banking business, as this is an occupation belonging to men.

13. *Ulpianus, On the Edict, Book IV.*

This action is not permitted after the lapse of a year, nor against an heir, unless through some act of his own; but it is granted to an heir.

TITLE XIV.

CONCERNING AGREEMENTS.

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

The justice of this Edict is natural, for what is so suitable to the good faith of mankind as to observe those things which parties have agreed upon?

(1) The term *pactum* is derived from *pactio*, and the word *pax* has also the same origin.

(2) An agreement is the consent of two or more persons to the same effect.

(3) The term "*conventio*" is a general one, and refers to everything to which persons who have transactions with one another give their consent for the purpose of making a contract, or settling a dispute; for as parties are said to come together who assemble from different places in one; so, also, the same word is applicable to those who, from different feelings of the mind, agree upon one thing; that is to say, arrive at one opinion. The term "*conventio*" is such a general one, as Pedius very properly says, that there is no contract and no obligation which does not include it, whether it is made by the delivery of the property, or verbally; for even a stipulation, which is verbally made, is void, where consent does not exist.

(4) The greater number of conventions have names that are peculiar to them, as, for instance, sale, hire, pledge, and stipulation.

2. *Paulus, On the Edict, Book HI.*

Labeo says that an agreement can be entered into by delivery of property, by a letter, or by a messenger. It can also be made between absent parties, and it is understood that an agreement can be entered into by tacit consent.

(1) Hence, if I restore his obligation to my debtor, it is held to have been agreed upon between us that I will not make any claim against him; and it is established that, if I do, he can plead in bar an exception based on the agreement.

3. *Modestinus, Rules, Book HI.*

But after a pledge has been restored to a debtor, there is no question that the debt can be collected, if the money had not been paid; unless it is expressly proved that the contrary was intended.

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

Again, for the reason that tacit agreements are valid, it is settled that personal effects brought into dwelling-houses, which have been rented, are to be regarded as pledged to the lessor; even though nothing was specially stated to that effect.

(1) In accordance with this principle, a person who is dumb can enter into a contract.

(2) A stipulation made on account of a dowry is another proof of this, for no one has a right, before marriage, to bring suit for the dowry, any more than if this had been expressly stated; and if the marriage does not take place, the stipulation has no effect, which is also the opinion of Julianus.

(3) Having been consulted in a case where it was agreed that the principal could not be demanded so long as the interest was paid, and the stipulation was unconditionally drawn up, it was the opinion of Julianus that the condition was implied by the stipulation, just as if it had been expressed therein.

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

There are three kinds of conventions, some of which relate to public matters, and some to private affairs. Those which are private are either based upon legislative enactments or upon the Law of Nations.

(1) A public convention is one by which peace is made when two military leaders agree upon certain things to that end.

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

A convention based upon legislative enactment is one which is confirmed by some law; and therefore sometimes an action arises from an agreement, or is abrogated by it; which takes

place as often as it is supported by an enactment, or by a Decree of the Senate.

7. *Ulpianus, On the Edict, Book IV*.

Some conventions based on the Law of Nations give rise to actions, and others give rise to exceptions.

(1) Those which give rise to actions are not known by their own names, but pass under the special designation of contracts; as purchase, sale, hire, partnership, loan, deposit, and other similar terms.

(2) Where the matter has not been placed under the head of some special contract, then, as Aristo very properly stated to Celsus, an obligation exists; as, for instance, I gave you something with the understanding that you would give me something else; or I gave you something with the understanding that you would perform some act, and this is συναλλαγμα, that is to say, a mutual agreement, and a civil obligation will arise therefrom. Therefore I am of the opinion that Julianus was very justly criticized by Mauricianus for his decision in the following case: "I gave you Stichus with the understanding that you should manumit Pamphilus; you manumitted him, but Stichus was evicted by another party." Julianus holds that an action *in factum* should be granted by the prætor; but the former says that there is a civil action for an object which is uncertain, that is to say, one in prescribed terms, for there is a contract which Aristo calls συναλλαγμα, and from this the action is derived.

(3) Where something is promised to prevent the commission of a crime, no obligation arises from such an agreement.

(4) But, where there is no ground for an agreement, it has been established that no obligation can be created; therefore, a mere agreement does not create an obligation, but it does create an exception.

(5) Sometimes, however, it does give rise to a suit, as in *bona-fide* actions; for we are accustomed to say that agreements which are entered into are included in *bona-fide* actions; but this must only be understood in the sense that where agreements follow as parts of a contract, they are included so as to give the right of action to the plaintiff; but if they are added afterwards, they are not considered to belong to the contract, nor do they confer a right of action; otherwise, an action would arise from the agreement. For instance, if after a divorce, it is agreed that the dowry shall not be surrendered at the end of the time prescribed by law, but immediately; this will not be valid; otherwise there would be an action founded on an agreement. Marcellus states the same thing, and if during an action of guardianship, it is agreed that a higher rate of interest than that established by law shall be paid, this is of no effect, or there would be an action founded upon an agreement; as the agreements contained in the contract constitute its very essence; that is, they were made when the contract was entered into. I am aware that Papinianus said that if, after a sale, any agreement was entered into which was not a part of the contract, an action growing out of the sale could not be brought, on account of this same rule, namely: "No action can arise on a simple contract," which may also be stated concerning all *bona-fide* actions. The agreement, however, will have effect on the side of the defendant, for the reason that agreements which are afterwards interposed usually give rise to exceptions.

(6) To such an extent are subsequent agreements included in the same contract, that it is established that in purchases and other *bonafide* cases where the exception has not been followed up, the party can withdraw from the purchase. If this can be done as a whole, why cannot a part of it be changed by an agreement? This Pomponius stated in his Sixth Book on the Edict. Since this is the fact, an agreement will still have effect on the part of the plaintiff, so as to give him a right of action, where no further proceedings have been taken; and, on the same principle, if the whole contract can be set aside, why can it not be amended and appear, as it were, in a new form? This can be said to have been properly stated, and therefore I do not

disapprove of what Pomponius says in his book of "Readings", namely: that one can by an agreement partially abandon a purchase, so that a purchase of the part may be made a second time.

Where, however, two heirs are left by the purchaser, and the vendor agreed with one of them to abandon the sale; Julianus says that the agreement is valid, and that the sale is in part annulled, since the other heir by entering into another contract would have been able to obtain an exception as against his co-heirs. Hence the opinion of Julianus and Pomponius are very properly established.

(7) The prætor says: "I will require the observance of agreements which have not been entered into maliciously or contrary to the laws, plebiscites, Decrees of the Senate, or Edicts of the Emperors, where no fraud appears in any of them."

(8) There are certain agreements which relate to real property, and others which relate to personal property. Those that relate to real property are those by which I agree, in general terms, not to bring suit; those which relate to personal property are those in which I agree not to sue a certain individual, for instance: "I will not sue Lucius Titiiis." Whether an agreement is made with reference to property or to a person is to be ascertained not only from the language, but also from the intention of the contracting parties; since generally, (as Pedius says) the name of the person is inserted in the contract, not for the purpose of rendering it personal, but that it may be shown with whom the contract was made.

(9) The prætor says that an agreement fraudulently executed shall not be observed. Fraud is perpetrated by means of craft and artifice; and, as Pedius says, a contract is fraudulently executed whenever something is done, under the pretence that something else is intended, for the purpose of cheating another.

(10) The prætor adds nothing with reference to contracts entered into in order to defraud; but Labeo very properly says that if he did, it would be either unjust or superfluous; unjust if, for instance, the creditor having once given his debtor a *bona fide* release, should afterwards attempt to annul it; superfluous, if he was deceived when he granted the release, for fraud is included in deceit.

(11) Where a contract is fraudulently made in the beginning, or some fraudulent act is committed afterwards, there is ground for an exception, according to the words of the Edict: "And no fraud is committed".

(12) With reference to what is usually inserted at the end of an agreement, namely: "Titius asked, Mævius promised"; these words are not only understood as forming part of the contract, but also as being part of the stipulation; and therefore an action on a stipulation arises from them, unless the contrary is expressly proved; for the reason that this was done, not with the intention of making a stipulation, but only of entering into an agreement.

(13) If I agree that an action shall not be brought on a judgment, or for burning a house, an agreement of this kind is valid.

(14) If I agree not to institute proceedings upon the "notice of a new structure", some authorities are of the opinion that the agreement is not valid, because it, as it were, attacks the authority of the prætor; but Labeo makes a distinction here, as, for instance, where the new structure may be injurious to private property the agreement can be entered into; but where it affects public property this cannot be done, which is a very proper distinction. Thus it is lawful to enter into an agreement with respect to all other matters to which the Edict of the prætor relates, and which affect private property, but not to those where the injury of public property is concerned; for the law even permits a compromise to be made with reference to a theft.

(15) Where anyone agrees not to institute proceedings on account of a deposit, the contract is valid, according to Pomponius. Also where anyone agrees: "To assume all risk attending a deposit"; Pomponius states that the agreement is valid, and it cannot be set aside as contrary to law.

(16) Generally speaking, whenever an agreement is contrary to the Common Law, one is not obliged to observe it, nor can a legacy be made to depend upon this; nor where an oath has been made that the party will not sue, the agreement should not be observed, Marcellus states the same in the Second Book of the Digest; and where a stipulation has been entered into with reference to matters which it is not lawful to make the subject of a contract it is not to be observed, but entirely rescinded.

(17) When anyone before entering upon an estate makes an agreement with the creditors to pay them less than is due, then the contract will be valid.

(18) Where a slave makes an agreement before he obtains his freedom and inheritance, Vindius says that the contract is of no force, because he was appointed an heir under a condition. Marcellus, however, in the Eighth Book of the Digest, is of the opinion that if a direct heir, and a slave who is a necessary heir, both of whom have been absolutely appointed, make an agreement before meddling with the estate, they do so properly, which indeed is correct. He also thinks that a foreign heir, where he enters upon the estate under the direction of creditors, does so lawfully, and that he also has a right of action. But where anyone (as we have previously stated) enters into an agreement while in slavery, Marcellus denies that his contract is valid, since whatever act a person performs while in slavery does not usually profit him after he has obtained his freedom; which must be admitted with respect to an exception based upon a contract. But the question arises does an exception which is based upon fraud benefit him? Marcellus, although he was previously in doubt whether this was the case, in similar instances, however, admits it; as, for instance, where the son of a family, having been appointed heir, makes an agreement with creditors, but after he has been emancipated, enters upon the estate; he holds that he can make use of an exception on the ground of fraud. He is of the same opinion where a son, during the lifetime of his father, makes an agreement with the creditors of the latter; for in this instance an exception on the ground of fraud will be admitted. Finally, an exception on the ground of fraud must not be rejected even in the case of slaves.

(19) At present, however, an agreement of this kind can only be a disadvantage to creditors where they assemble, and by common consent state with what portion of their debts they will be satisfied. But, if they do not agree, the intervention of the prætor will be necessary, who in his decision must follow the will of the majority.

8. *Papinianus, Opinions, Book X.*

It has been decided that, in the case of creditors, a majority has reference to the amount of the indebtedness, and not to the number of individuals. If the number of the creditors is the same as the number of the debts, then the majority of the creditors must be given the preference; when the number of the creditors is equal, the prætor must follow the will of him who is highest in rank among them; but where everything is equal on both sides, the most humane opinion must be chosen by the prætor, for this can be gathered from the Rescript of the Divine Marcus.

9. *Paulus, On the Edict, Book LXII.*

Where there are several creditors who have a single right of action, they are held to occupy the position of only one person; as, for example, where there are several creditors by stipulation, or several bankers whose obligations were entered into at the same time, they shall be considered as one, because there is only one debt. Where several guardians of one ward, who is a creditor, enter into an agreement, they are regarded as one, for the reason that they did so

in behalf of a single ward. Again, where a single guardian enters into an agreement in behalf of several wards who are claimants of one debt, it is established that they are to be considered as one person, since it is a difficult matter for one man to represent two persons; for, indeed, lie who has several causes of action against a party who has only one, is not permitted to represent several persons.

(1) We estimate the total amount of indebtedness when several sums are due; as, for example, where several sums, which together amount to a hundred *aurei*, are owing to one man; and a sum of fifty *aurei* is owing to another; for, in this instance, we must consider the amount which is made up of several sums, because when they are added together they are greater than the single one.

(2) We must also add to the principal the interest which is due.

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

The Rescript of the Divine Marcus provides that all the creditors shall assemble. But what if some of them are absent? Must those who are absent follow the example of those who are present? But if the agreement is valid as against those who are absent, an important question arises, namely, whether this agreement will bar absent privileged creditors? I repeat that, before the rule established by the Divine Marcus, the Divine Pius stated in a Rescript: "That the Treasury also, in those cases where hypothecation does not exist, as well as other privileged creditors, shall follow the example of the others."

All these rules must be observed with reference to those creditors who are without security.

(1) Where the stipulation of a penalty has been added to the contract, the question arises whether an exception on the ground of contract applies, or whether a suit should be brought on the stipulation? The opinion of Sabinus, which is the better one, is that he who made the stipulation can take either course, as he may choose; if, however, he makes use of the exception founded on the contract, it will be just to release the stipulation.

(2) We are for the most part accustomed to state: "that an exception founded upon fraud is an aid to an exception founded upon contract"; and then there are persons who cannot make use of an exception founded upon contract, but can use one founded upon fraud; which was the opinion of Julianus, and was endorsed by many others; for example, if my agent should make an agreement, I could have the benefit of an exception on the ground of fraud, which opinion is held by Trebatius, who thinks that as an agreement of my agent may injure me, it may also be to my advantage.

11. *Paulus, On the Edict, Book III*. For the reason that he can be paid.

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

For it is established that it will be a source of injury to me, whether I ordered him to make a contract, or whether he was my general agent; as Puteolanus states in the First Book on Assessors, since it has been decided that he also can institute judicial proceedings.

13. *Paulus, On the Edict, Book HI*.

But if the agent was only appointed for the purpose of bringing an action, an agreement made by him does not prejudice his principal, for the reason that he cannot receive payment.

(1) Where, however, the agent was appointed for the transaction of affairs in which he himself is interested, he is considered to occupy the place of a principal, and thus any agreement entered into with him must be observed.

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

Moreover, an agreement made by the head of a company is valid both for and against it.

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

An agreement made by a guardian on behalf of his ward is valid, as is stated by Julianus.

16. *Ulpianus, On the Edict, Book IV.*

Where an agreement has been made with the purchaser of an estate, and the vendor of the same brings an action, an exception on the ground of fraud is a bar to his proceeding; for, according to a Rescript of the Divine Pius, equitable actions must be granted to the purchaser of an estate, and it is but just that a debtor of the estate should be able to make use of an exception on the ground of fraud, as against the vendor.

(1) Where an agreement has been made between the owner of the property sold and the purchaser of the same, for instance, that a slave who had been purchased should be restored to the person who sold him as owner; if he brings suit for the price he will be barred by an exception on the ground of fraud.

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

If I give you ten *aurei* and agree with you that you shall owe me twenty, no obligation arises for more than ten, for none can be contracted for a greater amount than has been given.

(1) There are certain rights of action which are annulled under a contract by operation of law, as, for instance, one for injuries, or one for theft.

(2) A right of action based upon an agreement arises in the case of a pledge, under prætorian law; it is, however, annulled by an exception whenever I agree not to sue.

(3) When anyone makes an agreement that no suit shall be brought against himself, but shall be brought against his heir; an exception filed by the heir will be of no benefit to him.

(4) If I should agree that no suit shall be brought against me, or against Titius, this will be of no advantage to Titius, even if he should become the heir, because this cannot be confirmed subsequently. Julianus established this rule in the case of a father who made an agreement that suit should not be brought against him, or his daughter, when the daughter afterwards became the heir of her father.

(5) Where an agreement has been entered into with the vendor with reference to the property, it can be pleaded by the purchaser, according to the opinion of several authorities, and Pomponius states that we make use of this rule; but, according to Sabinus, when the agreement is personal, it can also be pleaded against the purchaser. He thinks that this is also the law where a succession arises through donation.

(6) When the unlawful possession of the estate of another enters into an agreement, many are of the opinion that the agreement will neither benefit nor prejudice the heir, if he should recover the estate.

(7) If a son or a slave enters into an agreement that no action shall be brought against the father or the master.

18. *Gaius, On the Provincial Edict, Book I.*

(Whether the agreement is made with reference to a former contract with the parties themselves, or with the father or master).

19. *Paulus, On the Edict, Book III.*

They are entitled to an exception. The same rule applies to those who are held in slavery in good faith.

(1) Again, if the son of a family makes an agreement that suit shall not be brought against him, it will be to his advantage and to that of his father also, if the latter is sued for the *peculium* of the son.

20. *Gaius, On the Provincial Edict, Book I.*

Or for any profit obtained by an obligation contracted by his son, or where he is sued as a defender of his son, if he should prefer this.

21. *Paulus, On the Edict, Book III.*

It can also be pleaded by the heir of the father during the lifetime of his son, but after the death of the son this cannot be done by the father or his heir, because the agreement is a personal one.

(1) Where a servant enters into an agreement that he shall not be sued, the agreement is worthless. Let us see whether an exception on the ground of fraud can be pleaded. When the agreement has reference to property, an exception based upon the agreement itself can be pleaded by the master and his heir, but where the agreement is personal, then the exception on the ground of fraud is only available.

(2) By making an agreement we cannot benefit those who are under our control; but it will be an advantage to us if we make an agreement in their behalf, as Proculus states. And this doctrine is correct if this was the understanding that the time that the contract was entered into; but if I agree that you shall not bring suit against Titius, and you begin an action against me in his name, an exception on the ground of contract is not allowed; for what is no benefit to Titius himself will be of none to his defender. Julianus also stated that where a father agreed that no suit should be brought either against him or his son, the better opinion is that the exception on the ground of contract cannot be pleaded by the son of the family, but merely one on the ground of fraud.

(3) The son of a family can enter into an agreement not to bring suit for a dowry when he becomes his own master.

(4) The son of a family can also legally enter into an agreement concerning a legacy bequeathed to him under some condition.

(5) Where there are several persons who have the right to collect an entire sum of money, or who are co-debtors for the same sum, the question arises to what an extent an exception on the ground of contract can be pleaded by one for, and against the others? An agreement made with reference to the property will benefit those who have been released from this obligation, where he who entered into the agreement had an interest in this; and therefore an agreement of the debtor will be an advantage to the sureties.

22. *Ulpianus, On the Edict, Book IV.*

Unless it was the intention of the parties that no suit should be brought against the principal, but that it might be brought against the surety; in this instance the surety cannot avail himself of an exception.

23. *Paulus, On the Edict, Book HI.*

An agreement made by the surety would be of no benefit to the principal, because the surety has no interest in the money not being collected from the debtor; nor would it be of any benefit to the co-sureties, nor will an agreement made with another, no matter what his interest may be; for he can only do this when an exception is granted him and the benefit chiefly enures to the party with whom the agreement was made, as in the case of a principal promisor along with those who are bound on his account.

24. *The Same, On Plautius, Book III.*

Where a surety has bound himself in a matter in which he was interested, in this instance he is to be considered as a principal debtor; and where an agreement is made with him, it is held to have been made with the principal debtor.

25. *The Same, On the Edict, Book III.*

The same rule applies where two principal debtors, or two bankers who are partners, bind themselves.

(1) Labeo says that a personal agreement does riot concern a third party, nor in fact an heir.

(2) But although the agreement of a surety is of no advantage to the principal debtor, Julianus says that the latter can, nevertheless, generally avail himself of an exception on the ground of fraud.

26. *Ulpianus, On the Edict, Book IV.*

That is to say, it was understood that no suit could be brought against the principal debtor. The same rule applies to co-sureties.

27. *Paulus, On the Edict, Book HI.*

Where one of two bankers, who are partners, make an agreement with a debtor, can an exception be pleaded in bar against the other?

Neratius, Atilicinus, and Proculus, are of the opinion that it can not, if the agreement relating to the property was made by one of them; for it has only been settled that the other can bring suit for the entire debt. Labeo holds the same opinion, because although one of them can receive payment, he cannot change the obligation; and thus payment of what they have loaned can properly be made to those who are under our control, but the obligation cannot be changed; and this is correct. The same rule applies to two creditors under a stipulation.

(1) Where an informal agreement has been made with a principal debtor granting him time, neither debtor nor surety will have the benefit of any further time. If the debtor, without releasing himself, enters into an agreement that his surety shall not be sued; some authorities think that this is of no benefit to the surety, even though the principal was interested therein; for the reason that the same exception should be available to him as to the principal. I have held that the surety is entitled to the benefit of an exception, for this would not be the case where a right was acquired through a free person, but rather one where we have provided for the party himself who entered into the agreement, which rule is at present in use.

(2) After an agreement has been made that suit shall not be brought, and it is subsequently agreed that it may be, the former agreement is annulled by the latter one; not indeed by operation of law, as one stipulation is extinguished by another, where this is the intention of the parties, because the law governs stipulations, and in contracts all depends upon the facts; therefore an exception is rebutted by a replication. On the same principle it happens that the first agreement will not release the sureties. But where the first agreement was of such a character that it extinguished the right of action, as, for instance, in a case of injury, suit cannot subsequently be brought after making the agreement that this can be done; because the first right of action was lost, and an agreement made afterwards has no effect to bestow a right of action, and an action for injury cannot be based on a contract, but only on insulting behavior. We say that the same rule applies in the case of *bona-fide* contracts, where the agreement annuls the entire obligation, as, for example, in the case of a purchase; for the prior obligation is not revived by a new contract, but it would be an advantage to it. But where the entire contract was not abrogated, but something in it was excluded, the second agreement acts as a renewal of the first. This can take place in an action for dowry, for example, where a woman makes an agreement that her dowry shall be restored to her without delay, and afterwards enters into one that it shall be returned to her at the time authorized by law; in this instance the dowry will revert to her in accordance with the law, nor can it be stated that the condition of the dowry becomes any worse by reason of the agreement; for as often as the right of action for a dowry resumes the condition with which the Law of Nature invested it, the state of the dowry does not become worse, but is restored to its original form. This opinion

was also held by Scævola.

(3) It cannot be provided by agreement that a person shall not be responsible for bad faith; for although a party may agree not to bring suit for a deposit, he seems by the terms of the contract to agree not to bring an action on the ground of fraud, and an agreement of this kind can be pleaded.

(4) Agreements which contain immoral provisions should not be observed; as, for instance, if I agree not to sue you for theft or injury, if you commit them; for it is proper that the fear of punishment for theft or injury should exist. After these offences have been committed, however, we can make an agreement. In like manner, I cannot agree that I will not apply for an interdict for violence, so far as this affects the interest of the public. And, in general, where the agreement extends beyond the interest of individuals, it should not be observed. And, above all things, it must be borne in mind that an agreement made with reference to one thing or to one person, shall not injure another thing or another person.

(5) Where you owe me ten *aurei*, and I contract not to sue you for twenty, it is established that you are entitled to an exception on the ground of contract, or on the ground of fraud, to the amount of ten *aurei.* Again, if you owe me twenty *aurei*, and I agree to only sue you for ten; the result will be that, if you oppose an exception to me, I can only exact from you the payment of the remaining ten.

(6) But where, having stipulated for ten *aurei*, or Stichus, I make an agreement with you for ten, and then bring suit for Stichus or the ten *aurei*, if an exception is pleaded on the ground of contract, the right of action will be absolutely extinguished; for, as the entire obligation will be discharged by payment, or by a suit, or by a lease of one of the two things; so, when an agreement is entered into not to bring suit for one thing, the entire obligation is disposed of. But where it is understood between us that ten *aurei* shall not be given to me, but that Stichus shall be, I can legally bring suit for Stichus, and no exception can be pleaded against me. The same rule applies where an agreement was made not to bring suit for Stichus.

(7) But where you owe me a slave in general terms, and I agree not to bring suit for Stichus, an exception on the ground of contract can be pleaded against me, if I bring suit for Stichus; but if I bring suit for another slave, I am acting properly.

(8) Moreover, if I make an agreement not to bring suit for an estate, and, acting as heir, I bring suit for certain pieces of property, an exception on the ground of contract can be pleaded against me with respect to what is agreed upon; just as if the agreement had been that I should not sue for a tract of land, and I bring an action for the usufruct of the same; or, having agreed not to bring suit for a ship, or a building, I bring an action for certain parts of them, after they have been demolished; unless there is some express understanding to the contrary.

(9) Where a release is not valid, it is held to be understood by tacit agreement that suit shall not be brought.

(10) A slave cannot make an agreement on behalf of the heir who is about to enter upon the estate, because the latter is not yet his master; but if the agreement was made with reference to property, it can be acquired by the heir.

28. *Gaius, On the Provincial Edict, Book I.*

Agreements entered into against the Civil Law are not considered valid; as, for instance, where a ward, without the consent of his guardian, enters into an agreement not to sue his debtor, or that he will not bring suit within a certain time (for example, within five years) for he cannot legally receive payment without the consent of his guardian. On the other hand, if a ward makes an agreement that he shall not be sued for what he owes, the agreement is held to be valid, for he is permitted to improve his condition without the consent of his guardian.

(1) Where the curator of an insane person or a spendthrift makes an agreement that suit shall

not be brought against the said insane person or spendthrift, it is perfectly proper that such an agreement of the curator should be sustained, but not in the contrary case.

(2) Where a son, or a slave makes an agreement that he himself will not bring an action, the agreement is void. But if it was made with reference to property, that is to say that suit shall not be brought for the money, it must be held to be valid as against the father or the master, if the son or the slave has the unrestricted management of his own *peculium;* and the property concerning which the agreement was entered into is his *peculium.* This, however, is not altogether advisable, for since it is true, as Julianus holds, that he who has the management of his *peculium* granted him still has no right to dispose of it; it follows that if the agreement was made not to sue for the money for the purpose of giving it away, the contract should not be allowed to stand; but if he should obtain something, by way of consideration for making the contract, which is worth not less, or even more than he gives, the contract must be considered valid.

29. *Ulpianus, On the Edict, Book IV.*

But if he lends his master's money, Celsus says that what he agreed upon at the time of the loan is valid.

30. *Gaius, On the Provincial Edict, Book I.*

Let us consider, with reference to the son of a family, whether the agreement is valid when he agrees not to bring suit, because sometimes the father of a family has a right of action, for example, for injury; however, where a father has a right of action on account of an injury done to his son, there is no doubt that if he wishes to bring suit he will not be barred by the agreement of his son.

(1) Where a man stipulated with a slave for money which Titius owed him, and brings suit against Titius, the question arises whether he can and should be barred by an exception on the ground of contract? Julianus thinks that he should be barred where the stipulator has a right of action against the master of the slave for his *peculium*, that is to say, if the slave has good ground for interposing, because, for instance, he owed the same amount to Titius. But where the slave intervenes as surety, a right of action is not granted for his *peculium*, on this ground; nor should the creditor be prevented from bringing suit against Titius. In like manner, he should, by no means, be prevented from doing so if he thought that the slave was a freeman.

(2) If I should stipulate with you under a condition for a sum which Titius owes me absolutely, and the condition should not be fulfilled, and I bring suit against Titius, can I and should I be barred by an exception based upon contract? The better opinion is that an exception cannot be interposed.

31. *Ulpianus, On the Edict of the Curule Ædiles, Book I.*

It is allowed at all times to enter into a contract contrary to the Edict of the Ædiles, whether this is done at the time of making the sale, or afterwards.

32. *Paulus, On Plautius, Book V.*

Where it is stated that, when an agreement is made with the principal debtor that suit shall not be brought against him, the surety is also entitled to an exception; and this was established for the benefit of the debtor, to prevent an action of mandate being brought against him. Therefore, if no action of mandate will lie, for instance, because the party became a surety with the intention of donating the debt, it must be held that the surety is not entitled to an exception.

33. *Celsus, Digest, Book I.*

A grandfather promised a dowry on behalf of his granddaughter by his son, and agreed that an action should not be brought for the dowry, either against himself or his son. Then, if an

action for the dowry is brought against a party who is the co-heir of the son, the former cannot protect him by pleading an exception on the ground of contract; the son, however, can very properly make use of it, since a party is permitted to consult the best interest of his heir, and there is nothing in the way of his providing for one of his heirs, if he should become an heir, and not consult the interest of the others.

34. *Modestinus, Rules, Book V.*

It is the opinion of Julianus that the right of agnation cannot be renounced, any more than anyone can say that he does not wish to be a proper heir.

35. *The Same, Opinions, Book II.*

Two brothers, Titius and Mævius, and a sister Seia, divided an estate between them, which they held in common, and executed an instrument in which they stated that they divided the estate of their mother, and alleged that no property held in common by them remained. Afterwards, however, two of them, namely, Mævius and Seia, who were absent at the time of their mother's death, learned that a sum of money in gold had been abstracted by their brother, of which sum no mention was made in the instrument of partition. I desire to know whether, after the agreement for partition was made, an action for the recovery of the money which had been abstracted would lie in favor of the brother and sister against the other brother? Modestinus answered that if, when they brought suit for a portion of the money which was said to have been abstracted by Titius, an exception was pleaded against them under a general contract, when they ignorantly agreed to the fraud which had been committed by Titius, they could avail themselves of a replication on the ground of fraud.

36. *Proculus, Epistles, Book V.*

Where you are in possession of land belonging to me, and I make an agreement with you that you shall deliver possession of the same to Attius, and I bring suit to recover the property from you, I cannot be barred by an exception based upon contract, unless you have already delivered possession of the property, or the agreement between us made for your benefit, and it is not your fault that you did not deliver it.

37. *Papirius Justus, On Imperial Constitutions, Book II.*

The Emperors Antoninus and Verus stated in a Rescript, "That a debtor to the Republic could not be released from payment by the curator, and that the release granted to the people of Philippi must be revoked."

38. *Papinianus, Questions, Book II.*

Public law cannot be changed by the contracts of private persons.

39. *The Same, Questions, Book V.*

It was established by the ancients that where an agreement was obscure or ambiguous, it must be construed against a vendor and a lessor, because it was in their power to have stated the terms of the contract more clearly.

40. *The Same, Opinions, Book I.*

A contract stated as follows: "I acknowledge that you are not bound", is not limited to the person, but, since it is general, it will apply to heirs as well as litigants.

(1) Where a party who appeared entered into an agreement that, within a certain time, he would satisfy the judgment, if the sum which he agreed to pay by way of compromise was not paid within the time; the appellate judge, without reference to the principal point at issue, shall act upon this as a lawful agreement, just as if the party had admitted his liability.

(2) After the division of an estate and of its liabilities, where the different creditors have accepted interest from the separate co-heirs for the entire amount of the indebtedness, without

any assignment of liabilities, as had been agreed upon; the right of action possessed by the creditors against each heir for his respective share shall not be inter-

fered with, unless the heirs do not offer to pay the entire indebtedness to them, in compliance with the terms of the settlement.

(3) A father who promised a dowry to his daughter and agreed: "That if she should die after him without leaving any children, a portion of the dowry shall belong to her brother, who will be her heir". If her father should afterwards have children, and make them heirs by his will, this agreement will give rise to an exception on the ground of fraud, since it was understood between the contracting parties that the heir should be provided for; and, at that time, when the father had no children, he appeared to express his last wishes for the benefit of the brother.

41. *The Same, Opinions, Book XI.*

"If you will pay me a part of your debt by a certain time I will give you a release for the remainder, and discharge you from liability." While no right of action exists under these circumstances, nevertheless, it is settled that the debtor has a right to an exception.

42. *The Same, Opinions, Book XVII.*

It was agreed between a debtor and a creditor, "That the creditor should not assume the burden of paying the tax on land which was encumbered, but that the necessity of payment should be imposed upon the debtor". I have answered that an agreement of this kind is not to be observed, so far as the Treasury is concerned, for it is not permissible that a rule of law affecting the Treasury should be overthrown in the interest of private individuals.

43. *Paulus, Questions, Book V.*

In making sales we know what acts the debtor must perform on the one hand, and what the purchaser must do on the other; but if any different terms are inserted in the contract they must be observed.

44. *Scævola, Opinions, Book V.*

Where a minor was about to reject the estate of his father, his guardian made an agreement with several creditors of the estate that they would accept a certain proportion of their indebtedness. The curators of the minor made the same compromise with other creditors; and I ask whether the guardian, being himself a creditor of the father, was entitled to retain the same proportion of the debt? I have answered that the guardian who had induced the other creditors to accept a percentage of what was due, ought himself to be content with a similar amount.

45. *Hermogenianus, Epitomes of Law, Book II.*

A contract for partition, which has not been concluded by either delivery or stipulation, being a mere agreement without consideration, does not confer a right of action.

46. *Tryphoninus, Disputations, Book II.*

An agreement entered into between an heir and a legatee, by which the latter agrees not to take security from the former, has been held to be valid; as a Constitution of the Divine Marcus recorded in the *Semestria*, sets forth that the will of the deceased shall be observed in this, as well as in other matters; and the release of security to the heir by the legatee under contract cannot be revoked if he changes his mind; as it is entirely lawful for a man to change for the worse his power to enforce his legal right, or his hope of future payment.

47. *Scævola, Digest, Book I.*

The purchaser of a tract of land bound himself for the payment of twenty *aurei*, and agreed to this by stipulation; and afterwards, the vendor entered into an undertaking that he would be content with thirteen, and would accept payment of that amount within a specified time. Suit

having been brought against the debtor for the payment of the latter sum, he agreed that, if it was not paid within another specified period, it could be collected from him in accordance with the bond first executed. The question arose as to whether the whole debt could not be collected under the first obligation, since the debtor had not complied with the terms of the later agreement? I answered that it could, in accordance with what had been stated.

(1) Lucius Titius had a confused account with Gaius Seius, a money broker, for the reason that he had received and paid him different sums. In the end, Seius owed him money, and Lucius Titius received a letter from him in the following words: "According to the broker's account which you have with me up to this date, there remains in my hands as the result of many transactions the sum of three hundred and eighty six *aurei*, and the interest upon the same. I will return to you the amount which you have in my hands without agreement. If any instrument issued, that is to say, written, by you, remains in my hands for any reason, no matter what the amount therein may be, it shall be considered void and cancelled". The question arose, since Lucius Titius had ordered Seius, the broker, to pay his patron three hundred *aurei*, before this letter was written, whether, according to the terms of the letter, by which all undertakings pertaining to any contract whatever were to be considered void and cancelled, it was provided that neither Seius nor his sons could be sued on this ground? I answered that if the account only included the receipts and payments, other obligations remained in the same condition.

48. *Gaius, On the Law of the Twelve Tables, Book V.*

It is evident that every agreement made at the time of the delivery of property is valid.

49. *Ulpianus, On Sabinus, Book XXXVI.*

When anyone loans money, and agrees that he will only bring suit against the debtor for the amount that he is able to pay, is such a contract valid? The better opinion is that this contract is valid, as there is nothing improper for anyone to consent to be sued for an amount which his means permit.

50. *The Same, On Sabinus, Book XLIII.*

I do not think that it is inadmissible to insert in a contract of deposit loan, hire, and others of the same description, an agreement of this kind, namely: "You must not make my slave a thief"; that is to say, you must not solicit him to become a thief, or a fugitive, nor must you neglect him to such an extent that he will commit theft; for as an action will lie for the corruption of a slave, so this agreement which relates to the prevention of the corruption of slaves will stand.

51. *The Same, On the Edict, Book XXVI.*

If you think that on account of a legacy you are obliged to make an agreement with your debtor that you will not bring suit against him; your debtor is not released by operation of law, nor can he bar your suit by means of an exception on the ground of contract, as Celsus has stated in the Twentieth Book.

(1) He also said in the same place, "If you think incorrectly that you are obliged to pay a legacy to Titius, and you direct your debtor to pay it to him, and the latter, being at the same time, his debtor, makes an agreement with Titius not to sue him; this will not extinguish your right of action against your debtor, or his against his debtor either."

52. *The Same, Opinions, Book I.*

A letter by which a party bound himself that a certain person was his co-heir, confers no right of action against parties in possession of the estate.

(1) If an agreement is made between a debtor and the party who purchased a tract of land held in pledge by the creditor, under the pretext that this was done on behalf of the debtor, so that

the profits already obtained might be set off against the debt, and that the balance should be settled, and the tract returned to the debtor; then the heir must carry out the contract made by the deceased.

(2) An agreement which provides, "But where the creditor has paid any sums for taxes on real property held by him in pledge, he can recover the same from the debtor, and the debtor must pay any taxes due upon the same tract of land"; this is a legal contract and therefore must be observed.

(3) Where a party was about to bring suit to set aside an inofficious will made by his father, and an agreement was entered into that he should receive a certain sum of money as long as the heir lived, an attempt was made to have this agreement construed as a perpetual obligation; but it was stated in a rescript that a claim of this kind could not be admitted on any ground of law or equity.

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

It is entirely proper to advance the expenses of a suit to a party engaged in litigation, but it is not legal to enter into an agreement that the sum expended for that purpose shall not be paid with lawful interest, but that half the amount recovered by the suit shall be paid.

54. *Scævola, Notes on Julianus, Digest, Book XXII.*

If I agree not to make a claim for Stichus, to whom I am entitled, it is not understood that my debtor is in default; and if Stichus dies, I do not think that the defendant is liable, if he was not in default before the contract was entered into.

55. *Julianus, Digest, Book XXXV.*

Where a debtor has an usufruct in a slave, and the slave in whom he enjoys said usufruct makes an agreement that suit shall not be brought against the debtor, by doing so he improves the condition of the latter. Likewise, if a creditor possesses such an usufruct, and agrees not to bring suit, and the slave then agrees that the creditor may do so, the creditor, by virtue of the agreement made by the slave, can properly claim the right to bring an action.

56. *The Same, On Minicius, Book VI.*

Where for some reason an agreement is made that a landlord shall not sue his tenant, and there is good cause for such an agreement, the tenant, nevertheless, can bring an action against his landlord.

57. *Florentinus, Institutes, Book VIII.*

Where a man accepts interest from a debtor in advance, it is held to be a tacit agreement that he will not bring suit for the principal during the time for which the interest is paid.

(1) Where a contract is drawn up in such a way that it is personal on one side, and relates to property on the other; as, for instance, that I will not bring suit, or that you shall not be sued; my heir will then have a right of action against all of you, and all of us will have a right of action against your heir.

58. *Neratius, Parchments, Book III.*

There is no doubt that the parties can withdraw in all contracts relating to purchase, sale, leasing, hiring, and other similar obligations, where everything remains the same by the common consent of those who have bound themselves. The opinion of Aristo goes still farther, for he thinks that if I have performed all the acts which it was necessary for me to perform as vendor, with regard to the property sold to you; and, while you still owe me the purchase money, it is agreed between us that you shall restore to me everything relating to the property sold, which was delivered to you by me, and that you shall not pay the purchase money; and, in accordance with this, you do return it to me, you will cease to owe me the

money; because good faith which governs matters of this kind admits of this interpretation and agreement. It does not matter whether the agreement is made to abandon the contract, all things as to which we bound ourselves remaining the same; or whether you return everything which I delivered to you, and we then agree that you shall not give me anything on account of the contract. It is certain that the following cannot be accomplished by a contract which has reference to annulling what has been done; that is, that you may be compelled to return to me what I have already given you; since, in this way, the business would be transacted not so much by annulling our former contract, as by creating new obligations between ourselves.

59. *Paulus, Rules, Book HI.*

Whenever any benefit can be obtained by us through a stipulation, it is established that our condition is improved by agreements made by the same parties.

60. *Papirius Justus, Constitutions, Book VIII.*

The Emperor Antoninus stated in a Rescript to Avidius Cassius: "That if creditors would be satisfied with a portion of their debts out of an estate, even though this was done through a stranger, those who were nearly related to the deceased must be first considered, if they were solvent".

61. *Pomponius, On Sabinus, Book IX.*

No one, by entering into an agreement, can bring it about that he will not be able to consecrate his own ground, or bury a corpse on his own land, or dispose of his property without the consent of his neighbor.

62. *Furius Anthianus, On the Edict, Book I.*

Where a debtor, after having agreed that suit shall not be brought against him for the debt (in such a way that the contract also benefits the surety), made another contract that suit may be brought against him; the question arose as to whether the surety was deprived of the benefit of the first agreement? It is the better opinion that where the right to an exception has been once acquired by the surety, it cannot afterwards be taken from him without his consent.

TITLE XV.

CONCERNING COMPROMISES.

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

When a man makes a compromise with reference to something which is in doubt, and the issue of the trial is uncertain, the compromise is not brought to a termination; but he who makes an agreement surrenders by way of donation through liberality, something which is certain and undisputed.

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

Anyone can accept a compromise, not only where the Aquilian stipulation is inserted, but also where an agreement is entered into.

3. *Scævola, Digest, Book I.*

The Emperors Antoninus and Verus stated in a Rescript, "That there is no doubt that private agreements which have been entered into do not prejudice the rights of others"; therefore, where a compromise has been made between the heir and the mother of the deceased, the will cannot be held to be rescinded by it, nor are manumitted slaves or legatees deprived of their rights of action thereby. Hence, when they bring suit for anything under the will, they must sue the heir mentioned therein; who, when he compromised matters connected with the estate, whether he provided for himself with reference to the burdens attached to it, or whether he did not do so, he has no right to permit his own negligence to injure others.

(1) When a compromise is entered into with regard to a trust, and afterwards codicils are found; I ask, if the mother of the deceased has received less through the compromise than her share, ought she to receive what is lacking by virtue of the trust? The answer was that she ought.

(2) A debtor whose pledge had been sold by his creditor compromised for a smaller sum with Mævius, who claimed to be the heir of the lawful creditor, and afterwards the will of the creditor having been produced, it appeared that Septicius was the heir. The question then arose whether, if the debtor brought suit against Septicius for the property pledged, he could make use of an exception on the ground of the compromise made with Mævius, who was not the legal heir at that time; and can Septicius have a right to recover the money which was paid by the debtor to Mævius as the heir, on the ground that it was received by him under the pretext of inheritance? The answer was that this could not be done, according to the facts stated, for the reason that Septicius did not himself make a compromise with him, nor was Mævius, when he accepted it, acting as the agent of Septicius.

4. *Ulpianus, On Sabinus, Book XLVI.*

The Aquilian stipulation absolutely changes and annuls all preceding obligations, and is itself annulled by a release; and this is now our practice. Therefore, even bequests which are made conditionally come under the Aquilian stipulation.

5. *Papinianus, Definitions, Book I.*

When the Aquilian stipulation is made use of, the consent of the contracting parties is implied, and any actions which they had not yet thought of remain in their former condition; for the interpretation of persons learned in the law is opposed to all captious liberality.

6. *Gaius, On the Provincial Edict, Book XVII.*

In controversies arising out of a will no compromise can take place, nor can the truth of the facts be inquired into, unless an examination and interpretation of the words of the will is made.

7. *Ulpianus, Disputations, Book VII.*

A compromise is valid even after judgment has been rendered, if an appeal has been, or can be taken.

(1) Where a surety was sued, and judgment rendered against him, and afterwards the principal made a compromise with the party who obtained the judgment against the surety; the question arises, was the compromise valid? I am of the opinion that it was, and that every cause of action against both principal and surety was removed. If, however, the surety himself made the compromise after he lost his case, while the judgment was not annulled by the compromise, still, it should be considered as settled, so far as anything which was paid is concerned.

(2) It is so true, however, that what was paid in this case even though it does not dispose of the compromise still diminished the amount of the judgment, that it may be held, and it is, in fact, contained in a rescript in a case where a compromise was entered into without permission of the prætor, that what had been paid should be applied to the furnishing of maintenance, and whatever, in addition, was due on account of maintenance must be provided, but what had already been paid should be credited.

8. *The Same, On all Tribunals, Book V.*

When those to whom provision for maintenance has been left, were ready to make a compromise, and were satisfied with a moderate sum to be paid to them at once; the Divine Marcus stated in an Address delivered in the Senate: "That no compromise with reference to maintenance should stand, unless it was made under the authority of the prætor". Therefore

the prætor is accustomed to intervene and decide between the contracting parties whether the compromise is one which should be admitted.

(1) Whether provision for a house, or for clothing, or for maintenance dependent on real-estate is bequeathed, the inquiry of the same prætor with reference to the compromise must be held.

(2) The above-mentioned Address relates to provision for maintenance left either by will or codicil, whether it was added to the will, or the party died intestate. The same rule is applicable where the provision was made by a donation *mortis causa* or where a charge was imposed upon anyone. Where bequests are made for the purpose of fulfilling a condition, we say that the rule is the same. It is evident that a compromise can be entered into without the authority of the prætor when provision for maintenance is not made *mortis causa*.

(3) The Address applies to sums to be paid monthly or daily or annually, and the same rule is applicable where they are not left for life, but only for a certain term of years.

(4) Where a certain sum is bequeathed to anyone in order that he may support himself with the interest of the same and restore the entire amount at the time of his death; the Address will still apply, although the amount cannot be held to be paid annually.

(5) Where, however, a certain sum of money, or a certain amount of property is left to Titius, in order to provide for the support of Seius, the better opinion is that Titius can compromise; for by this act of Titius the maintenance of Seius is not diminished. The same rule applies where property was left to the legatee under a trust in order to provide for maintenance.

(6) The Address forbids a compromise which is made in such a way that anyone can spend at once the amount which is given him. What would be the case then, if a party made a compromise without the authority of the prætor, to the effect that whatever was payable to him annually by the bequest, he should receive each month? Or what should be done if he received every day what had been left to him to be paid every month? Or how would it be if what he had a right to receive at the end of a year, should be received by him at the beginning? I am of the opinion that an arrangement of this kind is valid, because the party to be supported improves his condition by such a transaction; and that the Address of the Emperor did not intend that the maintenance of persons should be cut off by a compromise.

(7) It makes no difference whether the parties for whom provision for maintenance is made are freedmen, or freeborn, rich, or poor.

(8) The Address also directs inquiry to be made before the prætor with reference to the following matters; in the first place, concerning the cause of the compromise; second, concerning its terms; third, concerning the personal characters of the parties to the transaction.

(9) With reference to the cause, it must be ascertained what reason exists for making the compromise for the prætor will hear no one who desires to make a compromise without sufficient cause. The reasons which are usually alleged are the following, namely: where the heir and the party to be supported reside in different places; or where either of them intends to change his residence; or where there is some urgent reason for a sum of money to be paid at the time; or where provision for maintenance has been charged upon several heirs, and it is difficult for them to distribute small sums of money among different persons; or where any other reason exists among those which usually arise, and which may induce the prætor to sanction the compromise.

(10) The amount of money involved in the transaction must also be considered, for the good faith of the parties is to be determined in this way. The amount must also be estimated according to the age and condition of health of the person who is making the compromise, as it is clear that it must vary in the cases of a boy, a young man, or one who is old; and it is evident that a provision for maintenance will end with the life of the party for whose benefit it was made.

(11) The character of the persons must also be taken into consideration; that is to say, what are the habits of life of those for whom provision is made, whether they are frugal and have sufficient for their maintenance from other sources; or whether they are of an inferior class, who will be compelled to depend entirely upon the provision made for them. With regard to the person who is charged with furnishing maintenance, these things must be investigated namely, what his means are, as well as his intentions and his opinions, for it will then be apparent whether he desires to ever reach the party with whom he makes the compromise or not.

(12) A compromise made with respect to maintenance, does not apply to lodging or clothing; as the Divine Marcus ordered that special arrangements should be made with reference to these matters.

(13) Where, however, anyone makes a compromise with respect to maintenance, it will not be considered necessary for him, against his will, to make any arrangement concerning lodgings, or other matters; he can, therefore, enter into an agreement with reference to all things at once, or only concerning a few.

(14) A compromise with respect to a provision for shoes must also be made under the authority of the prætor.

(15) Where real-estate charged with maintenance has been left to one or several persons, and they desire to alienate it, it is necessary for the prætor to decide concerning both the alienation and the compromise. Where real-estate charged with maintenance is left to several persons, and these make a compromise among themselves without the consent of the prætor, the compromise should not be sustained. The same rule applies where land is given as security for maintenance, for, where a pledge is given for this purpose, it cannot be released without the authority of the prætor.

(16) It is perfectly manifest that the consent of the prætor is necessary where a compromise is made for the entire amount of the maintenance, or only for a portion of the same.

(17) If, when application is made to the prætor, he permits a compromise to be made without an investigation of the case, the transaction will be void; for the matter is referred to the prætor to be examined, and not to be neglected, or given up. If, however, he does not make inquiry about everything which he is directed to do by the Address; that is to say, about the cause, the amount, and the character of the parties to the transaction, it must be held that even though he investigates some matters, the compromise is void.

(18) Neither the Governor of the province, nor the prætor can delegate his jurisdiction in a matter of this kind.

(19) Compromises with respect to maintenance can also be made in the presence of the Imperial Procurator; for example, where maintenance is claimed from the Treasury, and hence this can be done in the presence of the Prefect of the Treasury.

(20) Where an action is pending with reference to provision for maintenance, and a compromise is made, it will not be valid without the authority of the prætor; as otherwise the Address of the Emperor might be evaded; for pretended suits could be brought, in order that a compromise might be arranged without the consent of the prætor.

(21) Where provision for maintenance is left to anyone, and in addition to this a legacy which is to be paid immediately, and a compromise is made without the authority of the prætor; whatever may be paid is first credited on the legacy which was made payable without delay, and the remainder on the provision for maintenance.

(22) Where anyone makes a compromise with reference to maintenance, without the authority of the prætor, whatever is paid will be applied to the settlement of what is due on the maintenance; for it makes no difference how much the arrears were, or whether they were

more or less than the amount paid; for if they are less, still the payment must be credited on the arrears of the provision for maintenance.

And it is clear that if he who made the compromise with respect to maintenance, became more wealthy by the payment, it will be perfectly just that the other party should have an action to recover the amount by which he became more wealthy, for no one ought to profit by the loss of another.

(23) Where a certain sum to be paid annually, as, for instance, an annual pension or an usufruct has been left by anyone to a man of superior rank, a compromise can be made without the authority of the prætor. But, if a moderate usufruct has been left, instead of a provision for maintenance, I say that a compromise made without the authority of the prætor is of no force or effect.

(24) Where provision has been made for the maintenance of a person, not in money but in grain, oil, and other articles which are necessary for subsistence, a compromise cannot be arranged with respect to them, whether the payments are to be made to him annually, or monthly. Where, however, the compromise made without the prætor's authority was, that he should, instead of the articles, receive a certain sum of money payable either annually, or monthly, and neither the date nor the amount was changed, but only the nature of the article; or if, on the other hand, he agreed to receive subsistence in kind, which had been left to him in money; as where he changed wine for oil, or oil for wine, or anything else of this description; or changed the place so as to receive the provision left to him at Rome, in some town, or in some province, or *vice versa;* or if he changed the person, so as to receive from one what he should have received from several; or accepts one debtor instead of another; all these things must be submitted to the decision of the prætor, and be determined for the benefit of the party entitled to maintenance.

(25) Where a certain sum, payable annually for lodging, has been left, any transaction which is entered into for the furnishing of lodging without the authority of the prætor is valid; since the party obtains the benefit of the lodging, although the compromise may afford a lodging liable to demolition, or fire. On the other hand also, if he agrees that a stated sum shall be paid him instead of the lodging which was bequeathed, the transaction is valid, even without the prætor's authority.

9. *The Same, Opinions, Book I.*

A party brought an action against his guardians with reference to his share of the estate administered under their guardianship, and compromised the case. If, having become an heir of his brother, he brought suit against the same guardians as his brothers' representative, he will not be barred by their pleading the compromise which was effected.

(1) Where a compromise of any description is made, it is considered to be restricted to those matters concerning which the parties have agreed among themselves.

(2) Where a party, being ignorant of all the existing conditions of the case through the deceit of his co-heir, executed an instrument of compromise without the Aquilian stipulation, he is held rather to have been deceived than to have made an agreement.

(3) Where a son who is not yet informed that he has a right to bring an action to set aside the will of his father, compromises other matters with his adversaries by an agreement; the agreement which he entered into will only prejudice him with reference to such things as it is proved that they were intended to do, even though one party who made the compromise was over twenty-five years of age; for, as far as relates to anything ascertained afterwards for which he was entitled to bring an action, it would be unjust to hold that the transaction extinguished rights which had not yet been considered.

10. *The Same, Opinions, Book I.*

It is settled that where a father makes a compromise with reference to the rights of sons who are not under his control, they are not prejudiced by it.

11. *The Same, On the Edict, Book IV.*

After judgment has been rendered, even if no appeal is taken, still, where the fact that judgment has been rendered is denied, or it is possible for the party to be ignorant whether the judgment was rendered or not; then, as a trial may still take place, a compromise can be effected.

12. *Celsus, Digest, Book III.*

It should not be tolerated that a party may make a compromise with reference to legacies left to him in general terms by will, and afterwards claim that his object was not to compromise except with reference to what was left him in the first part of the will, and not with reference to what was left him in the last part. But where codicils are produced, I think that he could not improperly say to me that he only was thinking about what was contained in those pages of the will of which he knew at the time of the transaction.

13. *Æmilius Macer, On the Five Per Cent Law Respecting Inheritances, Book I.*

It is not lawful for an Imperial Procurator to make a compromise without the authority of the Emperor.

14. *Scævola, Opinions, Book II.*

A controversy arose between an heir-at-law and a testamentary heir, and a compromise having been made, the matter was settled under certain conditions. I desire to know against whom the creditors can bring an action. The answer was that if the creditors were the same who made the compromise, whether others were present or not, on account of the uncertainty of the succession, an action should be brought against each one of the heirs for the share of the estate which each obtained by virtue of the compromise.

15. *Paulus, Sentences, Book I.*

It is customary for the Aquilian stipulation to be inserted in every contract, but it is more prudent to add to it a penal stipulation, because if the contract is rescinded, suit can be brought for the penalty under the stipulation.

16. *Hermogenianus, Epitomes of Law, Book I.*

He who breaks faith in a lawful compromise is not only barred by an exception, but also can be forced to pay the penalty which he has promised in proper form to pay to the stipulator if he violated the contract.

17. *Papinianus, Questions, Book II.*

The vendor of an estate having assigned his rights to the purchaser, made a compromise with a debtor to the estate who did not know that it had been sold. The purchaser of the estate should take measures to collect the debt, and an exception on the ground of business transacted is granted the debtor because of his ignorance. The same rule applies to the case of a man who received an estate by virtue of a trust, if the heir makes a compromise with a debtor who is not aware that this has been done.