THE DIGEST OR PANDECTS.

BOOK X.

TITLE I.

CONCERNING THE ESTABLISHMENT OF BOUNDARIES.

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

The action for the establishment of boundaries is a personal one; although it is a proceeding for the recovery of property.

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

This action has reference to rustic estates, even though buildings are situated between them; for it does not make much difference whether a party plants trees, or erects a building on the boundary line.

(1) A judge is permitted in the case of establishment of boundaries to decide the controversy as seems to him best where he cannot fix the boundaries; and if the judge, for the purpose of removing a doubt of ancient origin chooses to direct the boundaries to be established in a new direction, he can do so in this way, and order a sum of money to be paid by way of compensation.

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

In any case in which it is necessary that a decision should be made giving the land of one of the parties to the other, the one in whose favor the decision is rendered shall be required to pay to the other a certain sum of money by way of compensation.

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

Where a controversy exists with reference to a certain piece of real-estate the land can be divided into shares by means of a decree, in accordance with what the judge finds to be the interest of the parties in said land.

(1) In a suit for the establishment of boundaries an account must be taken of the interest of the parties; for example, where anyone obtains some benefit from a tract of land which is ascertained to belong to a neighbor, would it be unjust that payment should be required on that account? Moreover, if a surveyor had been employed by one of the parties, the other who did not employ him would be obliged to pay his share of the compensation.

(2) After issue has been joined in a case, account is taken of the profits, for from that time negligence and malice must be made the subject of investigation, but whatever is collected before issue is joined will not, under any circumstances, be considered, for either the party collected it in good faith, and he should be allowed the benefit of it if he has consumed it; or, if he collected it in bad faith, an action must be brought against him for its recovery.

(3) Where, however, anyone refuses to obey the judge by cutting down a tree, or removing a building erected on the boundary, or on some portion of it, he will be required to make payment.

(4) Where landmarks are alleged to have been thrown down or dug up; the judge who has jurisdiction can hear an application to establish the boundaries also.

(5) Where one tract of land belongs to two persons and another to three; the court can adjudge the tract which is in dispute to one side, even though it includes several owners, since where the boundaries of land are established, this is understood to be done rather for the benefit of an estate than for that of a person; in this instance, however, since the decision was for the benefit of several parties, each one will be entitled to the same share which he has in the estate, and which will be held in common.

(6) Those who have shares in the common estate will not be liable to payment to one another,

for no judicial controversy appears to have arisen between them.

(7) If you and I have an estate in common, and I alone own an adjoining tract of land, can legal proceedings be taken by us for the establishment of boundaries? Pomponius states that there cannot, because my joint-owner and myself cannot be adversaries in an. action of this kind, but we are considered to occupy the place of one person. Pomponius also says that even an equitable action cannot be granted, as the party who holds property in his own right can alienate either what he held jointly or severally, and then institute proceedings.

(8) An action can be brought for the establishment of boundaries not only between two estates, but even among three or more, as for instance, where one estate and several others, even as many as three or four, are contiguous.

(9) An action for the establishment of boundaries can be brought where lands are subject to perpetual lease; or between persons who have usufructs in the different tracts; or between an usufructuary and a mere owner of adjoining land; or between parties who have possession on account of real property given by way of pledge.

(10) This action is available where the boundary is between rustic estates; it does not, however, apply in the case of urban estates; for in the latter instance, the parties are not persons who have the same boundary, but they are rather said to be neighbors, and their estates are, for the most part, separated by common walls. Therefore, where buildings are adjoining, even in the country, there is no ground for this action; and, on the other hand, in a city there may be gardens which are contiguous, so that here also an action can be brought for the establishment of boundaries.

(11) Where a river or a highway intervenes, it is not understood to be a boundary; hence no suit can be brought for the establishment of a boundary.

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

Because the highway or the river constitutes my boundary, rather than the land of my neighbor.

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

But if a private stream intervenes, an action for the establishment of boundaries can be brought.

7. *Modestinus, Pandects, Book X.*

Arbiters are appointed to determine the dimensions of land; and he who is stated to have a larger part of the entire tract will be compelled to transfer a certain portion to the others who have smaller ones; and this is stated in a rescript.

8. *Ulpianus, Opinions, Book VI.*

Where an inundation destroys the boundaries of a field by the overflow of the water, so as to afford an opportunity to any person to seize places over which they have no right; the governor of the province must order that they shall not interfere with the property of others, and that the land of the owner shall be restored to him, and the boundaries be fixed by a surveyor.

(1) It is part of the duty of the magistrate in a case involving the boundaries of land to send surveyors, and by means of them dispose of the question of boundaries in accordance with justice, and by examination with his own eyes, if occasion demands It.

9. *Julianus, Digest, Book VIII.*

The case for the establishment of boundaries remains for hearing, even though the common owners may have brought an action for partition, or have sold the land.

10. *The Same, Digest, Book LI.*

An action for partition among joint-owners or heirs, or one for the establishment of boundaries is of such a nature that each individual party has the double right of both plaintiff and defendant in the action.

11. *Papinianus, Opinions, Book II.*

With reference to inquiries as to boundaries, the ancient memorials, and the authority of the census which had been taken before the suit was brought, must be followed; provided it is proved that no changes have resulted through a number of successions, and by the arbitrary acts of possessors tracts of land have been either added or taken away, and the boundaries subsequently altered.

12. *Paulus, Opinions, Book III.*

In a question relating to ownership, attention must be paid to those boundaries which a person who was the owner of both tracts designated when he sold one of them; for it is not necessary that the boundaries which formerly separated the two different tracts should be observed, but the descriptions of the adjoining owners must be used to establish the new boundaries between the said tracts of land.

13. *Gaius, On the Law of the Twelve Tables, Book IV.*

It should be remembered that in the action for the establishment of boundaries the rule must be observed which, to a certain extent, coincides with the plan of the one which Solon is said to have passed at Athens, which is as follows: "Where a party builds a wall adjoining the land of another, he must not go beyond the boundary; if it is a wall built of masonry, he must leave a foot; if it is a house, two feet. If he digs a grave or a ditch, he must leave an open space equal in width to the depth of the same; if a well, the width of a pace. If he plants an olive or a fig-tree, he must place it nine feet from the adjoining land, and in the case of other trees he must leave five feet."

TITLE II.

CONCERNING THE ACTION FOR THE PARTITION OF AN ESTATE.

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

This action is derived from the Law of the Twelve Tables, for it was considered necessary, where co-heirs desired to relinquish ownership in common, that some kind of action should be established by which the property of the estate might be distributed among them.

(1) This action, in fact, can be brought directly by a party who is not in possession of his share. Where, however, he who is in possession of the estate denies that the plaintiff is his co-heir, he can bar him by an exception stated as follows: "If the inheritance is not prejudiced with reference to the matter in question." If the party possesses his share, even though it may be denied that he is a co-heir, an exception of this kind will not be a bar; the result of which is that, in this instance, the judge himself who hears the case must determine whether the party is a co-heir or not; for if he is not, nothing will be adjudged to him, nor will his adversary be required to make him any payment.

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

By means of the action for the partition of an estate the latter can be divided whether it is derived from a will or passes by intestacy, and whether the estate is granted by the Law of the Twelve Tables, or by some other law, or by a Decree of "the Senate, or even by an Imperial Constitution. Generally speaking, an estate can be divided only between those after whose death an action to recover it can be brought.

(1) If a fourth of the estate is coming to anyone who was arrogated in accordance with the Constitution of the Divine Pius, then, because a party of this kind does not become either an heir or the possessor of the property, a prætorian action will be necessary for the partition of the estate.

(2) Moreover, if the *peculium* of the son of a family who is a soldier is in question, it can be forcibly asserted that an estate is created by the Imperial Constitutions, and therefore this action will be available.

(3) In an action for the partition of an estate, each of the heirs takes the part of both defendant and plaintiff.

(4) Again it cannot be doubted that an action for the partition of an estate can be maintained where only a few heirs out of many institute proceedings.

(5) Although claims are not considered in this action, nevertheless, if stipulations had been entered into with reference to the division of the same, so that it is settled that each party shall assign rights of action to the other and appoint him agent for the transaction of his business, the division shall be adhered to.

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

It is evident that it sometimes becomes the duty of the judge to see that different debts and claims are assigned to different heirs in severalty, because it often occurs that the payment or collection of debts to be apportioned among different shares causes no small degree of inconvenience. Still, this assignment does not always have the effect of rendering a single heir liable for the entire indebtedness, or of giving him the right to collect all of it, but the result merely is that if proceedings are instituted, the heir brings them partly in his own name and partly in the capacity of agent; or, where an action is brought against him, he is sued partly in his own name and partly as agent.

Although the creditors are fully empowered to bring suit against each individual heir; the latter still have a perfect right to substitute in their places such parties as the order of the court indicates should sustain the burden of the action.

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

Therefore everything except pecuniary claims are included in this proceeding. But if a pecuniary claim is bequeathed to one of several heirs, the said heir can obtain it by a suit for partition of the estate.

(1) Noxious drugs and poisons are embraced in this action; but the judge ought by no means to interfere in matters of this description, for it is his duty to perform the functions of a good and innocent man. He should act in the same manner with reference to books which it is improper to read (for instance, those treating of magic and similar subjects); all of these, however, should be immediately destroyed.

(2) Moreover, where anything has been acquired by peculation or sacrilege, or by violence, theft, or aggression, it shall not be divided.

(3) The judge should order the will to be placed in the hands of him who is heir to the greater portion of the estate, or to be deposited in a temple. Labeo says that where the estate is sold, a copy of the will should be deposited, and that the heir should furnish a copy, but he himself ought to keep the original will or deposit it in the temple.

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

Where any inheritable obligations are included in the property of the estate, the judge should take care that they remain in the possession of the party who is heir to the largest share; the others are entitled to copies which must be verified, and a bond shall be executed by the said heir to the effect that the original documents will be produced when occasion requires this to be done.

Where all the heirs are entitled to equal shares, and no agreement is made between them with reference to the party with whom the instruments are to be left, they must cast lots, or a friend should be chosen by common consent or by vote with whom they may be deposited, or they must be placed for safe keeping in some consecrated temple.

them. "All that a slave possesses belongs to his master, he possesses nothing of his own but his *peculium*, that is to say, the sum of money, or movable estate which his master chooses he shall possess.

6. *Ulpianus, On the Edict, Book XIX.*

The settlement of the matter by submitting it to competition, so that the party who makes the highest bid shall be entitled to possession of the obligations, belonging to the estate, is not approved by either Pomponius, or by myself.

7. *Venuleius, Stipulations, Book VII.*

If an heir, in an instance where a co-heir was added under a condition, or is in the hands of the enemy, should assert that he himself is the heir, and having brought an action should gain it, and afterwards the condition upon which the inheritance of the other heir depended is fulfilled, or the latter returns by *postliminium;* ought the other heir to share with him the advantages of his victory? He is undoubtedly entitled to an action to enforce judgment for the entire amount. In this case the co-heir should be granted his choice, that is to say, he must either be given a share of the estate or he must have the power to institute proceedings, for he is one who became an heir, or returned to the city, after his co-heir had been successful. The same rule must be observed where a posthumous child is born. These parties are not to blame on account of their silence, since they only obtained a right to the estate after their co-heir had won his case.

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

Pomponius says that where accounts are bequeathed as a preferred legacy to one of several heirs, they must not be delivered to him before his co-heirs have taken copies of the same. For, he says, suppose a slave who is a steward was bequeathed, he should not be delivered until he has rendered his accounts. We should consider whether a bond ought not to be executed providing that whenever the accounts are required, or the said steward bequeathed, they shall be produced; as it is frequently necessary that the original accounts and the steward himself should be produced in court for the explanation of matters which subsequently arise and in which the knowledge of the steward is involved; and it is necessary that a bond should be furnished the co-heir in this matter by the heir aforesaid.

(1) Pomponius also states that pigeons which are accustomed to leave the pigeon-house are included in the action for the partition of an estate, because they are our property as long as they have the custom of returning to us; and therefore if anyone should seize them, we are entitled to an action for theft.

The same rule applies to bees, because they are part of our property.

(2) Moreover, where one of our cattle is carried off by wild beasts, Pomponius thinks that if it escapes from said beasts it is to be included in the action for the partition of an estate; for he says it is the better opinion that, where anything is carried off by a wolf or any other wild beast, it does not cease to be ours so long as it is not devoured.

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

This action also includes property which the heirs have acquired by usucaption, in instances where it was delivered to the deceased, and also property which was delivered to the heirs, and which the deceased had purchased.

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

Also real property which belongs to our patrimony as well as land held by perpetual lease, or such as relates merely to the surface. Property of which the deceased had possession in good faith, even although it belonged to another, likewise comes under this rule.

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

The child of a female slave, if it is born after the estate has been entered upon,

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

And even after issue had been joined can, as Sabinus states, be included in an action for the partition of an estate, and be made the subject of adjudication.

(1) The same principle will apply where anything is given by a stranger to slaves forming a portion of the assets of an estate.

(2) Property bequeathed under a condition in the meantime belongs to the heirs, and is therefore included in the action for the partition of an estate, and can be made the subject of adjudication; subject of course, to the restrictions attaching to the same, so that if the condition is fulfilled it will be taken away from the party to whom it was adjudged; or, upon failure of the condition, it will revert to those charged with the bequest.

The same rule applies in the case of a slave who is to be liberated on a condition, for in the meantime he belongs to the heirs, but when the condition has been fulfilled he obtains his freedom.

13. *Papinianus, Questions, Book VII.*

Disposal of property after issue has been joined is forbidden, but this only applies to such as is voluntary, and not to such as becomes necessary through some former liability and originates in some legal requirement.

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

But where the right of usucaption has begun to run before issue is joined in favor of a party who is not an heir, and is subsequently completed, this removes the property from the case.

(1) The question arises whether an usufruct is embraced in the action; as, for example, where an usufruct was reserved and the land left to others than the heir.

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

Or where an usufruct was bequeathed to a slave belonging to the estate; as an usufruct cannot depart from the party in interest without being lost.

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

I think that it is part of the duty of the judge that, if the heirs should wish to relinquish their common ownership of the usufruct, he should accede to their wishes after causing them to give security to one another.

(1) Julianus says that where a Court adjudges the land to one heir and the usufruct of the same to another, the usufruct does not become common property.

(2) An usufruct can be adjudged from a certain time, or until a certain time, or for alternate years.

(3) Land which a river adds by alluvium to an estate after issue is joined is also included in an action of this kind.

(4) Where, however, an act has been committed maliciously or negligently by one of the heirs whose effect is to diminish the value of the usufruct, Pomponius says that this likewise comes within the scope of the action; for everything which an heir maliciously or negligently does to the damage of the estate will be considered in all actions for partition of the same, provided always that he commits the act in the capacity of heir. Therefore, if one of the heirs deprived the testator of money during his lifetime, this will not be included in the action for partition of the estate, because he was not yet an heir; but where he acted as an heir, even though the party interested should be entitled to some other action, nevertheless, as Julianus states, he is liable to a suit for partition of the estate.

(5) Finally, he says that if any one of the heirs should destroy accounts belonging to the estate or falsify them, he will be liable under the *Lex Aquilia* for destroying the same, and he will

also be liable to an action for partition of the estate.

(6) Moreover, where a slave who belongs to an estate steals the property of one of the heirs, Ofilius says that an action for partition of the estate will lie, as well as one for the partition of property held in common, but an action for theft cannot be brought; and hence if the heir brings an action for partition of the estate he will obtain a judgment by which the slave will be given to him, or the damages assessed, that is to say simple damages will be granted him.

17. *Gaius, On the Provincial Edict, Book VII.*

Where an injury is committed by one of the heirs, it is proper to state that simple damages should be considered in the action for partition of the estate.

18. *Ulpianus, On the Edict, Book XIX.*

In accordance with these rules, Julianus says that where there are several heirs, and a slave is left to one of them, in general terms, with the right of selection, and the remaining heirs allege that Stichus has falsified the will or defaced it, and they make this statement in order to avoid a slave being chosen; and then, after he has been chosen an action is brought to recover him, they can, if they are sued, avail themselves of an exception on the ground of malicious fraud and subject the slave to torture.

(1) The question arises whether in an action for the partition of an estate the heirs have a right to use torture with reference to the death of the testator, or to that of his wife and children; and Pomponius very properly says that these things have no reference whatever to the division of the assets of the estate.

(2) He also says that where anyone provides by will that a slave shall be sold in order to be transported to a distance, it is the duty of the judge to see that the wishes of the deceased shall not be thwarted.

But where the testator ordered that a monument should be erected, an action for the partition of an estate can be brought to compel this to be done. He suggests, however, that since it is to the interest of the heirs — as they will have a right in the monument — any one of them can institute proceedings in express terms to have a monument erected.

(3) Where one of the heirs incurs expenses in good faith, he can collect interest from a co-heir from the time of his default, in accordance with a Rescript of the Emperors Severus and Antoninus.

(4) Celsus also very appropriately adds that a co-heir, even if he does not make payment himself, nevertheless, is entitled to an action for partition of the estate to compel his co-heir to pay his share; as, otherwise, the creditor will not relinquish a certain piece of property unless he is paid in full.

(5) Where the son of a family was his father's heir to a share of the estate and was sued by creditors for his *peculium*, he being prepared to pay all that was due, he can, by means of an exception on the ground of malicious fraud, compel the creditors to assign their rights of action to him; and he is, in addition, entitled to an action for the partition of an estate against his co-heirs.

(6) Where one of the heirs has paid a legacy to a party who is directed by the court to take possession for the purpose of preserving legacies; Papinianus thinks, and his opinion is correct, that he is entitled to an action for the partition of the estate against his co-heirs; because the legatee would not otherwise give up the possession which he had once obtained, it being equivalent to security, until the entire legacy was paid to him.

(7) Moreover, if anyone should pay a debt to Titius to avoid the sale of a pledge, Neratius states that he can institute proceedings for partition of the estate.

19. *Gaius, On the Provincial Edict, Book VII.*

Again, on the other hand, the judge ought to provide in like manner that, where one of the

heirs has pecuniarily profited by the property of the estate, or has entered into a stipulation to its disadvantage, he shall not be the only one to be benefited. The judge can accomplish this by either causing accounts to be rendered by the different heirs, or by causing them to give security to one another by means of which the profits and losses will be equally divided between them.

20. *Ulpianus, On the Edict, Book XIX.*

Where a married daughter who was obliged to bring her dowry into the common fund, through an error of her co-heirs gave a bond that she would pay them in proportion to their shares whatever she recovered from her husband; Papinianus says that, notwithstanding this, the arbiter in the action for partition must decide that even if she herself should die while the marriage existed the dowry must be contributed; for ignorance of the co-heirs can not change the rules which govern legal proceedings.

(1) Where the son of a family has become liable to an obligation by order of his father, he must reserve the amount out of the assets to pay the debt; and, moreover, if he has expended money on property belonging to his father, the same rule will apply, and if the action is *de peculio* he will reserve the *peculium* for the same purpose; and this our Emperor stated in the Rescript.

(2) In addition to this, where the son of a family is appointed heir, he can reserve the dowry of his wife; nor is this unreasonable, since he must sustain the pecuniary burdens of matrimony. Therefore, he can retain the entire dowry, and must furnish security that he will defend his co-heirs who may be sued on the stipulation. The same rule applies where another party gave the dowry and entered into the stipulation. This is applicable not only to the dowry of his own wife, but also to that of his son's wife, since this also has reference to the expenses of matrimony for which he is responsible: because he is required to be liable for the expenses of his son and daughter-in-law. Marcellus says that the son must retain the dowry, not only where it was given to his father but also where it was given to himself, as his son; to the extent that it was given to him as being included in his *peculium*, or where it was expended for the benefit of his father.

(3) Where a father divides his property among his sons without any writing, and distributes the burden of his debts among them in proportion to what they possess; Papinianus says that this should not be considered a simple gift, but rather a division of property under a last will. It is clear, he says, that if the creditors bring suit against said heirs in proportion to their shares in the estate, and one of them refuses to abide by what was agreed upon, an action can be brought against him on special grounds, alleging that they made an exchange under a certain agreement; of course if all the property was divided.

(4) The action for the partition of an estate cannot be brought more than once, unless proper cause is shown; because if any property is left undivided, an action can be brought for its distribution.

(5) Papinianus says that if one of the heirs is required to pay a debt without this being provided for by way of a legacy; then the heir will be forced to assume payment by the judge presiding in the action for partition of the estate, but not for a greater amount than three quarters of his share, so that he may have one quarter undiminished; and therefore he must provide security to protect his co-heirs.

(6) He also says that if a son is liable for expenses which he has incurred on account of a public office that his father consented for him

to administer, and is then appointed heir to a share of the estate, he can reserve the amount which he owes, because this was one of his father's debts; but where he administered any offices after the death of his father, the heirs of the latter will not be liable for any obligations incurred with reference to said offices.

(7) Neratius, however, gave it as his opinion that where a man who had several sons

consented that one of them should undertake the office of the functionary who has charge of arranging and regulating public games, and, before he perform the duties of the office, his father should die, after having appointed all his sons his heirs; the question arises whether the said son could, by an action for partition of the estate recover what he had expended in the matter; and he answered he could not recover it by any action. This opinion is not accepted, and very justly, for the expense should be included in the action for partition of the estate.

(8) Papinianus also says that if a husband orders one of his heirs to assume the burden of paying the dowry, which is included in a stipulation, and his widow brings suit for her dowry against both heirs, the heir who was ordered to assume the burden must defend his coheir in the action. But where both heirs are charged with the payment of legacies instead of the dowry, and the widow elects to receive the dowry, the legacies are retained by said heirs, but this must not be for the benefit of the co-heir who is released from payment of the debt; that is to say, the co-heir who assumed the burden of the debt, should, by order of the court, obtain the legacy; and this is true unless the testator provided otherwise.

(9) He also says that where a slave who is to be liberated on a condition pays money out of his *peculium* to one of several co-heirs, for the purpose of fulfilling the condition, it will not be included in this action, and should not be subject to contribution.

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

The same rule applies in the case of an action brought for the partition of property held in common.

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

Moreover, Labeo says that if one of the heirs digs up any treasure which the testator left, he will be liable to an action for partition, just as if he had divided the treasure with a stranger who was aware of the fact.

(1) The judge in an action for the partition of an estate can adjudge the same property to several parties only where the right to have one thing was left to several persons; (or where, as Pomponius says, the necessity existed that the shares should be adjudged to several persons); or where the judge assigns a certain part of the property to each of the co-heirs; he can, however, adjudge the property to one heir after it has been bid for by all.

(2) Moreover, no one doubts that he can adjudge land that has been divided in accordance with the distribution which has already taken place.

(3) Again, when he makes these adjudications he can impose a servitude so as to make one tract which he assigned serve another; and if he absolutely adjudges a tract to one heir, he cannot, in assigning another, impose a servitude upon the first one.

(4) An action for the partition of an estate has reference to two matters; that is to say, the property, and delivery of the same, these being personal actions.

(5) Papinianus criticizes Marcellus for his opinion concerning property held by the enemy, because he does not think that transfers of property of this kind are included in the action for the partition of an estate. For how can there be any impediment to an action for the transfer of property when the very property itself is included.

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

On account of the hope of *postliminium?* Of course a bond should be given, because the party might not return; unless there was only an estimate made of an event that was uncertain.

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

Where, however, property has ceased to be in existence, the question of transfer may still arise; and I agree with Papinianus.

(1) The action for partition applies to the possessors of the property of an estate, and also to a

party to whom an estate has been restored in accordance with the Trebellian Decree of the Senate, and to other Prætorian successors.

25. *Paulus, On the Edict, Book XXIII.*

The heirs of a person who died in the hands of the enemy can bring this suit.

(1) Where a soldier makes one person an heir to his castrensian property and another an heir to the remainder of his estate, there is no ground for an action for partition; since the property will be divided between the heirs according to the Imperial Constitution, just as a suit for the partition of an estate cannot be brought where there is no corporeal property, but the assets all consist of claims.

(2) With reference to the point as to whether a party is entitled to undertake the defence in an action for partition, it makes no difference whether he has possession of the estate or not.

(3) Where several estates are held in common by different persons under different titles, a single action in partition can be brought.

(4) Where the Titian estate is held in common by you and me, and that of the estate of Seius is held by you and Titius and myself, Pomponius says that one action can be brought to which all three persons will be parties.

(5) Moreover, where several estates are held by us in common, we can proceed by an action for partition with reference to one of them alone.

(6) Where a testator holds property in common with a stranger, or bequeathed to anyone a portion of his property; or his heir, before joinder of issue in an action for partition, alienated his own share; it is the duty of the judge to order that the share which was the property of the testator should be transferred to some one.

(7) Where a co-heir has possession of property as a purchaser, or, for instance, has received it as a gift; Pomponius denies that it can be included in an action for partition of the estate.

(8) He also says if you and I become the heirs of Titius, and you bring an action against Sempronius for a portion of a tract of land all of which you say is included in the estate, and you are defeated; and I then purchase the same share from Sempronius and it is transferred to me, and you bring an action for partition, this will not only not include what I am in possession of as heir, but will not even embrace what I hold as purchaser; for, as it was evident by the former decree that the entire tract of land was not included in the estate, how could it be included in a suit for the partition of the latter?

(9) It is doubtful whether a stipulation, the terms of which give each heir a right of action for the entire amount, is included in a suit of this kind; as for instance, where a party dies after having stipulated for a right of way, a path or a driveway, for the reason that a stipulation of this kind according to the Law of the Twelve Tables is not permitted to be divided, because this cannot be done. The better opinion, however, is that it is not included in the action, but that all the heirs have a right to bring suit for the entire amount; and if the right of way is not furnished, the decision against the defendant should be for a sum of money in proportion to the share of the plaintiff in the estate.

(10) On the other hand, where a person who promises a right of way dies after having appointed several heirs, the obligation is not divided; and there is no doubt that it continues to exist, since a party can promise a right of way who has no land. Therefore, since each individual heir is liable for the whole, it is the duty of the judge to require bonds to be furnished, so that if any one of the heirs should be sued and pay the damages assessed by the Court, he can recover a portion of the amount from the others.

(11) The same rule applies where a testator bequeaths a right of way.

(12) In the case of a different stipulation also, where a testator promised that nothing should be done by him or by his heir to prevent the other party from walking or driving, since, if one

co-heir should prevent this a suit for the entire amount can be brought under the stipulation, the interests of the co-heir must be protected to prevent the act of one of them being prejudicial to the others.

(13) The same rule of law applies to a sum of money promised by a testator, if it was promised under a penalty; for although this obligation may, according to the Law of the Twelve Tables, be divided; still, for one party to pay his share will not in any way contribute to the avoidance of the penalty, yet, if the money has not been paid, or is not due, recourse must be had to a bond, so that provision may be made for the indemnity of the others by the party who is to blame for all the money not being paid; or each one must give security that he will make good a part to whoever pays the whole amount; or where one of the heirs pays the entire sum promised by the testator in order to prevent the penalty from attaching, he can recover from his co-heirs their shares of the same in an action for partition.

(14) The same rule is observed in the redemption of pledges, for unless a tender is made of the entire amount which is due, the creditor can legally sell the pledge.

(15) Where one of several co-heirs defends an hereditary slave in a noxal action, and tenders the amount of estimated damages, where this is expedient, he can by this action recover a part of what was paid.

The same rule applies where one co-heir gives security with reference to legacies, to prevent the legatees from being placed in possession. And, generally speaking, where measures cannot be taken for a division, if one party should act under the force of necessity, there will be ground for an action in partition.

(16) A co-heir is responsible not only for malice but also for negligence committed with reference to the assets of an estate, since we do not contract with the co-heir but happen upon him accidentally; still, a co-heir is not obliged to be accountable for as much diligence as the careful head of a family would exercise, as he had good reason for acting on account of his own share; and therefore he would not be entitled to an action on the ground of business transacted, hence he must therefore employ the same diligence which he would display in his own affairs. It is the same where property is bequeathed to two legatees; for it was not their consent but the circumstances of the case which united them in ownership.

(17) Where a slave is bequeathed in indefinite terms and the legatee afterwards dies, and one of the heirs of said legatee, by not giving his consent, prevents the legacy from being paid, he who caused the hindrance shall be compelled, by means of this action, to pay to the others whatever the interest of each amounts to. The same rule applies where, on the other hand, one of the heirs at whose charge a slave has been bequeathed in general terms, being such a one as they themselves might select, is unwilling to consent that a slave should be delivered whom it would be beneficial to all to have thus disposed of, and, in consequence, the heirs are sued by the legatee and compelled to pay, by way of damages, a larger sum than the slave is worth.

(18) Moreover, a man is liable on account of negligence who, after he had entered upon an estate before others, suffered servitudes attached to lands belonging to the estate to be lost by want of use.

(19) Where a judgment is rendered against a son who was defending his father in a suit, and he pays the amount of the judgment either during the lifetime of his father or after his death; it can very properly be stated that he has a right to bring suit for recovery against his coheir in an action for partition.

(20) A judge who presides in an action for partition of an estate should leave nothing undivided.

(21) He must also provide that security be given to those to whom he awards the estate against recovery of the property by eviction.

(22) When money which is not left in the house is bequeathed to be taken before division,

whether the co-heirs should pay the entire amount, or only what is in proportion to their shares in the estate; just as if the money had been left among the remaining property of the estate is a question with reference to which some doubt exists; but the better opinion is that what must be paid is the amount that would be paid if the money had been found.

26. *Gaius, On the Provincial Edict, Book VII.*

It is part of the duty of the judge to order one or more things belonging to the estate to be sold, and the proceeds of the sale to be paid to any person to whom said money was bequeathed.

27. *Paulus, On the Edict, Book XXIII.*

In this action judgment must be rendered against every party, or all must be discharged from liability; hence, if the decision is omitted with reference to any one whomsoever, what the judge does with reference to the others will not be valid; because a decision cannot be valid with respect to one part of the question at issue, and void with respect to another.

28. *Gaius, On the Provincial Edict, Book VII.*

Where a testator bequeaths property to be taken before division, which he has already pledged to a creditor; it is in the province of the judge to redeem it out of the common fund of the estate, and see that he to whom it was bequeathed in this way shall have it.

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

Where property was given to the deceased by way of pledge, it must be said to be included in the action for partition of the estate; but he to whom it is awarded should be required to pay his co-heir for the same in proportion to his share of the estate in an action for partition; but he need not give security to his co-heir that he shall be indemnified with reference to the party who pledged the property; for the reason that the case will be the same as if an hypothecarian or Servian Action had been brought, and the estimated amount had been tendered; so that the party who made the tender may be protected by an exception against the owner bringing suit to recover the property.

Again, on the other hand, if the heir to whom the pledge was adjudged desires to restore the whole, he should be heard, even though the debtor be unwilling. The same rule does not apply where the creditor purchases the other portion of the property pledged, because adjudication by the court is necessary, but the purchase is voluntary; unless the objection should be made that the creditor bid for the property too eagerly. The reason why this is taken into account is because what the creditor did must be considered as if the debtor had done it through an agent, and whatever necessary expenses the creditor incurred he has a right to recover in an action besides.

30. *Modestinus, Opinions, Book VI.*

I hold a tract of land in common with a female minor who is also my co-heir, and in said land remains are buried to which reverence is due from both of us; for the parents of the minor are buried there. Her guardians, however, desire to sell the land, but to this I do not consent, as I prefer to retain possession of my own share, since I cannot purchase it all, and I wish to discharge my duty to the dead in accordance with my own judgment. I ask whether I can legally petition for an arbiter in an action for the partition of said tract of land; or whether the arbiter who is appointed for the partition of an estate can discharge the functions of his office and also divide the said property between us according to the rights of each; the remaining assets of the estate being left out of consideration. Herennius Modestinus answered that there was nothing in what was proposed to hinder the party appointed arbiter in the action for the partition of the estate from including in his duties the matter of dividing the said tract of land; but religious places could not be brought into the action, as the rights with respect to them belong to the individual heirs interested in the entire estate.

31. *Papinianus, Questions, Book VII.*

Where a slave who is pledged is redeemed by one of the heirs, then, even if he should afterwards die, the office of the arbiter will, nevertheless, continue to exist; for there is sufficient reason for this on account of the joint ownership which previously existed and would have continued to exist up to this time, if the property had not been destroyed.

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

Property which a father has not divided among his children, after having given them rights of action instead of the division, belongs to said children in proportion to their respective shares in the estate, provided he did not give the property which he did not divide in general terms to one child; or it was not accessory to the property which was given.

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

Where the father of a family, in devising land to his respective heirs, wished to act the part of an arbiter in the partition; one co-heir will not be compelled to surrender his share unless he obtains in return for the same a share which is free from the incumbrance of the pledge.

34. *The Same, Opinions, Book VIII.*

Where a valuation is placed upon slaves by co-heirs at the time of division, it has been held that prices are placed upon them not for the purpose of purchase, but for that of division; hence, if any of them dies while the condition is pending, the loss must be borne by both the heir and the beneficiary.

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

Pomponius Philadelphus transferred certain tracts of land by way of dowry to a daughter who was under his control, and directed that the income of the same should be paid to his son-in-law. The question arose whether the daughter could retain the property as her own if her father appointed all his children heirs. I answered that she would have good cause to retain possession of the same, since her father wishes the land in question to be given by way of dowry, and that the marriage had continued even after the death of the father; for the case under consideration was that the daughter held possession of the property according to natural law by virtue of the dowry which she was capable of receiving.

36. *Paulus, Questions, Book II.*

I, being under the impression that you were my co-heir, although this was not true, brought an action for partition against you, and adjudications were made and orders issued by the Court, to make payment to both of us. I ask whether, when the truth of the facts is ascertained, a personal action will lie in favor of each of us, or one to recover the property; also whether one rule is to be adopted with reference to a party who is an heir, and another with reference to one which is not. I answered that where a person is heir to an entire estate and, thinking that Titius is his co-heir, joins issue with him in an action in partition, and a decision directing payment is rendered, he makes payment; then, since he did this in compliance with the decision of the judge, he cannot bring an action to recover the money. You, however, seem to hold that no action in partition can exist except between coheirs; but although the action is not legal, still, it is sufficient to prevent the suit to recover what the party believed he was obliged to pay.

But, if neither of the parties was an heir, yet joined issue in an action for partition just as if they were heirs, the same rule for recovering the property which we previously stated applies to one of them must be said is applicable to both. It is evident that, if they divided the property without application to the court, it may be stated that the heir who thought the other party was his co-heir has a right of action for the transfer of the property delivered to the latter; for it cannot be held that there was any compromise between them since he believed him to be his co-heir.

37. *Scævola, Questions, Book XII.*

A party who brings an action for the partition of an estate does not admit that his adversary is his co-heir.

38. *Paulus, Opinions, Book III.*

Lucius and Titia, who were brother and sister, having been emancipated by their father, when grown up had curators appointed for them, and the latter furnished them individually with money which was common property, having been obtained from the income of an estate. They subsequently divided the entire estate between them, and, after the division, Titia, the sister, instituted proceedings against her brother alleging that he had received more than she had; while, in fact, Lucius had not received more than his share, but even less than half the property. I ask whether Titia had a right of action against her brother? Paulus answered that: "In accordance with the statement of the case, if Lucius did not receive more from the income of the property held in common than he was entitled to on account of his share in the estate, his sister has no right of action against him." He gave the same answer in a case where it was alleged that a brother had received a larger amount for maintenance from the Prætor than his sister, but still not more than half.

39. *Scævola, Opinions, Book I.*

Where a person was appointed heir to a share of an estate with reference to which an action had been brought against the heirs because they did not avenge the death of the testator, he gained his case, and the co-heir then brought suit to recover his share from the other heir, but refused to pay his allotment of the expense incurred in the defence of the other suit. The question arose whether he would be barred by an exception on the ground of fraud? I answered that if greater expenses had been incurred by reason of the defence which he had made for the benefit of the said co-heir himself, this expense must be taken into consideration; but if the other party did not plead an exception on the ground of fraud, he could bring suit for the recovery of part of the expenses.

(1) A man who died intestate divided all his land and other property among his children by means of codicils, in such a way that he left a great deal more to his son than to his daughter. The question arose whether the sister had a right to bring her dowry into the common fund for the benefit of the brother? I answered that, according to the statement of facts, if the testator left nothing undivided, the better opinion was that the right to bring the dowry into the common fund was removed by the wish of the testator.

(2) A testator granted freedom to a slave, who was fifteen years of age, when he should reach the age of thirty; and also indicated that he desired that there should be given him from the day of his death, as long as the slave lived, ten *denarii* for his food, and twenty-five *denarii* for his clothes. Stichus died before the day when he was to become free arrived, and the question arose whether the legacy relating to food and clothing was valid; and whether, if it was not valid, the heir who had paid it could recover it from his co-heir with whom the slave had lived? I answered that if the money had not been due, but if what had been given had been expended for food, it could not be recovered.

(3) A son who, after the death of his father, contracted debts due to the Government, cannot charge his brother with said debts in proportion to his share in the estate of his father, if the brothers are not partners in all their property; even though they held the estate of their father in common, and their father had discharged the duty of a magistrate where he resided in behalf of his other son.

(4) A testator appointed his two sons his heirs, and before distribution bequeathed certain slaves to each of them; among said slaves a certain Stephanus was left to one of the sons together with his *peculium.* The said slave, having been manumitted during the lifetime of the testator, died, and afterwards the father died. The question then arose whether what Stephanus had in his *peculium* before he was manumitted belonged to both sons, or only to the one to whom he had been previously bequeathed together with his *peculium?* I answered that, according to the statement of the case, it belonged to both.

(5) A father who divided his property between his sons and confirmed the division by his will, provided that any debt which either of them had contracted or should contract, he alone should be liable for the same. One of his sons having afterwards borrowed money, the father appeared, and with his consent the land which had been transferred to the said son was pledged for the debt, and after the death of the father the same son who was in possession of the land paid the interest, I ask whether, if the creditor should sell the land which was pledged, anything should be paid to this son by a co-heir if an action for partition of the estate should be brought? I answered that, in accordance with the facts stated, he would not be required to pay anything.

40. *Gaius, Trusts, Book II.*

Where anyone who is appointed heir to an entire estate is asked to deliver a certain portion of it to me, for instance, half; an equitable action for partition can properly be brought between us.

41. *Paulus, Decrees, Book I.*

A certain woman appealed from the decision of a judge because, as she stated, in an action for the partition of an estate between herself and the co-heir, he had divided not only the property but the freedmen also, as well as an obligation for maintenance directed by the testator to be furnished to certain freedmen; which, she alleged was something that he had no right to do. On the other hand, it was stated that the parties had agreed to the division, and had paid sums for maintenance in accordance with the terms of the division for many years. It was decided that they must abide by the provision for maintenance; but the judge added that the division of freedmen was of no effect.

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

Where a legacy is bequeathed to one of several heirs in the following terms, "Let him retain what he owes me;" it is the duty the judge has in an action for partition to prevent the co-heirs from exacting payment from the heir aforesaid; but, where one heir is ordered to retain what another owes, it is the duty of the judge to require the rights of action to be assigned to him in proportion to the share of a co-heir in the estate.

43. *Ulpianus, On Sabinus, Book XXX.*

One person can petition for the appointment of an arbiter in an action for the partition of an estate; for it is clear that a single heir can appeal to a judge, and therefore one heir can petition for an arbiter, even though the others are present and do not give their consent.

44. *Paulus, On Sabinus, Book VI.*

Proceedings may be instituted for the partition of land held in common by co-heirs in such a way that only the property which is held in common and matters relating to it which are pending in court shall be included; but with reference to all other things the right of action for the partition of the estate remains unimpaired.

(1) Where an action for the partition of an estate or for the division of property held in common has been tried; the Prætor will sustain any decisions made by the Court by granting exceptions or actions.

(2) Where co-heirs have sold property while one of their number was absent, and in the transaction have managed fraudulently to obtain more than they were entitled to, they can be compelled to indemnify the party who was absent, either by an action for partition or by a suit for the estate.

(3) Any of the profits which an heir takes from the funds of an estate before it has been entered upon, Julianus says he will not have to surrender in an action for partition; unless when he took the same he knew that the land belonged to the estate.

(4) Parties who bring actions for the partition of an estate, or for the division of common

property, or for the establishment of boundaries are both plaintiffs and defendants; and therefore they must swear that they have not instituted proceedings for the purpose of annoyance, and do not make a defence with the intention of causing unnecessary trouble.

(5) Where one of several co-heirs, on account of a stipulation relating to the estate, makes a payment through his own act, he cannot recover the amount from his co-heir; as, for instance, where the deceased promised that no malicious fraud should be committed by himself or by his heir, and that nothing should be done either by himself or by his heir which would prevent anyone from walking or driving over a road; and, in fact, even where the remaining heirs became liable through the act of one, for the reason that the condition of a stipulation relating to the estate is fulfilled, they will be entitled to an action for the partition of the estate against the party through whom the stipulation became operative.

(6) Where anyone stipulates that Titius and his heir shall ratify some act of his, and Titius dies leaving several heirs, he alone will be liable who neglected ratification; and, among the heirs of the party stipulating, he alone who has been sued can institute proceedings to enforce the liability.

(7) Where an usufruct is bequeathed to a widow "until her dowry shall be paid to her;" then, Cassius says that whatever is paid to her by way of dowry on behalf of a co-heir can be recovered by order of the arbiter in an action for partition, and the co-heir can be made to pay his share of the dowry; and this opinion is correct.

(8) Where two co-heirs have been charged to erect a statue, and one of them neglects to do so but the other erects it; Julianus says that it is not unjust to grant an action in partition, so that a part of the expenses may be paid, the amount of which would be approved by a good citizen.

45. *Pomponius, On Sabinus, Book XIII.*

Where you contend that part of an estate is owned by yourself and me in common, which I, for some other reason, declare to be mine alone; this is not included in the action for the partition of an estate.

(1) Fraud committed by a slave of the heir does not come within the terms of the action for the partition of an estate, unless there was negligence on the part of the owner of the slave in that he employed a slave which was not trustworthy to take care of the common property.

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

Where a husband is appointed heir by his father under a certain condition, in the meantime the right of action for the dowry of the wife is in abeyance; for it is evident that if a divorce should take place after the death of her father-in-law although at a time when the condition of the appointment of the party as heir was still pending, it must be held that there is ground for the retention of the dowry; because, when the father dies, some things pass to the sons even before they become heirs, such as matters relating to marriage, children and guardianship. Therefore, a son who bore the expenses of matrimony after his father's death can take the dowry before division; and this was held by our Scævola.

47. *Pomponius, On Sabinus, Book XXL*

In an action for the partition of an estate or for the division of property held in common, if, while the case is pending, a controversy arises concerning a right attaching to the land, it is established that all those with reference to whom the arbiter has been appointed can both bring suit and give notice of a new structure, each one in proportion to his respective interest in the property; and when an award is made by the arbiter, if the entire tract of land is adjudged to one party, security must be furnished that whatever is recovered by means of the actions must be delivered, and whatever expenses have been incurred on their account must be paid. And if, while the matter was in court, no proceedings were instituted with reference to the said land, the unimpaired right of action shall belong to him to whom the entire tract has been awarded, or in proportion to the share for which the award was made.

(1) Moreover, where there is any movable property which can be included in said actions, and in the meantime it should be stolen, proceedings for theft can be brought by the parties at whose risk the said property was.

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

Where a suit has been brought either for the partition of an estate, for the division of property held in common, or for the establishment of boundaries, and one of the parties should die leaving several heirs; the case cannot be separated into parts, but all the heirs must either accept it as it is, or they must appoint some one as agent against whom suit may be brought as the representative of all of them.

49. *Ulpianus, Disputations, Book II.*

A certain man was appointed heir to a share of an estate and having been ordered by the Prætor to bury the testator, he sold a slave who had been granted his freedom by the will, and promised the purchaser double damages in case of eviction, and suit having been brought against him on account of this guarantee, he paid the money. The question arose whether he could, in an action for the partition of the estate, recover the amount he lost on account of his agreement to pay double the value of the slave? Let us see, in the first place, whether he should have given security for double the amount? And it seems to me that he should not have done so; for those only are required to give security for double the amount who make sales voluntarily; but where the party who makes the sale is performing a duty, he ought not to be compelled to promise any more than where the one who makes a sale was appointed by the Prætor to execute a judgment; and even then the party is not in such a condition that he can be compelled to do what those who sell at their own will are forced to do; for there is a great deal of difference between him who discharges a duty and him who sells voluntarily. Hence in the first place the party was not obliged to make a stipulation for double the value, but the Prætor should hold that the purchaser has a right of action on the sale against the actual heir, if the property sold should be recovered by reason of a superior title.

If, however, the heir made a mistake and furnished the bond, and the slave acquired his freedom, suit may be brought on the stipulation; and if this should be done, it is only just that a prætorian action should be granted against the co-heir, (as the action for the partition of an estate will not lie) so as to prevent him from sustaining the loss. And, indeed, for anyone to be able to bring the action for the partition of an estate, he must not only be an heir, but he must also sue or be sued because of some act which he performed, or failed to perform, after he became an heir; otherwise the action for the partition of an estate will not lie. Hence, if anyone should perform any act with reference to the estate before he knew that he was an heir, there will be no ground for an action in partition, because the party is not held to have acted with the intention of an heir; and therefore where anyone performs an act before the estate has been entered upon, for instance, if he buried the testator, he will not be entitled to an action for partition, but if he did this after the estate was entered upon, we hold, in consequence, that he can recover by an action in partition the expenses which he incurred through the funeral.

.50. *The Same, Opinions, Book VI.*

Justice does not permit anything which a father furnished his emancipated son, who was absent for the purpose of pursuing his studies, to be included in the share of the property of the deceased which passed to the said son; where it is proved that the father furnished said property not as a loan, but because he was induced to do so by paternal affection.

51. *Julianus, Digest, Book VIII.*

Where land is delivered to a father-in-law as dowry, and the said father-in-law appoints his son-in-law an heir to any portion of his estate, the land should be reserved before division, in compliance with the award of an arbiter in an action for partition; so that the condition of the son will be the same as it would have been if the dowry had been bequeathed in order to be

retained. Wherefore, any profits acquired after issue has been joined must be delivered to him, after an account of the expenses has been taken; but such as have been acquired before issue was joined, belong equally to all the heirs. An account must also be taken of the expenses in this case also, because no instance can occur which will prevent this deduction.

(1) If I wish to bring an action for an estate against you, and you wish to bring one for the partition of the estate against me, the desires of both of us should be gratified where proper cause is shown; or if I am in possession of the entire estate and acknowledge that you are the heir to one half of the same, but I wish to relinquish the joint ownership, I should obtain an action for the partition of the estate, because the latter cannot be divided among us in any other way.

Moreover, if you have good ground for bringing a suit for the estate rather than one in partition, then you must be permitted to bring a suit for the estate, since some matters are included in an action of this kind which are not included in one in partition; for instance, if I am indebted to the estate you will not recover what I owed to the deceased by an action in partition, but you will do so by an action for the estate.

52. *The Same, On Urseius Ferox, Book II.*

Mævius, who appointed us heirs, held property in common with Attius, and if we should bring suit in partition against Attius, and the property was adjudged to us, Proculus says it will be included in an action for partition of the estate.

(1) Where a slave is left his freedom and appointed heir, he can be compelled by an action for the partition of the estate to pay to the co-heir anything which he retains in his hands arising from the accounts that he kept for the testator.

(2) An arbiter whom you and I selected in an action in partition desired to award certain property to me and some other to you, and held that, with reference to these matters, each of us should be directed to make payment to the other; and the question arose whether he could not set off one account against the other, and direct the party who owed the larger account to pay only the excess? It was decided that the arbiter could do this.

(3) Where an action is brought for the partition of an estate or for the division of property held in common, the entire property must be appraised, and not the shares in the different things.

53. *Ulpianus, Opinions, Book II.*

Where an emancipated son lent a sum of money to be paid to his father, it will afterwards be included in the estate of the father only in case the latter had a right of action against his son for the said sum of money.

54. *Neratius, Parchments, Book III.*

You and I were both joint heirs to the estate of Lucius Titius, and I sold my share of a tract of land belonging to the estate, and then an action for the partition of the estate was brought between us. In this instance, the share which was mine will not be included in the case, since when it was sold it was no longer a part of the estate; nor will your share be taken into consideration, because even if it remains in its former legal condition and belongs to the estate; still, by the sale of my share the ownership of it ceased to be common. Whether one heir does not sell his share or several do not do so, is of no importance; provided a certain portion which has been alienated by one of the heirs and has ceased to form part of the estate.

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

Where an action for the partition of an estate, or for the division of property held in common is brought, and it seems almost impossible to make the division; the judge can render a decision in favor of one party, and adjudge the entire property to him.

56. *Paulus, On the Edict, Book XXIII.*

Profits which have been due for some time are also included not only in an action for the

establishment of boundaries, but also in one for the partition of an estate.

57. *Papinianus, Opinions, Book II.*

Even after an arbiter has been accepted, brothers who divide the common estate by consent perform the duties demanded by natural affection, and the division should not be revoked; even though the arbiter did not render a decision after the controversy was ended, unless relief should be granted on account of want of age.

TITLE III.

CONCERNING ACTIONS FOR THE PARTITION OF PROPERTY OWNED IN COMMON.

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

The action for the partition of property held in common is necessary because the action on partnership has reference rather to the personal transfers from one side to the other than to the division of common property. In short, an action for the partition of common property will not lie where the property is not held in common.

2. *Gaius, On the Provincial Edict, Book VII.*

It makes no difference, however, whether property is held in common among different persons with partnership or without it; for in either instance an action for the partition of common property will lie.

Common property exists with partnership where, for instance, parties jointly purchased the same thing; and it is common without partnership where, for example, the same property is bequeathed to them by will.

(1) With reference to the three double actions, namely; that for partition of an estate, that for the division of common property, and that for the establishment of boundaries, the question arises who is to be considered the plaintiff, because the position of all of them appears to be the same? The better opinion is, however, that he must be considered the plaintiff who instituted the proceedings in court.

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

In an action for the partition of common property nothing is to be considered except the division of the property itself which is held in common; and where any damage is caused to, or committed against any of said property, or where loss is sustained by any of the joint-owners, or where anything derived from the common property came into his possession.

(1) Where the parties themselves have entered into an agreement with one another without fraud, the judge must cause it to be upheld in the first place in an action for the partition of an estate or in one for the division of common property.

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

By means of this action a division is made of corporeal property of which we have ownership, but not of an estate.

(1) The question arises whether an action can be brought for the partition of common property in a well, and Mela says it can only be done where the soil in which it is dug is subject to joint ownership.

(2) This action is a *bona fide* one, and therefore if anything remains undivided, the division of all the rest will be valid, and an action in partition can be brought with reference to whatever is still undivided.

(3) Since the division of the property itself may be the subject of an action for the partition of common property, so, also, payments due and expenses which have been incurred may be recovered in this way, and therefore if anyone incurs expenses he can recover them; but where

he does not bring an action against the other joint owner, but against the heir of the latter, Labeo very properly thinks that the expenses as well as the profits collected by the deceased may be included in the action. It is evident that the profits collected before the property became subject to joint ownership, or any expenses incurred before that time should not be included in a suit for the partition of common property.

(4) Julianus says with reference to this, that if we apply for an order of court for possession to prevent threatened injury; and, before we are ordered to take possession, I prop up the building, I cannot recover the expense of this by an action for the partition of common property.

5. *Julianus, On Urseius Ferox, Book II.*

But where the case was not defended, and we are ordered by the Prætor to take possession of the house, and by reason of this we have obtained the ownership of the same; it is the opinion of Proculus that I can, by an action for the partition of common property, recover a portion of the expense that I have incurred.

6. *Ulpianus, On the Edict, Book XIX.*

Where anyone believing that he owns land in common with Titius, gathers the crops or incurs expense, when, in fact, he owns said land jointly with another party; he can bring a prætorian action for the partition of said property.

(1) Wherefore, if Titius should sell his share in the land, even though in this instance there would be no ground for an action for the partition of common property, because the joint ownership has ceased to exist; there will still be ground for a prætorian action, which is granted with reference to payments when the property ceased to be held in common.

(2) Where, however, one joint-owner acquires any profit out of the common property either by leasing the same or by cultivating it, he will be liable to an action in partition; and if he did this in behalf of all the owners, he should either acquire the profit or sustain the loss; but if he did not act in their behalf but obtained the profit as an individual, there is much more reason that he should also be responsible for the loss. The reason why he must be held accountable for the profit in an action for the partition of common property is, because it is considered that he could not readily lease his own share.

There will, however, be no ground for an action for the partition of common property, unless (as Papinianus says) the party only performed such acts as were absolutely necessary for properly administering his own share; but if he could have done otherwise, he has a right of action on the ground of business transacted, and is liable to the same action.

(3) Where any expenses are incurred after issue has been joined in an action for the partition of common property; Nerva properly holds that these are also included.

(4) Sabinus and Atilicinus are of the opinion that the offspring of a female slave is also included.

(5) The same writers think that this action likewise includes accessions and diminutions.

(6) Where a party inters a corpse in a burial-place held in common, it should be considered whether he renders said burial-place religious? In fact, each owner has an individual right of interment in a burial-place, but either of them alone cannot make a place that is free religious. Trebatius and Labeo, although they think that the place is not rendered religious, still hold that an action *in factum* can be brought.

(7) If you give security for the entire amount with reference to the prevention of threatened injury to a house, Labeo says that you will not be entitled to an action for the partition of common property, since you were not obliged to give security for the entire amount, but it was sufficient to have given it for your share; which opinion is correct.

(8) Where you and I have a tract of land in common but my share has been given in pledge, it

will be included in action for the partition of common property, but the right of the creditor to what has been pledged will remain unimpaired, even though it should be made the subject of adjudication by the Court; for the security will remain unimpaired even if one joint-owner had conveyed his share to the other.

Julianus says that the arbiter, in an action for the partition of common property, must appraise the share at so much less, because the creditor can sell that part of the property under the agreement.

(9) Julianus also says that if anyone with whom I own a slave in common pledges his share to me, and then begins an action for the partition of common property, he can be barred by an exception on the ground of pledge; but if I do not make use of this exception, it will be the duty of the Court after adjudging the entire slave to the debtor, to compel him to pay me the appraised amount of my share; since my right to the pledge remains unimpaired. If, however, the Court should adjudge the slave to me, then he can only compel me to pay whatever the pledge is worth over and above the money which was lent, and shall order that the debtor be released from liability to me.

(10) It is within the province of the judge to render such a decision that the land may be vested in one party, and an usufruct in the same in another.

(11) The other matters relating to this subject are the same that we have discussed with reference to the action for the partition of an estate.

(12) Urseius states that where a neighbor has given notice that no new work shall be performed on a building held in common, and one of the joint owners, on account of this, has judgment rendered against him, he can recover damages from his joint owner in proportion to his share; but Julianus very properly notes that this is true only where it was advantageous to the house that it should be done.

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

There is ground for an action for the partition of land held in common where it is subject to a perpetual lease. It should be considered whether land under a perpetual lease can be divided into separate tracts; but, as a general rule, the judge ought to avoid making a division of this kind, otherwise the perpetual rent will become confused.

(1) Neratius says that where an arbiter, dividing an estate not subject to a perpetual lease into two parts, awards them to two persons, he can impose a servitude, just as if they were two separate tracts of land.

(2) Where parties have the right to bring the Publician Action *in rem*, they can also bring an action for the partition of common property.

(3) An action for the recovery of property by the owner of the same does not lie under certain circumstances; still, if there is just cause for retaining possession, an equitable action for the partition of common property can be brought; for instance, where property is held in possession on account of the payment of a debt which in reality is not due.

(4) There is no ground for this action among depredators, nor is there any where parties hold possession by sufferance or by stealth; for the reason that this possession is unjust, and while possession by sufferance is, in fact, lawful, it does not justify judicial proceedings.

(5) Julianus states that if one possessor makes a demand for partition, and the other alleges that he holds possession by force, this action should not be granted, not even after a year has elapsed; because it is settled that, even after a year, an interdict will be granted against the one who forcibly ejected the other. He also says that where the party who instituted proceedings is said to be in possession by sufferance, this action will not lie, because an interdict is also granted in an instance of this kind. Moreover, if the plaintiff is said to hold possession by stealth, it must be held that this action will not lie; for, he adds, an interdict can likewise be obtained in a case of possession by stealth.

(6) Where there are two persons who have received property in pledge, it is perfectly just that they should be granted an equitable action for partition.

(7) Moreover, if a controversy arises between two parties with reference to an usufruct, this action should be granted.

(8) Again, if two parties are placed in possession by order of the Prætor for the preservation of legacies, there is good ground for possession on account of the custody; and hence, where there are two unborn children, the same rule will apply, and this is reasonable.

(9) It is evident that where anyone who was placed in possession for the prevention of threatened injury has already been ordered to take possession, he would not be entitled to an equitable action for his own benefit, as he has a right to bring an action for recovery.

(10) Where an action for the division of a common usufruct is brought, the judge must discharge his duty either so as to permit each one to enjoy the usufruct in different parts, or he can lease the usufruct to one of them, or to a third person; so that in this way they may collect the rents without any further disagreement; or if the property is movable, he can contrive to make the parties agree among themselves, and give security to one another for use and enjoyment for a certain time, that is to say that the usufruct shall belong to them alternately, each one having for it a special term.

(11) Neither tenants, nor persons who have received property on deposit are entitled to this action, although they may hold possession in accordance with natural law.

(12) Where parties have accepted a pledge in common, a division should be made between them in such a way that a share shall not be appraised at its true value, but only at so much as the indebtedness on that particular share amounts to; and the pledge should be assigned to one of the creditors, but permission shall not be refused to the debtor to tender the amount which he owes and redeem his pledge. The same rule applies where the possessor of a pledge brings an action *in rem* for redemption, and the party in possession tenders him the amount assessed by the Court.

(13) Where a debtor has pledged his share of a tract of land owned in common, and his creditor is sued by the owner of the other share, or by another creditor of another debtor, and he makes a higher bid for the property in question, and the debtor of the party to whom the property was adjudged wishes to recover his share of the land after paying what he himself owed; it is very properly held that he should not be heard, unless he is prepared to also recover what his creditor purchased under the adjudication. For, if you should sell a share of the property, and, before you have delivered it to the purchaser, an action for partition is brought against you, and the other share also should be adjudged to you; it is stated in consequence that no action can be brought on the ground of purchase, unless the plaintiff was prepared to take the entire property, because this share accrues to the vendor through another; and the purchaser can also be sued on account of the sale to compel him to take all of it; and the only question to be considered is whether any fraud was committed by the vendor. Where, however, one share has been disposed of, and the vendor is defeated in the bidding, he will be liable in an action on purchase to refund the price. The same rule is observed in mandate and other cases of this kind.

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

Even though the entire number of parties who own property in common do not desire partition but only some of them, this action can be brought among them.

(1) If it is uncertain whether the *Lex Falcidia* is available, an action for partition can be brought between the legatee and the heir, or proceedings for recovery may be instituted, for a share the value of which is not ascertained. This likewise takes place where a *peculium* is bequeathed, because it is uncertain to what extent an indebtedness to the owner diminishes the *peculium.*

(2) The action for the partition of common property also includes the case where anyone depreciates the value of said property; for instance, by wounding a slave, or by corrupting his morals, or by cutting down trees on the land.

(3) Where a joint-owner pays on behalf of a slave more by way of reparation for damage than he should have done, the slave shall be appraised and he can recover his share.

(4) Moreover, where one joint-owner is sued in an action *De peculio* for the entire amount of the obligation and judgment is rendered against him, he will *be* entitled to an action in partition to enable him to recover a part of the *peculium.*

9. *Africanus, Questions, Book VII.*

But where one joint-owner, on account of a slave held in common, has judgment rendered against him in an action *De peculio* for the entire amount of the indebtedness, and the property belonging to said *peculium* is lost while in his hands; still, an equitable action in partition for a recovery of a portion of the money will lie; for otherwise it would be unjust if the whole matter should cause loss to be incurred by the party who defended the action; since there ought to be an equal risk imposed upon both owners with reference to property included in *peculium.* For where anyone undertakes the defence of a slave at the request of his owner, he will be repaid everything which he expended in good faith, even though the *peculium* should subsequently be lost. This is the case where no negligence has been committed by either party; since if an action *De peculio* is brought against the owner, and he is prepared to surrender to the plaintiff the property included in the *peculium*, it is held he should be heard if proper cause be shown, of course, if he did this without malicious or fraudulent intent.

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

Again, although the action under the *Lex Aquilia* cannot be brought against an heir; still, in this action the heir must pay the joint-owner for any damage which the deceased caused to the common property on account of which any right of action arises under the *Lex Aquilia.*

(1) Where we have only a right of use which can neither be sold nor leased, let us consider how a division can be made in an action for the partition of common property. If, however, the Prætor should interpose and arrange matters in such a way that the Court may adjudge the use to one of the parties; it will not be held that the other, who accepts compensation, is not making use of the property, on the ground that he who appears to enjoy it is doing more than the other; because this results from the necessity of the case.

(2) In an action brought for the partition of common property the judge should appraise such property at its true value, and security should also be furnished against recovery by eviction.

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

We should, by all means, bear in mind that if, after the destruction of the common property, he who is entitled to be paid something by reason of the common ownership desires to bring an action on this ground, he will be granted an equitable action in partition; for instance, where the plaintiff incurred certain expenses on the common property, or the joint-owner alone obtained some profit from it — as, for example, the labor of a slave, or money paid for the same — an account of all these things is taken in an action of this kind.

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

Where a house or a wall is held in common, and it becomes necessary to rebuild it, or demolish it, or insert something into it; an action can be brought for the partition of common property, or we may institute proceedings under the Edict *Uti possidetis.*

13. *The Same, On the Edict, Book LXXV.*

Everything is included in an action for the partition of common property, unless something has been expressly excepted by common agreement to avoid its being included.

14. *Paulus, On Plautius, Book III.*

This action includes whatever has been done, or ought to have been done for the common benefit by a party who knew that he had a fellow-owner.

(1) Any expenses, however, which I incurred while I believed that the land was my own, and which, if suit is brought for the recovery of a part of the land I can, of course, retain by pleading the exception on the ground of fraud; it should be considered whether I can retain them on account of the justice of the action itself, if suit in partition should be brought against me. I think the better opinion is that I can do so, because the action for the partition of common property is a *bona fide* one, but this is only the case where suit is brought against me; still, if I should dispose of my share, nothing will remain from which I can retain the expenses.

Let us consider if a purchaser from me can retain them, for if an action is brought to recover a share from him, can he retain the amount on the ground of the expense which I incurred, just as I myself could do? The better opinion is that, in this instance, the expenses can be retained, and since this is the case, it is most justly held that I should be granted an equitable action against my co-owner on account of said expenses, even though the joint ownership still continues to exist.

The rule is different, however, where I spend money upon my own property, as it were, which really belongs to another, or is held in common; for, in this instance, I have only the right of retention because I do not wish to bind anyone to myself; where I think property belongs to Titius which in fact belongs to Mævius, or that it is owned by me in common with another party who in reality is not my co-owner, I do this to bind another party to me; and as an action on the ground of business transacted is granted me against someone whose affairs I have attended to thinking that they were those of another, so also in the instance under consideration. Therefore, if I were to sell the land to another, for the reason that the case was such that I should be entitled to an action, one on the ground of business transacted should be granted me (as Julianus also says).

(2) If it should be agreed that no partition whatever shall be made, it is perfectly evident that an agreement of this kind would have no force; but if it was agreed that none should be made within a certain time, and this enures to the benefit of the property itself, such an agreement will be valid.

(3) Where it is agreed between joint-owners that the community of ownership shall not be divided within a certain time, there is no doubt that a party who is bound by an agreement of this kind is at liberty to sell; and therefore a purchaser from anyone who brings an action for the division of common property will be barred by the same exception by which the vendor himself would have been barred.

(4) If a joint-owner makes an agreement not to bring suit for his share, the joint ownership is, to all intents and purposes, terminated.

15. *The Same, On Plautius, Book V.*

Where a joint-owner is sued with reference to a slave held in common, and judgment is rendered against him, he can bring a suit for partition even before he complies with the judgment; for, if a noxal action is brought against one he can immediately bring suit against his co-heir for the delivery of his share to him, giving security at the same time that, if he does not deliver the slave, he will return the share.

16. *The Same, On Plautius, Book VI.*

Where joint-owners dissolve their ownership, it is customary for security to be furnished with reference to any indebtedness which may exist, which is dependent upon a condition.

17. *Modestinus, Rules, Book IX.*

Where one of a number of joint-heirs purchases from a creditor a tract of land which had been given in pledge by the testator, he should

not be sued by his co-heirs in an action for the partition of common property.

18. *Javolenus, Epistles, Book II.*

An arbiter cannot decide that land belonging to an estate shall be subject to a servitude attaching to land which is not a part of said estate; for the reason that the authority of a judge cannot extend beyond what is before the court.

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

A tree which grows up on a boundary line and also a stone which extends over two tracts, so long as they are attached to the soil belong to both owners, according to the position they occupy over the land of each; and they will not be included in an action for the partition of common property. But as soon as the stone is removed, or the tree uprooted or cut down, it becomes common and undivided property, and will be included in action for the partition of such property; for what was formerly in separate parts is now merged. Wherefore, where two masses of any substance belonging to two owners are mixed together, the entire mass is common property, even though some portion of the substance, as it was in the first place, exists separately; and so, also, where a tree or a stone are separated from the soil, the rights of ownership are merged.

(1) An arbiter for the purpose of dividing common property should not be appointed with reference to a vestibule, which is common to two houses, where either of the parties are unwilling; because where anyone is compelled to bid for such a vestibule, he necessarily will sometimes be obliged to pay the value of the entire house, if it has no other entrance.

(2) Where a right of way through the same place belongs to two of us, and one has incurred some expense with reference to it; Pomponius says rather harshly that either an action for partition or one on partnership will lie; for how can joint ownership be understood to exist in something which the parties use separately? A suit should be brought on the ground of business transacted.

(3) The judge who presides in an action for the partition of common property as well as in one for the partition of an estate, where a slave has taken to flight, must direct the parties who are before him to bid, and should then adjudge the slave to him who bids the highest; and there will be no danger that the penalty prescribed by the *Lex Fabia* will be incurred on account of the decree of the Senate.

(4) A watercourse is said by Labeo not to be included in an action for the partition of common property; for it is either a part of the land — and hence should not be considered in the trial — or it is separated from the land but is divided either with reference to the quantity or the time when it is to be used. Sometimes, however, rights may be separated from the land and still not be divided either by quantity or by periods of use; as, for instance, where the party to whom they belonged left several heirs, and, when this happens, it is suitable that these things also should be included in an action for partition; for Pomponius says that he does not see why they should not be included in an action for the partition of common property as well as in that of the partition of an estate. Therefore, in instances of this kind, they are also included in an action for the division of common property, just as the aforesaid rights are divided either by quantity or by periods of time.

20. *Pomponius, On Sabinus, Book XIII.*

Where a person with whom you hold land in common does not answer in the case of an offence, and on this account the house is demolished, or the trees are cut down by order of the judge; damages can be recovered by you in an action for the partition of common property, for whatever is lost through the negligence of a joint-owner is included in this proceeding.

21. *Ulpianus, On Sabinus, Book XXX.*

It is greatly advantageous to all parties for a judge, in dividing tracts of land, to follow whatever is most beneficial, or what the litigants may prefer.

22. *Pomponius, On Sabinus, Book XXX.*

If I build a wall for my neighbor and myself with the understanding that I can recover the expense of the same from him in proportion to his share; or if I build the wall by way of donation, it will be common property.

23. *Ulpianus, On the Edict, Book XXXII.*

Where an agreement is made between you and your co-owner to the effect that you can take the crops in alternate years, and your co-owner does not permit you to gather them during your year; it should be considered whether an action based on the contract of leasing or one for the partition of common property will lie. The same question arises where a joint-owner who agreed that he should enjoy the crop every second year turns in cattle, and causes the crop for the next year, which his co-heir had a right to gather, to be ruined?

I think that the better opinion is that an action for the partition of common property should be brought, rather than one on the contract of leasing (for how can a lease exist when there is no rent involved?) or a civil action should certainly be granted for uncertain damages.

24. *Julianus, Digest, Book VIII.*

Where a slave held in common acquires anything through the property of one of his owners, it will, nevertheless, be subject to joint ownership; but the party through whose property the acquisition was made can collect the amount by an action in partition, because it is in conformity with good faith that every one should have a prior lien on anything which a slave acquires by means of his property.

(1) If I intend to bring an action against you for the partition of common property, and you transfer your share to Titius for the purpose of changing the conditions of the trial; you will be liable to me in a prætorian action, because you acted in such a way as to avoid an action in partition being brought against you.

25. *The Same, Digest, Book XII.*

Where Stichus, a slave owned by you and me in common, has himself a sub-slave named Pamphilus, who is worth ten *aurei*, and an action *De peculio* is brought against me, and, having lost it, I pay ten *aurei;* then, even though Pamphilus should die afterwards, you will, nevertheless, be compelled to pay me five *aurei* in an action in partition or in one on partnership, because I have released you from a debt of that amount. Much more ought I to be entitled to recover this amount, if Stichus, after the death of Pamphilus, should acquire another sub-slave.

26. *Alfenus Verus, Digest, Book II.*

A slave owned in common, while in the hands of one of his owners, broke his leg while working; and the question arose what kind of an action the other owner could bring against him with whom the slave had been at the time? I answered that if the common property had been injured rather through negligence than through accident, he could recover whatever damages were assessed by an arbiter in an action for the partition of common property.

27. *Paulus, Epitomes of the Digest of Alfenus, Book III.*

A single joint-owner cannot legally put a slave owned in common to torture, except with respect to some matter in which all the parties were interested.

28. *Papinianus, Questions, Book VII.*

Sabinus says that no joint-owner can legally perform any act with reference to common property without the consent of the other, hence it is manifest that the right of prevention exists; and where parties are in the same position, it is established that he who objects has the advantage. But, although where property is in common, one joint-owner may be prevented from proceeding where a building is in course of erection, he cannot be compelled to remove it if the other failed to prevent him from constructing it when he could have done so; and,

therefore, compensation for the damage can only be obtained by means of an action for the partition of common property. Where, however, he consented to the erection of the building, he will not be entitled to an action for damages; but if one party did something during the absence of his co-heir to the injury of the latter, he can then be forced to remove it.

29. *Paulus, Questions, Book II.*

Where anyone holds land in common with Titius, and, believing that he held it in common with Mævius, expends money thereon; it is very

properly held that an action for the partition of common property will be sufficient for him; for this is the case if I know that the property is common but do not know who my co-heir is, as I am not transacting the business of my co-heir, but am managing my own property; and the action arises rather with reference to the property on which the money was expended, than on the person of the joint owner. In short, we hold that this action is the one under which a ward would be liable, in an application to the court to compel him to reimburse expenses.

The case is different where a man thinks that he is spending money on his own property, while in fact it is held in common; and in this instance he will neither be entitled to an action in partition, nor will an equitable action be granted him; for anyone who knows that property is owned in common or belongs to another transacts his business with a view to render him liable to himself, even though he may be mistaken with reference to the person.

(1) Pomponius says that anyone of a number of joint-owners can demand a judge; but where anyone of the said joint-owners remains silent, an action for the division of common property may properly be brought against him.

30. *Scævola, Opinions, Book I.*

An action for the partition of common property may be properly brought either where neither party is in possession, or where one of the joint-owners is not in possession of the land.

31. *Paulus, Opinions, Book XV.*

Where two slaves were reserved out of an estate by the order of the Prætor for the purpose of serving certain minors, it was held that they were not divided, but remained the common property of all.

TITLE IV.

CONCERNING THE ACTION FOR PRODUCTION.

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

This action is very necessary, it is employed every day; and it was introduced principally on account of suits for the recovery of property.

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

To "produce" is to place property publicly in the power of another, so that he who brings a suit may have an opportunity for trying it.

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

In this proceeding the plaintiff ought to know everything, and to state all the facts relating to the property which is the subject of the action.

(1) A party litigant who institutes proceedings for the production of property does not, in fact, state that he is the owner, nor is he obliged to prove this, as there are many causes for bringing an action of this kind.

(2) Moreover, it should be noted in this action that where the defendant is contumacious, judgment based on the oath of the plaintiff may be rendered against him, the amount to be decided by the judge.

(3) This action is a personal one, and he is entitled to it who is about to bring a suit *in rem*, no matter what kind of a suit it may be, whether the Servian Action on a pledge, or an hypothecary action, both of which can be brought by creditors.

(4) Pomponius says, however, that where a man is about to bring suit for an usufruct he is entitled to an action for production.

(5) Moreover, where anyone who is about to apply for an interdict asks that the property be produced, he shall be heard.

(6) Moreover, if I desire to select a slave or any other property, the right to choose which has been bequeathed to me; it is established that I can bring an action for production, and when the property is produced, that I can bring suit for recovery of the same.

(7) Where anyone wishes to institute proceedings by means of a noxal action, an action for the production of the property is necessary; for, in fact, where the owner of the slave is ready to make a defence, and the plaintiff cannot designate the slave unless he is present, either because he does not recollect him, or does not have his name; is it not just that the entire body of slaves should be produced before him, in order that he may pick out the one who committed the offence? Therefore, this should be done, where proper cause is shown, in order that the party with reference to whom the action is brought may be designated after a survey of the slaves is taken.

(8) Where anyone besides the heir wishes the will, or the codicils, or anything else relating to the will to be produced, it should be held that this cannot be done by means of this action, since the interdicts relating to such matters will be sufficient for the party; and this was the opinion of Pomponius.

(9) It must be remembered, however, that not only those persons whom we have mentioned are entitled to the action for production, but also anyone who has an interest in having the production made; hence the judge ought to determine in the first place whether the party has an interest, and not whether he is the owner of the property in question; and he should then order it to be produced, or refuse to do so because the party has no interest in the matter.

(10) Julianus further states that if I have no right of action for recovery, I can still institute proceedings for production, because it is to my interest that this should be done; as, for instance, where a slave is left to me that Titius may choose, for I can bring an action for production, since I have an interest in its being done in order that Titius may make his selection; and I then have an action for recovery, even though I have no right to select a slave that may be produced.

(11) Where an action for the production of property is brought against me, I cannot bring one for the same purpose merely because I have been sued in the said action; even though it may be held that I am interested, as I am liable for the restoration of the slave. This, however, is not sufficient, for, otherwise, where anyone had managed to fraudulently relinquish possession, he could bring an action for production, even when he did not intend to bring one for recovery, or to proceed by means of an interdict; and either a thief or a robber could do this; which is by no means true. Therefore Neratius very properly states that the judge, in an application for production, must investigate carefully whether the party has a just and probable cause of action by reason of which he desires the property to be produced.

(12) Pomponius states that several parties may legally bring an action for the production of the identical slave; for instance, where a slave belongs to the first one, the usufruct of the same to the second, and the third contends that he has possession of him, and the fourth alleges that he was pledged to him; hence, all of them are entitled to an action for his production, because all of them have an interest in having the said slave produced.

(13) The same author adds that the judge, by reason of the authority vested in him on account of this action, can also examine any exceptions which the possessor may interpose, and if any of them shows clearly that the plaintiff is barred, then he who is in possession should be

discharged; but if the exception should be obscure, or a more important matter be involved, this should be deferred until the trial takes place, and the property should be ordered to be produced.

There are certain exceptions, however, which the judge who is to preside in the action for production should by all means himself determine; for instance, those based upon an informal agreement, on malicious fraud, on an oath, or on a judgment formerly rendered.

(14) Justice sometimes demands the production of the property so that, although an action for this purpose cannot be brought, an action *in factum* may be granted; a matter which Julianus refers to. He says a slave who belonged to my wife kept my accounts, you are in possession of said accounts, and I desire them to be produced. He says further if the said accounts are written upon my paper, there is ground for this action, because I can bring suit for said accounts, since if the paper is mine what is written thereon is mine also; but if the paper is not mine, as I cannot bring suit to recover it, I cannot institute proceedings for its production; hence an action *in factum* will lie in my favor.

(15) It must be remembered that by this action proceedings can be instituted against the possessor, and not only against him who has civil possession, but also against him who has possession naturally. Finally, it is established that a creditor who has received property in pledge can be compelled to produce the same.

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

For the action can be brought against a party with whom property has been deposited, to whom it has been loaned, or by whom it has been rented.

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

Celsus states that if anyone who agreed to remove merchandise places it in a warehouse, an action for production based on his contract can be brought against him; and, moreover, if the party making the agreement dies and leaves an heir, the action can be brought against the latter. Where, however, there is no heir, the action can be brought against the keeper of the warehouse; for, if the property is not in the possession of anyone, he says it is evident that either the keeper of the warehouse has it in his possession, or, at all events, it is certain that he can produce it. He also asks, "How can a party be in possession of property who agreed to remove it? Is this because he had a lien on it?" This example shows that even those persons who have the power to produce property are liable to an action for its production.

(1) Julianus, however, says that in accordance with this rule a person is liable to an action for the production who is in possession for the purpose of preserving property or legacies, as well as he who holds property by reason of an usufruct, even though, in this instance, he by no means has possession of it. Hence Julianus asks to what extent shall such parties produce said property? He answered that the former must do so to enable the plaintiff to have possession, but the party against whom the suit was brought must be in possession in order to preserve the property; and that he who has the usufruct must do so in order that the plaintiff may possess the property, but that he against whom the action is brought may use and enjoy the same.

(2) Moreover, Julianus says that a purchaser who does not return partially used materials, can be compelled to produce them; the damages being estimated according to the amount that I am willing to swear to; but he adds in the same place: "If the purchaser has possession, or has committed fraud in order to avoid having possession."

(3) Celsus also says that if you have piled manure upon my unoccupied land, you can, by an action for production, obtain permission to remove it, on condition, however, that you remove the whole of it, otherwise you cannot do this.

(4) Moreover, if a boat should be carried by the force of a river upon the field of another party, Neratius holds that the latter can be sued for production. Wherefore, he asks whether the plaintiff must give security to the owner of the land merely with reference to future

damage, or for past damage also; and he replies that it must also be given for the damage already committed.

(5) Where, however, if anything from a fallen building is thrown upon your land, or upon your house, you can be compelled to produce it, even though it may not be in your possession.

(6) Again, where anyone has not the power to deliver anything, even though he has possession of it, he will not be liable to an action for its production; as for instance, where a slave is a fugitive it is evident that the party will only be liable to give security to produce said slave if at any time he should come into his power. But where he has not taken to flight, but you permit him to live where he wishes, the same rule applies; or if you have sent him on a journey, or you employ him upon your land, you will only be compelled to furnish security.

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

A jewel which is set in gold belonging to another, or any ornamentation attached to a candlestick belonging to another party cannot be demanded in an action for recovery, but an action can be brought for production in order to have it detached.

The rule is different where material is used in a house, as, in this instance, even an action for production will not lie, because the Law of the Twelve Tables forbids the material from being separated; but an action on the ground of material used can be brought for double its value under the same law.

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

By the term *tignum* we understand in the Law of the Twelve Tables every description of material; as is very properly held by certain authorities.

(1) If you attach my wheel to a vehicle of yours, you can be compelled to produce it — and this was stated by Pomponius — although, strictly speaking, it is not legally in your possession.

(2) The same rule applies where you attach my plank to your chest or ship, or my handle to your cup, or my ornaments to your bowl, or use my purple for your clothing, or join to your statue an arm which is mine.

(3) Moreover, a municipality can be sued for production because it has the power of delivery; for it has been settled that it can hold possession and acquire by usucaption. The same rule must be held to apply to societies and other corporate bodies.

(4) Where the party is not in possession at the time issue is joined, but comes into possession before the decree has been rendered; we think it should be held that judgment should be pronounced against him unless he restores the property.

(5) Where anyone has possession at the time that issue is joined, and afterwards ceases to have possession without fraudulent intent, he should be discharged; even though, (as Pomponius says) he is to blame because he did not at once make restitution, but permitted issue to be joined against him.

(6) The same author states that where a party in possession at the time when issue was joined afterwards ceased to have possession, and then came into possession again, either by reason of the same title or of another one; judgment must be rendered against him, unless he delivers up the property.

(7) Pomponius not improperly adds that the party who brings suit for production must have an interest at both times in the property being delivered to him; that is to say, at the time when issue is joined and when the decision is rendered. This opinion is also held by Labeo.

8. *Julianus, Digest, Book IX.*

Where an action for production is brought against the party who was neither in possession nor was guilty of fraud to avoid having possession, and after his death his heir has possession of

the property, the latter can be compelled to produce it; for if I bring suit against a man for a tract of land, and his heir comes into possession of it under the same title, he can be compelled to surrender it.

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

Julianus says that if anyone should kill a slave who is in his possession, or should transfer the possession to another, or should spoil property in such a way that it cannot be held; he will be liable to an action for production of the same, because he acted fraudulently to avoid being in possession. Hence, if he spills or destroys wine, oil, or anything else, he will be liable to this action.

(1) Acorns from your tree fall upon my land and I turn cattle thereon to pasture them. To what action am I liable? Pomponius states that an action for production will lie if I turned the cattle out with fraudulent design so that they might feed upon the acorns; for even if the acorns were still there, and I should not permit you to remove them, I will be liable to an action for production, just as if anyone were not permitted to remove materials which had been placed upon my land; and we accept the opinion of Pomponius, whether the acorns are still there, or they have been consumed. If they are still there, I will be entitled to an interdict to permit me to gather acorns, so that I may have the power to gather every third day, if I furnish security against threatened injury.

(2) Where anyone has caused property to come into the possession of another, he is held to have acted fraudulently in order to avoid being in possession; provided he committed the act with malicious intent.

(3) Where anyone produces property which is in a worse condition than it was previously, Sabinus says that he is still liable to an action for production. This is certainly true where the property was fraudulently changed into another form; as, for instance, where an ingot of metal is made out of a cup; for even though he produces the ingot, he will be liable to the action for production, as the form having been changed, he almost destroys the substance of the property.

(4) Marcellus states that if ten *aurei* are bequeathed to you under a certain condition, and the usufruct of the same to me absolutely, and then the heir, while the condition is still pending, and without requiring security, pays the said ten *aurei* to me, the usufructuary; he will be liable to an action for production, as having acted fraudulently to avoid being in possession. The fraud consists in his neglecting to exact security from the usufructuary, and the result was that your legacy was lost, since you now are not able to bring an action to recover the money. The action for production, however, could only be available if the condition on which the legacy depends takes place. You might, however, have protected yourself by means of a stipulation for the payment of the legacy, and, if you did so, you will have no need of the action for production. If, however, the heir, not being aware that a legacy had been bequeathed to you, did not exact security from the usufructuary, Marcellus says that an action for production will not lie, of course because there was no fraud; but the legatee will be entitled to relief by means of an action *in factum* against the usufructuary.

(5) To "produce," so far as this section is concerned, is to exhibit something in the same condition in which it was when issue was joined, so that the party, having full power to examine the property, can proceed with the action which he intended to bring without the property which he claimed being in any respect injured; even though the suit was brought, not for the purpose of restitution, but for production.

(6) Hence, if when the party produces the property it has become his by usucaption after issue has been joined, he cannot be considered to have produced it at all, because the plaintiff has lost his case, and therefore the defendant must not be discharged; unless he is ready to answer the claim as referred back to the original day, so that the profit may be estimated in accordance with law.

(7) For the reason that in this action the plaintiff obtains everything depending upon the property which is the object of the suit, Sabinus holds that the offspring of a female slave should likewise be delivered, whether she was pregnant at the time, or conceived subsequently; and this opinion is also approved by Pomponius.

(8) In addition to this, any advantages which may have been lost on account of the property not having been produced, or because it was produced too late, should also be considered by the judge; hence Neratius says that the advantage to the plaintiff, and not the actual value of the property, should be estimated, and this advantage, he says, is sometimes of less value than that of the property itself.

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

Where a right of choice is granted within a certain time, and the trial has been protracted so long that the production will be of no avail, the advantage to which the plaintiff is entitled must be preserved; but if the heir was not to blame because he did not produce the property at the time when issue was joined, he should be discharged.

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

But where an estate is lost on account of a slave not being produced, it will be perfectly just for the judge, in the assessment of damages, to take into consideration the injury done to the estate.

(1) Let us consider where the property must be produced, and at whose expense this shall be done. Labeo says that it should be produced where it was at the time when issue was joined, but it must be transported or led to the place where the proceedings were instituted, at the risk and expense of the plaintiff. He says that it is evident that the party in possession of a slave must furnish him with food and clothing, and take care of him. I hold that sometimes the plaintiff must do this also; where, for example, a slave was accustomed to support himself either by manual labor, or by some trade, and is now compelled to be idle.

In like manner, where the slave who is to be produced is placed in charge of the Court, the party who desired him to be produced must be responsible for his food, if his possessor was not accustomed to provide him with it; for if he had been accustomed to do so, then he can not refuse to pay for his maintenance. Sometimes the party in possession is required to produce him at his own expense; as, for instance, where he has placed property in some secret place so that the production of the same might be more inconvenient for the plaintiff; for, in this instance, he must produce the property at his own expense and risk in the place where the proceedings have been instituted, so that his bad faith may not benefit him.

(2) Where anyone is sued with reference to several things, and was in possession of all of them at the time when issue was joined, even though he may afterwards have relinquished possession of some of them without fraudulent intent; judgment must be given against him, unless he produces all that he can.

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

There is ground for this action where a party is to be produced whose freedom anyone wishes to have established.

(1) A son under paternal authority is liable to this action, if he has power to produce the property.

(2) Julianus says that where several actions are brought for production of the same property, and this is done for the same reason, an exception can be pleaded. Where, however, a party brings suit for the recovery of property, and after issue has been joined he receives the property from another person, a new cause of action is introduced, and therefore he cannot avail himself of an exception.

Again, where anyone is about to bring suit against a party for theft and institutes proceedings

for production, and the property is stolen a second time, the same principle will apply. Finally, where a party institutes proceedings for production in order that a choice may be made, and after issue has been joined the right to choose is given to him by the will of some one else, he can bring another action for production.

(3) Where anyone makes must out of my grapes, or oil out of my olives, or clothing out of my wool, being aware that these things belong to another; he will be liable to an action for production with reference to both, because what is made out of our property is certainly ours.

(4) Where a slave dies after issue has been joined, even though this happens without the malicious fraud or negligence of the possessor; still, judgment sometimes should be rendered against him to an amount equal to the benefit which would have accrued to the plaintiff if nothing should be done by the possessor to prevent the slave from being produced in court when issue was joined; and so much the more is this the case if it appears that he died on account of some accident which would not have happened if he had been produced at the time.

(5) Where property cannot be produced immediately for some good reason, the party must furnish security by order of court, that he will produce it upon a specified day.

(6) An heir can make use of this proceeding in his own name, but not while acting as heir. The heir of a possessor is also liable on his own account. Hence, it is not worth while to ask whether the action can be granted either to an heir or against one. It is evident that this action should be granted against an heir where the deceased had been guilty of fraud, if the estate has become more valuable on this account; for instance, where the heir obtained the price of the property.

13. *Gaius, On the Edict of the Urban Prætor; Title, Cases Relating to Liberty.*

Where a freeman is said to be detained by anyone, an interdict is available against him who is said to detain him for the purpose of compelling him to produce him; as an action for his production is held to be of no force in a case of this kind, because it is considered to lie only in favor of one who has a pecuniary interest.

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

Where a husband has received money as a gift from his wife, and, knowing that it did not become his, paid it out for the purchase of some article, he acted fraudulently to avoid being in possession, and therefore is liable to an action for production.

15. *The Same, On Sabinus, Book XVIII.*

Treasure which belongs to me is buried in your land and you will not permit me to dig it up. So long as you do not remove it from the place in which it is, Labeo says that I am not legally entitled to an action for theft, or to one for production on this account, because you were not in possession of the said treasure, nor have you acted fraudulently in order to avoid having possession of the same, since it may be that you do not know that the treasure is in your land. It is not unjust, however, where I make oath that I do not assert this claim for purpose of annoyance, if an interdict or a judgment should be granted to the effect that you shall not employ force against me to hinder me from digging up, raising, and removing the said treasure, if I take no steps to prevent security for the avoidance of threatened injury being furnished you, on account of my acts. Where, however, the treasure is stolen property, I am entitled to an action for theft.

16. *Paulus, On Sabinus, Book X.*

Where a slave has anything in his possession, his owner is liable in his own name to an action for production; but if the slave without the knowledge of his owner, is guilty of fraud to avoid being in possession, a noxal action for theft, or one for malicious fraud should be granted on account of the slave, but no prætorian action can be brought for production.

17. *Ulpianus, On All Tribunals, Book IX.*

Where a party produces a slave who is disabled or blind, he should be discharged from liability under this action, for he has produced him, and a production of this kind is no impediment to a direct action, for the plaintiff can still bring suit under the *Lex Aquilia* for the damage sustained.

18. *The Same, Opinions, Book VI.*

Where a note becomes worthless through payment and pledges are released, the creditor can, nevertheless, bring suit for the production of documents relating to the contract against anyone else than the debtor.

19. *Paulus, Epitomes of Alfenus, Book IV.*

Any one who is interested can bring an action for production. A certain person, however, made inquiry as to whether this action was available to compel the production of the accounts of his adversary for his inspection, as he alleged had a great interest in having the same produced.

The answer was that the law should not be employed to cause annoyance, and that terms ought not to be captiously construed, but that it was proper to consider with what intention the words were uttered; for, in accordance with this principle, if anyone was desirous of studying some branch of knowledge, he might state that he had an interest in such and such books being produced for his benefit, because if they were produced, after he had read them he would become a more learned and a better man.

20. *Ulpianus, Rules, Book II.*

Where an action for production is brought on account of the offences of slaves, torture may be employed for the purpose of making them reveal their accomplices.

THE DIGEST OR PANDECTS.

BOOK XI.

TITLE I.

CONCERNING INTERROGATORIES WHICH SHOULD BE PUT IN COURT, AND ACTIONS BASED ON INTERROGATORIES.

1. *Callistratus, Monitory Edict, Book II.*

The heir should be interrogated in court with reference to what part of the estate he is the heir, whenever an action is brought against him, and the plaintiff is in doubt as to what share the person whom he intends to sue is heir. An interrogatory is necessary whenever the action is *in personam,* where suit is brought for a certain amount, as otherwise the plaintiff would be ignorant as to what portion of the estate of the deceased his adversary was entitled as heir, and sometimes he might claim too much and sustain some loss.

(1) We do not, however, make use of interrogatory actions at present, because no one can be compelled to answer anything with reference to his rights before the case is tried; and therefore these actions are less used and have fallen into desuetude. Only matters stated by the adverse party in court can be employed as proof by litigants, whether such matters relate to estates or to other things involved in judicial proceedings.

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

The Prætor published his Edict with reference to interrogatories because he knew that it was difficult to a party who brings suit against an heir or the possessor of the property of an estate to prove that anyone was an heir, or the possessor of such property.

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

For the reason that proof of entry upon an estate is, for the most part, difficult.

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

The Prætor desires to bind the party who was sued by his own answer made in court, so that if he makes admissions or tells a falsehood he may take the consequences; and at the same time that he may, by means of the interrogatory, obtain information as to what portion of the estate each heir is entitled.

(1) With reference to the statement of the Prætor: "He who answers having been interrogated in court," this must be understood to mean in the presence of a magistrate of the Roman people, or of the governor of a province, or any other judge, for the term *jus* he says merely signifies the place where the judge happens to be for the purpose of exercising his functions or rendering decisions, whether he does this at home or while on a journey.

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

Where anyone is interrogated as to whether he is heir, or to what portion of an estate he is entitled, or whether he has under his control anyone on whose account a noxal action is brought; he should have time for deliberation, because if he makes an incorrect statement he will be subjected to inconvenience.

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

And because, as it is to the interest of deceased persons that they should have successors, so it is also of interest to those who are living that they should not be hurried, so long as they deliberate in a proper manner.

(1) Sometimes a person who is interrogated as to whether he is an heir is not compelled to answer; as, for instance, where he is sued by another if the estate is in dispute, (and this was determined by the Divine Hadrian); for otherwise if he denied that he was the heir, he would

prejudice his case; or if he alleged that he was the heir he might be entangled in such a way as to be deprived of the estate.

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

Where anyone is interrogated in court as to whether a quadruped which has committed damage belongs to him, and he answers that it does, he will be liable.

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

Where a person who is interrogated with reference to a slave who has commited damage, answers that the slave is his, he will be liable under the *Lex Aquilia* as owner; and if the action is brought against him who answers, the real owner will be released from liability in said action.

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

Where anyone, without being interrogated, answers that he is the heir, he is considered as having been interrogated.

(1) We must understand the term "interrogated" not only to apply where questions are asked by the Prætor, but also where this is done by the adversary.

(2) If, however, a slave is interrogated, this is no interrogation any more than if a slave should ask the question.

(3) One person should not be compelled to answer for another as to whether the latter is the heir, for every one should be interrogated in court about himself; that is to say, when suit is brought against him.

(4) Celsus states in the Fifth Book of the Digest, that where a party defending a case for another is interrogated in court as to whether he for whom he appears is the heir, or to what part of the estate he is entitled, and he answered falsely, he himself will be liable as the defender of the case to the opposite party; but the case of him for whom he is conducting the defence will not be prejudiced; and there is no doubt that this opinion of Celsus is correct. Therefore, if he does not answer, should it not be considered whether or not he shall be held to be defending the case? It is only proper to say that he is not, since he is not defending it fully.

(5) Where anyone who is interrogated answers that he is the heir, but does not add to what part of the estate, it must be held that he has answered that he is heir to all of it; unless he should have been asked, for instance, whether he was heir to half of it, and he replied, "I am the heir," for then I should rather think that he had answered the question which was addressed to him.

(6) The question was asked, if anyone can be compelled to answer whether he is an heir by will, or whether the estate was obtained in his own name or through others who are subject to his authority, or through someone to whom he was heir? Therefore, in general, the Prætor should make up his mind when this question is put, whether the party is required to answer by what right he is heir, so that if he should ascertain that it is a matter of great importance, he may order him to answer more fully. These rules should be observed not only with reference to heirs but also with reference to Prætorian successors.

(7) Finally, Julianus states that anyone to whom an estate has been delivered after having been interrogated in court, is required to answer whether the estate has been delivered to him.

(8) Where an action *De peculio* is brought, neither the father nor the owner is required to answer whether he has the son or the slave under his control; because this question alone can be put, namely, whether the *peculium* is in the hands of the party against whom proceedings have been instituted.

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

It is not foreign to the purpose, when we wish to enter into a stipulation for the prevention of threatened injury, for the party to be interrogated in court as to whether his house or the place from which it is feared damage may result is his, and what interest he has in the same; so that if he denies that the property is his, and refuses to give security against the threatened injury, he may be compelled either to yield, or if he prefers to resist, to surrender the property as having acted fraudulently.

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

Sometimes also a party when interrogated is required to answer with reference to his age.

(1) Where anyone who is not an heir, having been interrogated, answered that he is an heir to a share in the estate, he can be sued just as if he were an heir to a share in the same; for he will be trusted as against himself.

(2) Where a party who is an heir to the fourth of an estate, or not an heir at all, answers that he is heir to the entire estate, he can be sued in an action brought for the whole.

(3) Where anyone who is the heir to half alleges that he is heir to a quarter, he will suffer the following penalty for his falsehood, that is to say, he can be sued for the entire estate; for he should not have lied by stating that he was an heir to a smaller portion;

(4) Sometimes, however, he may reasonably think that he is the heir to a smaller portion; for instance, if he did not know that he had acquired a part of said estate by accrual, or had been appointed heir to an uncertain portion of the same; why then should his rights be prejudiced by his answer?

(5) Moreover, where one keeps silent in the presence of the Prætor, he is in such a position that if an action is brought he can be sued for the entire amount, just as if he denied that he was an heir; for where a person does not answer at all he is contumacious. He must suffer the following penalty for contumacy, that is to say, he may be sued for the entire amount, just as if he had denied that he was an heir; because he is held to have been guilty of contempt of the Prætor.

(6) Where the Prætor says, "Does not answer at all," the latter authorities understand this term as meaning that a man is considered not to have answered at all who does not specifically reply to the question asked, word for word. Where anyone is interrogated as to whether he is the sole heir to the estate, and he answered that he is an heir to a portion of the same, then, if he is heir to half, his answer will not prejudice him, for this opinion is the more lenient one.

(7) It makes no difference whether a party, when interrogated, makes a denial, or keeps silent, or answers ambiguously, so as to leave the interrogater in a state of uncertainty.

(8) We have no doubt that when a party who is interrogated answers he will be entitled to relief, where proper cause is shown; or if anyone is interrogated as to whether he is heir to his father and answers that he is, and afterwards, a will is produced by which it is ascertained that he was disinherited; it is perfectly just that he should obtain relief, and this was stated by Celsus. He, however, bases it upon another principle, namely, that matters which are subsequently ascertained demand relief; as, for example, a will might be concealed or removed, and afterwards produced; for why should this prejudice the party who answered what seemed at that time to be true?

I hold that the same rule applies where a party answers that he is the heir, and the will is subsequently pronounced to be a forgery, or inofficious, or of no effect, for he did not answer dishonestly, but because he was deceived by the instrument.

(9) Where a man who is interrogated answers, he is liable in the same way as if he was bound by a contract under which he can be called to account, provided that he is interrogated by his adversary; but if he is interrogated by the Prætor, the authority of the Prætor has no bearing on

the case, but only the answer of the party himself, or any falsehood which he may tell, is involved.

(10) Where a person, induced by a reasonable mistake, denies that he is an heir, he is worthy of indulgence.

(11) But where a party answers incorrectly without malicious intent, but through negligence; it must be held that he should be released from liability, unless the negligence closely resembles malice.

(12) Celsus states that a party can recall his answer, if no disadvantage results to the plaintiff from his doing so; and this seems to me to be perfectly true, and especially if he should do this after he has obtained more information, being better informed as to his rights either by documents or by letters from his friends.

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

Where a son who has rejected his father's estate, is interrogated in court and answers that he is the heir, he will be liable; for by answering in this manner he is held to have acted as the heir. But if a son who has rejected the estate is interrogated, and remains silent, he is entitled to relief; for the Prætor does not consider anyone who has rejected an estate as an heir.

(1) Any exception which can be employed in bar of an action brought in court against defendants can also be employed by a party against whom proceedings have been instituted on account of his answer; as, for instance, one based upon informal agreement, or previous decision, etc.

13. *The Same, On Plautius, Book II.*

Persons who, while answering, make false confessions, are bound by the same only where anyone has a right of action against another on account of a matter with reference to which he was interrogated; because where suit can be brought against another party if he were the owner, we render ourselves liable by our confession. Hence, where someone is under the control of his father, and I answer that he is my son, I will only be liable where his age appears to be such that he can be my son; because false confessions must agree with what is natural; and on this account the result would be that if I answered on behalf of the father I will not be held liable.

(1) Where anyone answers that the head of a household is his slave, he will not be liable to a noxal action; and even if a free man serves me in good faith as a slave, a noxal action cannot be brought against me; and if proceedings should be instituted, the right of action against the person who committed the illegal act will remain unimpaired.

14. *Javolenus, On Cassius, Book IX.*

When the individual on whose account issue has been joined in a noxal action is decided to be free, during the course of the trial, the defendant should be discharged; and the interrogation will be of no benefit because it was made in court; since where anyone has a right of action against another on account of a third party, he cannot transfer the liability of said party to one who confesses in court that he is his slave; as, for instance, if he confesses that the slave of another is his own; still, as no action can be brought against another person on account of a man who is free, liability cannot be transferred by means of any interrogatory or confession. The result in this case is that no action can properly be brought with reference to a freeman against someone who has made a confession.

(1) In general, confessions are considered only where what is included in the confession can be accepted as in conformity with law and nature.

15. *Pomponius, On Sabinus, Book XVIII.*

If, before an estate has been entered upon, I answered that a slave belonging to the estate is

mine, I am liable; because an estate is considered the same as an owner.

(1) Where a party who is interrogated in court confesses that a slave is his, and the slave then dies, the party who answered is not liable; just as he would not have been liable after the death of said slave if he had belonged to him.

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

Where a slave is taken by the enemy, and someone, having been interrogated in court, answers with reference to him that he is under his control; although the right of *postliminium* may cause us to hesitate, nevertheless, I do not think that there is ground for a noxal action, because the slave is not under our control.

(1) Although it is held that a party is liable who confesses that another slave is his; still, it has been very properly held that he is only liable if the slave could have been his own, but if he could not acquire ownership in him, he is not liable.

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

Where the slave does not belong to one person, but to several, and all of them state falsely that he is not under their control, or some of them have done so, or have acted fraudulently to avoid having control of him; each one of them will be liable for the entire amount of damages, just as they would be liable if they had control over said slave; but one party who was not guilty of fraud in order to avoid having control of the slave, or does not make a false statement, will not be liable.

18. *Julianus, On Urseius Ferox, Book IV.*

Where a person who was heir to half of an estate wished to defend his absent co-heir, and, in order to avoid the burden of furnishing security, answered that he was the sole heir, and judgment was rendered against him; the plaintiff asked whether, as the party was insolvent, the former judgment could not be rescinded, and an action be granted him who was really the heir. Proculus answered that the judgment could be rescinded and the action be brought, and this is correct.

19. *Papinianus, Questions, Book VIII.*

Where a son who appears in behalf of his father keeps silent when interrogated, everything must be observed just as if he had not been interrogated.

20. *Paulus, Questions, Book II.*

Where a party answers that a slave who belongs to another is his, and suit is brought against him in a noxal action, the actual owner will be released. It is otherwise, however, where anyone confesses that he killed a slave whom someone else killed, or where anyone answers that he is an heir; for, in these instances, he who committed the act, or he who is the actual heir, is not released. These things do not conflict with one another; for, in the first instance, two parties are liable on account of the person of a slave, just as we say they are liable where a slave is owned in common, and if one is sued the other is discharged; but a party who confesses that he killed or wounded anyone is liable on his own account, nor should the crime of the person who committed it go unpunished on account of him who answered, unless the party making the confession was acting as the defender of him who committed the offence, or of the heir, and appeared in the case for this purpose; for then an exception will be granted and the plaintiff will be barred, because the former can recover what he paid by an action either on the ground of business transacted, or on that of mandate.

The same rule applies where a party states that he is the heir by direction of the heir himself, or he, for any other reason, wishes to appear in his defence.

(1) Where anyone is asked in court whether he is in possession of a certain tract of land; I ask whether he can be compelled to answer as to how much of the said land he is in possession? I

replied that Javolenus states that the possessor of land is obliged to answer as to the amount of said land which he holds in his possession; so that if he alleges that he is in possession of the smaller portion, the plaintiff shall be placed in possession of the other portion with reference to which no defence is made.

(2) The same rule applies where we give security against threatened injury; for in this instance the party should also answer what portion of the land belongs to him, so that he may arrange the stipulation with respect to said portion; and the penalty in this case, where the party does not promise, is that we should take possession; and therefore, on this account it is essential to know whether the party is in possession of said premises or not.

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

Wherever a sense of equity influences a judge, there is no doubt that in pursuance of justice an interrogatory should take place.

22. *Scævola, Digest, Book IV.*

Where the Imperial Procurator was conducting an examination with reference to a debt due to the Treasury, one of the sons of the deceased who had not obtained possession of the property of the estate and was not an heir, answered that he was the heir; can he be held liable by the other creditors as having answered the interrogatory? The reply was that a party cannot be sued on account of his answer by those who have not interrogated him in court.

TITLE II.

CONCERNING CERTAIN MATTERS WHICH COME BEFORE THE SAME JUDGE.

1. *Pomponius, On Sabinus, Book XIII.*

Where an action for the partition of an estate and one for the division of property held in common or for the establishment of boundaries is brought between several persons, the same judge should be selected; and, moreover, they should all be present in the same place, in order that the co-heir or joint-owners may the more easily assemble.

2. *Papinianus, Questions, Book II.*

Where one of several guardians is sued because the others are not solvent, and this one requests it, they can all be brought before the same judge; and this is set forth in Imperial Rescripts.

TITLE III.

CONCERNING THE CORRUPTION OF A SLAVE.

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

The Prætor says: "Where anyone is alleged to have harbored a male or female slave belonging to another, or have persuaded him or her maliciously to do anything which would depreciate the value of him or her, I will grant an action for double the value of the property."

(1) He will not be liable under this Edict who purchases a slave in good faith, nor can he bring an action for the corruption of the slave, because he has no interest in the slave not being corrupted; and, in fact, if anyone should admit that this is true, the result would be that an action would lie in favor of two parties for the corruption of the slave, which is absurd.

We are of the opinion that this action cannot be brought by a party whom a free man is serving as a slave in good faith.

(2) When the Prætor says "harbors," we understand this to mean where anyone takes under his protection a slave belonging to another; and this, properly speaking, signifies giving him refuge for the purpose of concealing him, either on his own premises, or in a place or building belonging to another.

(3) "To persuade" does not exactly mean to compel and force anyone to obey you, but it is a term of moderate signification; for anyone can persuade another by either good or bad advice, and therefore the Prætor adds "maliciously," by which he "diminishes the value," hence, a party does not commit the offence unless he persuades the slave to do something by which his value may be lessened, and therefore, where a party solicits a slave either to do something or to contrive something which is dishonorable, he is held to be subject to this Edict.

(4) Shall a person, however, be liable where he has driven a slave of good habits to commit a crime, or instigates a bad slave, or shows him how to perpetrate the act?

The better opinion is that even if he showed the bad slave how to perpetrate the offence he will be liable. And, in fact, if the slave had already intended to take to flight, or to commit a theft, and the person referred to should have approved of his intention, he will be liable, for the malice of the slave should not be increased by praising him; therefore, whether he made a good slave bad or a bad slave worse, he will still be held to have corrupted him.

(5) He also makes a slave worse who persuades him to commit some injury or theft, or induces him to take to flight, or instigates the slave of another to do these things, or to confuse his *peculium*, or to be a lover of women, or to wander about, or to devote himself to magical arts, or to be present too often at exhibitions, or to be riotous; or to persuade a slave who is a court official either by words or by bribery to mutilate or falsify the accounts of his master, or even to render an account of which he has been placed in charge unintelligible;

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

Or makes him extravagant or disobedient, or persuades him to indulge in debauchery.

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

By the addition of the term "maliciously" the Prætor refers to the deceit of the party who persuades the slave, but if anyone should depreciate the value of the slave without malicious intent, he does not incur disgrace; and he is not liable if he does this for a joke.

(1) For this reason a question arises if anyone should persuade a slave belonging to another to climb up on a roof, or to descend into a well, and he, obeying, ascends or descends and breaks a leg or any other limb, or loses his life; will the party be liable? If he did this without malicious intent he will not be liable, but if he did it maliciously he will be;

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

It is more convenient, however, to hold him liable to a prætorian action under the *Lex Aquilia.*

5. Ulpianus, On the Edict, Book XXIII.

The term "maliciously" also has reference to a person who harbors a slave, so that he is not liable unless he acted maliciously in doing so. If, however, anyone harbors a slave in order to hold him for his master, or, induced by humanity or pity, or for some other reason which is praiseworthy and just, he will not be liable.

(1) Where anyone maliciously persuades a slave whom he thought to be free to commit some act, it seems to me that he should be held liable; for he is guilty of a greater offence who, thinking a man is free, corrupts him, and therefore if he is a slave the party will be liable.

(2) This action is for double damages, even against a party who confesses, although the *Lex Aquilia* only imposes this penalty upon one who makes a denial.

(3) Where a male or female slave is said to have committed the act, an action is granted with the privilege of surrendering the slave by way of reparation.

(4) This action has reference to the time when the slave was corrupted or harbored, and not to the present time; and therefore if the slave should die, or be sold or manumitted, the action can, nevertheless, be brought; and where the right has once arisen, it is not extinguished by

manumission;

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

For the estimate of former value is made for the purposes of this action;

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

Since bad slaves may perhaps obtain their freedom, and sometimes good reasons may arise subsequently for their manumission.

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

An heir, whose slave was corrupted, is entitled to this action, not only where the slave continues to be a portion of the estate, but also where he has ceased to be such; for instance, where he has been bequeathed.

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

The question is asked by Julianus in the Ninth Book of the Digest, whether a party who corrupts a slave owned in common by myself and him, can be held liable to this action; and he says that he can be held liable by the other joint-owner; and, moreover, that suit can be brought against him for the partition of common property, and also on the ground of partnership, if the joint-owners are partners. But why does Julianus make the condition of the partner worse when he brings suit as such, than where he institutes proceedings against a stranger? Where an action is brought against a stranger, this can be done whether he harbored or corrupted the slave, but when it is brought on the ground of partnership, this is done without the alternative, that is to say, without the allegation of harboring him; for perhaps Julianus thought that this did not affect the partner, for no one can harbor his own slave; but if he did so for the purpose of concealing him, it can be maintained that he is liable.

(1) Where I have the usufruct in a slave and you the mere ownership, and the said slave is deteriorated by me, you can institute proceedings against me; but if you committed the act, I can proceed against you by means of a prætorian action; for this action is applicable to all kinds of corruption, and it is to the interest of the usufructuary for the slave in whom he enjoys this right to be of good habits. The usufructuary is also entitled to a prætorian action if another party should harbor or corrupt the slave.

(2) This action is also granted for double the value of the property.

(3) But it is still a question whether an estimate of the damage sustained by the slave in body or disposition should only be made, that is to say, of the amount of diminution of the value of the slave, or whether other things should be also taken into consideration. Neratius states that the party guilty of corrupting the slave should be compelled to pay damages to the amount to which the value of the slave is diminished on account of his being corrupted.

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

In this case an appraisement of the property which the slave took away with him is also included, as all the loss is doubled, and it makes no difference whether the property was brought to the defendant or to another, or was even consumed; for it is more just that the party who was the principal in the offence should be held liable, than for him to be sought for to whom the property was brought.

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

Neratius says that where thefts are committed afterwards, they are not to be included in the estimate. This opinion I think to be correct, for the words of the Edict, "As much as the value of the property," embrace all damage.

(1) I persuade a slave to deface notes of debtors, and I undoubtedly will be liable; but if, on account of the habit of committing breaches of the law which he has contracted, the slave

steals, defaces, or destroys, other documents of this kind, it must be said that the person who corrupted him is not liable on account of these acts.

(2) Although an action will lie for the corruption of slaves with reference to property which is stolen, we can, nevertheless, bring an action for theft, as it must be held that the articles were removed with the aid and advice of the party who made the solicitation; nor will it be sufficient to bring either one of the actions, because the employment of one does not cause the other to be dispensed with.

Julianus says the same thing with reference to a party who harbors and conceals a slave, and deteriorates him; for the offences of theft and of deteriorating a slave are distinct. In addition to this, the party will be liable to a personal action for the recovery of the property; for although the other may have obtained the slave by means of a suit of this kind, as well as a penalty by an action for theft, still, he is entitled to an action for the corruption of the slave to the amount of his interest:

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

For the reason that the defendant is still bound, although the property has been restored.

13. *Ulpianus, On the Edict, Book XXIII.*

This action is a perpetual one, and is not limited by time, and lies in favor of the heir and other successors; but it will not be granted against an heir, because it is a penal one.

(1) A party is also liable to this action if he corrupts a slave belonging to an estate; and he is also liable in a suit for the estate as a depredator,

14. *Paulus, On the Edict, Book XIX.*

So that the action for the recovery of an estate may have the same scope as this action.

(1) This Edict does not apply in the case of the corruption of a son or a daughter under paternal control, as the action was established for corrupting a slave who is part of our property, and it is one in which the owner can prove that he has become poorer, although the honor and reputation of his family remain unimpaired. An equitable action for damages, however, will lie for an amount to be decided by the judge, since it is for our interest not to have the minds of our children corrupted.

(2) Where a slave who is owned in common by yourself and me corrupts a slave who is mine individually; Sabinus says that an action cannot be brought against the joint-owner any more than if my own slave had corrupted another of my slaves. Moreover, if a slave owned in common corrupts one owned by another, it should be considered whether an action can be brought against both joint-owners, or against each separately, in the same way as other offences which are the subject of noxal actions. The better opinion is that each owner is liable for the entire amount, but if one of them pays, the other will be released.

(3) Where a slave in whom I have an usufruct corrupts a slave belonging to me, I have a right of action against the mere owner of the property.

(4) A debtor is entitled to this action on account of a slave who has been given in pledge for the debt.

(5) In this action the double damages are not estimated in addition to the property, for what was doubled is the loss sustained.

(6) The result of this is that if it is proved that you have persuaded my slave to steal something from Titius; you will not only be liable to the extent to which the slave is deteriorated, but also for what I shall be obliged to pay to Titius.

(7) Again, you will be liable to me not only if the slave caused me loss on account of your advice, but also if he caused it to a stranger as well, because I am responsible under the *Lex*

Aquilia; but if I am liable to anyone for hiring because I leased a slave to him, and he became deteriorated through your influence, you will be liable on this account, and also under similar circumstances.

(8) The estimate of damages made in this action depends upon how much the value of the slave was diminished, which is the question to be decided by the judge.

(9) Sometimes, in fact, the slave becomes worthless, so that it is of no advantage to have such a slave. In this instance, can the party who influenced him be compelled to pay the value of the slave, and the owner still hold him and profit by this; or should the owner be compelled to surrender the slave and accept his value? The better opinion is, that the owner should have the choice as to whether he would prefer to retain the slave and receive damages equal to double the amount to which the slave was deteriorated; or to surrender the slave, if he has the power to do so, and accept his value; and if he has not power to do this, he should still accept his value, and assign to the party who solicited the slave his right of action to recover the slave at his own risk.

Whatever has been stated with reference to the surrender of the slave is only applicable where the slave is alive when proceedings are instituted. But what if proceedings were instituted after the slave was manumitted? The defendant will not readily be heard by the judge, if he alleges that he manumitted him because he did not wish to have him in his house, as he desired to obtain the money as well as the freedman.

15. *Gaius, On the Provincial Edict, Book VI.*

The mind of a slave is corrupted if he is persuaded to treat his master with contempt.

16. *Alfenus Varus, Digest, Book II.*

The owner of a slave who had employed him as a steward manumitted him, and subsequently caused him to produce his accounts, and finding that they were not correct, he ascertained that the slave had spent the money on some woman. The question arose whether he could bring suit against this woman for corrupting the slave, as the slave was already free? I answered that he could, and that he could also do this for theft on account of the money which the slave had given her.

17. *Marcianus, Rules, Book IV.*

An action is granted a husband against his wife on account of corrupting a slave, even while marriage exists, but only for simple damages in consideration of matrimony.

TITLE IV.

CONCERNING FUGITIVE SLAVES.

1. *Ulpinaus, On the Edict, Book I.* He who conceals a fugitive slave is a thief.

(1) The Senate decreed that fugitive slaves shall not be admitted on land or be protected by the superintendents or agents of the possessors of the same, and prescribed a fine. But, if anyone should, within twenty days, restore fugitive slaves to their owners, or bring them before magistrates, what they had previously done will be pardoned; but it was afterwards stated in the same Decree of the Senate that immunity is granted to anyone who restores fugitive slaves to their masters, or produces them before a magistrate within the prescribed time, when they are found on his premises.

(2) This decree also granted a right of entry to a soldier or civilian on the estates of senators or private parties for the purpose of searching for a fugitive slave, and, indeed, the *Lex Flavia*, as well as the Decree of the Senate which was enacted while Modestus was Consul, had reference to this matter. It is stated therein that where parties wished to search for fugitive slaves, letters should be given them addressed to magistrates, and a fine of a hundred *solidi* was established to be imposed upon the magistrates, if, having received the letters, they

refused to assist the parties making the search; and the same penalty was inflicted upon anyone who refused to allow the search to be made on his premises.

A general Rescript of the Divine Marcus and Commodus is extant, in which it is set forth that all governors, magistrates, troops and garrisons are obliged to assist persons who are searching for fugitive slaves, and to surrender them if they are found; and that any parties on whose land the slaves are concealed shall be punished if they are implicated in the crime.

(3) Every person whosoever who arrests a fugitive slave is bound to produce him in public.

(4) And the magistrates are very properly notified to detain them carefully in custody to prevent their escape.

(5) You must understand the word "fugitive" to include a slave who is in the habit of running about. Labeo, however, says in the first Book on the Edict, that the offspring of a fugitive female slave is not included in this designation.

(6) A slave is understood to be produced in public who is delivered up to the municipal magistrates or officers of the government.

(7) Careful custody permits the use of irons.

(8) The slaves must be held in custody until they are brought before the Prefect of the Watch, or the Governor. Information must be given to the magistrates of their names and marks, as well as the addresses of the party to whom any one of them says he belongs; in order that fugitive slaves may be the more easily recognized, and claimed. And in the word "marks" scars are also included.

The rule is the same where these matters are brought to public notice by writing in a public place or in a temple.

2. *Callistratus, Judicial Inquiries, Book VI.*

Slaves who are simply fugitives should be returned to their masters; but where they pretend to be free, it is customary to punish them severely.

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

The Divine Pius stated in a Rescript that, where a party wishes to search for a fugitive slave on the premises of another, he can apply to the Governor for letters to be furnished him; and, if the case demands it, an officer also, in order that he may be permitted to enter and make search, and the Governor can also inflict a penalty upon him who does not permit the search to be made. The Divine Marcus, in an Address which he delivered before the Senate, granted power to parties who wished to search for fugitive slaves to enter upon and search the land of the Emperor, as well as that of senators and private individuals for fugitive slaves, and to examine the bed-rooms and tracks of those who concealed them.

4. *Paulus, Sentences, Book I.*

Custom-house officers and policemen are required to carefully retain fugitive slaves in custody after they have been caught. Municipal magistrates must also send such fugitive slaves, after they have been caught, properly guarded to the office of the Governor of the province or the Proconsul.

5. *Tryphoninus, Disputations, Book I.*

Where a fugitive slave betakes himself to the arena, he cannot escape the power of his master by exposing himself to this danger, which is only that of the risk of death; for the Divine Pius stated in a Rescript that such a slave must, by all means, be restored to his master, either before or after the combat with wild beasts; since sometimes he may have embezzled money, or committed some other greater breach of the law, so that he would prefer to betake himself to the arena rather than undergo an inquiry, or suffer punishment for his flight, hence he must

be given up.

TITLE V.

CONCERNING GAMBLERS.

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

The Prætor says: "Where anyone beats a person in whose house a game with dice is said to have taken place, or damages him in any way; or where anything at the time has been removed clandestinely from the house, I will not grant an action. Where anyone employs violence on account of a game with dice, I will punish him as the circumstances may demand."

(1) Where gamblers rob one another, an action will not be refused on the ground of property taken by force; but it is only the host who is forbidden to bring suit, and not the gamblers, although they may seem to be unworthy of indulgence.

(2) It should also be noted that where the proprietor of the house has been beaten or has suffered loss, he cannot bring an action, no matter when or where this occurred, but theft can be committed with impunity in the house at the time when the gambling was going on, even though the party who commits any one of the offences may not have taken part in the game. It is certain that we must understand the term "house" to mean the habitation and domicile.

(3) Where the Prætor refuses to grant an action for theft, let us see whether this refers to the penal action alone, or whether the complainant wishes to introduce proceedings for the production of the property, or bring an action for recovery? It is stated by Pomponius that it is only the penal action which is refused, but this I do not think to be correct, as the Prætor says simply, "If anything has been removed clandestinely, I will not grant an action." He says further: "Where anyone employs violence on account of a game with dice, I will punish him as the circumstances may demand." This clause has reference to the punishment of a party who compels another to play, and signifies that he may be fined or sentenced to the quarries, or imprisoned in chains.

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

For certain persons are accustomed to force others to play, sometimes doing this from the beginning, and sometimes, after they themselves are beaten, compelling them to remain.

(1) A Decree of the Senate forbids playing for money, except where the parties contend with spears, or by throwing the javelin, or in running, leaping, wrestling, or boxing, for the purpose of displaying courage and address:

3. *Marcianus, Rules, Book V.*

In cases of this kind bets are allowed under the Titian, Publician, and Cornelian laws, but it is not lawful under other laws where the contest is not for the exhibition of skill.

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

Where anything is out on the table at a banquet members of the household are permitted to gamble for it.

(1) If a slave, or a son subject to paternal control loses, his father or his owner are entitled to recover what he lost. Moreover, if a slave has received money, an action *De peculio* will be granted against his master, but not a noxal action, because it is based on business transacted; but the defendant will not be compelled to pay more than the amount included in the *peculium.*

(2) An equitable action is granted under this Edict against the head of a household or a patron, for the recovery of money lost by games with dice.

TITLE VI.

WHERE A SURVEYOR MAKES A FALSE REPORT WITH REFERENCE TO MEASUREMENTS.

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

The Prætor grants an action *in factum* against a surveyor of land, as we must not be deceived by him, since we are interested in obtaining a correct report of measurements; where, for example, a controversy has arisen with respect to boundaries, or the purchaser or the vendor desires to ascertain the size of the tract of land to be sold.

He grants this action for the reason that the ancient authorities did not consider the contract made with a person of this kind to be one of leasing and hiring, but rather that his services were donated as a favor, and hence what was given to him by way of remuneration was designated honorary; but if an action is brought for leasing and hiring, it must be said that it is brought to no purpose.

(1) This action only requires the existence of positive malice. For it was held that the surveyor will be thoroughly restrained if he can only be sued on the ground of positive malice, since he is not civilly liable. Therefore, if he has displayed a want of skill, he who employed him has only himself to blame, but if he was guilty of negligence, he will be equally secure; and it is evident that gross negligence resembles malice. But where he receives compensation, he will, according to the terms of the Edict, be responsible for every kind of negligence; for undoubtedly the Prætor knows that parties of this kind work for pay.

(2) He only is liable to this action who makes a report; but we must understand that he makes a report who does so through another;

2. *Paulus, On the Edict, Book XXV.* Or in writing.

(1) If, however, I direct you, a surveyor, to survey my field, and you turn this over to Titius, and he, in the course of the work does something through positive malice, you will be liable; because you have displayed positive malice in trusting such a man.

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

Where I direct two persons to make a survey and both of them are guilty of malice, I can bring suit against them severally for the entire amount; but where one of them, after having been sued, satisfies my claim, an action against the other one must be refused.

(1) This action can be brought by anyone whose interest it was that a report of false measurement should not be made; that is to say, either by the purchaser or by the vendor, who has been injured by the report.

(2) Pomponius, however, says that if on account of the report, the purchaser pays the vendor too much, a suit cannot be brought by him against the surveyor, because he has a right of action to recover what has been paid in excess; for it is not the interest of the purchaser to do this, since he has the right of action for recovery, unless the vendor is insolvent; for then the surveyor will be liable.

(3) Where the vendor, having been deceived by the surveyor, conveys a larger amount of land; Pomponius says, that in compliance with the same rule, no action against the surveyor will lie, because the vendor is entitled to an action on sale against the purchaser, unless the purchaser is not solvent.

(4) Pomponius also states that where a surveyor is employed on account of a trial, and he defrauds me in his report, he will be liable if, on this account, I obtain less by the judgment. It is clear that, if he was appointed by the court and maliciously makes a report against me, he doubts whether I have a right to hold him liable, nevertheless, he rather thinks I have.

(5) Pomponius says that this action should be granted to the heir and to other persons of the same kind, but that it should be refused against the heir and persons of that description.

(6) He says that the action is noxal rather than *De peculio* when brought with reference to a slave, although a civil action *De peculio* may be available.

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

This action is a perpetual one, for the cause derives its origin not from the time when the bad faith began, but from the date when the business was undertaken.

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

Where the surveyor does not make a false report of the measurement, but delays the report, and the result is that the vendor is released after promising to convey the property within a specified time, this action cannot be brought; and Pomponius says that an equitable action should not be granted, and therefore recourse must be had to an action based on fraud.

(1) If a false report is made, and the purchaser sues the vendor on his contract, he can also sue the surveyor, but if he had no interest in doing this, judgment will not be rendered against the surveyor. If he does not sue the vendor for the entire amount which is lacking, but for a smaller amount; Pomponius says, and very properly, that suit can be brought against the surveyor for the remainder. The Prætor extended the scope of this action still further; for where there is a false statement made of the measure of anything else, this action is available; hence, where a party deceives his employer in the measurement of a building or in that of grain or wine;

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

Or with reference to the breadth of a pathway, or as to a servitude calling for the insertion of timbers, or a projecting roof, when inquiry is made for this purpose, or where the measurement of a court-yard or of materials or stone is taken, and a false report given;

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

Or where the dimensions of anything else is falsely stated, he will be liable.

(1) This action will be granted where the surveyor makes a false measurement by means of instruments.

(2) Pomponius also states that anyone is entitled to this action against someone who is not a surveyor but was guilty of deceit in measurement.

(3) In the same manner the action should be granted against an architect who has been guilty of deceit; for the Divine Severus decreed that action should be granted against an architect or a contractor.

(4) I, myself, think that an action should be granted also against an accountant who designedly makes a false calculation.

TITLE VII.

CONCERNING RELIGIOUS PLACES, THE EXPENSES OF FUNERALS, AND THE RIGHT TO CONDUCT THE SAME.

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

Where anyone expends anything on account of a funeral, he is considered to have made the contract with the deceased and not with his heir.

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

Aristo says that a place in which a slave has been buried is religious.

(1) A party who has placed a dead body in the premises of another or caused this to be done, is liable to an action *in factum*. We must, however, understand "the premises of another" to mean either a field or a building; but these words grant the action to the owner, not to a possessor in good faith; for when the statement is made "In the premises of another," it is apparent that the owner is meant, that is the party to whom the ground belongs. Even when an usufructuary makes the interment, he will be liable to the mere owner of the property. It is debatable whether a joint-owner is liable if he acted without the knowledge of his co-owner; but the better opinion is that he can be sued in an action for the partition of an estate, or in one for the division of common property.

(2) The Prætor says: "Where the body or bones of a dead man are said to have been taken to ordinary ground or to a burial place in which the party had no right, he who does this is liable to an action *in factum,* and will be subjected to a pecuniary penalty."

(3) The "taking" which the Prætor was thinking of is that which occurred for the purpose of burial.

(4) Ground is styled "ordinary" which is neither sacred, consecrated, nor religious, but is a locality to which none of these adjectives will apply.

(5) A burial-place is a spot where human bodies or bones are deposited. Celsus, however, says that a place which is destined for burial does not become religious entirely, but only that portion of it where the body is laid.

(6) A monument is whatever is erected for the purpose of preserving the memory of the deceased.

(7) When anyone has an usufruct, this does not render the place religious. Where, however, one party has the mere ownership, and another the usufruct, the latter cannot make the place religious, nor can the mere owner do so, unless he should happen to bury there the party who bequeathed the usufruct, since he could not be so conveniently buried elsewhere; and this was the opinion of Julianus. The place, however, cannot be rendered religious if the usufructuary is not willing; but if he consents, the better opinion is that it becomes religious.

(8) No one can make a place religious which is subject to a servitude, unless the party entitled to the servitude consents. But if the party can make use of the servitude no less conveniently in some other place, it cannot be held that the burial was made for the purpose of interfering with the servitude, and therefore the place becomes religious; and indeed this is reasonable.

(9) Where a person has given his land in pledge and buries one of his own family therein, he will make it religious; and if he himself should be buried there, the same rule applies; but he cannot assign this right to another.

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

It is more to the public advantage to say that a place can be made religious by the consent of all parties; and this was held by Pomponius.

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

Where a party who was appointed heir buries the body of the head of the family before he enters upon the estate, by doing so he makes the place religious, but no one should think that by this act he is conducting himself as heir; for let us suppose that he is still deliberating as to whether he will enter upon the estate. I, myself, am of the opinion that even though the heir did not bury the body but someone else did, and the heir either took no active part, or was merely absent, or feared that he might be considered as conducting himself as heir, still he makes the ground religious; for very often deceased persons are buried before their heirs appear. In this instance the ground becomes religious only when it was the property of the deceased, for it is but natural to hold that a place where a person is buried belonged to him;

especially if he is buried in a spot which he himself had selected. To such an extent does this rule apply that, even where the body is buried by the heir in ground bequeathed by a legacy, still, the burial of the testator renders the place religious, provided that he could not have been buried as conveniently elsewhere.

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

"The family burying place" means one set apart by some one for himself and his household; but an "hereditary burial-place" is one which a man provides for himself and his heirs,

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

Or where the head of the household acquired it by hereditary right. In both instances, however, heirs and other successors of every description whatever may legally be buried, and may also bury others, although they may be heirs to a very small amount either by will or on intestacy, even if the other heirs do not consent.

The same privilege is granted to children of both sexes, and descendants of other degrees, as well as to emancipated persons, whether they have become heirs or have rejected the estate. With reference to disinherited relatives, however, they may be buried through motives of humanity, unless the testator, influenced by just hatred, has expressly forbidden it; but they cannot bury others except their own descendants. Freedmen can neither be buried, nor bury others under such circumstances, unless they become the heirs to their patron; although certain patrons have indicated by inscriptions that they have erected monuments for themselves and their freedmen. Papinianus also held this opinion, and it has repeatedly been established by decisions.

(1) So long as there is only a monument, anyone can sell it, or give it away; if, however, it becomes a cenotaph, it must be stated that it can be sold; as the Divine Brothers stated in a Rescript that a structure of this kind is not religious.

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

He who buries a dead body on land belonging to another can be compelled by an action *in factum* to either remove the body which he buried, or to pay the price of the land. This action can be brought by an heir as well as against one, and it is perpetual.

(1) Where a man placed a dead body in a stone chest which belongs to another, in which, as yet, no corpse has been laid; the proconsul grants an equitable action *in factum* against him, since it cannot be properly said that he placed the body in a burial-place, or on land belonging to another.

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

Where bones or a body have been buried by another party not a relative, it is a question whether the owner of the land can dig them up, or remove them without a decree of the pontiffs or the order of the Emperor; and Labeo says that the pontifical permission or the order of the Emperor must be obtained, otherwise an action for injury will lie against the person who removed the remains.

(1) Where a place that is religious is alleged to have been sold as profane, the Prætor grants an action *in factum* in favor of the party who is interested in the matter against the vendor; and this action can also be brought against the heir of the latter, since it resembles an action on a contract of sale.

(2) Where a man buried a dead body in a place intended for the use of the public, the Prætor will grant an action against him if he acted maliciously, and he should be punished by the extraordinary authority of the Court, although the penalty is a moderate one; but where he acted without malice he must be discharged.

(3) In this action the term "profane place" is also applicable to a building.

(4) This action can not only be brought by an owner but by anyone entitled to the usufruct in the land, or by one who is entitled to a servitude over the same; because these parties also have the right to prevent it being done.

(5) Where anyone is prevented from burying in a place where he has the right to do so, he is entitled to an action *in factum* as well as an interdict, even though he himself has not been hindered but his agent has been; since, under such circumstances, he himself is considered to have been prevented.

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

Where some one is prevented from burying the body or bones of a deceased person, he can at once make use of an interdict by which it is forbidden to employ force against him, or he can make the interment elsewhere, and afterwards bring an action *in factum*, by means of which, as plaintiff, he will recover damages to the amount of his interest in not having been prevented from making the interment; and in the calculation shall be included the price of the land which he purchases or the rent of any which he leases, or the value of his own land which no one would render religious unless compelled to do so. Therefore, I wonder why it should appear to be settled that this action cannot be granted either in favor of, or against an heir; as it is evident that it involves the account of a certain sum of money which forms the basis of the claim; at all events the suit can be brought at any time between the parties themselves.

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

Where the vendor of land reserves a burial-place for the interment of himself and his descendants, and he is prevented from using a road for the purpose of burying a member of his household, he can bring suit; for it has been decided that a right of way through the land for the purpose of burial was reserved in the agreement between the purchaser and the vendor.

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

If, however, the site of a monument should be sold under the condition that no one should be buried there whom there was a right to bury; an agreement of this kind will not be sufficient, but it must be made secure by means of a stipulation.

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

Where anyone has a burial place but has no right of way to it, and is prevented from reaching it by his neighbor, the Emperor Antoninus and his father stated in a Rescript that it is customary to petition for a pathway to a burial place by sufferance, and it is usually granted; and, whenever there is no servitude, the privilege can be obtained from the party who owns the adjoining premises. This rescript, however, which gives the means of obtaining the right of way by petition, does not allow a civil action, but it may be applied for in extraordinary proceedings; for the governor is required to compel a pathway to be granted to the party where a reasonable price is paid, and the judge must also investigate whether the place is suitable so that the neighbor may not suffer serious injury.

(1) It is provided by a decree of the Senate that the use of a burial place is not to be contaminated by alterations, that is to say, it must not be used for other purposes.

(2) The Prætor says: "Where any expense is incurred on account of a funeral I will grant an action for its recovery against the party who is interested in the same."

(3) This Edict is issued for a good reason, namely, in order that a party who conducted the funeral may bring suit for what he expended; so that the result would be that bodies will not lie unburied, or that some stranger should conduct the funeral.

(4) He whom the deceased selected must conduct the funeral, but if he should not do so he will be liable to no penalty, unless something of value was left to him for this purpose; for then, if he does not comply with the will of the deceased, he will be excluded from the

bequest. If, however, the deceased did not make any provision for this, and the duty has not been transferred to anyone, it will devolve upon the heirs who were appointed, and, if none were appointed, upon the heirs at law or the cognates who succeed in their regular order.

(5) The funeral expenses are to be regulated in accordance with the means or dignity and rank of the deceased.

(6) The Prætor, or the municipal magistrate, is required to order the funeral expenses to be paid out of the money belonging to the estate if there is any, and if there is none, he must order such property to be sold as would perish by lapse of time, and the retention of which would be a burden to the estate; and in case this cannot be done, he shall order any gold or silver which there may be, to be sold or pledged, in order to provide the necessary funds.

13. *Gaius, On the Provincial Edict, Book XIX.*

Or he may collect the money from debtors to the estate if he can easily do so:

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

And if anyone should interfere with the purchaser in order to prevent said property from being delivered to him, the Prætor must intervene and protect an act of this kind, where any obstacle is interposed.

(1) Where the deceased was either a tenant or a lodger, and left nothing to pay his funeral expenses; Pomponius says that they must be paid out of the proceeds of articles which have been brought into the lodging, and if there is anything in excess, this will be liable for unpaid rent.

Moreover, if any legacies have been bequeathed by the testator whose funeral is the subject of discussion, and there is nothing with which to bury him, the said legacies must also be utilized for this purpose; for it is better that the funeral expenses of a testator should be obtained from his own property than that others should receive their legacies. Where, however, the estate has been entered upon, any property sold must not be taken from the purchaser, because he who has brought anything under an order of court is a *bona fide* possessor, and has the ownership of the same. Nevertheless, a legatee should not be deprived of his legacy if he can be indemnified by the heir; but if he cannot, it is better for the legatee not to be benefited pecuniarily, than that the purchaser should sustain any loss.

(2) Mela says that if a testator directs anyone to attend to his funeral and he does not do so after having received money for that purpose, an action on the ground of fraud shall be granted against him; nevertheless, I think, that he can be compelled to conduct the funeral under the extraordinary authority of the Prætor.

(3) The only expense which can be incurred on account of a funeral is that without which the funeral could not be conducted; as, for instance, what is incurred by the removal of the body, and also where money is expended on the place where the body is to be buried. Labeo says it must be considered to be expended on account of the funeral, because a place must be prepared in which the body may be laid.

(4) The expenses of anyone who dies away from home and which are incurred for the purpose of bringing back the body, are included in the funeral expenses, although he is not yet buried; and the same rule applies where anything is done for the purpose of guarding the body, or for preparing it for burial, or where anything is expended in providing marble or clothing.

(5) It is not proper, however, that any ornaments nor other articles of this kind should be buried with the body, as persons of the lower class are accustomed to do.

(6) This action which is styled a funeral one, is based upon what is proper and reasonable, and includes only what has been expended with reference to the funeral, but no other outlay. The term "reasonable" must be understood to have reference to the rank of the party who was

buried, to the circumstances of the case, to the time, and to good faith; so that no charge may be made for more than the actual amount disbursed, nor even for what was actually expended, if this was immoderate. Therefore the means of the party for whom the money was spent must be taken into consideration, as well as the property itself, where it is immoderately expended without good cause. But what must be done where the expense is provided for by the will of the testator? In reply to this it must be held that his will is not to be followed if the expense should be excessive, for it ought to be in proportion to the means of the deceased.

(7) Sometimes, however, where a man has assumed the payment of funeral expenses he cannot recover them if he was actuated by filial affection, and did not pay with the intention of recovering the amount which he incurred; and this our Emperor stated in a Rescript. Therefore an estimate will have to be made by an arbiter, and the motive with which the expense was incurred carefully considered; that is, whether the party attended to this matter for the deceased or for his heir, or whether he was induced by humanity, or compassion, or filial reverence, or affection? Nevertheless, the degree of compassion may be distinguished so as to conclude that the party who conducted the funeral at his own expense did so in order that the deceased should not remain unburied, and not that he did this gratuitously; and if this should be clear to the judge he ought not to discharge the defendant; for who is there that can bury the dead body of a stranger without being impelled by a sense of duty? Hence it is proper for the party to state whom he buried, and from what motive he did so, to avoid being afterwards interrogated with reference to the same.

(8) In the case of many sons who conduct the funerals of their parents, or other persons who could have been appointed heirs do so although on this account it is not to be presumed that they are acting as heirs, or entering on the estate, still, in order that necessary heirs may not be held to have interfered, or others to have acted as heirs; it is customary for them to state that they caused the funeral ceremonies to be conducted from motives of duty. If anything superfluous should have been done, it would be held that the parties protected themselves to avoid being thought to have intermeddled, and not for the purpose of recovering their expenses; since they have plainly stated that they acted from motives of duty, but they must go still farther in their allegations in order to be able to recover what they expended.

(9) Perhaps someone may say that there are instances where a certain share of the expense incurred can be recovered, so that the individual in question did this partly while transacting business for another, and partly because he was impelled by a sense of duty. This is true, and therefore he can recover a portion of the expense which he did not incur with the intention of donating.

(10) When a judge hears a case of this kind which is based on grounds of equity he should sometimes not allow a moderate expenditure where, for example, the expenses of his funeral had been small, with the intention of casting odium upon the character of the deceased, who had been a wealthy man; as the judge, in this instance, ought not to consider an account of this kind, since it is apparent that by burying him in this manner a premeditated insult was offered to his memory.

(11) Where anyone buries the head of a household while under the impression that he himself is his heir, he cannot bring an action to recover the funeral expenses; because he did not act with the intention of transacting the business of another; and this is also the opinion of Trebatius and Proculus. I think, however, that an action for the funeral expenses should be granted to him where proper cause is shown.

(12) Labeo says that whenever anyone has some other action for the purpose of recovering funeral expenses he cannot avail himself of a funeral action; and therefore, if he is entitled to an action for the partition of an estate, he cannot bring a funeral action; but it is clear that if an action for the partition of an estate has been already brought, he can bring one for the recovery of the funeral expenses.

(13) Labeo also says that if you conduct the funeral of a testator against the wishes of his heir, you can bring the funeral action if proper cause is shown; but what if the person whom the heir forbade to act was the son of the testator? In this instance it can be alleged against the plaintiff, "Therefore you have conducted the funeral through a sense of duty." But suppose that I have made the statement, I will then be entitled to bring the funeral action, for it is proper that deceased persons should be buried by means of funds obtained from their estates. What if a testator had directed you to make arrangements for the funeral, and the heir prohibits it, and you, nevertheless, conduct it; is it not just that you should have the right to bring an action for the recovery of the funeral expenses?"

Generally speaking, I am of the opinion that a just judge will not rigidly adhere to the mere action based on business transacted, but will construe the rules of equity more liberally, since this is something which the character of the proceeding enables him to do.

(14) The Divine Marcus, however, stated in a Rescript that any heir who prevents a funeral from being conducted by the party whom the testator selected, does not act honorably; although there is no penalty established by which he may be punished.

(15) If anyone conducts a funeral at the request of another, he is not entitled to a funeral action, but he certainly is who directed the funeral to take place, whether he paid the expense of the same to him whom he requested to conduct it, or whether he still owes it. Where, however, a ward makes such a request without the authority of his guardian, a prætorian action for the recovery of the funeral expenses should be granted against the heir in behalf of the party who incurred them; for it is unjust for the heir to profit in this way. Where, however, a ward orders a funeral which he himself ought to attend to be conducted without the authority of his guardian; I think that the action should be granted against him, if he himself is the actual heir to the party who was buried, and the estate is solvent.

On the other hand, where anyone conducts a funeral at the request of the heir, Labeo says he cannot bring the funeral action, because he is entitled to an action on mandate.

(16) If, however, he conducts the funeral as one transacting business for the heir, although the latter may not have ratified the act, Labeo said that he is, nevertheless, entitled to an action for the recovery of the funeral expenses.

(17) This action is granted against those who ought to conduct the funeral, for instance, against the heir, the possessor of the property of the estate, or any other successor.

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

A patron who makes application for the possession of the property of an estate in opposition to the provisions of the will, must pay the expenses of the funeral.

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

Where any property comes to anyone by way of dowry, the Prætor grants a funeral action against him; for it was held by the ancient authorities to be perfectly just that the funeral expenses of women should be paid out of their dowries, just as out of their private property, and that the man who profits by the dowry on the death of a woman should contribute to her funeral expenses, whether he is the father or the husband of the woman aforesaid.

17. *Papinianus, Opinions, Book III.*

If, however, the father has not yet recovered the dowry, the son alone may be sued, and he can charge the father with whatever he has paid on this account:

18. *Julianus, Digest, Book X.*

For the expenses of a funeral are a debt of the dowry:

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

And therefore the dowry is liable for this debt.

20. *The Same, On the Edict, Book XXV.*

Neratius asks: Where a man who gave a dowry for a woman stipulated that two-thirds of the same should be returned to him, and that the other third should remain with the husband, and agreed that the husband should not contribute anything to the funeral expenses; will the husband be liable for them? He answers that if the stipulator himself buried the woman, the agreement will be operative, and that a funeral action will be of no effect; but if someone else conducted the funeral, then the husband can be sued, because the public law cannot be infringed by such an agreement. But what if anyone should give a dowry for a woman under the condition that it is to revert to him if she died during marriage, or if the marriage should be terminated in any other manner; would he not then be compelled to contribute to the funeral expenses? Since, however, the dowry reverts to him on the death of the woman, it may be stated that he should contribute.

(1) If the husband profits by the dowry, he can be sued for the funeral expenses, but the father cannot; however, I think with reference to this case that where the dowry is not sufficient to meet the funeral expenses, because it is very small, an action should be granted against the father for the deficiency.

(2) Where a woman who is her own mistress dies, and her estate is not solvent, her funeral expenses must be paid out of her dowry alone; and this was stated by Celsus.

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

Where the person whose funeral was conducted was under paternal control, a funeral action can be brought against the father in proportion to his rank and means.

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

Celsus says that where a woman dies, her funeral expenses should be paid out of the dowry remaining in the hands of her husband, and out of the remainder of her property in proportion.

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

For instance where the dowry is worth a hundred *aurei*, and her estate two hundred, the heir must contribute two-thirds, and the husband one-third of the funeral expenses:

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

Julianus states that, in this instance, the legacies must not be deducted.

25. *Paulus, On the Edict, Book XXVII.*

Or the value of slaves who have been manumitted.

26. *Pomponius, On Sabinus, Book XV.* Nor debts deducted.

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

Thus the husband and the heir are compelled to contribute to the funeral proportionally.

(1) Suit cannot be brought for the recovery of funeral expenses against a husband, if he paid the dowry to his wife during marriage, so Marcellus says; and this opinion is correct in those instances in which he is permitted by law to do this.

(2) Moreover, I think that a husband is liable to an action for funeral expenses only so far as his means permit; for he is held to be enriched by the sum which he would have been forced to pay to his wife if she had sued him.

28. *Pomponius, On Sabinus, Book XV.*

Where there is no dowry, then Atilicinus says that the father must pay the entire expense; or

else the heir of the woman, if she was emancipated, should do so. If, however, there are no heirs, and the father should not be solvent, suit can be brought against the husband to the extent of his property, in order that it may not appear due to his bad behavior that his wife was left unburied.

29. *Gaius, On the Provincial Edict, Book XIX.*

Where a woman, after a divorce, marries another man and then dies; Fulcinius does not think that the first husband should pay the expenses of the funeral, even though he may have profited by the dowry.

(1) Where anyone conducts the funeral of a daughter under paternal control, before her dowry is returned to her father; he can very properly bring suit against her husband, but where the dowry has been returned, he can hold her father liable; but, at all events, where suit is brought against the husband, he should return to the father of the woman that much less.

30. *Pomponius, On Sabinus, Book XV.*

On the other hand, whatever the father has expended on the funeral of his daughter, or paid on account of a funeral action having been brought against him by another, he can recover from the husband in an action of dowry.

(1) But where an emancipated married woman dies during coverture, her heirs, or the possessors of the property of her estate will be compelled to contribute, as well as her father in proportion to the amount of the dowry which he has received, and her husband in proportion to the amount of the dowry by which he has profited.

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

Where a son under paternal control is a soldier and has *castrense peculium*, I think that his successors are primarily liable, and that afterwards recourse must be had to his father.

(1) Anyone who buries a male or female slave belonging to another, has a right of action against his or her owner for the recovery of the funeral expenses.

(2) This action is not limited to a year, but is perpetual; and is granted to the heir and other successors, as well as against successors.

32. *Paulus, On the Edict, Book XXVII.*

Where the possessor of an estate conducts the funeral and afterwards loses his claim to the estate, and, in delivering the same fails to deduct the amount which he expended, he will be entitled to a prætorian action for the recovery of the expenses.

(1) Where both husband and wife die at the same moment of time, Labeo says that this action should be granted against the heir of the husband in proportion to the amount of the dowry to which he is entitled; since the liability itself passed to him on account of the dowry.

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

Where a man was formerly heir, but the estate was subsequently taken from him as being unworthy; the better opinion is that the right of sepulture still remains with him.

34. *Paulus, On the Edict, Book LXIV.*

Where a place is bequeathed under a condition, and in the meantime the heir buries the deceased, this does not make the place religious.

35. *Marcellus, Digest, Book V.*

Our ancestors were very far from thinking that anyone who came forward for the destruction of his country and to kill his parents and

children should be mourned; so where a son killed his father or a father his son, if either had

been guilty of such an offence, they held that the act was without criminality; and that the party should even be rewarded.

36. *Pomponius, On Quintus Mucius, Book XXVI.*

Where a place is taken by the enemy it ceases to be either religious or sacred, just as freemen pass into slavery. Where, however, such places are freed from this calamity, they are restored to their former condition by a kind of *postliminium*, as it were.

37. *Macer, On the Law of the Twentieth Relating to Successions, Book I.*

Under the head of "funeral expenses" must be understood whatever is disbursed on account of the body; for instance, in the purchase of ointments, as well as the price of the place where the deceased is buried, and where any rent that is to be paid, together with the cost of the sarcophagus, the hire of vehicles, and anything else which is consumed on account of the body before it is buried; I think should be included in the funeral expenses.

(1) The Divine Hadrian stated in a Rescript that a sepulchral monument is anything which is erected as a monument, that is to say, for the protection of the place where the body is laid; and therefore, if the testator ordered a large building to be constructed, for example, a number of porticos in a circular form, these expenses are not incurred on account of the funeral.

38. *Ulpianus, On All Tribunals, Book IX.*

It is the duty of the governor of a province to see that the bodies or bones of deceased persons are not detained, or maltreated, or prevented from being transported on the public highway, or buried.

39. *Marcianus, Institutes, Book III.*

The Divine Brothers decreed by an Edict that a body should not be disturbed after it had been lawfully interred, that is to say, placed in the ground; for a body is held to be placed in the ground where it is deposited in a chest with the intention that it shall not be removed elsewhere. It must not be denied, that it is lawful to remove the chest itself to a more convenient spot, if circumstances demand it:

40. *Paulus, Questions, Book III*,

For where anyone has interred a body with the intention of subsequently removing it to some other locality, and preferred to deposit it there for a time rather than to bury it permanently, or to provide, as it were, a last resting place for it; the place will remain profane.

41. *Callistratus, Institutes, Book II.*

Where several persons own the place where a body is brought for interment, all of them must give their consent if the remains are those of a stranger; for it is established that any one of the joint-owners themselves can properly be buried there, even without the consent of the others, especially when there is no other place in which he could be buried.

42. *Florentinus, Institutes, Book VII.*

Generally speaking, a monument is something which is handed down to posterity by way of a memorial; and in case a body or remains should be placed inside of it, it becomes a sepulchre; but if nothing of this kind is deposited therein, it becomes merely a monument erected as a memorial which is termed by the Greeks a cenotaph, that is to say an empty sepulchre.

43. *Papinianus, Questions, Book VIII.*

There are persons who, although they cannot make a place religious, still can very properly make application for an interdict with reference to the burial of a dead body; as, for instance, where the mere owner of property buries or wishes to bury a corpse in land of which the usufruct is held by another, since, if he buries it there he will not make the place a lawful

sepulchre, but if he is prevented from doing so, he can very properly make application for an interdict by means of which an inquiry can be instituted as to the right of ownership.

The same rules apply to the case of a joint-owner who wishes to bury a dead body in ground held in common against the consent of his co-owner; for, on account of the public welfare, and in order that corpses may not lie unburied, we have ignored the strict rule which sometimes is dispensed with in doubtful questions relating to religious matters; for the highest rule of all is the one which is favorable to religion.

44. *Paulus, Questions, Book III.*

Where interment is made in different places, both of them do not become religious, for the reason that two sepulchres are not created by the burial of one person; but it seems to me that place should be religious where the principal part of the body is laid; that is to say, the head, whereof a likeness is made by means of which we are recognized.

(1) When, however, permission is obtained for remains to be removed, the place ceases to be religious.

45. *Marcianus, Trusts, Book VIII.*

Funeral expenses are always charged to the estate, and it is customary for them to take precedence of all other debts, when the estate is insolvent.

46. *Scævola, Questions, Book II.*

Where a man had several tracts of land and bequeathed the usufruct of all of them separately, he can be buried in any one of them, and the heir shall have the right of selection, and the opportunity to favor the others. A prætorian action will, however, be granted the usufructuary against the heir, to enable him to recover damages to the amount that the value of his usufruct is diminished by the selection.

(1) Where the heir of a woman buries her body on land belonging to her estate, he can recover from her husband the amount which he should contribute towards the expense of the funeral, which depends upon the value of the land.

(2) Where clothing is bequeathed to anyone, and he sells it for the purpose of paying the funeral expenses, it is held that a prætorian action based on a prior claim should be granted against the heir.

TITLE VIII.

CONCERNING THE TRANSPORT OF A DEAD BODY, AND THE CONSTRUCTION OF A SEPULCHRE.

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

The Prætor says: "Whither or howsoever anyone has a right to transport a dead body without your consent, I forbid force to be employed to prevent him from taking the said dead body thither and burying it there."

(1) Where anyone has the right to bury a corpse, he must not be prevented from doing so, and he is held to be prevented if he is hindered from conveying the body to the place or is interfered with on the way.

(2) The mere owner of the premises can make use of this interdict with reference to the transport of a dead body; and, indeed, it is applicable in the case of land which is not religious.

(3) Moreover, if I have a right of way to a tract of land to which I desire to take a corpse for burial, and I am prevented from using the said right of way, it has been held that I can proceed by means of this interdict; because, having been prevented from using the right of way, I am also prevented from transporting the corpse; and the same rule must be adopted where I am

entitled to any other servitude.

(4) It is evident that this interdict is a prohibitory one.

(5) The Prætor says: "Wherever anyone has a right to take a dead body without your consent, I forbid force to be employed to prevent him from building a sepulchre on the land, if he does this without malicious intent."

(6) This Edict was promulgated because it is to the interest of religion that monuments should be erected and adorned.

(7) No one shall be prevented from building a sepulchre or a monument in a place where he has a right to do so.

(8) A person is held to be prevented when he is hindered in having material transported which is necessary for erecting a building; and hence if anyone prevents the workmen who are necessary from coming, there will be ground for an interdict; and if anyone prevents the placing of machinery the interdict will also be available, provided he does this in a place which is subject to the servitude; but if you try to set up your machinery on my land, I will not be liable to an interdict, if I have the right to prevent you from doing so.

(9) A person must be understood to "build" not only when he begins a new work, but also where he wishes to make repairs.

(10) When a man does something in such a way that a sepulchre falls down, he is liable to this interdict.

2. *Marcellus, Digest, Book XXVIII.*

The Royal Law refuses permission for a woman who died during pregnancy to be buried before her unborn child is removed from her; and anyone who violates this law is held to have destroyed the hope of a living child by the burial of the pregnant mother.

3. *Pomponius, On Sabinus, Book IX.*

Where anyone is building a sepulchre near your house you can serve notice of a new structure upon him; but after the work has been completed, you will have no right of action against him except by means of the interdict *Quod vi aut clam.*

(1) Where a body is buried near a house belonging to another but within the limits prescribed by law, the owner of the house cannot afterwards prevent the same party from burying another body there, or from erecting a monument; if he acted with the knowledge of the owner from the beginning.

4. *Ulpianus, Opinions, Book II.*

The right to a burial-place is not acquired by a party through long possession, if it does not lawfully belong to him.

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

Where human remains are deposited in a tomb which is said to be unfinished, this does not offer any hindrance to its completion.

(1) Where, however, the place has already been made religious, the pontiffs should determine to what extent the desire of repairing the structure may be indulged without violating the privileges of religion.

THE DIGEST OR PANDECTS.

BOOK XII.

TITLE I.

CONCERNING THINGS WHICH ARE CREDITED WHERE A CERTAIN DEMAND IS MADE, AND CONCERNING SUIT FOR RECOVERY.

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

It is proper before we proceed to the interpretation of the terms to say something concerning the signification of the Title itself. As the Prætor has inserted under this Title many rules having reference to various contracts, he has, therefore, prefixed to the Title the words "Things which are credited," for this includes all kinds of contracts which we enter into, relying upon the good faith of others; for, as Celsus states in the First Book of Questions, the term "to credit" is a general one, and hence under this Title the Prætor treats of property loaned and pledged. For where we, relying upon the good faith of others, assent to anything, and are afterwards to receive something on account of this contract, we are said to give credit. The Prætor selected the term "thing" also as being a general one.

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

We make the loan called *mutuum* when we are not to receive in return the same article which we gave (otherwise this would be a loan for use or a deposit) but something of the same kind; for if it was of some other kind, as for instance, if we were to receive wine for grain, it would not come under this head.

(1) A gift of *mutuum* has reference to articles which can be weighed, counted, or measured, since people by giving these can contract a credit; because by payment in kind they perform the contract instead of paying in specie. For we cannot contract a credit with respect to other articles, because the creditor cannot be paid by giving him one thing in exchange for another, where he does not give his consent.

(2) A loan of this kind is so called *mutuum.* because the article becomes yours instead of mine, and therefore it does not become yours if the obligation does not arise.

(3) Therefore a credit differs from a *mutuum* just as a genus differs from a species; for a credit may exist separate from articles which can be weighed, counted, or measured, so that it is a credit where we are to receive the very same article in return. Moreover, a *mutuum* cannot exist in the case of money unless the money is paid down, but a credit can sometimes exist even though nothing is paid; as, for instance, where a dowry is promised after marriage.

(4) In a loan of this kind he who makes it must be the owner, and no objection can be raised because sons under paternal control and slaves can cause an obligation to arise by loaning money which is part of their *peculium;* for it is the same thing as if you pay money at my request, for I would then acquire a right of action even though the money did not belong to me.

(5) We can also give credit by means of words, where some act is performed for the purpose of creating an obligation, as, for instance, a stipulation.

3. *Pomponius, On Sabinus, Book XXVII.*

Where we give a *mutuum*, although we do not provide that what is equally good shall be returned to us, still it is not lawful for the debtor to restore an article of the same kind but which is inferior, for example, to return new wine instead of old; for in entering into a contract the intention of the parties must be considered equivalent to an express agreement, and in this instance the intention is understood to be that payment shall be made with an article of the same kind, and of the same quality as that which was loaned.

4. *Ulpianus, On Sabinus, Book XXXIV.*

Where a party has no reason or intention to lend at interest, but you being about to purchase certain land, desire to borrow money, although you do not desire to do so until you actually buy the property, and the creditor having perhaps some urgent need to go upon a journey, deposits the money with you on the condition that if you make the purchase you will be liable on account of the credit, this deposit is at the risk of the party who received it; for where anyone receives something for the purpose of selling it in order to make use of the purchase-money, he will hold the property at his own risk.

(1) Where an article is given in pledge, and the money advanced is paid, suit can be brought for its recovery. Again, if a tenant gathers crops after the period of five years has elapsed, it is established that they can be recovered by a personal action, provided they have not been gathered with the consent of the owner of the land; for if this has been done, then there is no doubt that an action for their recovery will not lie.

(2) Things which have been carried on shore by the force of a stream can also be recovered by a personal action.

5. Pomponius, On Sabinus, Book XXII.

If you are obliged to deliver something to me, and it should afterwards be lost on account of some act of yours which prevented you from delivering it to me, it is established that the loss must be borne by you. Where, however, the question arises whether you performed the act, it should be considered not only whether this was in your power or not, but also whether you were guilty of malicious intent in order to prevent it from being in your power; and also whether there was any just reason why you should know that you were compelled to deliver me the article.

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

An article is styled "certain" when the kind or quality which is the subject of an obligation is specifically designated either by name or by some description which performs the function of a name, and its quality and quantity are made manifest. Pedius states in the First Book of Stipulations, that it makes no difference whether anything is called by its own name, or pointed out with a finger, or described in so many words, since these methods perform common functions, any one of which is as good as another.

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

Everything which can be inserted in a stipulation may also be included in the loaning of money, and therefore conditions may be imposed.

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

Hence a gift of *mutuum* sometimes remains in abeyance, in order to be confirmed by some subsequent act; as, for example, if I loan you a sum of money with the understanding that if a certain condition takes place, it will become yours and you shall be bound to pay me. In like manner, where an heir lends money which has been bequeathed as a legacy, and the legatee afterwards is unwilling to take it, for the reason that it is held that the money was the property of the heir from the day the estate was entered upon, he can bring an action to recover the money which was loaned. For Julianus says that even where delivery of property has been made by the heir, reference must be had to the time when the estate was entered upon, whether the legacy is rejected or accepted.

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

A specific action for recovery will lie on account of everything and by reason of any obligation under which a positive claim can be made; whether it is based on an express contract or on one which is uncertain, for we are permitted to bring such an action on account of every kind of contract, provided an actual obligation exists; but where enforcement of the obligation is limited to a specified date, or is dependent upon some condition, I cannot bring an action before the time arrives, or the condition is fulfilled.

(1) This action will also lie on account of a legacy or under the *Lex Aquilia*, and proceedings may be instituted by means of it in a case of theft. Moreover, if proceedings are instituted under a decree of the Senate, this action will still lie; as, for instance, where the party who wishes to bring suit is one to whom an estate held in trust is to be delivered.

(2) This action may also properly be brought where anyone has bound himself either in his own behalf or as the agent of the other.

(3) Since, therefore, this specific action for recovery is available in all contracts, whether the contract was made by an act, by words, or by both together, certain cases must be mentioned by us with relation to which it may be discussed as to whether this action will be appropriate to the claims set forth.

(4) I paid you ten *aurei*, and I stipulated that the amount should be given to another party; which stipulation is void. Can I proceed by means of this action to recover ten *aurei* on the ground that there are two contracts existing, one which was entered into by means of an act, that is to say, by the payment of the money, and the other which was entered into verbally, that is to say without effect, because I could not stipulate for another? I think that I can.

(5) The case is the same where I took a stipulation from a ward without the authority of his guardian, and loaned him money with his guardian's consent; for, in this instance also, I shall be entitled to a suit for recovery based on the payment of the money.

(6) The same inquiry may be made if I paid you a certain sum of money and I stipulated that it should be returned under a condition which is impossible; since the action for recovery will still remain available, as the stipulation is null.

(7) Moreover, where I lend a man money and his property is afterwards placed under an interdict, and I then enter into a stipulation with him, I think that his case resembles that of the ward; since he also acquires rights by stipulation.

(8) Where I pay out my own money in your name, you being absent at the time and not aware of the fact, Aristo says that you will have a right to bring a personal action for recovery; and Julianus also, having been consulted with respect to this, states that the opinion of Aristo is correct, and that there is no doubt that if I should pay out my money in your name with your consent the obligation will be acquired by you, as we ask every day that money shall be lent by other parties in our name to those whom we wish to become our debtors.

(9) I deposited ten *aurei* with you, and afterwards I permitted you to make use of them; Nerva and Proculus are of the opinion that I will be entitled to a personal action for recovery, as for a *mutuum*, even before you have removed the money, and this is correct, and also appears so to Marcellus; for on account of your intention you have already become the possessor, and therefore the risk is transferred to the party who requested the loan, and he can be sued for its recovery.

10. *The Same, On the Edict, Book II.*

If, however, when I deposited the money with you in the beginning, I permitted you to make use of it, if you wished to do so; it is held that the loan does not exist before the money is removed, since it is not certain that anything is owing.

11. *The Same, On the Edict, Book XXVI.*

Where you asked me to lend you money, and, as I did not have it at the time, I gave you a dish or a lump of gold for you to sell and make use of the proceeds; and you sold it, I think that the money received for it constitutes a loan. But if, before you sold the dish or the lump of gold, you lost it through no negligence on your part, the question arises whether the loss falls upon me or upon you. It is my opinion that the distinction made by Nerva is perfectly correct, who thinks that it makes a great difference whether I had the dish or the lump of gold for sale or not, and that if I had, I must bear the loss just as if I had given it to someone else to be sold; but if it was not my intention to sell it, but the only object of the sale was that you might make

use of the proceeds, you must be responsible for the loss especially if I lent it to you without interest.

(1) If I loan you ten *aurei* with the understanding that you shall owe me nine, Proculus very correctly says that you do not legally owe me any more than nine. But if I loan you that amount with the understanding that you shall owe me eleven, Proculus thinks that an action for recovery cannot be brought for more than ten.

(2) Where a fugitive slave lends you money, the question arises whether his owner can bring suit against you for its recovery? And, indeed, if my slave, who has been granted the management of his *peculium*, lends you money, the loan will stand; but where a fugitive slave, or any other slave lends money without the consent of his master, it does not pass to the party receiving it. What then is to be done? The money can be claimed, if it is still accessible, or if you have fraudulently relinquished possession of the same proceedings can be instituted for its production; but if you have expended it without fraudulent intent, an action for its recovery can be brought against you.

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

Where you receive money as a loan from an insane person, who you think is of sound mind, and the money is expended for your benefit, Julianus says the insane person will have a right of action for its recovery; for it is the rule that where a right of action is acquired by a party who is unaware of the fact, it is also, under the same circumstances, acquired by one who is insane.

Moreover, if anyone makes a loan to a slave and afterwards becomes insane, and the slave spends the money for the benefit of his master, an action for recovery can be brought in the name of the insane person. And where any one loans the money of another, and subsequently becomes insane, and the money is expended, the right to sue for its recovery is acquired by the insane person.

13. *Ulpianus, On the Edict, Book XXVI.*

Where a thief lets you have money as a loan, he does not transfer to you the property in the same; but if the money is expended, a right to bring suit for its recovery will arise.

(1) Wherefore, Papinianus says in the Eighth Book of Questions, "If I lend you money belonging to someone else, you are not liable to me in an action before you spend it." And he asks if you spend the money a little at a time, whether I have a right to sue for its recovery in the same way? He replies that I have, if I had been notified that the money belonged to another, and I then bring suit for part of it; because I have not yet ascertained whether the entire amount has been expended.

(2) Where a slave held in common by two joint-owners loans ten *aurei,* I think that whether he has been granted the management of his own *peculium* or not, if the money is spent, an action for five *aurei* will lie in favor of each owner. For Papinianus states in the Eighth Book of Questions, that if I lend you a hundred pieces of money which I own in common with another, I can bring a personal action to recover fifty, even though each individual coin was owned in common.

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

Where a son under paternal control having borrowed money in violation of the Decree of the Senate pays it, no exception can be pleaded against a suit brought by the father for the recovery of the money; but, where it has been expended by the creditor, Marcellus says that the personal action for recovery will not lie, since such a suit is only granted where the money was paid over under such circumstances as would permit an action to be brought if the ownership had been transferred to the party who received the money, but this is not the case in the proposed instance. Finally, where money is loaned contrary to the Decree of the Senate, and is repaid by mistake, the better opinion is that no action for its recovery will lie.

15. *The Same, On the Edict, Book XXXI.*

There are certain special rules which have been adopted with reference to money loaned; for if I order a debtor of mine to pay you money, you will become responsible to me, even though the money which you receive was not mine. Therefore, this rule being established with reference to two persons, it must also be observed where there is but one; so that, where you owe me money on account of a mandate, and it is agreed between us that you shall retain it as a loan, it is held that the money was paid to me and transferred from me to you.

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

Where a joint-owner of money paid out his own money as a loan, he makes an absolute loan of said money, even though his co-owners did not consent; but if he paid out money which was owned in common, he does not make a valid loan, unless the others also consent, because he has only the right to dispose of his own share.

17. *Ulpianus, Disputations, Book I.*

Where a son under parental control who was at Rome for the purpose of pursuing his studies made a loan of money which was a part of his travelling expenses; Scævola gave it as his opinion that he could obtain relief by means of extraordinary proceedings.

18. *Ulpianus, Disputations, Book I.*

If I give you money as a present, and you accept it as a loan, Julianus says that it is not a present; but we should consider whether it is a loan. I think, however, that it is not a loan, and that the money does not, as a matter of fact, become the property of the party who receives it, as he did so with a different opinion. Hence, if he spends the money, although he is liable to a personal action for its recovery, he can, nevertheless, make use of an exception on the ground of fraud, because the money was expended in accordance with the wish of the party who gave it.

(1) Where I give you money as a deposit, and you accept it as a loan, it is neither a deposit nor a loan; and the same rule applies where you give money as a loan to be consumed and I accept it as a loan to be used for the purpose of ostentation; in both instances, however, if the money is expended, there will be ground for a personal action for recovery without an exception based on fraud.

19. *Julianus, Digest, Book X.*

The payment of money does not bind the party who receives it at all times, but only where it is understood that he shall be liable immediately. For where a party gives money *mortis causa*, he pays it out, but he does not bind him who receives it, unless something happens on which the obligation depends, as, for instance, where the donor recovered, or the party who received the money died before him. And where money is given in order that something may be done, so long as it is doubtful whether this will take place or not, liability will not exist; but, as soon as it becomes certain that it will not take place, the party who received the money will be liable; for instance, if I give Titius ten *aurei* under the condition that he will manumit Stichus before the next *kalends*, I will be entitled to no action before that time; but when the time has elapsed I can then bring suit, if the slave has not been manumitted.

(1) Where a ward lends money or pays it in discharge of a debt without the authority of his guardian, he has a right of action for recovery, if the money has been spent; or he will be released from the debt, for no other reason than that it is understood to have come into the hands of the party who received it through the act of the ward; therefore, if he who received the money as a loan or in payment of a debt, gives it to another party as a loan or a payment, then, if the money is spent, the party is liable to the ward, or he must discharge him from liability, and he will have a claim against the party to whom he paid the money, or he will be released from liability to him. For indeed, he who pays out the money of another as a loan, if it is spent, will have a claim against the party who received it; and likewise, he who pays out

money to discharge a debt will be released from liability by the party who receives it.

20. *The Same, Digest, Book XVIII.*

Where I give you money in order that you may lend me the same money, is a loan made? I said in reply that, in instances of this kind, we do not use correct words, as such a contract is neither a donation nor a loan; it is not a donation, because the money is not given with the intention that it shall remain absolutely in the hands of the receiver; and it is not a loan because it is paid rather for the purpose of avoiding a debt than of making another party liable. Therefore, if a party who received money from me under the condition that he should lend it to me, and he does pay me the money which he receives, this will not be a loan, for I shall rather be considered to have received what already belonged to me. It must be understood in this way in order that the strict signification of the terms may be preserved; however the more liberal construction is that both transactions are valid.

21. *The Same, Digest, Book XLVIII.*

Some authorities have thought that a man who sues for ten *aurei* cannot be forced to accept five and then bring suit for the remainder; or, if he should allege that a certain tract of land is his, that he can only be compelled to bring suit for a portion of the same; but, in both instances, it is held that the Prætor would be more indulgent if he compels the plaintiff to accept what is offered him, since it is part of his duty to diminish litigation.

22. *The Same, On Minicius, Book IV.*

A loan of wine was made and proceedings were instituted to recover it; the question arose with reference to the time when an estimate of its value should be made, whether when it was delivered, when issue was joined in the suit, or when the case was decided? Sabinus answered that if it had been stated at what time it was to be restored, the estimate should be made of what it was worth at that date; but if not, its value should be estimated at the time when suit was brought. I asked at what place the valuation should be made? The answer was, if it had been agreed that it should be restored at a certain place, the valuation should be made there; but if this had not been mentioned, it should be appraised at the place where suit was brought.

23. *Africanus, Questions, Book II.*

If I take possession of a slave who is bequeathed to you, and sell him just as if he had been bequeathed to me, and he dies, then, Julianus says, that you can recover the purchase money from me as I have profited by means of your property.

24. *Ulpianus, Pandects.*

Where a party stipulates for any certain property, he does not acquire a right of action under the stipulation, but he must proceed through a personal action for recovery by means of which suit is brought for some specific things.

25. *The Same, On the Office of Men of Consular Rank.*

Where a creditor lends money for the repair of buildings, he will have a prior lien on the money which he lent.

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

If the agent of a soldier lends money and takes a surety, it is established that an action will be granted the soldier to whom the money belonged; just as in the case where the guardian of a ward or the curator of a youth stipulates for the repayment of money loaned which belonged to either of them.

27. *The Same, On the Edict, Book X.*

A municipal corporation can be bound by a loan, if the money is expended for its benefit; otherwise, those who contracted the loan will be liable as individuals, and not the corporation.

28. *Gaius, On the Provincial Edict, Book XXI.*

Where a creditor did not take proper security, he will not for that reason lose the right to exact payment for the amount of the debt which the pledge was not sufficient to secure.

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

Where an owner employs his slave as his agent, Julianus holds that it may be said that he is liable to a personal action for recovery just as if he had contracted in pursuance of the order of the party by whom he was appointed.

30. *The Same, On Plautius, Book V.*

Where a party who is about to receive a loan of money promises his future creditor that he will repay him, he has the power to escape liability by not accepting the money.

31. *The Same, On Plautius, Book XVII.*

Where a personal action has been brought for the recovery of a tract of land or a slave, I am of the opinion that the present practice is that, after issue has been joined, everything which has accrued must be surrendered; that is to say, everything which the plaintiff would have been entitled to if delivery had been made of what was due at the time of the joinder of issue.

(1) I purchased your slave in good faith from a thief, without being aware of the facts, and the slave himself purchased a slave out of the *peculium* which belonged to you, and the latter slave was delivered to me. Sabinus and Cassius say that you can bring a personal action against me for the recovery of the second slave; but if I have lost anything through the business which he transacted, I, in my turn, will be entitled to an action against you. This is perfectly true for Julianus says that it must be considered whether the owner has an unimpaired right of action growing out of the purchase, but the vendor can bring a personal action for recovery against the *bona fide* purchaser. With reference to the money derived from the *peculium*, if it is still accessible, the owner can bring suit for its recovery, but he will be liable to the vendor in an action *De peculio* for the payment of the price; but if the money is spent, the right of action *De peculio* will be extinguished.

Julianus, however, should have added that the vendor is only liable to the owner of the slave on account of the purchase, if he pays him the entire price, as well as whatever would have been due to him if he had made the contract with a man who is free.

The same rule applies where I make a payment to a *bona-fide* possessor, if I am ready to assign to the owner any right of action which I may have against the said possessor.

32. *Celsus, Digest, Book V.*

If you request Titius and myself to lend you money and I order a debtor of mine to promise to furnish it to you, and you make a stipulation believing that he is the debtor of Titius, will you be liable to me? I am in doubt on this point, if you did not enter into any contract with me, but I think it is probable that you are liable; not because I lent you money (for this cannot be unless the parties consent); but because my money came into your hands, and therefore it is proper and just that you should repay it to me.

33. *Modestinus, Pandects, Book X.*

It is provided by the Imperial Constitutions that neither those who govern provinces nor their attendants, shall go into business, or lend money with or without interest.

34. *Paulus, Sentences, Book II.*

The officials who are in attendance on the Governor of a province can make loans with or without interest.

(1) The Governor of a province is not forbidden to borrow money at interest.

35. *Modestinus, Opinions, Book III.*

The risk of obligations for money lent attaches to the party by whose negligence it can be

established that the risk was increased.

36. *Javolenus, Epistles, Book I.*

You owed me a sum of money without any condition, and by my direction you promised Attius to pay said sum of money under a condition. While this condition is pending, your obligation toward me is just the same as if you had promised me the money on the contrary condition; if, while the condition is pending, I bring suit, will this be of no effect? The answer was: I have no doubt that the money with reference to which I stipulated with you absolutely will remain as a loan to you, even if the condition relating to Attius — who, with my consent, stipulated for the payment of said money under a condition — is not fulfilled: for the legal position is the same as if no stipulation had been made by him, and, while the fulfilment of the condition is pending, I cannot bring an action for the money, because it is uncertain whether it may not be due under the stipulation, and I will be held to have brought my action too soon.

37. *Papinianus, Definitions, Book I.*

When a condition refers to the time when the obligation was contracted, the stipulation is not suspended, and if the condition is an actual one, the stipulation will hold, even though the contracting parties do not know that this is the case; for instance: "Do you promise to pay me a hundred thousand sesterces if the King of the Parthians is living?"

The same rule also applies where the condition refers to time which has passed:

38. *Scævola, Questions, Book I.*

For it should also be considered whether, as far as human nature can determine, it can be ascertained that the money will be due:

39. *Papinianus, Definitions, Book I.*

Therefore the clause only acquires the force of a condition when it relates to the future.

40. *Paulus, Questions, Book III.*

There was read in the court of Æmilius Papinianus, Prætorian Prefect and Jurist, an obligation of the following kind: "I, Lucius Titius, have stated in writing that I received from Publius Mævius fifteen *aurei* as a loan which was paid to me at his house, and Publius Mævius stipulated, and I, Lucius Titius, promised that the said fifteen *aurei* in current coin shall be duly paid on the next *kalends.* If on the day aforesaid the said sum shall not have been paid to the said Publius Mævius, or to whomsoever has a right to the same, nor any security has been given on account of it; then, for the time that has elapsed after payment was due, Publius Mævius stipulated and I, Lucius Titius promised that there should be paid by way of penalty, for every thirty days and for every hundred *denarii* one *denarius.* It was also agreed between us that I should be obliged to pay to the said Publius Mævius out of the sum aforesaid three hundred *denarii* of the entire sum every month, either to him or to his heir."

A question arose with reference to the obligation to pay interest, as the number of months specified for payment had elapsed? I stated that, as an agreement entered into at the same time is held to be a part of the stipulation, the result is that it is the same as if the party having stipulated for the payment of a certain sum of money every month, had later added an agreement for interest in proportion to the delay in the payments; and therefore interest on the first payment would begin to run at the end of the first month, and, likewise, after the second and third months, interest on the unpaid money would increase, but interest could not be collected on the unpaid principal until it could itself be collected.

Some authorities say that the agreement which was added only relates to the payment of the principal and not to the interest as well, since the latter had been plainly provided for by the stipulation in the former clause, and that the agreement would only admit of an exception; hence, if the money was not paid at the times indicated, the interest would be due from the

date of the stipulation, just as if this had been expressly stated. But where the time for collecting the principal has been deferred, the result will be that interest also will accrue from the day when the party was in default; and if, as the said authorities held, the agreement would only render an exception available (although a different opinion afterwards prevailed), still, according to law, the obligation to pay interest could not be enforced; for a party is not in default where the money cannot be collected from him, because he can plead an exception in bar to the claim.

When, however, we stipulate for a certain quantity to be furnished where a condition is to be fulfilled, and it is collected in the meantime, as, for instance, where crops are concerned; the same provision may also be made with reference to interest, so that if the money is not paid by the specified day, what is due by way of interest may be paid from the day when the stipulation was entered into.

41. *Africanus, Questions, Book VIII.*

A testator having appointed his slave Stichus an accountant in a certain province, his will was read at Rome, by which the said Stichus was set free and appointed an heir to a portion of the estate; and Stichus, who was ignorant of his change of condition, continued to collect the money of the deceased, and made loans, and sometimes entered into stipulations and took pledges; an opinion was asked what was the law in the case? It was held that any debtors who had paid him were released from liability, provided they, also, were not aware that the owner of the slave was dead; but with reference to the sums of money which had come into the hands of Stichus, his co-heirs had no right to bring an action for the partition of the estate, but that one should be granted them on the ground of business transacted; and where he himself had loaned money, property in the same was only transferred in proportion to the amount to which he himself was an heir. This is the case, because if I give you money in order that you may lend it to Stichus, and I then die, and you, being ignorant of the fact, should give him the money, you will not transfer the property in the same; for, notwithstanding that it may be held that the debtors after paying him are released from liability, it is not settled that he has a right to dispose of the ownership of the money by lending it. Wherefore, if no stipulation for repayment was entered into, suit could not be brought for the money which was lent, in proportion to the share of the coheir, nor could the pledges be retained.

If, however, the stipulation was made for repayment, it is a matter of importance in what terms the stipulation was made; for instance, if he made it expressly in favor of Titius, his owner, who was dead at the time, there is no doubt that the stipulation would be void; but if he stipulated that the money should be repaid to him, it must be held that he acquired the benefit of the same from the estate; just as where freemen or the slaves of others serve us in good faith, whatever they acquire by means of our property belongs to us; so whatever is acquired through a portion of the estate is made for the benefit of the estate itself.

Where, however, an estate has been entered upon by the co-heirs, this rule cannot be held to equally apply; at all events, if they knew that Stichus was appointed co-heir together with them, as, in this instance, those cannot be considered to be *bona-fide* possessors who did not have the intention of holding possession. If, however, the case suggested has reference to co-heirs who are ignorant of the facts, for example, because they themselves were necessary heirs, the same opinion may still be given; and in this instance the result will be that if the said slave has co-heirs of the same condition, they will all be held to serve one another in good faith.

42. *Celsus, Digest, Book VI.*

If I stipulate for ten *aurei* from Titius, and I afterwards stipulate from Seius for the amount of the debt which I may fail to collect from Titius, then, if I bring suit against Titius for ten *aurei*, Seius will not be released from liability, otherwise the security provided by Seius will be worthless; but if Titius complies with the judgment, Seius will be no longer liable. If, however, I proceed against Seius, whatever the amount I can collect from Titius, when issue

is joined between Seius and myself, is less than the obligation, so much the less can I subsequently collect from Titius.

(1) Labeo says that if you stipulate that a party shall see that ten *aurei* are paid, you cannot, for this reason, claim that ten should be paid to you, because the promisor can be released by finding a wealthier debtor; and, in fact, this means that the party cannot be compelled to join issue if he offers to provide a wealthier debtor.

TITLE II.

CONCERNING THE TAKING OF AN OATH, WHETHER VOLUNTARY, COMPULSORY, OR JUDICIAL.

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

A very important means for promptly disposing of litigation has come into use, that is to say, the religious character of an oath, by means of which controversies are decided either through the agreement of the parties themselves, or by the authority of the judge.

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

The taking of an oath has the appearance of a compromise, and it has greater weight than the judgment of a court.

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

The Prætor says: "Where a party against whom suit is brought, after certain proposals have been offered, makes oath." We must understand the words "The party against whom suit is brought" to mean the defendant himself. The other words "After certain proposals have been offered," as not unnecessarily added; for if a defendant should take the oath without its being tendered to him by anyone, the Prætor will not recognize an oath of this description, as the party merely swears to himself; otherwise, it would be extremely easy for anyone who cares little for an oath to take it where no one tendered it to him, and thereby free himself from the burden of a suit.

(1) Where a party is sued in any kind of an action, if he makes oath it will be a benefit to him, whether the action is one *in personam, in rem,* or *in factum*, or where it is a penal action, or any other kind, or where the proceedings relate to an interdict.

(2) Where the oath is taken with reference to the civil condition of the person, the Prætor will sustain it; as, for instance, where I tendered you an oath and you swore that you were not under my control, the oath must be sustained.

(3) Wherefore, Marcellus states that an oath can be taken with reference to the question as to whether a certain woman is pregnant or not, and the oath must stand. Finally, he says that where the inquiry relates to possession, the oath must be sustained; for example, where a woman wishes to be placed in possession of property because she is pregnant, and when this is disputed by the other side, then she must either swear that she is pregnant, or the other party must swear that she is not, for if she herself makes oath, she can enter into possession without apprehension; and, on the other hand, if the oath is made against her, she cannot do so, even though she may be actually pregnant; and therefore Marcellus says that a woman who takes the oath will have the benefit of it, and will avoid legal proceedings on the ground of having taken possession in behalf of an unborn child, for the purpose of deception; nor can she be subject to force while she is in possession. But whether an oath will be an advantage so far as to prevent inquiry being made after a child is born as to whether it is the offspring of him who is said to be its father or not, is a question discussed by Marcellus, and he says that the truth ought to be ascertained, because the oath does not benefit or injure another; hence the oath of the mother will not benefit the child, nor will it cause any injury if the mother tenders it, and oath is made that she is not pregnant by a certain man.

(4) It is necessary for a party to swear in the terms in which the oath is tendered, but if I

tender it for you, you may swear by God and you swear by your own head,

4. *Paulus, On the Edict, Book XVIII.* Or the heads of your sons,

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

An oath of this kind will be of no effect. If, however, I required you to swear by your own salvation and you do so, I must abide by it; for every kind of an oath which is at all lawful and by which any one wishes to be sworn in his own behalf is suitable, and if it is taken, the Prætor will sustain it.

(1) The Divine Pius stated in a Rescript that if an oath was taken in accordance with some peculiar superstition, it must stand.

(2) When the oath has been taken, nothing else must be asked but whether the party was sworn, and the question as to whether anything is due is not considered, as this is sufficiently established by the oath.

(3) Where, however, a party tenders an unlawful oath, that is to say, one relative to a religion the profession of which is publicly forbidden; let us see whether it should be considered as if no oath had been taken; and this, I think, is the better opinion.

(4) Where an oath is taken, and the party is not released from being sworn, it must be held that the matter has never been submitted to determination by oath, and hence if he should afterwards be willing to be sworn, the oath will be of no advantage to him; because it was not taken with reference to the matter for which it was tendered.

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

A party waives an oath who, when he tenders it, and his adversary evinces a willingness to take it, he excuses him from doing so, being satisfied because the other party consents to be sworn. Where, however, the latter did not take it, but is afterwards ready to do so, and the plaintiff is unwilling to tender it; he is not held to have dispensed with it, for it can only be dispensed with when it is accepted.

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

The Prætor says: "With reference to a matter for which an oath has been tendered, I will not grant an action either against the party himself, or against him to whom the property belonged." The term "matter" must be understood to be applicable whether the oath is taken with reference to the entire property in question or only a portion of the same; for the Prætor promises that he will not grant an action with reference to what was sworn to, either against the party who took the oath, or against those who succeed to him to whom the oath was tendered,

8. *Paulus, On the Edict, Book XVIII.* Even though they succeed to the property.

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

For, after the oath is taken, the action is refused; and if there should be any controversy, that is to say, if it is disputed whether the oath was taken or not, there is ground for an exception.

(1) Where the oath has been taken or dispensed with, the defendant will be entitled to an exception both for himself and for others; and the plaintiff will acquire a right of action in which the only matter to be considered is whether he swore that something should be given him, or where he was prepared to swear and the oath was dispensed with.

(2) If judgment is rendered against a party after the oath has been taken, in a case where infamy is involved; the better opinion is that he becomes infamous.

(3) Where a party who is liable to me in a temporary action tenders me an oath in such a way that I must swear that he is obliged to pay, and I swear to this; he will not be released by lapse of time, for the reason that his liability is perpetuated after issue has been joined.

(4) Where anyone under twenty-five years of age tenders an oath, and states that advantage has been taken of him in doing so, he should file a replication in answer to an exception based upon the oath; as Pomponius says. I, however, am of the opinion that this replication should never be granted; but that, in most instances, the Prætor himself should investigate as to whether advantage was taken of the minor, and grant him complete restitution; for the mere fact that he is a minor does not establish the fact that he has been swindled. Moreover, this exception or inquiry ought not to extend beyond the time prescribed by law after the minor has reached his twenty-fifth year.

(5) Moreover, where a party tenders an oath to a debtor in fraud of his creditors, and a replication on the ground of fraud should be granted the creditors against an exception based upon the oath; and, moreover, if the party guilty of fraud tenders an oath to a creditor in order to have the latter swear that he should pay him ten *aurei*, and afterwards, when his property has been sold, he wishes to bring an action; either the action must be refused, or it may be opposed by an exception on the ground of defrauding creditors.

(6) Julianus says that the oath of a party who defends a case voluntarily or is appointed an attorney, if tendered by the adversary, will be a good defence and will provide the principal with an exception. Hence it must be said that the same rule applies where an agent is appointed to bring an action, and the defendant, having tendered an oath, swears that the amount should be paid to me; for this furnishes me with a right of action. This opinion is reasonable.

(7) Where the plaintiff has sworn, on the oath tendered by the party in possession, that the property is his, he will be entitled to an action; but this only applies to the party who tendered the oath and to these who have succeeded to his place; but if he should wish to make use of the privilege obtained by taking the oath in an action against another, his oath will be of no benefit to him;

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

Because a transaction between certain parties should not injure anyone else.

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

Where an oath is tendered to a party in possession, and he swears that the property does not belong to the plaintiff, then, so long as he holds possession, he can make use of an exception based upon the oath against the party who tendered it; but if he should lose possession, he will not be entitled to the action, not even if the party who tendered him the oath is in possession; for he did not swear that the property was his, but merely that it did not belong to the other party.

(1) Hence, if, while he is in possession, the plaintiff having tendered him the oath he swore that the property was his; we hold, in consequence, that even though he should lose possession, and the party who tendered him the oath should acquire it, an action *in factum* should be granted him.

Again, it has been settled that any crops which may have been gathered from property which I have sworn to be mine must be restored to me, and that the offspring of female slaves and the young of cattle must be surrendered, after the oath is tendered.

(2) In like manner, if I should swear that the usufruct of any property is either mine or should be surrendered to me, an action will lie in my favor as long as I am entitled to the usufruct in the same; but in those cases in which the usufruct would be lost, I will have no right of action. Where, however, the party swears that he has an usufruct, or that he is entitled to one in property in which no usufruct can be created, because it would be consumed by use; my opinion is that the effect of the oath must be sustained, and, therefore, even though it should be held that he was properly sworn, I think that, on account of the oath, he can claim the usufruct if security is given.

(3) When a controversy exists between yourself and me with reference to an estate, and I swear that it belongs to me, I have a right to obtain whatever I would have been entitled to if judgment had been rendered in my favor in a suit for the estate; and you are required to deliver not only the property of which you had possession at the time, but also whatever you became possessed of afterwards; and the oath must be considered of as much importance as if my case had been proved, and therefore an equitable action will lie in my favor. If, however, I am in possession on account of a right to the estate, and you undertake to recover it from me, and I make oath against you; I shall be entitled to an exception based on said oath. It is clear that, if some other party institutes proceedings against me to recover the estate, there will be no doubt (as Julianus says), that the oath will be of no advantage to me.

12. *Julianus, Digest, Book IX.*

The same rule prevails where I wish to sue anyone who is in possession of property belonging to an estate; because if I should bring an action to recover the estate from you, and prove that it is mine, nevertheless, if I brought suit against another person it would be necessary for me to prove the same thing. 13. *Ulpianus, On the Edict, Book XXII.*

Where there are two patrons, and, one of them having tendered an oath, a freedman swears that he is not his freedman, will the other be entitled to possession of the entire property which patrons have a right to, or only to half of the same? It is said, by way of answer, that if the party to whom the oath was sworn was a patron, the other has a right to the possession of his own share of the property, and it will be of no benefit to him that the freedman made oath against the other; but the patron will have a great deal of consideration and authority if he applies to a judge in an attempt to prove that he is the sole patron, because the freedman swore that the other was not his patron.

(1) Julianus says that anyone who swears that a certain tract of land is his should, after sufficient time has elapsed to give him a title by prescription, also have a right to a prætorian action.

(2) Julianus also says that where a party swears that he did not commit theft, he is held to have made oath with reference to everything relating to the matter; and therefore he will not be liable to an action of theft, or to a personal action for recovery, for the reason that only a thief is liable to the latter action. Therefore, can anyone who swears that he did not commit theft, make use of an exception on this account, if a personal action for recovery is brought against him? Where the party who brings the action alleges that he is the heir of the thief, he cannot be refused a hearing, and he should be granted a special action for recovery against the heir of the thief, and the judge must not permit him to proceed if he attempts to prove that the party is a thief.

(3) Where anyone swears that I sold him something for a hundred *aurei*, he can bring an action based on the purchase for the performance of whatever is connected with the contract; that is to say, for the delivery of the property and for security against recovery by a genuine owner. Should it not, however, be considered whether he can be sued on the contract of sale for the recovery of the purchase-money? If, indeed, oath was taken with reference to this, that is to say, that the money was paid, no right of action will exist for the recovery of the latter; but if this was not sworn to, the party will, in consequence, be liable for the purchase-money.

(4) We say that the same rule applies where anyone swears that he entered into a partnership; for he can still be sued in a partnership action.

(5) Marcellus says that where anyone swears that he gave his land as security for ten *aurei*, he cannot bring suit on the pledge without paying ten *aurei*, but he adds that perhaps he can be sued for ten *aurei* on account of his oath; and this he entirely approves of. Quintus Saturninus concurs in this opinion, and he makes use of the case where a party swore that his former wife gave him certain property as a dowry; for he says that, in this instance, an equitable action for the dowry should be granted her, and I deny that this opinion exceeds the demands of justice.

(6) Where, in a pecuniary transaction, a party swears by the Genius of the Emperor that he is not obliged to pay, or that his adversary is entitled to payment, and perjures himself; or where he swears that he will pay within a certain time and does not do so; our Emperor and his father stated in a Rescript that he must be sent away to be whipped with rods, and the following notice attached to him, namely: "Do not swear rashly!"

14. *Paulus, on the Edict, Book III.*

Whenever an oath is taken with reference to property, it cannot be dispensed with in favor of a parent or a patron, and an oath is exacted with reference to property; for instance, where money is borrowed and the plaintiff swears that he should be paid, or the defendant swears that he is not obliged to pay.

The same rule applies where an oath is required with reference to mere promise to pay at a certain time.

15. *The Same, On the Edict, Book VI.*

Someone must be sent to their homes to administer the oath to distinguished persons, and to those who are prevented by illness from appearing in court.

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

When a patron marries his freedwoman, he cannot be compelled to swear in an action for the removal of property; but if he himself tenders the oath to his freedwoman, he will not be compelled to swear that he did so for the purpose of annoyance.

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

Where an oath is tendered extrajudicially in accordance with an agreement, it cannot be tendered back again.

(1) A ward shall tender an oath with his guardian's consent, because, if he tenders it without it, an exception can be placed against him; but he is entitled to a replication, because he has no legal right to attend to his own affairs.

(2) Where a guardian who is administering a guardianship, or the curator of an insane person or a spendthrift, tenders an oath, it should be considered as ratified; as they dispose of property, and give receipts where money is paid, and can also bring a matter into court by means of a legal action.

(3) Moreover, where an agent tenders an oath, it must be sustained where he has control of all the property of his principal, or was especially directed to do this, or is an agent acting in his own behalf.

18. *Ulpianus, On the Edict, Book XXVI.*

But, otherwise, an agent who attempts to tender an oath should not be heard, as Julianus states in the Tenth Book of the Digest, nor can a defendant who has taken the oath subsequently be sued by the principal; and it is of not much benefit to him if security was furnished that the principal would ratify the act; for if the latter should sue him, the defendant will be compelled to show that he made oath in all sincerity, provided an exception is filed; but if he should bring suit based on the stipulation that the act would be ratified, he will be required to prove that perjury was committed by himself.

19. *The Same, On the Edict, Book XXVI.*

Therefore, if an agent was directed to bring suit, and he tendered an oath, he did something which he was not directed to do.

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

Where a slave tenders an oath or takes one, it will be sustained if he has the administration of his *peculium:*

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

For he can lawfully receipt for money paid, and has the right to renew an obligation.

22. *Paulus, On the Edict, Book XVIII.*

Some authorities hold that an action *De peculio* should be granted against the owner where a slave tenders an oath to the plaintiff. The same rules apply to a son under paternal control.

23. *Ulpianus, On the Edict, Book XXVI.*

Where a slave swears that his owner is not obliged to pay, the latter is entitled to an exception, and his adversary, who tendered the oath to the slave, has no one but himself to blame.

24. *Paulus, On the Edict, Book XXVIII.*

It is much more true that the religious feeling of a son is advantageous to his father, where suit can be brought against the latter. But where parties of this kind tender the oath back, they do not render the legal position of those to whose authority they are subject any worse.

25. *Ulpianus, On the Edict, Book XXVI.*

If my slave, where an oath has been tendered in the first place or tendered back to him, swears that certain property belongs to his master, or should be delivered to him; I think that I am entitled to an action or an exception based on contract, on account of the sacred character of the oath and the terms of the agreement.

26. *Paulus, On the Edict, Book XVIII.*

Where any one is said to have sworn, it makes no difference what his or her sex, or age may be, for the oath should, by all means, be sustained against the party who was content with it when he tendered it; although a ward is never considered to have perjured himself, because it is not held that he can knowingly be guilty of deception.

(1) If a father swears that his son is not obliged to pay; Cassius stated as his opinion that an exception based on the oath should be granted to both father and son. Where a father swears that there is nothing in the *peculium*, an action can be brought against the son; and it can also be brought against the father in order to obtain an accounting for any *peculium* which may have been subsequently acquired. (2) The taking of an oath may be considered as belonging to the same class as the renewal or assignment of an obligation, as it grows out of an agreement; although it also bears some resemblance to a judgment.

27. *Gaius, On the Provincial Edict, Book V.* An oath also takes the place of payment.

28. *Paulus, On the Edict, Book XVIII.*

Where two creditors jointly interested enter into a stipulation, and the oath is tendered by one of them, it will also prejudice the other.

(1) Where the principal debtor takes an oath, it also benefits a surety; and where an oath is required of a surety it likewise benefits the principal debtor, as Cassius and Julianus say; for, because it takes the place of payment it must, in this instance also, be considered as doing so; provided that the oath was introduced with reference to the contract itself and the property in question, and not with respect to the person who was sworn.

(2) Where anyone promises to produce my debtor in court, and I tender him the oath, and he swears that he never promised to produce him, this should be of no advantage to my debtor; but if he swears that he himself is not at all indebted to me, a distinction ought to be made, and the proceedings amended by means of a replication; whether he made oath to the effect that after his promise he had produced the party, or, in fact, had paid what was due.

A distinction of the same kind can also be made in the case of a surety for a debt.

(3) Where one of two joint-debtors of a certain sum of money took the oath; this should also benefit the other.

(4) An exception based upon an oath can be used not only where a party brings an action on account of the matter for which he executed the oath, but also with reference to another case, provided the same question is concerned in the latter proceeding; for example, where an oath is required in an action on mandate, or in one based on business transacted, partnership, and others of the same kind; and then a specific action for recovery based on the same matters can be brought, for the reason that one action is annulled by the other.

(5) Where anyone swears that he did not commit robbery, he should not be permitted to derive any advantage from his oath in an action for theft, or in one for the recovery of stolen property; because theft is a different crime, being one that can be perpetrated secretly.

(6) Where suit is brought against a tenant on his lease, for instance, because trees have been cut down, and he swears that he did not cut them, and he is afterwards sued under the Law of the Twelve Tables for having cut trees, or under the *Lex Aquilia* for wrongful damage, or an interdict *Quod vi aut clam* is applied for against him; he can make a defence by means of an exception based upon his oath.

(7) Where a woman swears that she did not remove property belonging to her husband on account of a divorce, she cannot make a defence by means of an exception, if suit is brought against her for the recovery of the property, and if she contends that it is hers, another oath will be required; on the other hand, if she swore that the property was hers, this oath can be set up as a defence in an action for the removal of property which has been removed. And, indeed, it should be generally observed that where the same question comes up in a different action, an exception based upon the oath will be available.

(8) Therefore, where a party swears that judgment was not rendered against him, even though he is sued on a judgment based on a stipulation that the decision of the court will be obeyed; he can defend himself by means of an exception.

Where, however, on the other hand, he is sued on the stipulation that the decision of the court will be complied with, and he then swears that he is not obliged to pay, an exception cannot be properly pleaded against the party bringing suit on the judgment; for it may happen that the stipulation did not become operative, even though judgment was rendered against him, unless he should swear that this was not the case.

(9) Moreover, Pomponius says that where a man swears that some of his property was stolen, he does not immediately acquire a good cause of action for the recovery of the property.

(10) Again, since under this Section the oath affords ground for both an action and an exception, if the defendant takes an oath out of court, which is tendered by the plaintiff, and swears that he is not obliged to pay; and then the plaintiff, on the tender of the oath by the defendant, swears that he has a right to exact payment, or *vice-versa;* the last claim supported by oath will have more force, but this will not prejudice the point as to whether the other party has committed perjury; for the question is not whether the defendant was obliged to pay, but whether the plaintiff made oath that he was.

29. *Tryphoninus, Disputations, Book VI.*

Moreover, if you tender an oath, and I swear that you did not swear that I was obliged to pay you; then, in opposition to an equitable action by which it is intended to ascertain whether you made oath that you had a right to require payment, I can plead an exception based upon my oath for the purpose of disposing of the question included in the action.

30. *Paulus, On the Edict, Book XVIII.*

Pedius says that where a man, in an action in which the amount is increased by the denial of the defendant, swears that something is owing to him, he acquires a right to bring suit for simple and not for double damages; for it is abundantly sufficient that the plaintiff should be freed from the necessity of proving his case, since, leaving out this part of the Edict, his right of action for double damages remains unimpaired; and it may be said that in a case of this

kind the principal cause of action is not the object of the proceeding, but that the oath of the plaintiff should take effect.

(1) If I swear that you are obliged to deliver Stichus to me, and such a slave is not in existence, you, as defendant, are not required to pay me his value, except in case of theft or because of your default; for in either of these instances the value of the slave must be stated, even after his death.

(2) Where a woman swears that ten *aurei* are due to her on account of dowry, that entire amount must be paid; but if she swears that she paid ten *aurei* by way of dowry, inquiry will not be made as to the mere fact whether the amount was paid, but it will be considered as paid, and whatever portion should be returned must be given to her.

(3) In a popular action, an oath which has been exacted can be used against others only if it was demanded in good faith; for, where anyone institutes proceedings, this does not prevent a public action, unless the proceedings were instituted through collusion.

(4) Where a freedman, after his patron has tendered him the oath, swears that he is not his freedman, the oath must be sustained; so that no claim for services, nor one for the possession of the property of an estate contrary to the provisions of the will, can be considered.

(5) If I swear that I have a right to have a usufruct transferred to me, this should be done only where I give security that I will make use of it in the way that a good citizen would do, and that, when the usufruct terminates, I will restore it.

31. *Gaius, On the Provincial Edict, Book XXX.*

We must remember that sometimes, even after the oath has been exacted, it is permitted by the Imperial Constitutions to have recourse to ordinary proceedings, where the party interested alleges that new documents have been found which he now only desires to use. These Constitutions are held to be available solely where a party has been discharged by the court; for judges, after requiring an oath, are frequently accustomed to render a decision in favor of the party who was sworn; but where the matter has been settled between the parties by means of an oath, it is not permitted for the same case to be reheard.

32. *Modestinus, Differences, Book III.* A ward cannot dispense with the oath.

33. *Ulpianus, On Sabinus, Book XXVIII.*

When a party swears by his own salvation, although he is held to swear by God (for when he swears in this way he has reference to the Divinity), still, if the oath had not been tendered him in this particular manner, he is held not to have sworn; and therefore he will be compelled to make oath again in the proper form.

34. *The Same, On the Edict, Book XXVI.*

An oath may be employed both with reference to money and to all other matters, for an oath may even be tendered in an action for services, and the adversary cannot complain of any injury done him, since he can tender the oath back. What then should be done if the defendant alleges that he is released because he thinks that Stichus, the slave whom he promised, is dead? In this case he cannot be protected by tendering the oath back; and therefore, for this reason, Marcellus thinks, and very properly, that he should either be excused from taking the oath, or that certain time should be granted him that he may ascertain the facts and then be sworn.

(1) A party who appears in defence of a municipality or of any corporate body can tender the oath, if he has an order to do so.

(2) An oath cannot be tendered to a ward.

(3) Neither an agent nor a defender can be compelled to swear; for it is stated by Julianus in the Ninth Book of the Digest that a defender cannot be compelled to swear and that it will be sufficient for a complete defence if he is prepared to join issue in the case.

(4) Where a party tenders an oath, he must himself first swear that he does not do so with a desire to cause annoyance, if this is required; and then the oath for him will be taken. This oath with reference to annoyance is dispensed with in the case of a patron or parents.

(5) If there is any doubt among the parties as to the nature of the oath to be taken, its terms are to be decided by the arbiter who hears the case.

(6) The Prætor says, "He who is asked to swear I will compel either to pay or to take the oath," and therefore the defendant must choose whether he will pay or swear, and if he does not swear, he will be compelled by the Prætor to pay.

(7) Another resource is, however, granted to the defendant, namely, that of tendering back the oath if he prefers to do so, and if he who brings the action refuses to accept the conditions under which he must be sworn, the Prætor will not permit the case to go on, and in doing so he acts most justly; since the conditions under which the oath must be taken should not be displeasing to the party who himself tendered one.

The plaintiff, however, cannot tender the oath relating to annoyance to the defendant who tenders back the oath, for, that the plaintiff should expect that an oath *de calumnia* will be taken with reference to terms which he himself imposed, is something that ought not to be tolerated.

(8) It is not always proper for an oath to be again tendered in the same terms as at first; for, perhaps, on account of the diversity of things or persons, matters may arise which cause a difference to exist between them, and therefore if anything of this kind should occur, the terms of the oath should be decided by the judge.

(9) When the matter in dispute is referred to an oath, the judge discharges the party who swears and will hear the one who desires to tender the oath back, and if the plaintiff should swear, he must render a judgment against the defendant; and if the latter refuses to swear, but pays, he must discharge him, and if he does not pay, he must render judgment against him; and where the plaintiff, after the oath is tendered back, refuses to take it, he must discharge the defendant.

35. *Paulus, On the Edict, Book XXVIII.*

When the guardian of a ward tenders an oath where all other evidence is lacking, he must be heard, for circumstances may exist under which an action will be refused the ward.

(1) Where a spendthrift tenders an oath, he shall not be heard, and the same rule applies in other similar cases; for, whether the oath takes the place of an agreement, or of a debt, the payment of the execution of a judgment, it should not be allowed, except when tendered by those who are properly qualified for such things.

(2) Parties who cannot be compelled to join issue at Rome, cannot be compelled to make oath there; as, for example, provincial envoys.

36. *Ulpiamis, On the Edict, Book XXVII.*

Where the plaintiff tenders an oath with reference to money which had been merely promised, and the defendant swears, he can avail himself of an exception if an action is brought against him on the promise; but if he is sued for the principal — that is on account of the prior obligation — an exception cannot be pleaded, unless he swore with respect to this also, after the plaintiff had tendered him the oath.

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

If the oath has not been waived by the party who tendered it, and no oath has been taken denying that proceedings have been instituted for purposes of annoyance, the action will not be granted in consequence; for he has only himself to blame who proceeded to tender the oath before the denial that annoyance was intended was sworn to, so that he is in the same position as if he had dispersed with the oath.

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

Where a party is unwilling either to swear or to tender back the oath, it is an evidence of manifest depravity, and equivalent to a confession.

39. *Julianus, Digest, Book XXX.*

Where anyone agrees with his debtor that suit shall not be brought for the money if he swears that he did not "ascend the Capitol," or that he had done or had not done anything else whatsoever; and the latter makes oath accordingly, an exception on the ground of the oath should be granted him, and if he has paid he can recover the money; for an agreement is lawful where, in any case whatsoever, it is made dependent upon the condition of an oath.

40. *The Same, Digest, Book XIII.*

Where an oath is required from a debtor it effects a release of a pledge; for this resembles the discharge from liability for a debt, and certainly gives rise to a perpetual exception. Therefore, a creditor who brings suit for a penalty will be barred by an exception, and if the money has been paid it can be recovered; just as where an oath is interposed all controversy is at an end.

41. *Pomponius, Rules.*

Labeo stated that the oath may be dispensed with in favor of a party who is absent, or ignorant of the facts; and it can even be waived by letter.

42. *The Same, Epistles, Book XVIII.*

Where an oath was tendered by a creditor who had instituted proceedings against a ward for money which had been loaned, the latter swore that he was not obliged to pay, and then the creditor brought suit against his surety for the money; should he be barred by an exception based on the oath? Write to me what your opinion is. Julianus discusses the point more fully; for he says if the controversy that arose between the creditor and the ward was whether the ward had ever received the money, and it was agreed that the whole question should be settled if the ward would take an oath, and he swore that he was not obliged to pay; the natural obligation is disposed of by this agreement, and if any money has been paid it can be recovered.

If, however, the creditor maintained that he had made the loan, and the ward only defended himself upon the ground that his guardian had not intervened, and an oath of this kind is taken; the Pra3tor, in this instance, will not afford the surety any relief. But where it cannot be clearly proved what the agreement was, and it is doubtful (as very frequently happens) whether the controversy between the creditor and the ward was a question of fact or one of law; and the creditor, having tendered the oath, the ward took it; we must hold that the understanding between them was that if the ward should swear that he was not obliged to pay, the controversy should be considered at an end, and the money paid can be recovered; and we think that an exception should be granted the sureties.

(1) Where a surety swears that he is not obliged to pay, the defendant is protected by an exception founded on the oath; but if a surety should swear that he had never been surety at all for the sum demanded, this oath ought not to benefit the person who promised.

(2) Moreover,, where the plaintiff tenders the oath, and a party who appears for either the absent or present defendant swears that the latter is not obliged to pay; an exception based upon the oath shall be granted to him in whose behalf the oath was taken.

The same rule is applicable where some one who appears in defence of a surety makes oath for an exception to be granted the principal.

(3) In like manner if the principal makes oath, his surety will be protected; because a decision in favor of either of them will benefit the other.

TITLE III.

CONCERNING AN OATH MADE IN COURT.

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

Where property is the subject of legal proceedings and an oath is taken with reference to the claim, we do not consider its value to be greater because the judgment may be for a larger amount on account of the contumacy of the defendant in not surrendering the property, as it does not by this means become more valuable; but its value is increased above what it is worth on account of the contumacy of the defendant:

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

Whether we sue for something which is ours or whether proceedings are instituted for production.

(1) Sometimes the appraisement is made only with reference to the interest of the plaintiff in the action; for instance, where the negligence of the defendant in not surrendering or producing the property is to be punished; but when the fraud or contumacy of the party who does not surrender the property or produce it is to be punished, the value must be estimated in accordance with the amount which the plaintiff swore to in court with reference to the claim.

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

Where money has been deposited, the judge should not tender the oath in order that the party may swear to the amount of his interest, since the value of the coins is certain; unless he should swear as to what his interest was to have the money returned to him on the appointed day; for what if he had to pay a sum of money under a penalty, or on account of a pledge, and the pledge was sold because the other party had refused to pay the money which had been deposited with him?

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

Let us consider who can take this oath where proceedings are instituted against the guardian, and against whom he can do so. The ward himself, indeed, cannot take it if he has not arrived at puberty, for this has very frequently been published in rescripts. The Divine Brothers stated in a Rescript that the guardian himself cannot be compelled to swear, or the mother of the ward be permitted to do so, even though she be ready to make oath; for it was held to be a serious matter for guardians who are ignorant of the facts, to incur the risk of perjury for the benefit of another, against their consent.

It was also established by our Divine Emperor and his father that the curators of a ward or a minor could not be compelled to make oath with reference to a claim; but, where guardians or curators wish to manifest so much affection for the wards or minors under their charge, the authority of the law will not prevent trials from being ended in this way where issue has been joined between the parties; since the appraisement established by oath must be made, not with reference to the advantage of the party who is sworn, but to that of his principal in whose behalf an account of guardianship must be rendered. The minor, however, can be sworn if he wishes.

(1) The judge must tender the oath, but if anyone else should tender it, or if it should be taken without being tendered, it has no sanctity, and, in fact, is no oath at all; and this is stated in the Constitutions of our Emperor and his Divine Father.

(2) Any sum may be sworn to; but, I ask, can the judge fix a limit to the oath so as to restrict it to a certain amount, in order to prevent the party from taking the opportunity to swear to an immense sum? It is settled that it is in the discretion of the judge to tender the oath or not to do so; and therefore the question arises whether anyone who can refuse to tender the oath cannot also limit the amount to be sworn to; and this also is in the discretion of a judge acting in good faith.

(3) Moreover, it should be considered whether the judge who has tendered an oath is not entitled to refuse to follow it, and either to dismiss the case entirely, or to render judgment for a smaller amount than has been sworn to; and the better opinion is that where some unusually good cause exists, and new evidence has been discovered he can do so.

(4) It is well established that where negligence has been committed, the oath should not be tendered, but a valuation should be made by the judge.

5. *Marcianus, Rules, Book IV.*

In actions *in rem* and in those for production, as well as in *bona fide* proceedings, an oath is taken with reference to the claim.

(1) The judge, however, can fix a certain amount up to which the party may swear; for he had a right in the first place not to tender him the oath.

(2) Moreover, where the oath is taken, the judge has a right either to dismiss the case, or to render judgment against the defendant for a smaller amount.

(3) In all these instances, however, the oath with reference to the claim can be taken only where fraud exists, and not on account of negligence; for the judge makes an estimate of what comes under the latter.

(4) There is no question that sometimes an oath is taken with reference to the claim in an action of strict law; for example, where a party who promised to deliver Stichus makes default, and Stichus dies; as the judge cannot make an estimate of the value of property which no longer exists, without tendering an oath.

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

It is otherwise where proceedings are taken on a stipulation or under a will, for then it is not customary for the claim to be sworn to.

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

It is generally taken for granted that no one but the party who has control of the case can make oath with reference to the claim; for Papinianus says that no one but a party who has joined issue in his own behalf can do so.

8. *Marcellus, Digest, Book VIII.*

Where a guardian who is in possession of the property of a person who has attained his majority refuses to surrender it to him; I ask whether judgment should be rendered against him for what the property is worth, or for the amount of the claim sworn to by the plaintiff? I answered that it is not just that the value, (that is what the property is worth), alone should be estimated, but that the contumacy displayed must be punished; and that the value of the property should rather be left to the judgment of the owner of the same by the power of making oath to the claim being granted to the plaintiff.

9. *Javolenus, On Cassius, Book XV.*

Where proceedings for theft are instituted, the value of the property at the time when the theft was committed must be sworn to, without adding the words, "Or more," because where property is worth more, it is, at all events, worth as much.

10. *Callistratus, Questions, Book I.*

Where anyone does not produce documents, the plaintiff is permitted to swear to the claim, so that judgment may be rendered against the defendant for an amount of damages equal to the interest the plaintiff has in having the documents produced; and this the Divine Commodus stated in a Rescript.

11. *Paulus, Opinions, Book III.*

Inquiry is not readily permitted where a party commits perjury in a case in which he is

compelled by law to swear to a claim.

TITLE IV.

CONCERNING A SUIT FOR THE RECOVERY OF PROPERTY GIVEN FOR A CONSIDERATION WHICH DOES NOT TAKE PLACE.

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

Where money is paid on account of some act which is not dishonorable, as that a son shall be emancipated, or a slave manumitted, or a suit abandoned; then, if the act is performed, an action for the recovery of the money will not lie.

(1) If I pay you ten *aurei* for fulfilling a condition, and I afterwards reject an estate or a legacy, I can bring suit to recover the money.

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

Where, however, the will is pronounced to be forged or inofficious, without criminality on the part of him who paid the money, the said ten *aurei* can be recovered by an action on the ground of failure of consideration.

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

I paid you a certain sum of money to avoid your bringing me into court; and, hence I, as it were, disposed of the matter. Can I bring suit for recovery, if security is not furnished me that judicial proceedings will not be instituted? It is true that it makes a great deal of difference whether I paid the money for no other purpose than to avoid being brought into court, or that I should be promised that this would not be done; but if this was the consideration, namely, that I should be promised, I can bring suit to recover the money if the promise was not given; but if the understanding was merely that judicial proceedings should not be undertaken, no action for recovery will lie as long as this is not done.

(1) The same rule will apply if I pay you a sum of money on the condition that you do not manumit Stichus; for, in accordance with the distinction above stated, an action for recovery can either be granted or refused.

(2) But if I pay you the sum of money on the condition that you will manumit Stichus, and you do not do so, I can bring an action for its recovery; or, if I change my mind, I can still bring it.

(3) Where, however, I paid you the money on condition that you would manumit him by a certain time, what then? If the time has not yet elapsed, a suit to recover the money will be refused, unless I have changed my mind; but if it has elapsed, suit can be brought. But if Stichus is dead, can the money which was paid be recovered? Proculus says that if he died after the time had arrived when he could have been manumitted, an action for recovery will lie, otherwise not.

(4) And, indeed, if I did not pay you anything to induce you to manumit the slave, but it was agreed that I should pay you, you are at liberty to bring the action which arises from such a contract, that is, a personal action for recovery, even though the slave be dead.

(5) Where a freeman who was serving me as a slave in good faith pays me money on the condition that I will manumit him, and I do so, and he is afterwards proved to be free; the question arises, can he bring an action against me to recover the money? Julianus says in the Eleventh Book of the Digest that the manumitted party has a right of action for its recovery. Neratius also, in the Book of Parchments, states that a certain Paris, a dancer, who had paid Domitia, the daughter of Nero, ten *aurei* to obtain his freedom, brought an action against her to recover it, and the inquiry was not made as to whether Domitia received it knowing at the time that he was free.

(6) If anyone pays me ten *aurei*, with the understanding that he is a slave who expects to be free on a certain condition, when he was not ordered to do this; Celsus holds that he can bring

suit to recover the ten *aurei.*

(7) Where a slave who was directed under a will to pay the heir ten *aurei* and become free, received his freedom absolutely under a codicil, but, being ignorant of the fact, paid ten *aurei* to the heir; can he bring an action for their recovery? He states that Celsus, his father, held that he could not recover them; but Celsus himself, being influenced by a feeling of natural justice, thinks that suit can be brought for their recovery. This opinion is the more correct one, although it is established (as he himself states) that a party who paid money with the expectation that he would be remunerated by the person who received it, or that the latter would be more friendly to him in the future, cannot recover it; because he was deceived by a false opinion.

(8) He also discusses here a nicer point, namely, as to whether a slave who thought that he would be conditionally free, did not transfer the property in the money which he paid to the party receiving it; since he paid it to the heir under the impression that it belonged to the heir instead of to himself, although the money was his, as he received it after his freedom had been granted him under the will. I am of the opinion that, if he paid it under this impression, it did not become the property of the heir; for even where I pay you my money as if it was your own, I do not make it yours.

What would be the case, then, if the party above mentioned did not pay it to the heir, but to someone else to whom he thought he had been ordered to pay it? If, indeed, he paid the money out of his *peculium*, he would not make it the property of the party who received it; but if another paid it for him, or he himself paid it after he became free, it would become the property of the person who received it.

(9) Although a slave freed under a condition is permitted to pay money out of his *peculium*, in compliance with some condition, still if the heir wishes to retain it, he can forbid him to pay it; for then the result will be that the slave will obtain his freedom just as if he had fulfilled the condition which he was forbidden to comply with, and the money will not be lost. But the party whom the testator wished to receive the money can bring an action *in factum* against the heir to compel him to obey the order of the testator.

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

Where a creditor discharges his debtor after he had agreed to provide someone who would promise to make payment in his stead, and he does not do so; it may be held that the party who was discharged is liable to a suit for the recovery of the money.

5. *The Same, Disputations, Book II.*

Where you receive money on the condition that you will go to Capua, and then at the time when you are prepared to start on your journey, the state of the weather, or your health prevents you from doing so; let us consider whether an action to recover the money can be brought on the ground of your failure to make the journey? Since you were not to blame for not going, it may be stated that an action to recover the money will not lie; but, as the party who paid it has a right to change his mind, there is no doubt that what has been paid can be recovered by an action, unless it would have been to your advantage not to have received the money for that purpose; or if the condition of things is such that, although you have not yet started you have, nevertheless, arranged your affairs so that you are compelled to go, or that you have already incurred the necessary expenses for the journey, so that it is evident, for instance, that you have expended more than you have received, an action for recovery will not lie; but if you have spent less, the action can be brought, provided, however, that you will be indemnified for what you have expended.

(1) Where one party delivers a slave to another with the understanding that he shall, within a certain time, be manumitted by him, and he who delivered the slave changes his mind and communicates this to the other party; and the slave should be manumitted after his mind has been changed, he who delivered the slave will, nevertheless, be entitled to bring an action

because he changed his mind. It is evident, however, that if the other party does not manumit the slave, the constitution becomes operative, and renders the slave free, if the party who delivered him for this purpose has not yet changed his mind.

(2) Moreover, where anyone gives Titius ten *aurei* in order that he may purchase a slave with the money and manumit him, and he afterwards changes his mind; if the slave has not yet been purchased, the change of mind will give him a right of action to recover the money, if he makes this plain to Titius, lest he may purchase the slave afterwards and suffer loss. If, however, the slave has already been purchased, the change of mind will not injure the party who purchased him but, instead of the ten *aurei* which he received, he must surrender the slave that he purchased; or if, in the case proposed, the slave should have previously died he need not pay anything, provided his death was not caused by him. If, however, the slave has fled, and the party who purchased him was not to blame for it, he will not be required to pay anything; but it is clear that he must promise to restore him if he should ever come into his power.

(3) But if he received money in order to manumit a slave and he runs away before he is manumitted; let us consider whether what he received can be recovered by a personal action? If, indeed, he had been about to sell the said slave, and failed to do so because he had received money to manumit him, suit for recovery cannot be brought against him. But it is evident that he must give security that if the slave comes into his hands, he will return what he received, after deducting any diminished value the slave may have sustained on account of his flight. There is no doubt that if the party who made the payment is still desirous that the slave should be manumitted, but the other does not wish this to be done, because he is offered on account of his having taken to flight, he must return the entire amount that he received. If, however, the party who paid him the ten *aurei* chooses to have the slave himself delivered to him; the result will be, that either the slave must be delivered to him or the money which he paid be refunded. But if the party had no intention of selling the slave, then what he received must be returned, unless that if he had not received the money to manumit him he would have guarded him with greater care; for, in this instance, it is not just that he should be deprived of the slave and the entire price as well.

(4) Where, however, he accepted the money for the purpose of manumitting the slave, and the slave died; then, if he was in default with reference to the manumission, it follows that we must hold that he should refund what he received; but if he was not in default, having started on a journey to see the Governor of the province or any other magistrate before whom proceedings for manumission could be instituted, and the slave died on the journey; the better opinion is that, if he had the intention of selling the slave or of making use of him himself for some purpose, it must be held that he is not obliged to refund anything; for if he had no intention of doing these things, he must sustain the loss resulting from the death of the slave, since he would have died even if his owner had not received the money to manumit him, unless that the journey undertaken in order to manumit him happened to be the cause of his death; as, for instance, if he was killed by robbers, or crushed by the fall of a stable or by being run over by a vehicle, or lost his life in some other way, and this would not have occurred if the journey for the purpose of manumitting him had not been undertaken.

6. *The Same, Disputations, Book III.*

Where a stranger gives a dowry for a woman, and it is agreed that in whatever way the marriage may terminate the dowry shall be returned to him, and no marriage should take place; then, because the agreement only had reference to matters which happened after marriage, and the marriage was not celebrated, the question will arise whether the woman has a right of action for recovery, or whether the party who gave the dowry is entitled to one? It is probable, however, that, in this instance also, the party who gave the dowry had a view to his own interest; for he who made the gift on account of the marriage can, if the marriage is not performed, bring an action for recovery as if on the ground of want of consideration, unless the woman should be able to prove by the most convincing evidence that he did this rather for

her benefit than for his own advantage.

(1) But where a father gives a dowry for his daughter, and an agreement of this kind is made; then, unless the intention was manifestly different, Marcellus says that the father has a right to bring a personal action for its recovery.

7. *Julianus, Digest, Book XVI.*

Some one who thought that he owed a certain sum of money to a woman promised her betrothed, at her request, to pay it to him as dowry, and did so; and afterwards the marriage did not take place. The question arose whether the party who paid the money could recover it, or whether the woman could do so? Nerva and Atilicinus answered that since the party thought that he owed the money, and could have defended himself by an exception based on fraudulent intent, he himself could bring suit; but if he was aware that he did not owe the woman anything, and made the promise, the woman would have the right of action because the money would belong to her. If, however, he had been actually her debtor, and had paid the money before marriage, and the marriage did not take place; he can bring an action to recover the money, and no other right of the woman to payment of the debt would remain than that the debtor could be compelled to assign to her his right of action for recovery, and would be subject to no further liability.

(1) Where land is conveyed by way of dowry, and the marriage does not take place, it can be recovered by a personal action, and the crops also can be sued for. The same rule applies to a female slave and her children.

8. *Neratius, Parchments, Book II.*

With reference to what Servius states in his book on Dowries; that is, if a marriage has taken place between persons neither of whom has yet reached the proper age, whatever in the meantime has been given by way of dowry can be recovered; we must understand by this that if a divorce is obtained before either person has reached the lawful age, the money may be recovered, but so long as they remain in the state of matrimony the property cannot be recovered any more than where it is given as dowry by a betrothed woman to her betrothed husband, so long as the connection exists between them; for when anything is given on this account before the marriage has been consummated, then, (since it is given in such a way that it may become a dowry) it cannot be recovered as long as it is possible that this may happen.

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

If I intend to give money to a woman, and pay it to her betrothed as dowry by her direction but the marriage does not take place, the woman has a right of action for its recovery. But if I made a contract with her betrothed, and gave him the money with the understanding that if the marriage was performed the dowry would be acquired by the woman, but if it was not it should be returned to me; it is given as it were in consideration of something, and if this did not take place I can recover it from the betrothed husband.

(1) Where a person, through mistake, promises to the intended husband of a woman, by her direction, money which he does not owe, and the marriage takes place, he cannot avail himself of an exception on the ground of fraudulent intent; for, as the husband was transacting his own business, he is not guilty of fraud, and should not be deceived, which would be the case if he were compelled to take a wife who was without a dowry. Therefore, the aforesaid party has a right of action for recovery against the woman, and in it he can demand from her what he gave her husband, or that he shall be released from liability if he has not yet made payment. But if the husband should bring an action to recover the money after the marriage has been dissolved, the exception should only be a bar with reference to the amount which the woman would have received.

10. *Javolenus, On Plautius, Book I.*

Where a woman wishing to give a dowry to the man whom she intends to marry releases him

from liability for the money which he owes her, and the marriage does not take place, she can very properly bring suit against him to recover the money; because it makes no difference, since he received it without consideration, whether it was actually paid to him or he obtained a release for it.

11. *Julianus, Digest, Book X.*

Where an heir who is directed by the decision of a freedman to erect a monument for a certain sum, pays the money to the freedman, and he, having received it, does not erect the monument, he will be liable to an action for the recovery of the money.

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

Where anyone brings an action for a *donatio mortis causa* on the recovery of the party from sickness, he can claim also the produce of the property donated, the children of female slaves, and anything else which may have accrued to the property donated.

13. *Marcianus, Rules, Book III.*

Where a son brings any property into hotchpot for his brother as if he were about to institute proceedings for the possession of the estate, and does not do so; Marcellus says in the Fifth Book of the Digest, that he is entitled to an action to recover it.

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

Where a party pays money which he does not owe to one who falsely represents himself as an agent, the money cannot be recovered from the agent unless his alleged principal ratifies the transaction; but, as Julianus states, the principal himself would be liable. Where, however, the principal does not ratify the act, then if the money paid had been actually due, it can be recovered from the alleged agent himself; since an action for the recovery of money paid where there was no debt is not based on this fact, but on the ground that it was paid on account of something which did not take place, and no ratification was made; or suit may be brought because the false agent committed a theft of the money, since he can not only be sued for theft but also in a personal action for recovery.

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

Where one of your slaves was suspected of theft by a certain Attius, and you surrender the slave to be put to torture, under the condition he should be returned to you, if he were found to be not guilty; and then Attius delivered him to the Prefect of the Watch as one who was caught in the act, and the Prefect of the Watch inflicted the extreme penalty upon him; you are entitled to an action against Attius on the ground that he was obliged to deliver you the slave, because he was required to do this before his death.

Labeo says that you are entitled to an action for production, since Attius is responsible for preventing him from being produced. Proculus, however, says that for Attius to be obliged to deliver the slave you must have made him his slave, in which instance, you could not bring an action for his production; but if he had still remained yours, you could bring an action against Attius for theft, because he was making use of the property of another in such a way that he must have been aware that he was doing so against the will of the owner, or that if the latter had been aware of it he would have forbidden it.

16. *Celsus, Digest, Book III.*

I paid you a sum of money on the condition that you should deliver Stichus to me; is this kind of a contract one of incomplete purchase and sale, or does no other obligation arise from it than would from property given in consideration of something which did not take place? I am rather inclined to adopt the last opinion; and therefore, if Stichus had died, I could recover the amount which I gave on the condition that you would deliver Stichus to me. Suppose, for instance, that Stichus belonged to some one else, but you, nevertheless, delivered him to me; I can recover the money from you because you did not transfer the ownership of the slave to the

party who received him; and, again, if Stichus is your property, and you are not willing to give security against his recovery by anyone having a better title, you will not be released so that I cannot bring suit to recover the money from you.

TITLE V.

CONCERNING THE ACTION FOR RECOVERY WHERE THE CONSIDERATION IS IMMORAL OR UNJUST.

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

Everything which is given is parted with either with some purpose in view or for a consideration; and where it is given for some purpose it may be either immoral or honorable, and where it is immoral, the immorality may either attach to the giver and not to the receiver, or it may attach to the receiver and not the giver, or it may attach to both.

(1) Hence where anything is given for an honorable purpose, an action can be brought for its recovery only where the purpose for which it was granted was not accomplished.

(2) Where, however, the receiver is the one guilty of immorality, even though the purpose be accomplished, an action can be brought for the recovery of the gift.

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

For example, suppose I gave you something to induce you not to commit sacrilege or theft, or not to kill a man. In this instance, Julianus says that if I give it to you to prevent you from killing a man, an action for its recovery can be brought.

(1) Moreover, the rule is the same, if I gave you something on the condition that you would return to me property which I deposited with you, or would restore to me certain documents.

(2) Where, however, I gave you something on the condition that the judge would decide in my favor in a good cause, it has indeed, been stated that there will be ground for an action for recovery, but he who does this commits a crime, as he is held to corrupt the judge; and recently our Emperor decreed that he should lose his case.

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

Where both the giver and the receiver are guilty of immoral conduct, we hold that suit cannot be brought for the recovery of the donation; as, for instance, where money is paid in order that an unjust judgment may be rendered.

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

The same rule applies where money is paid in consideration of prostitution, or where a party who has been caught in adultery purchases immunity, as no action for recovery will lie; and this is the opinion of Sabinus and Pegasus.

(1) Moreover, where a thief pays to avoid being surrendered, since, in this instance, as both parties are guilty of immorality, no action for recovery will lie.

(2) Where, however, only the receiver is guilty of immoral conduct, Celsus says an action for recovery can be brought; for example, where I pay you to prevent you from injuring me.

(3) Money paid to a harlot, however, cannot be recovered, as Labeo and Marcellus state; but the principle is not the same, as the question is not whether there is immorality on both sides, but that it exists only on the part of the giver; as the woman acts in an immoral manner because she is a harlot, but she is not immoral when she accepts the money since she is a harlot.

(4) If I give you something in return for information, for example, in order that you may reveal the whereabouts of my fugitive slave, or tell me where a thief who has stolen my property may be found; suit cannot be brought for what I have, because you, in receiving it, were not guilty of immorality. But if you accept money from my fugitive slave to prevent you

from giving information respecting him, I can bring an action against you to recover said money, just as if you were a thief; and if the thief himself, or the companion of a thief, or of a fugitive slave, received money from me in return for information; I am of the opinion that there will be ground for an action for the recovery of the same.

5. *Julianus, On Urseius Ferox, Book III.*

Where anyone receives money from my slave to prevent him from giving information concerning a theft which he committed, whether he gives the information or not, Proculus says that an action will lie for the recovery of the money.

6. *Ulpianus, On Sabinus, Book XVIII.*

Sabinus always approved of the opinion of the ancient authorities, namely, that where anything is in the hands of a party illegally, it can be recovered by a personal action; and Celsus also concurs in this opinion.

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

Where money has been obtained through a stipulation which was extorted by force, it is established that an action will lie for its recovery.

8. *Paulus, Questions, Book III.*

If you should promise Titius anything for an immoral consideration, you can bar him by an exception on the ground of malicious contrivance, or *in factum;* nevertheless, if you give it, you cannot bring an action for its recovery; since the more recent event, that is to say the stipulation, is disposed of, having been made of no effect by reason of the exception, and the former event, that is to say the immorality, remains. And, moreover, if the position of both the giver and the receiver is immoral, that of the possessor is preferable; and hence an action for recovery will not lie, although the money was paid on account of the stipulation.

9. *The Same, On Plautius, Book V.*

If I lend you clothes to be used by you, and afterwards I pay money for their return, it has been held that I can properly proceed by means of a personal action for recovery; because, although the money was paid for a certain purpose, and the purpose was accomplished, nevertheless, it was improperly paid.

(1) If you receive money from me as an incentive for you to return property which was rented to you, or sold to you, or placed in your custody, I will be entitled to an action against you based on lease, sale, or mandate; but if I paid you the money to induce you to deliver to me something which you owed by reason of a will or a stipulation, there will be merely a right to bring suit for recovery of the money paid you for this purpose; as was stated by Pomponius.

TITLE VI.

CONCERNING AN ACTION FOR THE RECOVERY OF MONEY WHICH IS NOT DUE.

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

Now let us consider the case of money which was paid without being due.

(1) And, indeed, if anyone ignorantly pays what is not due, he can recover the same by means of this action; but if he paid it being aware that he did not owe it, an action for its recovery will not lie.

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

Where anyone pays with the understanding that if it should appear that the money was not due, or that the *Lex Falcidia* is applicable, it shall be returned; an action for recovery will be available, for an agreement has been made between the parties.

(1) Where anything is paid in compliance with the terms of a will, but the will afterwards proves to be forged, or inofficious, or invalid, or should be set aside, it can be recovered; and

if, after a long time, a debt should come to light, or codicils which have been long concealed should be produced, which contain a revocation of legacies already paid, or the legacies are diminished because bequests have been left to others; the same rule applies. This is the case because the Divine Hadrian stated in a Rescript that where an inofficious or forged will exists, an action should be granted the party in whose favor a decision was rendered with reference to the estate.

3. *Papinianus, Questions, Book XXVIII.*

The same course should be pursued where, after the legacies are paid, some new or unexpected event transfers the estate to others; for example, where a posthumous child is born whom the heir did not know was in its mother's womb, or where a son who was in the hands of the enemy and whom his father erroneously thought to be dead, returns; for the Emperor Titius Antoninus stated in a Rescript that a prætorian action should be granted to a posthumous son or to one to whom the estate had been awarded against the parties who had received legacies, because a possessor in good faith is liable for the amount by which he became more wealthy, and the risk of claims of this kind does not attach to a party who makes payment without being guilty of negligence.

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

The Divine Hadrian stated in a Rescript that the same rule would apply if another will should be produced.

5. *Ulpianus, On Sabinus, Book XVI.*

It is no new doctrine that, where one party pays, another can bring an action to recover the money; for where a minor under twenty-five years of age, without proper consideration, enters upon an estate, and obtains complete restitution after the legacies have been paid; then, as set forth in the Rescript to Arrius Titianus, the right of action for recovery does not belong to him, but to the party entitled to the property of the estate.

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

If your agent pays a debt which was not due, and you do not ratify his act, then, as Labeo states in the Books styled "Last Works," an action can be brought to recover the money, but if it was due, Celsus says it cannot be recovered; because where anyone appoints an agent to transact his business, it is held that he also directs him to pay his creditor; and it is not necessary afterwards to wait for him to ratify his acts.

(1) Labeo also says that if money which is not due is paid to an agent and his principal does not ratify his act, suit can be brought to recover it.

(2) Celsus says that anyone who pays a debt to an agent is immediately released, and no ratification should be considered; but where the agent receives what is not due, then ratification is required, because he would be held not to have directed that anything should be done with reference to the collection of this claim, and therefore, if his act is not ratified, suit must be brought against the agent for its recovery.

(3) Julianus says that neither a guardian nor an agent can bring an action for the recovery of money after they have paid it; and that it makes no difference whether they paid out their own money or that of the ward or principal.

7. *Pomponius, On Sabinus, Book IX.*

Where money which is not due is paid through mistake, suit may be brought for the recovery of the same money, or of an equal amount.

8. *Paulus, On Sabinus, Book VI.*

Where a third party pays a wife on account of a husband who is insolvent, he cannot bring suit to recover the money, since it is, to all intents and purposes, a debt due to the wife.

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

For even if a husband, when he is absolutely unable to pay his debts, gives his wife the dowry, he is in such a position that he cannot bring an action to recover it.

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

He who has undertaken to pay a debt on a certain day is a debtor to such an extent that, if he pays the debt before the prescribed time, he cannot bring an action to recover the money.

11. *Ulpianus, On Sabinus, Book XXXV.*

If a party against whom an action *De peculio* is brought should, through carelessness, pay more than there is in the *peculium*, he cannot bring an action to recover it.

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

If I give you an usufruct in my land, thinking erroneously that I owe it to you, and I should die before bringing an action for its recovery, the right to bring the action will pass to my heirs.

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

Even a slave may be bound by a natural obligation; hence, if anyone should pay a debt for him, or the slave himself should do so after being manumitted (as Pomponius says), he cannot recover the money out of the *peculium* the free administration of which he enjoys; and on this account a surety who had been accepted for the slave will be liable, and a pledge given on his account will be retained; if, however, the slave who has the administration of his *peculium* gives anything as a pledge for what he owes, he should be granted a prætorian action to recover it.

(1) Moreover, where a ward borrows money without the authority of his guardian, becoming more wealthy thereby, and pays the same after he reaches puberty, he cannot bring an action for its recovery:

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

For it is only in accordance with natural equity that no one should profit pecuniarily by the injury of another.

15. *Paulus, On Sabinus, Book X.*

The right to recover anything which was not due is based upon natural law, and therefore the action will include any addition to the property, for instance, a child born of a female slave, or any land added by alluvium; and, indeed, it also includes crops gathered in good faith by the party to whom delivery was made.

(1) Moreover, where money belonging to another person was paid, an action will lie in order to obtain possession of the same; just as if I, laboring under a false impression, should deliver possession of certain property to you thinking that I was obliged to do so, I could bring suit for its recovery.

But if I should have made the possession yours, so that you could not be deprived of the property on the ground of prescription, even then I could properly bring an action against you for the recovery of money which had been paid without being due.

(2) Even if an usufruct in the property delivered belongs to another, I could bring suit against you for recovery leaving out the usufruct.

16. *Pomponius, On Sabinus, Book XV.*

Where a debt dependent upon a condition is paid by mistake, then, so long as the condition is pending, suit can be brought for its recovery; but if the condition has taken place, an action cannot be brought for it.

(1) But where something is to be delivered at an uncertain time, it cannot be recovered after

that time has elapsed.

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

For, if I promise to give something when I die, and I give it before that time, Celsus says that I am not entitled to an action for its recovery; and this opinion is correct.

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

Where anything is owing upon a condition which must inevitably take place, it cannot be recovered by an action after it has been delivered; although if it had to be given under another condition whose fulfillment was uncertain, an action could be brought for its recovery, even if it had been previously delivered.

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

Where a debtor is released from liability by way of inflicting a penalty of the person to whom the debt is due, the natural obligation remains unimpaired; and therefore if the money is paid it cannot be recovered.

(1) Even though a party may receive payment of a debt, due to him, still, if he who pays gives what he does not owe, there will be a right of action for its recovery; for instance, where anyone erroneously thinks that he is an heir or the possessor of the property of an estate pays a creditor of the same, in this instance, the true heir will not be released, and the party who paid can bring an action for recovery; for although anyone may receive something which is due to him, still, if the party who pays it pays what is not due, an action for its recovery will lie.

(2) If I am under the false impression that I owe a debt, and I pay it in coin, part of which belongs to another and part of it to me, I can bring an action for half the amount, and not for half of each share.

(3) If I think that I am obliged to deliver either Stichus or Pamphilus, while in fact I am obliged to deliver Stichus, and I deliver Pamphilus; I can bring an action for property given which was not due; for I cannot be held to have made the delivery in payment of what I owe.

(4) Where two debtors who owed ten *aurei* together paid twenty, Celsus says each of them can bring an action for the recovery of five; because since they owed ten, and paid twenty, what both paid over and above what was due both can sue to recover.

20. *Julianus, Digest, Book X.*

If a debtor and a surety unite in payment of a debt, they do not, in this instance, differ from two debtors who promise; wherefore, all that has been said with reference to the latter can also be applied to the former.

21. *Paulus, Questions, Book III.*

It is evident that where you state that there are two parties bound by the same obligation, not for the payment of the same sum of money but for the performance of some other act; for instance, the delivery of Stichus or Pamphilus, and the two were delivered together — or perhaps a toga, or a thousand *denarii* — it cannot be said that the same rule applies with respect to an action for recovery, that is that they can bring an action for separate shares; because in the beginning they could not have discharged the obligation in that way. Therefore in this case the creditor has the right to elect to which of the parties he will make the delivery, in order that the other may be prevented from bringing suit.

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

Moreover, if I think that I have promised anything to you or to Titius, while, in fact, no promise was made to either, for Titius was not personally included in the stipulation, and I deliver the article to Titius, I am entitled to an action to recover it from him.

(1) Where I, through mistake, conveyed a tract of land as free, when I ought to have reserved

a right of way; I am entitled to a right of action for the recovery of an uncertain amount, in order that a right of way may be granted me.

23. *Ulpianus, On Sabinus, Book XLIII.*

Pomponius submits this nice question, namely: where anyone suspects that a compromise has been effected by a party to whom he is an heir, or by someone of whom he is the agent, and he delivers property in compliance with the terms of the presumed compromise, while in fact none was made; is there ground for an action for recovery? He says that there is, as the delivery of the property was made for a reason erroneously supposed to exist.

I think that the same rule applies where the compromise was not completed with reference to the matter on account of which delivery was made, and the same principle will prevail where the compromise is annulled.

(1) Where a party makes a compromise after a decision is rendered, and pays in compliance with the same, he can bring an action for recovery, because it has been held that the compromise is void; for this the Emperor Antoninus, together with his Divine Father, stated in a Rescript. Nevertheless, whatever has been paid in compliance with the terms of such a compromise can be retained, and credit given for the same in an action brought to enforce the judgment.

What then would be the case if an appeal was taken, or if it should be uncertain whether a decision was rendered, or whether it was valid? The better opinion is that the compromise remains in force; for it must be held that there is ground for these rescripts only where the compromise has reference to an absolutely certain decision which can, under no circumstances, be amended.

(2) Moreover, if payment was made on account of a compromise relative to a provision for maintenance left by will, it is evident that an action can be brought for the recovery of what was paid, because the compromise is annulled by a decree of the Senate.

(3) If anyone, after having entered into a compromise, nevertheless, has judgment rendered against him; while this is indeed wrongfully done, still the judgment is valid. The party, however, can plead an exception on the ground of fraud against anyone desiring to join issue — where, indeed, he made the compromise before issue was joined — but if this was done afterwards, he can, nevertheless, make use of an exception on the ground of bad faith committed subsequently; for he acts fraudulently who proceeds in spite of a compromise and still demands payment; and hence, if the defendant has judgment rendered against him, he can bring an action for the recovery of whatever he paid in compliance with the compromise. It is certain that he paid it for a consideration, and when anything is paid for a consideration it is not customary for an action to be brought, if the consideration takes place; but, in this instance, it cannot be held that the consideration took place, because the party did not abide by the compromise. Where then the right of action for recovery arises, there is no ground for an exception founded on the compromise, for the suit for recovery and the exception cannot both be operative.

(4) Where any law prescribes at the beginning that an action for double or quadruple damages will lie; it must be held that suit can be brought for the recovery of money which has been paid under the false impression that this was authorized by the law.

24. *The Same, On Sabinus, Book XLVI.*

Where a party who could protect himself by a perpetual exception promises to give something in order to be released, when he knew that he could take advantage of this exception; he cannot bring an action for recovery.

25. *The Same, On Sabinus, Book XLVII.*

Where two parties became sureties for a debtor for ten *aurei*, and the debtor afterwards paid three, and then each of the sureties paid five, it was decided that he who paid last can bring

suit for the recovery of three *aurei;* and this is reasonable, because after three had been paid by the debtor, seven remained due, and when these were paid, three were paid which were not due.

26. *The Same, On the Edict, Book XXVI.*

Where anyone does not pay the principal but pays interest which is not due, he cannot bring an action for its recovery if the principal on which he paid the interest was due; but if he should pay more than the legal rate, then the Divine Severus stated in a Rescript (which governs the practice of the present time) that he could not bring an action for its recovery, but credit will be given on the principal; and if he afterwards pays the principal, an action can be brought as for the recovery of principal not due. Hence, if the principal should be paid first, any interest above the legal rate which has been collected can be recovered as being principal which was not due. What would be the case if both should be paid at the same time? It can be said that, in this instance also, there would be ground for an action for recovery.

(1) Interest, however, above twofold the amount of the principal, or compound interest, cannot be inserted in a stipulation or collected, and if paid, it can be recovered by an action; just as interest on future interest can be.

(2) Where a party, erroneously believing that he owes a certain sum as principal, pays interest upon it; he can bring an action for its recovery and is not held to have knowingly paid what was not due.

(3) We understand the payment of money which is not due not only to refer to what is not owed at all, but to such as cannot be recovered because of a perpetual exception; wherefore, in this instance also, an action can be brought for its recovery, unless the party who paid it was aware at the time that he was protected by an exception.

(4) If I owe a hundred *aurei*, and I transfer a tract of land which is worth two hundred, just as if I was indebted for that amount; Marcellus states, in the Twentieth Book of the Digest, that an action to recover the land will lie, and the stipulation for a hundred *aurei* will remain in full force; for, although it is established that where property is delivered instead of money it may operate as a release of the obligation, still, if property of greater value is delivered through mistake, on account of a debt, no inseparable union arises between a share in the property and the sum of money, since no one is compelled against his will to accept joint ownership; but a right of action to recover the entire property remains, and the obligation is unimpaired; the land, however, will be retained until the money which is due has been paid.

(5) Moreover, Marcellus says that where a party who owes money delivers oil of greater value than the debt, as though he owed a larger amount, or if he gives oil as if owing a larger quantity, he can bring an action to recover the excess of the oil, but not all of it; and that, on this account, his obligation is terminated.

(6) Marcellus also says that, if I am entitled to part of a tract of land, and an appraisement is made as if I was entitled to all of it, and payment is made to me in money equal to the value of the entire tract, the whole amount of the purchase money cannot be recovered, but only the value of that part of the land to which I had no right.

(7) To such an extent does a perpetual exception give a right of action for recovery, as Julianus states in the Tenth Book, that if the purchaser of a tract of land directs his heir to release the vendor from the obligation arising from the sale, and afterwards the vendor, being ignorant of this, transfers the property, he will be entitled to an action to recover the land.

The same rule applies where a testator directs the release of his debtor, and the latter, not knowing this, pays the debt.

(8) Where anyone indebted with reference to the *peculium* of a son under paternal control pays him the debt, he will be released if he did not know that the latter had been deprived of his *peculium;* but if he knew it, and made payment, he will not be entitled to an action for

recovery because he knowingly paid what was not due.

(9) If a son under paternal control borrows money contrary to the provisions of the Macedonian Decree of the Senate, and pays the same, and afterwards, having become the heir to his father, takes steps to recover the money; he will be barred by an exception from prosecuting the action for recovery.

(10) If anyone makes a payment erroneously under the impression that an award has been made against him in an arbitration, he can bring an action to recover the money.

(11) Where money which is not due is paid either to an heir or the possessor of the property of an estate, suit can be brought for its recovery if the party defends his right to the estate; but if he does not do so, suit can also be brought even for the recovery of money paid which was due.

(12) A freedman who incorrectly thought that he owed services to his patron performed them, but Julianus states, in the Tenth Book of the Digest, that he is not entitled to an action for recovery even though he performed the services thinking that he was obliged to do so; for a freedman is under a natural obligation to perform services for his patron. But where services of this kind were not performed for a patron, but the latter having asked him to perform some duty, he compromised with the patron for a sum of money and paid it, he cannot bring suit for its recovery. Where, however, he did not perform services for his patron which could be classed under the head of duty, but which were those of an artist; for instance, the painting of pictures and other things of this description, he, thinking that he was obliged to perform them, it should be considered whether he is entitled to an action for recovery. Celsus, in the Sixth Book of the Digest, holds that the reasons for the performance of the services are of such a character that they may not be rendered for or by the same person; since very frequently the strength of the man, or the time, as well as the circumstances, will change the ground for requiring them; and therefore a party may not be able to render them, even if he should be willing to do so.

He further states that services of this kind are subject to appraisement; and sometimes we are permitted to provide one thing and bring an action for the recovery of another; as, for example, suppose I convey land to you which I was not obliged to convey, and I bring an action to recover the crops; or I give you a slave whom I was not obliged to give you, and you sold him for a small amount without fraudulent intent; you are certainly only bound to refund as much of the purchase-money as you may have; or suppose I have increased the value of a slave at my own expense; should not these matters admit of an appraisement? He also says that in the case which is proposed a suit for recovery can be brought for the amount for which the services of the slave could have been hired.

It is asked by Marcellus, in the Twentieth Book of the Digest, where a claim for services on the ground of duty has been assigned by the patron, whether the freedman is not obliged to render such services? He says he is not obliged to do so, unless they relate to a trade and should be performed for another if the patron orders this to be done, but where the freedman performs services on the ground of duty, the claim for which has been assigned, he cannot bring an action for recovery against the creditor for whom he performed such services (where this was done with reference to another and the creditor had received that to which he was entitled) nor can he bring an action against his patron, because the services were due to him by natural obligation.

(13) Where anyone stipulates with me for ten *aurei* or Stichus, and I pay him five, the question arises can I bring an action for recovery? This question depends upon the facts as to whether I am not released to the amount of five *aurei;* for, if I am, an action for recovery will not lie; but, if I am not released, can such an action be brought? It has, however, been established (as Celsus states in the Sixth Book and Marcellus in the Twentieth Book of the Digest) that the claim for half an obligation cannot be annulled; so that if a party pays five *aurei*, the question as to whether he will be released must remain in abeyance, and he may be

sued for the remaining five *aurei* or Stichus. Then, if he pays the remaining five, it must be held that he has discharged the original indebtedness, and if he delivers Stichus, he can bring an action to recover five *aurei* as not having been due. Thus his later payment will establish whether, when the first five were paid, they were due or not. But if after the five *aurei* were paid, and Stichus was delivered, I prefer to keep the five *aurei* and return Stichus; Celsus asks whether I should be heard? He thinks that, in this case there is ground for an action to recover five *aurei*, for even though both payment and delivery of the slave may have been made simultaneously, I should be permitted to retain whichever I prefer.

(14) He also says that if there are two heirs of the stipulator, that five *aurei* cannot be given to one of them and a share in Stichus to the other. The same rule applies where there are two heirs of the promisor; and, according to this, there will be no release unless either five *aurei* or a share in Stichus is given to each of them.

27. *Paulus, On the Edict, Book XXVIII.*

Where anyone thinking that he is obliged to make payment at some certain place, pays something that is not due, he can bring an action to recover the money anywhere that he chooses; for the special right of action for recovery does not follow the mistaken opinion of the person who pays.

28. *The Same, On the Edict, Book XXXII.*

Where a judge discharged a party improperly, and he who is discharged pays the debt voluntarily, he cannot bring an action to recover the money.

29. *Ulpianus, Disputations, Book II.*

Sometimes the personal condition of the party establishes a ground for recovery; for example, where a ward without the authority of his guardian, or an insane person, or one who has been forbidden the management of his property, makes payment; for, generally speaking, there is no doubt that there is ground for an action under these circumstances; and where any money remains, suit can be brought for its recovery, but if it has been spent there will be ground for a personal action.

30. *The Same, Disputations, Book X.*

Where anyone is both creditor and debtor in a case in which no set-off can be allowed, and he pays the debt; he has no right of action to recover the money because it was paid when it was not due, but he can bring an action for his own debt.

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

Where anyone, through mistake, makes provision for payment to a creditor of a larger amount than his share of the estate warrants, he has a right of action for recovery on the ground of a promise made for payment of what was not due.

32. *Julianus, Digest, Book X.*

Where anyone is obliged to deliver Pamphilus or Stichus, and delivers both of them at the same time, and afterwards either both or one of them should happen to die, he cannot recover anything; for what still remains will be applied to the payment of the obligation.

(1) Where a surety enters into an agreement that suit shall not be brought against him for money which is due, but through carelessness he pays it, he can bring a personal action against the stipulator to recover it, and therefore the principal debtor will remain liable, but he himself will be protected by his exception; nor does it make any difference whether the surety or his heir makes payment. If, however, the principal debtor should become heir to the surety, and pay the debt, he cannot bring an action for the recovery of the money, and he will be released.

(2) Where a woman believes that she is obliged to transfer property as dowry, and gives anything by way of dowry, she cannot bring suit for its recovery; for, leaving her mistaken

opinion out of consideration, the question of duty remains, and what is paid on this account cannot be recovered by an action.

(3) Where a party promises in general terms to deliver a slave, the case is the same as where one is bound to give a slave or to pay ten *aurei;* and therefore if he delivers Stichus, thinking that he had promised to do so, he can bring an action for his recovery, and he will be released by giving any other slave whatsoever.

33. *The Same, Digest, Book XXXIX.*

If I build on your unoccupied land, and you obtain possession of it afterwards, there will be no ground for an action for recovery, because no business contract was made between us; for he who pays money which is not due, by this act transacts business to a certain extent, but when the owner of land takes possession of a building erected thereon by another, no business transaction takes place; for, in fact, even if a person who built upon the land of another should himself deliver possession, he would not have a right of action for recovery, because he would not, in any respect, have transferred the property to him who received it, as the owner would merely have obtained possession of what was already his. Therefore it is established that if the party who thought himself to be an heir should prop up a house which was part of the estate, he could be reimbursed for his expenses in no other way than by retaining the property.

34. *The Same, Digest, Book XL.*

Where an entire estate has been left in trust to some one and, in addition to this, a tract of land if he should pay ten *aurei* to the heir, and the heir states that he is doubtful as to the solvency of the estate, and relinquishes it in accordance with the Trebellian Decree of the Senate; the party aforesaid will have no reason to pay him the money, and hence he can recover by means of an action whatever he may have given for the purpose of complying with the condition.

35. *The Same, Digest, Book XLV.*

Where anyone pays a sum of money for the reason that no defence was made to an action for its recovery, even though he subsequently may be ready to set up a defence, he cannot recover what he has paid.

36. *Paulus, Epitomes of the Digest of Alfenus, Book V.*

The slave of a certain party without the knowledge of his master lent a dish, and the party to whom he lent it pledged it and took to flight, and he who received it in pledge said that he would not return it unless he received the money; which was paid to him by the slave, and he returned the dish. The question arose whether an action could be brought against him for the recovery of the money? The answer was that if he who received the dish in pledge knew that it belonged to another, he had rendered himself liable for theft; and therefore if he received money from the slave for the purpose of redeeming stolen property, an action could be brought against him. But if he did not know that the article which was deposited with him belonged to another, he is not a thief; and besides, if the money had been paid to him by the slave in behalf of the party from whom he had received the pledge, suit could not be brought against him for the recovery of the same.

37. *Julianus, On Urseius Ferox, Book III.*

I, being ignorant of the fact, purchased my own slave from you, and paid you the money for him. I am perfectly convinced that I am entitled to an action against you for the recovery of the money, and that such a suit can be brought against you for that purpose, whether you knew that the slave was mine, or were not aware of it.

38. *Africanus, Questions, Book IX.*

Where two brothers were under the control of the same party and one of them borrowed money from the other and paid it to him after the death of their father, the question arose can it be recovered by an action? The answer was that there was no doubt that suit might be

brought for the amount of the share to which the heir was entitled to inherit from his father; but with reference to the share which his brother was to inherit, he could bring suit only in case that much had come into the hands of the brother out of his own *peculium;* for the natural obligation which existed was held to have been removed by the very fact that his brother had obtained part of the former's *peculium,* and therefore, if the *peculium* had been previously bequeathed to the son, that is to say, the same one who was indebted to his brother, a deduction of this amount could be made by the latter.

This exactly coincides with the opinion approved of by Julianus, that if the party had owed anything to a stranger and it had been collected from him after the death of his father; he would be entitled to a right of action for partition of the estate, in order to recover the amount from his co-heir to the extent that the creditor would have been able to collect from them by an action *De peculio.*

Therefore, where proceedings are instituted in an action for partition of the estate, it is only just for the *peculium* to be divided, so that the party shall be indemnified by his co-heir with reference to a certain portion of it; and hence, as he could defend himself against a stranger, much more should he be indemnified against what he owed his brother.

(1) The question has been asked whether, where a father lends money to his son and the latter pays it after being emancipated, he can bring an action for the recovery of the same? The answer was that if no part of the *peculium* remains in the possession of the father, an action cannot be brought by the son, and what proves that the natural obligation still exists is that if a stranger brought an action *De peculio* within a year, the father could deduct what the son owed him.

(2) On the other hand, where a father owed money to his son and paid the latter after he has been emancipated, he cannot recover it; for it is proved by the same argument that the natural obligation still exists in this instance, because if a stranger should bring an action *De peculio* within a year, the *peculium* would be held to include what the father owes him.

The same rule applies where a foreign heir pays a disinherited son what his father owed him.

(3) I received security for a legacy, when the surety paid me it appeared that I had no right to the legacy; and it was held that the surety could recover the money by an action.

39. *Marcianus, Institutes, Book VIII.*

Where anyone, when he can have security furnished him by the beneficiary of a trust, does not do so; the Divine Severus and Antoninus stated in a Rescript that he can bring an action to recover whatever he has paid over and above the amount.

40. *The Same, Rules, Book III.*

Where anyone is entitled to a perpetual exception, he has a right of action to recover anything paid by mistake; this, however, is not universally applicable, for where an exception is granted in behalf of the party against whom proceedings were instituted, he can bring suit to recover what he paid, as happens in the case of securities under the decree of the Senate; but where the exception is granted by way of grudge against the party to whom the money is due, whatever has been wrongfully paid cannot be recovered; for example, where a son under parental control borrows money against the Macedonian Decree of the Senate, and afterwards, having become his own master, pays it, he cannot bring an action to recover the same.

(1) Where a part of a house is left in trust from a certain day, and before the time when the trust vests, it burns, and the heir rebuilds it at his own expense, it is established that the expense of the same must be deducted from the amount included in the trust; and if the heir delivers the house without deducting the said expense, an action may be brought for the recovery of an uncertain amount on the ground that the heir paid more than was due.

(2) If a patron enters into an agreement with his freedman that suit shall not be brought against him for services, and anything should afterwards be paid by the freedman, suit may be

brought to recover the same.

41. *Neratius, Parchments, Book VI.*

Where a ward, without the consent of his guardian, promises in a stipulation to make payment and does so, he will have a right of action for recovery; for the reason that he did not owe the money even under natural law.

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

It is not customary for penal sums which have been paid to be recovered by an action.

43. *Paulus, On Plautius, Book III.*

Where a party swears that he is not obliged to pay, all controversy is terminated, and it must be stated that, in this instance, money which has been paid can be recovered.

44. *The Same, On Plautius, Book XIV.*

An action for recovery cannot be brought against the party who has received that which is his own; even though payment was made by another person than the real debtor.

45. *Javolenus, On Plautius, Book II.*

Where a party sold an estate and transferred it to the purchaser, but failed to retain what the deceased owed him, he can bring an action for its recovery; as anything which is paid in excess of what is due can properly be recovered by a personal action.

46. *The Same, On Plautius, Book IV.*

A party who pays in the name of the heir and with money belonging to the heir, legacies which are not due, cannot himself bring an action for the recovery of what he paid; but if he paid the money of the heir without the knowledge of the latter, then the owner of the money, it is held, can properly bring suit to recover it.

The same rules apply to corporeal property of all kinds.

47. *Celsus, Digest, Book VI.*

You promised, through a mistake, to pay money which was not due, and the party who was your surety paid it. I am of the opinion that, if the surety paid it in your name you will then be liable to the surety, and the stipulator will be liable to you; for it is not to be expected that you should first ratify his act, since you may be held to have directed the surety to make payment in your name. If, however, the surety made payment in his own name of a sum which he did not owe, he can bring an action against the stipulator as having paid money which was not due under the Law of Nations; but where there is a deficiency in the amount which he can recover from the party whom he paid, this he can recover from you by an action on mandate; provided he who was bringing suit in ignorance of the facts should not be barred by an exception.

48. *The Same, Digest, Book VI.*

Where anyone promises that, if something is done by him or when it has been done, he will pay ten *aurei*, and he pays the sum that he promised before the act is performed; he will not be held to have done what he promised, and therefore he can bring an action to recover the money.

49. *Modestinus, Rules, Book III.*

Suit can be brought for the recovery of money only against those to whom the money has been in some way paid, and not against those whom the payment benefits.

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

Where anyone knowingly pays what he does not owe with the intention of afterwards bringing suit to recover it, he has no right of action.

51. *The Same, On Quintus Mucius, Book VI.*

In those cases in which we have a right of retention of property but no right of action to recover the same, if we deliver said property we cannot sue to recover it.

52. *The Same, On Quintus Mucius, Book XXVII.*

We make payment either for a good reason or for a purpose, and the reason may depend upon what has already passed, for example, where I make payment because I have obtained something from you or something has been done by you, so that, even if the reason is nonexistent, no action will lie for the recovery of the money; but payment for a purpose is made where some act is to be performed, and if this does not take place, a suit for the recovery of the money will lie.

53. *Proculus, Epistles, Book VII.*

A master gave his slave freedom by his will, on condition of his paying ten *aurei*, and the slave, not knowing that the will was void, paid me the ten *aurei;* the question arises, who has a right of action to recover the money? Proculus answered that if the slave paid the money out of his *peculium*, when permission to do so had not been granted him by his master, the money remains the property of his master, and he can bring suit for the recovery of the same by an action *in rem.* But where another party, at the request of the slave paid me his own money, it becomes mine, and the owner of the slave on whose account it was paid can bring an action for its recovery; but a more indulgent, as well as a more practical method would be for the party who paid the money to himself recover what belongs to him directly from me.

54. *Papinianus, Questions, Book II.*

Where payment is made through mistake, on grounds which are not valid in law or have no force or effect, an action for recovery can be brought.

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

Where a depredator rents urban estates, what he receives as rent cannot be recovered in an action by the party who paid it, but the trespasser will be liable to the owner. The same rule applies to money paid for transportation in ships which a person of this kind leased or controlled, as well as to compensation to slaves whose services were leased by him; for, indeed, where a slave who is not hired out pays the price of his services to a trespasser, as if he were his owner, the money paid does not become the property of the receiver. If such a party receives money for transportation by ships which he hired out as the owner, or the rent of tenants, he will be liable for money paid which was not due to him, and the party who pays is not released by doing so; so that it is usually held that suit can be brought to recover the profits from a trespasser, and this only can take place where the profits belonged to the owner.

56. *The Same, Questions, Book VIII.*

It is sufficient to establish a case of money not due where it is uncertain whether the defence based on an exception is temporary or perpetual. For, if the party enters into an agreement that suit shall not be brought against him until Titius becomes Consul, then, because an exception may become perpetual if Titius should die, which if Titius should obtain the consulship will be temporary, it may be stated with perfect correctness that whatever is paid in the meantime can be recovered. For as an agreement for money to be paid at a certain time does not any more give rise to an action for recovery than if the debtor made payment at the appointed time; so it is evident that where there is a lawful defence which is based on an uncertain ground a conditional obligation exists.

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

With reference to the next payment in the name of a boy who has not reached puberty, the latter has a right of action for the recovery of the money.

(1) When a creditor directs that a debt shall be paid to his agent, in this instance, if more

money is paid than was due, the agent will be liable to an action for the payment of what was not owing; but if the creditor, when appointing someone to receive payment, expressly mentioned a larger sum to be paid to him, an action for the recovery of money paid which was not due will lie against the party who appointed him, and the right of action will not be held to be taken away if suit is brought against the said agent in vain.

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

A testator left a trust to a manumitted slave in such a way that he obtained his freedom by the will; and after he had received the money without applying to the court, he was pronounced to be freeborn. As the money left under the trust was not due, an action will lie for the recovery.

59. *The Same, Definitions, Book II.*

Where a surety who is legally released pays money through mistake, he will not be prevented from bringing an action for its recovery; but if the principal debtor should afterwards himself make payment by mistake, he cannot bring suit to recover, since the first payment, which was void, does not dissolve a natural or a civil obligation if the principal debtor was liable.

60. *Paulus, Questions, Book III.*

Julianus denied that a debtor who actually owed money could bring an action for its recovery after issue had been joined and while the suit was still pending; because he could not bring the action if he was discharged, or if judgment was rendered against him, for, even though he were discharged, he would still remain a debtor by natural law; and he states that his case would be similar to that of a party who promised that he would pay whether a certain ship came, or did not come from Asia, since occasion for payment arises from either ground.

(1) Where, however, a party who owes money absolutely, promises to pay it under a certain condition, with a view to renewal; many authorities hold that, if the money is paid while the renewal is pending, an action can be brought for its recovery, because it is still uncertain under which obligation he makes payment; and they hold that the same rule applies if we suppose that two different persons promise the same money, one absolutely, and the other under some condition, with the intention of renewing the contract. The cases, however, are not similar; as in that of the absolute and conditional stipulation, it is certain that the same party will be indebted.

61. *Scævola, Opinions, Book V.*

The guardians of a ward paid certain creditors of his father out of the estate of the latter, but afterwards, the property not proving to be sufficient, they caused the ward to reject the estate; and the question arises whether the creditors would be obliged to return the overplus paid them by the guardian, or whether they must return all they received? I answered that, if no fraud had been committed, nothing was due to the guardians or to the ward, but that they were liable to the other creditors for the amount of the excess of the debts which had been paid.

62. *Mæcianus, Trusts, Book IV.*

Where a trust has been inserted into a stipulation, even though it was not due, still, because it has been promised for the purpose of complying with an obligation by a party who was aware of the facts, it is due and payable according to law.

63. *Gaius, Cases.*

Neratius speaks of a possible case where a party who could not sue to recover what he had given, on the ground that he had discharged a debt, is still not released; for example, where he was obliged to deliver a certain slave, and gives one who was to be free under a certain condition; for, in this instance he is not released because he does not make the said slave the absolute property of the stipulator; still, he cannot recover him because he was paying a debt.

64. *Tryphoninus, Disputations, Book VII.*

Where a master owed money to his slave and paid him after he was manumitted, he cannot

bring an action for its recovery; even though he paid thinking he was liable to proceedings to force him to do so, since he acknowledged a natural debt. For, as freedom exists under natural law and the domination of persons was introduced by the Law of Nations, the question as to whether a debt exists or not together with the right of action for its recovery, must be considered with reference to natural law.

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

In order that we may discuss the recovery of property by law in general terms, it must be understood that property is either delivered on account of a compromise, or for a past consideration, or in compliance with some condition, or for some act to be performed, or where there is no indebtedness; and in all these instances the question arises with reference to the recovery of the property.

(1) And, in fact, with reference to its delivery on account of a compromise, if there is not good reason for it, no action will lie for its recovery, since if there was a contest, the fact that the contest has been abandoned is held to be a good ground; but where evident fraud is disclosed and the compromise is void, the action for recovery will be granted.

(2) Moreover, where something is given for a past consideration, for example, because I thought that I had been assisted in my business by the person in question, although this was not true; then, for the reason that I wished to make him a gift, notwithstanding I was laboring under a false impression, an action for the recovery of the gift will not lie.

(3) I can, however, proceed by a personal action on account of a condition upon which the payment of a legacy or the transfer of an estate is dependent, even though no legacy was left me, or, if it was, I was deprived of it, so that I can bring suit for the recovery of what I gave; since I did not give it with the intention of making a contract, and because the object on account of which I had made the gift was not accomplished.

The same rule applies if I was either unwilling or unable to enter upon the estate. It cannot, however, be said to be applicable where my slave was appointed an heir under a condition and I give something, and afterwards, the slave having been manumitted, enters upon the estate; for in this instance the object is attained.

(4) What is given in consideration of an act to be performed confers a right of action in accordance with what is proper and just; as, for instance, if I give you something in order that you may perform some act, and you do not perform it.

(5) Where a party brings suit for the recovery of something which is not due, the profits and the offspring of female slaves that were given must also be returned, after all expenses have been deducted.

(6) Where grain has been delivered which was not due, its quality must be taken into consideration; and if the party has consumed it, an action can be brought for its value.

(7) In like manner, where lodgings were given, I can bring an action for the money, not indeed for the amount for which I could have rented them, but for the amount for which you would have rented them.

(8) Where I delivered you a slave that I did not owe you, and you manumitted him, if you did this knowingly you will be liable for his value, but if you did it ignorantly, you will not be liable; but you must make good the value of his services as a freedman, and transfer any estate obtained through him.

(9) Payment is not due, not only where it is absolutely not owing, but also where it is owing to another and is paid to a third party, or where what one man owes another he pays as if he himself owed it.

66. *Papinianus, Questions, Book VIII.*

This suit, based on justice and equity, is ordinarily employed for the recovery of property

which belongs to one party and is found in the possession of another without any right to the same.

67. *Scævola, Digest, Book V.*

Stichus, having received his freedom under the will of the party whom he thought to be his owner, on condition that, for ten years after the death of the latter he would pay ten *aurei* annually to his heirs, paid the prescribed sum for eight years, as he was directed to do; he afterwards ascertained that he was born free, and did not make any payments for the remaining years, and he was also pronounced free born in court. The question arose whether he could institute proceedings for the recovery of the money as not having been due, and, if this was the case, by what kind of an action? The answer was that, if the money he paid had not been obtained either by his own labor or through the property of him whom he had served in good faith, an action could be brought for the recovery of the same.

(1) A guardian paid a larger sum than was due to the creditor of his ward, and did not give himself credit when he brought an action on guardianship; I ask whether he would have a right of action for recovery against the creditor? The answer was that he would.

(2) Titius, who had many creditors, among whom was Seius, having privately transferred his property to Mævius by a sale, with the understanding that the latter would satisfy his creditors, Mævius paid to Seius, as if it was owing to him, money which had already been paid by Titius; and the question arose whether, when receipts were afterwards found in the hands of Titius having reference to debts which had been partly paid, who had a right of action for the recovery of the money which had been paid without being due, Titius the debtor, or Mævius who had been appointed agent in his own behalf? The answer was that, in accordance with what had been stated, the party who paid last had the right of action.

(3) The same individual asked whether the agreement which it was customary to insert in the settlement of accounts, namely, that there should be no further controversy between the parties growing out of the said contract would bar the action for recovery. The answer was that nothing was stated which would render it a bar.

(4) Lucius Titius lent to Gaius Seius, who was under twenty-five years of age, a certain sum of money, and received from him a certain sum as interest. The heir of Gaius Seius, the minor, obtained from the Governor of the province an order for complete restitution against Publius Mævius to avoid paying the debt due to the estate; but no mention was made before the Governor of an action for the recovery of the interest on the principal which Seius, who was under twenty-five years of age, had paid, nor was any judgment rendered by him with reference to the same. I ask whether the heir of Gaius Seius, the said minor under twenty-five years of age, can bring an action for the recovery of the interest which the latter had paid to the creditor as

long as he lived? The answer was that, according to the facts stated, an action would not lie for the recovery of what the deceased had paid as interest. I ask also, since you think that an action cannot be brought for recovery, whether the heir can retain the interest out of some other debt. The answer was "No, not even that."

TITLE VII.

CONCERNING AN ACTION FOR RECOVERY WITHOUT GROUND.

1. *Ulpianus, On Sabinus, Book XL1II.*

There is also the following kind of a personal action for recovery where anyone makes a promise without consideration, or where he pays something that was not due. Where a party makes a promise without consideration, he cannot bring an action for an amount which he did not give, but only for the obligation itself.

(1) But even though he may have promised for a consideration but the consideration did not take effect, it must be held that there would be ground for an action for recovery.

(2) Whether the promise was made without consideration in the beginning, or in consideration of a promise which is terminated, or did not take effect, it must be said that there will be ground for an action for recovery.

(3) It is established that a suit for recovery can be brought against the party only where the property came into his possession without a valid consideration, or for some consideration which has ceased to be valid.

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

Where a fuller made a contract to clean some clothes, and the clothes being lost, he is sued on the contract and pays their value to the owner, and the owner afterwards finds the clothes; what kind of an action must the fuller bring to recover the amount which he paid? Cassius says that he not only can bring an action on contract, but also one for recovery against the owner. I think that he has, at all events, a right of action under a contract, but with respect to the suit for a recovery there is a question, because he did not pay what was not due; unless, indeed, we can hold that an action for recovery can be brought on the ground that the money was paid without any consideration, for the clothes having been found, this would seem to be the case.

3. *Julianus, Digest, Book VIII.*

Where parties bind themselves without any reason for doing so, they can obtain a release by means of a suit brought for an uncertain amount, and it makes no difference whether the party contracted the entire obligation without any ground, or a greater one than there was any necessity for; unless, indeed, the proceedings brought to release him from every obligation whatsoever are different from those brought to discharge him from liability for part of the obligation; for example, where a party promised to pay ten *aurei*, for, if he had no reason to make the promise, he can, by means of an action for an uncertain amount obtain a release from the entire stipulation; but if he promised to pay ten *aurei* when he ought only to have promised five, he can, by means of an action for an uncertain amount, secure his release from the payment of five.

4. *Africanus, Questions, Book VIII.*

It is of no consequence whether something was given in the beginning without consideration, or whether it was given for a consideration which did not take place.

5. *Papinianus, Questions, Book XI.*

Where a woman who was about to be married to a maternal uncle, gave a sum of money as dowry, but did not marry him, the question arose whether she could bring an action for the recovery of the money? I said that where money was paid for some immoral consideration which affected both the giver and the receiver, an action for recovery would not lie, and where both of them are equally culpable, the possessor has the advantage; and that anyone who adopted this principle perhaps would answer that the woman could not bring an action for recovery; but, on the other hand, it could be justly maintained that the question to be considered was not so much that the consideration was immoral, as that there was no consideration at all; since the money which was paid could not be converted into a dowry, as it was paid not for the purpose of unlawful cohabitation but on account of matrimony.

(1) A stepmother paid a sum of money as dowry for her marriage to her stepson, and a daughter-in-law also did this for her marriage to her father-in-law, and neither marriage took place. It would seem at first view that an action for recovery of the money would not lie, since an union of this kind is incest by the Law of Nations; still, in such instances it is the better opinion that there was no consideration for giving the dowry, and therefore an action for its recovery will lie.

THE DIGEST OR PANDECTS.

BOOK XIII.

TITLE I.

CONCERNING THE ACTION FOR THE RECOVERY OF STOLEN PROPERTY.

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

Where property is stolen, suit for its recovery can be brought by the owner alone.

2. *Pomponius, On Sabinus, Book XVI.*

Both insane persons and infants are liable to an action based on theft where they have become necessary heirs, although suit cannot be brought against them personally.

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

Where a slave is sued in an action based on theft, it is certain that damages can be claimed to the amount of the interest of the plaintiff; as, for instance, where he was appointed heir, and his master may be in danger of losing the estate; and Julianus is of this opinion. Moreover, if the action is brought for a slave who is dead, the plaintiff will obtain the value of the estate.

4. *Ulpianus, On Sabinus, Book XLI.*

Where a slave or a son under paternal control commits a theft, an action can be brought against the owner of the slave for whatever came into his hands; and with respect to the remainder, the owner can surrender the slave by way of reparation.

5. *Paulus, On Sabinus, Book IX.*

An action arising from theft can be brought against a son under paternal control, for no one is ever liable to an action of this kind but the party who committed the theft or his heir.

6. *Ulpianus, On the Edict, Book XXXVIII.*

Hence, even where a theft is committed with the assistance and advice of another party, the latter will not be liable to this action, although he will be to an action for theft.

7. *The Same, On Sabinus, Book XLII.*

Where a party has made good the loss as a thief, it is perfectly certain that this is no bar to an action for recovery of the property; for by payment of the loss the right of action for theft is extinguished, but not the right of action for recovery of the stolen property.

(1) The action for theft is brought for the lawful penalty, but the action for recovery for the property itself; and the result is that neither the right of action for theft is lost by the one for recovery nor the action for recovery by that of theft. Therefore, a party who is the victim of a theft has a right of action for theft, a right of action for damages, and a right of action for recovery, and he is also entitled to an action for production. The action for the recovery of stolen property, because it involves proceedings to obtain the property itself, renders the heir of the thief also liable, and not only while the slave who was stolen is living, but also after his death. Where, however, the slave who was stolen lost his life while in possession of the heir of the thief — or even when he was not in his possession — after the death of the thief; it must be said that the action will continue to lie against the heir.

What we have stated with reference to the heir is equally applicable to all other successors.

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

In the case of stolen property suit for recovery can be brought for the articles themselves; but can this be done only so long as they still exist, or where they have ceased to be in existence? If, indeed, the thief has surrendered them, then there is no doubt that suit for their recovery

cannot be brought; but if he did not surrender them, a right of action for the recovery of their value still remains, for the articles themselves cannot be delivered.

(1) Where an action is brought for the recovery of stolen property, the question arises at what time the appraisement of its value should be made? It is, however, established that the time must be considered when the property was of the greatest value it ever possessed, and especially since a thief will not be released by giving up property which is deteriorated; for a thief is considered to be always in default.

(2) Finally, it must be said that the profits are also included in this action.

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

In a suit for the recovery of stolen property, the party is liable not only for the amount which came into his hands, but also for all of it, if he is the sole heir; but where he is heir to a share, he is liable to the same proportion of such a share in the stolen property as he is entitled to in the estate.

10. *The Same, On the Edict, Book XXXVIII.*

A thief can be sued for the recovery of stolen property whether he is a manifest thief or a non-manifest one. A manifest thief, however, will only be liable to an action for recovery where the possession of the property stolen has not been obtained by the owner; for no one is liable to a suit for recovery after the owner has taken possession of the property. Therefore, Julianus, in order that he may proceed with the discussion of the action for recovery in the case of a manifest thief, supposes that the thief, after being caught, has either killed, broken to pieces, or spilled what he had wrongfully appropriated.

(1) A person also who is liable for robbery with violence, (so Julianus states in the Twenty-second Book of the Digest), can be sued in an action for the recovery of the property.

(2) There is ground for an action for recovery only so long as the ownership of the property has not been lost to the proprietor by his own act; and therefore, if he transfers it to another, he cannot bring suit for its recovery.

(3) Wherefore Celsus states in the Twelfth Book of the Digest, that if the owner bequeaths the stolen property to the thief absolutely, the heir cannot bring an action against him to recover it; and where the bequest was not made to the thief himself but to another, the same rule is applicable, and an action for recovery will not lie, as the ownership is lost by the act of the testator; that is to say of the owner.

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

Nor can the legatee himself bring a personal action, for this is only available by the person whose property has been stolen or by his heir; but the legatee has a right to recover property which was bequeathed to him by means of another action.

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

Consequently Marcellus very properly states in the Seventh Book, that if the property stolen still remains yours you can bring a personal action to recover it; but if you lose the ownership in some other way than by your own act, you can likewise bring suit to recover it.

(1) Therefore he very aptly says that where the property is held in common, it makes a difference whether you instituted proceedings against your co-owner by an action for partition, or he brought suit against you, and if you instituted proceedings for this purpose you will lose the right to bring a personal action for recovery, but if he did so, he will still retain that right.

(2) Neratius, in the Books of Parchments, states that it is held by Aristo that he to whom property had been pledged can, if it should be stolen, bring an action for an uncertain amount of damages.

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

Where cups have been made out of stolen silver, Fulcinius says that a personal action can be brought, and therefore in the proceedings for their recovery an estimate should be made of the value of any engraving which was done at the expense of the thief; just as where a slave-child is stolen and grows up, an estimate is made of his value when grown, even though he was reared under the care and at the expense of the thief.

14. *Julianus, Digest, Book XXII.*

Where a stolen slave has been bequeathed under some condition, then, as long as the condition is pending, the heir will have a right of action for his recovery, but if the condition should be fulfilled after issue has been joined, the case must be dismissed; just as if the same slave had been directed by the testator to be free under a certain condition, and the condition was complied with after issue had been joined; for the plaintiff is no longer interested in securing the slave, and the property has ceased to be his without any fraudulent act on the part of the thief. Where judgment is rendered while the condition was pending, the judge must make an estimate of the sum the slave would have been worth if a purchaser had been found.

(1) In this action, however, the plaintiff is not obliged to furnish security to the party who is sued.

(2) Where an ox is stolen and killed, a personal action for recovery can be brought by the owner for the ox, the hide, and the flesh; that is, where the hide and the flesh have been handled in stealing, and suit to recover the horns may also be brought. Where, however, the owner obtains the value of the ox by a personal action for recovery, and afterwards brings a similar suit for any of the things above mentioned, he can undoubtedly be barred by an exception. On the other hand, if he should bring suit for the hide and recover its value, and then sue to recover the ox, and the thief tenders the value of the ox after deducting the value of the hide, the plaintiff will be barred by an exception on the ground of fraudulent intent.

(3) The same rule applies where grapes are stolen, for the must and the grape-stones can be recovered by a personal action.

15. *Celsus, Digest, Book XII.*

Where a slave steals from another party, he will be liable for theft in his own name if he becomes free; but a personal action for recovery cannot be brought against him unless he handled the property after he was free.

16. *Pomponius, On Quintus Mucius, Book XXXVIII.*

Where anyone commits a theft by using something which was lent to him or deposited with him, he can be compelled to account for doing so by a personal action for recovery on the ground of theft also, and this differs from the action to recover property loaned, because, even if the property had been destroyed without his malice or negligence, he will, nevertheless, be liable to a personal action for recovery; while in the action to recover property loaned he will not readily be held liable, except where he was guilty of negligence, and in an action on deposit he would not be liable at all unless malicious intent was established.

17. *Papinianus, Questions, Book X.*

It makes little difference, so far as the loss of the right of action to recover is concerned, whether, after a slave had been stolen, an offer is made to return him, or whether the case is placed under a different class or a different species of obligation; for it does not matter to me whether the slave is present or not, as the default which arose from the theft is disposed of by a kind of assignment of the claim.

18. *Scævola, Questions, Book IV.*

Where a party knowingly receives money which is not due, since this is the same as a theft, it

should be considered whether, when an agent makes payment with his own money, he does not commit a theft upon himself? Pomponius says in the Eighth Book of the Epistles, that the agent has a right of action for recovery based on theft; and that I, also, have such a right, if I ratify the payment of money which is not due; but where one action is brought, the right to bring the other is extinguished.

19. *Paulus, On Neratius, Book III.*

Julianus says, with reference to a daughter who removed property belonging to her husband, that a personal action for recovery should be granted against her father to the extent of her *peculium.*

20. *Tryphoninus, Disputations, Book XV.*

Suppose a thief is prepared to defend a personal action brought against him for the recovery of stolen property; as long as the property exists I have a right to bring the action, but where it is afterwards destroyed, the ancient authorities held that the right still remained, because it was their opinion that where a man had, in the beginning, handled the property without the consent of the owner, he is always in default with reference to returning it, because he ought not to have removed it.

TITLE II.

CONCERNING SUITS FOR RECOVERY UNDER THE LAW.

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

Where an obligation is introduced by a new law, and it is not provided in the said law by what kind of an action we are to proceed, this must be done in accordance with this law.

TITLE III.

CONCERNING THE TRITICARIAN ACTION.

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

He who brings suit for a certain sum of money must make use of the action to which the clause, "Where a certain demand is made," refers: but a party who sues for any other kind of property must do so by means of a Triticarian Action. And, generally speaking the property to be sued for in this action is anything except a definite sum of money, whether it is established by weight or by measure, and whether it is movable or a part of the soil. Therefore, we may also bring suit for a tract of land, whether it is under perpetual lease, or whether anyone has stipulated for a right, as, for instance, an usufruct, or a servitude attaching to either kind of estate.

(1) No one can, by means of this action, bring suit for his own property, except where he is permitted to do so in certain cases; as, for instance, in an action based on theft, or where movable property has been taken away by force.

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

Sabinus states that where anyone has forcibly ejected another from his land, he can be sued for its recovery; and Celsus also holds the same opinion, but this rule applies only where the party who was ejected and brings the suit is the owner; but if he is not, Celsus states he can still bring an action for possession.

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

If it is asked, in this action, to what time the appraisement of the property for which suit is brought should date back; the better opinion is, as Servius says, that the time when judgment was rendered against the defendant ought to be considered. For, if the property has ceased to exist at the time of death, according to Celsus, we must grant some latitude, and not make the

estimate from the very last moment of life, lest it be reduced to a very small amount; for instance, where a slave is mortally wounded. In either case, however, if the property is deteriorated after default, Marcellus states in the Twentieth Book that an estimate must be made of the amount to which the property is deteriorated, hence, if the party delivered a slave who, after default, had lost his eye, he is not released; and therefore the estimate must be reckoned from the date of the default.

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

Where an action is brought for some kind of merchandise which should have been delivered on a certain day, for instance, wine, oil, or grain; Cassius says that the damages should be appraised in accordance with what the property would have been worth on the day when it should have been delivered, or if the day was not agreed upon, then, according to its value when issue was joined.

The same rule applies with reference to place, so that the valuation should first be made with reference to the place where the property should have been delivered, but where there was nothing agreed upon with reference to place, then the place where the action was brought should be taken into consideration. This law also applies to other matters.

TITLE IV.

CONCERNING PROPERTY WHICH MUST BE DELIVERED AT A CERTAIN PLACE.

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

It was formerly held that a party did not have the power to bring suit in any other place than that where he had stipulated that the property which was the subject of the action should have been delivered; but, because this would be unjust, if the promisor never came to the place where, according to what he promised the property was to be delivered, (either because he failed to do so purposely, or for the reason that he was unavoidably detained elsewhere) and hence the stipulator could not obtain what belonged to him; it, therefore, seemed proper that an equitable action should be provided for this purpose.

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

An arbitrarian action may be for the benefit of either the plaintiff or the defendant; and where it benefits the defendant, judgment is rendered for a smaller sum of money than what is claimed, and where it benefits the plaintiff, it is rendered for a larger sum.

(1) This action may arise out of a stipulation where I agree with you to pay me ten *aurei* at Ephesus.

(2) Where anyone brings suit under a stipulation that ten *aurei* should be paid to him at Ephesus, or a slave delivered to him at Capua, he should not, when he institutes proceedings, omit one of the two places, lest he may deprive the defendant of the advantage of locality.

(3) Scævola says in the Fifteenth Book of Questions that what tacitly exists in a stipulation is, indeed, not always under the control of the defendant and he can decide according to his judgment what he ought to do, but that it is not in his power to decide whether or not he is under an obligation. Therefore, where a party promises to deliver Stichus or Pamphilus he can choose which one he will give, so long as both are living; but where one of them dies, his right of choice is terminated, otherwise, it would be in his power to determine whether or not he was under any obligation, if he was not willing to deliver the living slave whom alone he was required to deliver. Wherefore, according to the facts stated, if a party promised to deliver something at either Ephesus or Capua, an action could not be brought against him if he had the choice of the place where he should be sued, for he would always select the other place, and the result would be that he would have the power to decide whether he was under any obligation whatever. Hence Scævola thinks that an action can be brought against him in either

place, and without any addition of locality; and therefore we give the choice of the place of the action to the plaintiff. Scævola states in general terms that the plaintiff is entitled to choose where he will sue, and the defendant where he will pay, of course before suit is brought. Therefore he says there is an alternative of claim as well as an alternative of place, which necessarily gives the plaintiff the choice as to the claim on account of his right to select the place; otherwise, if you wish to reserve the option for the defendant you will deprive the plaintiff of the power to bring an action.

(4) Where anyone stipulates as follows, "At Ephesus and Capua," Scævola says he can bring suit for part of the claim at Ephesus and part at Capua.

(5) Where anyone stipulates for a house to be built, and does not mention the place, the stipulation is void.

(6) He who stipulates for ten *aurei* to be paid at Ephesus, and brings suit before the day on which he can arrive at Ephesus, proceeds improperly before the time; for it is the opinion of Julianus that a certain date is tacitly understood in a stipulation of this kind; hence I think that the opinion of Julianus is correct, and that where a party stipulates at Rome that delivery is to be made at Carthage on the same day, the stipulation is void.

(7) Moreover, Julianus discusses the following question, namely: where a party stipulated that payment should be made at Ephesus to either himself or to Titius, and if Titius should be paid elsewhere, whether he could, nevertheless, claim that payment should be made to himself; and Julianus says that there is no release from liability for the debt, and that therefore an action can be brought for the amount of the party's interest.

Marcellus, however, discusses the question separately, and states in a note on Julianus that it may be held that there is a discharge of the debt even if payment is made to me elsewhere, although I cannot be compelled to accept it if I am unwilling; and that it is evident, if there is no discharge, that it must be held that the right remains to sue for the entire amount; just as if some one built a house in another place than that where he promised to build it, he will not be released from any portion of his obligation. It seems to me, however, that the payment of a sum of money is different from the construction of a house, and therefore that suit can only be brought for the amount of the party's interest.

(8) We must now treat of the duty of the judge who presides in this action; that is whether he should adhere strictly to the amount involved in the contract, or whether he should increase or diminish it, so that if it was to the interest of the defendant that payment should be made at Ephesus rather than at the place where suit was brought, this may be taken into account. Julianus, following the opinion of Labeo, also considered the position of the plaintiff, who sometimes might be interested in recovering payment at Ephesus; and therefore the benefit to the plaintiff must also be taken into consideration. For suppose he lent money on a maritime contract which was to be paid at Ephesus, where he himself owed money under a penalty or on a pledge, and the pledge was sold or the penalty incurred on account of your default? Or suppose he was indebted to the Treasury, and the property of the stipulator was sold for an extremely low price? The amount of the interest which he had in the matter must be considered in the arbitrarian action, and this indeed can be done so as to include a higher rate of interest than is legal.

What would be the case if he was accustomed to purchase merchandise; ought not an account to be taken of the profit and not merely of the loss which he suffered? I think that an account should be taken of the profit which he failed to obtain.

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

This action is submitted to the decision of the judge for the reason that the prices of articles vary in different cities and provinces, and especially those of wine, oil, and grain; and so far as money is concerned, although it might seem to have one and the same power everywhere,

still, in certain localities it is more easily obtained and at a lower rate of interest than in others, where it is harder to get and the rate of interest is heavy.

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

Where suit is brought at Ephesus, only the actual amount can be demanded, and nothing more, unless the plaintiff had stipulated for it, or else the advantage of time is involved.

(1) Sometimes the judge who has jurisdiction of this action, as it is arbitrarian, should discharge the defendant, after having required him to provide security for payment of the money where it was promised. For, suppose it is stated that the money was tendered to the plaintiff, or deposited, or could readily have been paid there; should not the judge sometimes discharge the defendant? In short, the judge appointed to hear the action ought always to have equity before his eyes.

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

Where an heir is directed by the testator to pay something at a certain place an arbitrarian action will lie.

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

Or where money was lent with the understanding that it should be repaid at a certain place.

7. *Paulus, On the Edict, Book XXVIII.*

In *bona-fide* cases, even if it was agreed upon in the contract that something should be delivered at a certain place, an action can be brought on purchase, on sale, or on deposit, but an arbitrarian action will not lie.

(1) Where, however, a party stipulated that he would deliver the property at a certain place, this action must be employed.

8. *Africanus, Questions, Book III.*

Having stipulated that a hundred *aurei* should be paid to you at Capua, you received a surety; proceedings to recover the money should be instituted against the surety just as they should be against the promisor himself; that is to say, if an action is brought at any other place than Capua it ought to be an arbitrarian one, and the damages must be assessed at an amount equal to the interest that either the plaintiff or the defendant would have in the sum of money being paid at Capua rather than elsewhere. Nor should the obligation of the surety be increased because it was the fault of the principal debtor that the entire sum of a hundred *aurei* was not paid at Capua; for this case cannot properly be compared with an obligation for the payment of interest, for there there are two stipulations, but in this instance there is only one for money borrowed, and, with reference to the execution of the same, the amount of damages must be left to the discretion of the Court. I think that a very clear proof of the difference between these two cases is established by the fact that, if a portion of the money is paid after the party is in default and suit is brought for the remainder, the duty of the judge is to estimate the interest which the plaintiff has in payment to be made at Capua of only the amount involved in the action.

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

Where a person promises to pay at a certain place, he can do so at no other place than the one for which he promised, if the stipulator is unwilling.

10. *Paulus, Questions, Book IV.*

If, after default of payment at Capua, the creditor should wish to bring an arbitrarian action, and should first take a surety on account of said action, let us consider whether any amount that may be added by the decision of the court to the original debt will not be due and be included in the obligation, so that now if the principal should be paid, or suit is brought at

Capua, the jurisdiction of the court is terminated; unless someone should say, for example, that the judge ought to render a decision for one hundred and twenty *aurei*, and a hundred of the entire amount is paid, this should be considered to be paid on the total, that is out of the principal and the penalty; so that the plaintiff would have a right of action for the amount still remaining due on the original debt, as well as the penalty which has accrued for default of payment of that amount. I do not think however that this can be accepted as sound; and the more so because the creditor is held to have remitted the penalty when he received the money.

TITLE V.

CONCERNING THE ACTION FOR MONEY PROMISED.

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

In this Edict the Prætor favors natural equity, as he protects promises made by consent, since a breach of good faith is a serious matter.

(1) The Prætor says, "Where a person makes a promise for a sum of money which is due." The term "person" must be understood to mean anyone at all, for women also are liable for promises to pay, if they do not act as sureties.

(2) Although nothing is stated in this Edict with reference to a minor, still, he is not liable for a promise without the authority of his guardian.

(3) The question arises whether, if a son under paternal control makes such a promise, he will be liable? I think that it is true that he will be liable, and that his father also will be liable to the extent of his son's *peculium.*

(4) Where anyone makes a stipulation which is void, but intended to make a stipulation and not a promise to pay; it must be held that the creditor cannot institute proceedings on account of a promise made, because the debtor did not act with the intention of making a promise, but of entering into a stipulation.

(5) The question has been asked whether a promise can be made for something else than what is due? But since it. has already been established that one thing can be delivered instead of another, there is nothing which prevents a promise being made for something else than what was due; for example, where a party who owes a hundred *aurei* promises grain of that value, I think that the promise is valid.

(6) The payment of a debt can be promised, no matter what the consideration may be; that is to say, no matter what the contract is, whether it is for a certain or an uncertain amount, and whether the party owes the purchase-money due on a sale, or money owing on account of a dowry, or on account of guardianship, or by reason of any other contract whatsoever.

(7) Even a debt due by natural law is sufficient.

(8) A person who is liable to a prætorian action, but not under the Civil Law, is liable for a promise; for it is held that what is due by prætorian law is a debt. Therefore, if a father or the owner of a slave makes a promise for which an action *De peculio* can be brought against him, he will be liable for the amount which there was in the *peculium* at the time when the promise was made; but if he promised more than that in his own name, he will not be bound for the excess.

2. *Julianus, Digest, Book XI.*

But if he promises in behalf of his son that he will pay ten *aurei,* even though only five should be in the *peculium*, he will be liable for ten on the promise.

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

Where a husband promised a larger dowry than he is able to give, as he contracts a debt he is liable for all that he promises; but judgment shall be rendered in favor of the wife for the

amount that he is able to pay.

(1) If anyone promises a sum of money which he owes by the Civil Law but does not owe by prætorian law, that is, because he is entitled to an exception; the question arises whether he is liable on account of the promise? It is true (as Pomponius states) that he is not liable, because the money which was promised is not due under prætorian law.

(2) Where anyone who owes money under both the Civil and prætorian law is bound by an obligation which is to become operative at some future time, will he be liable under a promise? Labeo says that he will be, and Pedius approves of his opinion. Labeo adds that this kind of promise was introduced mainly on account of those pecuniary obligations for which actions could not yet be brought, and I am not unwilling to adopt this opinion; for the principle is advantageous that a party who is bound from a certain time, by promising to make payment at that time will be liable.

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

But if he promises to pay before that time, he will also be liable.

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

Where anyone promises to pay at Ephesus, and also promises to pay at some other place, it is settled that he will be liable.

(1) Julianus thinks that an envoy who promised to repay at Rome something which he had received in a province can be sued there, and this opinion is correct; but if he promised to make payment at Rome, not while he was there, but while he was still in the province, an action on the promise will be refused.

(2) What we have stated, namely, that where a debt is owing a promise to pay it must have reference to the very property itself, does not by any means require that the party to whom the promise was made should be already a creditor; for if you promise to pay what I owe, you will be liable, and if a promise is made to me to pay what is due to you, an obligation arises.

(3) Julianus also says in the Eleventh Book: "Titius wrote me a letter as follows, 'I have stated in writing under the direction of Seius, that, if it should be proved that he owes you anything, I will give you security for the debt, and will pay it without any dispute.'" Titius, then, is liable for the payment of money promised.

(4) But where anyone promises that another will make payment, and not that he will do so for another, he is not liable; and this Pomponius states in the Eighth Book.

(5) Moreover, if you promise that you will pay me, you will be liable; but if you promise me that you will pay Sempronius, you will not be liable.

(6) Julianus says in the Eleventh Book of the Digest that a promise can be made to an agent; and this Pomponius holds must be understood to signify that you may promise to pay the agent, but not the principal.

(7) Moreover, a promise can be made to the guardian of a ward and to the representative of a municipality, as well as to the curator of an insane person.

(8) These persons will also be liable on any promises which they themselves make.

(9) Where a promise is made to the representative of a municipality, or to the guardian of a ward, or to the curator of an insane person or of a minor, in such a way that payment shall be made to the municipality, or the ward, or the insane person, or the minor; I am of the opinion that an equitable action should be granted to the municipality, or the ward, or the insane person, or the minor aforesaid.

(10) It is also established that a promise can be made even to a slave, and if this is done to the effect that payment shall be made either to the owner of the slave or to the slave himself, the

slave will acquire a certain obligation for his master.

6. *Paulus, Sentences, Book II.*

The same rule applies where a promise is made to some one who is serving me as a slave in good faith.

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

Even where a promise is made to a son under parental control it is valid.

(1) If I stipulate for payment to be made to me or to Titius, Julianus says that a promise cannot be made to Titius on his own account, because he has no right of action to recover the money, although payment can be made to him.

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

If, however, you promise to pay either me or Titius, I have a right to bring an action; although, after you have made the promise that you will pay me alone you pay Titius, you will, nevertheless, be liable to me.

9. *Papinianus, Questions, Book VIII.*

Titius, however, will be liable to a personal action for the recovery of money not due, in order that what has been wrongfully paid to him may be refunded to the party who paid it.

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

The same rule applies where there are two creditors under a stipulation, and a promise to pay is made to one of them, and payment is subsequently made to the other; because the party to whom the promise is made should be considered to be in the position of one who has been already paid.

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

Therefore, a promise will also be valid so long as what is promised is actually due, even though, in the meantime, no one should appear who owes anything; as, for example, where, before the estate of the debtor is entered upon, or while he is held captive by the enemy, some one promises that he will make payment; for Pomponius states that a promise of this kind is valid since the money which is promised is in fact due.

(1) Where a man owing a hundred *aurei* promises to pay two hundred, he will only be liable for a hundred, because that is the amount of the money due; and therefore if anyone makes a promise to pay the principal together with the interest which is not due, he will be liable only for the principal.

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

Moreover, if ten *aurei* are due, and the party promises to pay ten and deliver Stichus, it can be said that he is only liable for the ten *aurei.*

13. *The Same, On the Edict, Book XXIX.*

Where anyone who owes twenty *aurei* promises to pay ten, he will be liable.

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

Where a man promises to pay he will be liable, whether he specifies a certain amount or not.

(1) If anyone promises that he will give a pledge, then, if necessity for a pledge arises, even a promise of this kind must be admitted.

(2) Where anyone promises that some certain person will act as his surety, Pomponius states that he will, nevertheless, be liable; but what if the party refuses to act as surety? I think that he who made the promise will be liable, unless there was some other understanding, but what

if the surety should die beforehand? If there should be a default, it is only just that the party who made the promise should be liable either to the amount of the interest of the creditor, or to offer as surety some other person not less solvent; but where there was no default, I rather think that he will not be liable.

(3) We can make a promise for payment whether we are present or absent; just as we can make an agreement by a messenger or in our own proper persons, and in any terms that we may choose.

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

And although the party through whom I make you a promise to pay may be free, this will be no obstacle, as we can acquire property through a person who is free, because in this instance the party is considered only to offer his services.

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

Where two of us make a promise for payment as two principal debtors, an action can be brought for the entire amount against either of us.

(1) Anyone can make a promise to pay at a certain place or time, and suit may be brought not only at the place mentioned in the promise but anywhere, as in the case of an arbitrarian action.

(2) The Prætor says: "If it should be apparent that the party who made the promise neither paid the debt nor did what he should have done, and the plaintiff was not to blame because the act which was promised was not performed."

(3) Therefore, if it was not the plaintiff's fault, a right of action will exist, even though he was prevented by the nature of the circumstances; but the better opinion is that the defendant is entitled to relief.

(4) There is some occasion for doubt with reference to the words of the Prætor, "The debtor did not do what he should have done," whether his words relate to the time mentioned in the promise, or whether we should refer them to the date when issue was joined; and I think that they refer to the time mentioned in the promise.

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

But where he offers to make payment on another day, and the plaintiff is unwilling to receive it, although he has no good reason for refusing, it is but just that relief should be granted the defendant, either by an exception or by a proper interpretation, so that, up to the time of trial, the act of the plaintiff will injure himself; and that the construction of the words, "Did not do," may be that he did not perform what he promised up to the date which he mentioned, or at any time subsequently.

18. *Ulpianus, On the Edict, Book XXVII.*

Again, the words of the prætor, "The plaintiff was not to blame," also raise some doubt. Pomponius is uncertain, where the plaintiff was not responsible for the promise not being fulfilled at the time indicated, but was, either before or afterwards. I am of the opinion that these words also should be deemed to refer to the time mentioned in the promise. Thus, if the plaintiff having been prevented by violence, by illness, or by bad weather, does not appear; Pomponius states that he himself must suffer the consequences.

(1) With reference to what is added, namely: "And that the money for which payment was promised was actually due," this requires a more complete explanation; for, in the first place, it means that if a debt was due at the time when the promise was made, but not now, the promise will, nevertheless, hold, because the right of action is retroactive. Hence as Celsus and Julianus state, where a party is bound by an obligation on which suit can be brought against him only during a certain time and he promises payment, he should be held liable;

even though the time during which suit could be brought has elapsed after the promise was made. Therefore, even if he promises that he will pay after the time of his obligation has expired, Julianus still thinks that the same rule will apply; since at the time when he made the promise he was under an obligation, although he referred it to a date when he would not have been liable.

(2) It is proper here to consider whether this action includes a penalty or is merely for the collection of the claim, and the better opinion is, as Marcellus himself thinks, that it is brought only for the collection of the claim.

(3) It was formerly a matter of doubt whether a party who brought this suit lost his right of action for the principal claim; and the safest opinion is that, when payment is made in a case of this kind, there will be a release from liability, rather than when issue is joined, since payment will benefit both obligations.

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

Where something is due under a condition, and the promise is made which renders it payable either absolutely or at a certain time, it will remain in abeyance under the same condition; so that if the condition is complied with the party will be liable, but if it is not, both rights of action will be extinguished.

(1) But where anyone owes a debt absolutely, and makes a promise for payment under *a* condition, Pomponius says that an equitable action can be brought against him.

(2) Where a father or the owner of a slave promises to make payment to the amount of what is contained in the *peculium*, the *peculium* will not be diminished for the reason that he obligated himself in this way; and even though the *peculium* may have been lost, he will, nevertheless, not be released from liability:

20. *The Same, On Plautius, Book IV.*

For neither the increase nor the decrease of the *peculium* will affect the right of action on the promise.

21. *The Same, On the Edict, Book XXIX.*

Where a party promises to deliver Stichus, and Stichus dies after he is in default, if he promises to pay his value, he will be liable.

(1) If you make a promise without mentioning the time of payment, it may be said that you will not be liable, although the terms of the Edict are susceptible of a broad interpretation; otherwise, proceedings may be instituted without delay, unless you have prepared to make payment just as soon as you promised to do so, but a reasonable time should be granted, for instance, not less than ten days, before the claim can be collected.

(2) In this action, as in other *bona fide* actions, the same oath shall charge his obligation if he merely tenders security; but where he promises that he will give security and he offers a surety or a pledge, he will not be liable, because it makes no difference in what way he provides security.

22. *The Same, Abridgments, Book VI.*

If after a sum of money has been promised to you, you deliver the estate under the Trebellian Decree of the Senate; then, since you transferred to another the right to bring suit for the original debt, you will be refused an action for the money due to you under the promise.

The same rule applies where the possessor of an estate loses it to one who has a better title; but the action in this case should preferably be granted to the beneficiary of the trust or to the party who gained the suit.

23. *Julianus, Digest, Book XI.*

Where a promisor agrees to deliver a slave and the slave dies when the former was to blame for his not having been delivered; even though he promised to deliver a slave, he will still be liable for a promise for the payment of money, and hence he must pay the value of the slave.

24. *Marcellus, Opinions.*

Titius sent a letter to Seius in the following words: "There remain in my hands fifty *aurei* of your loan on account of a contract of my wards, which I shall be obliged to pay you in current money on the *Ides* of May, and if I do not pay the said sum on the above mentioned day I shall then owe you so much as interest." I ask whether Lucius Titius has, by this bond, taken the place of his wards as debtor? Marcellus answered that, if a stipulation had been entered into, he would have taken it. I also desire to know if he did not do this, whether he is liable on his promise to pay? Marcellus answers that he is liable for the principal; as this is the more liberal and advantageous interpretation.

25. *Papinianus, Questions, Book VIII.*

A certain person owed me either one of two things, and promised to deliver one of them; the question arose whether he could deliver the one which he did not promise? I answered that he should not be heard if he now desired to break faith with reference to what had been promised.

(1) Where an oath has been tendered to you, and you swear that something is due to you, when you already have a right of action on account of it, you can properly proceed on the ground of a promise to pay; but if I did not voluntarily tender the oath, but did so being compelled by the necessity of tendering it back to you, no distinction exists, even though the necessity of tendering it back arose on account of your willingness and my respect; for no one doubts that a party acts with greater moderation when he tenders an oath back, than he does when he himself makes it.

26. *Scævola, Opinions, Book I.*

A certain man wrote a letter to his creditor as follows: "The ten *aurei* which Lucius Titius received as a loan from your chest are in my possession, and at your disposal, with the exception of the amount of interest." The answer was that, according to the facts stated, the party was liable to an action based on money promised.

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

It makes but little difference whether anyone promises to pay in the presence or in the absence of the debtor. Pomponius goes still farther

in the Thirty-fourth Book, and states that anyone can make a promise for payment even without the consent of the debtor, and, therefore, he considers the opinion of Labeo to be incorrect, who thinks that if, after a party has made a promise on account of someone else, the principal should notify him not to pay, he ought to be granted an exception *in factum;* and Pomponius is not unreasonable in this; for when the party who made the promise is once bound, the act of the debtor should not enable him to avoid liability.

28. *Gaius, On the Provincial Edict, Book IV.*

Where anyone has promised that he will make payment, in behalf of another, he in whose behalf he made this promise will still remain bound.

29. *Paulus, On the Edict, Book XXIV.*

A person who is liable to an action for either injury, theft, or robbery, will be liable under a promise to pay.

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

Where anyone promises to pay money to one of two persons, for instance, to you or to Titius;

then, although in strict law he remains bound by the proper action for the money promised, even if he should pay Titius, he will still have the right to an exception.

31. *Scævola, Digest, Book V.*

Lucius Titius died while debtor to the Seii, and they persuaded Publius Mævius that the estate belonged to him, and caused him to write a letter to them in which he stated that he was their debtor in such a way as to admit that he was the heir of his paternal uncle; and in this letter he added that the amount due had been entered in his accounts. The question arose whether since nothing had come into the hands of Publius Mævius out of the estate of Lucius Titius, whether he could be sued for money promised in the letter aforesaid, and whether he could make use of an exception on the ground of fraud? The answer was that no civil action would lie on that ground, but that an action to collect money promised would not lie either, according to the facts stated. The inquiry was also made whether suit could be brought for the recovery of the interest which had been paid on the ground above-mentioned? The answer was that, in accordance with the facts stated, it could be.

TITLE VI.

CONCERNING THE ACTION ON LOAN FOR USE AND THE COUNTER ACTION.

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

The Prætor says, "Whatever anyone is said to have loaned, I will grant an action for the same."

(1) The interpretation of this Edict is not difficult; there is only one thing to be noted, and that is that the party who drew the Edict referred to a loan, while Pacuvius mentioned using something. Labeo says, however, that there is the same difference between a loan and something given to be used, as there is between genus and species; for. movable property may be loaned, but what belongs to land cannot be, although what belongs to the land may be given to be used. But it is also apparent that land may very properly be said to be lent, and Cassius holds the same opinion. Vivianus goes still further, and says that a lodging can be lent.

(2) Parties under the age of puberty are not liable to an action on a loan for use, since a loan of this kind cannot exist with reference to a ward without the authority of his guardian; and this principle is applicable to such an extent that even if, after he reaches puberty, the boy commits fraud or is guilty of negligence, he will not be liable to the action, because in the beginning the loan was inoperative.

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

Nor should an action on a loan for use be granted against an insane person, but an action for production should be granted against both; so that, when the property is produced, a suit may be brought for its recovery.

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

It seems to me, however, that if a ward is pecuniarily benefited, an equitable action on the loan should be granted against him, according to a Rescript of the Divine Pius.

(1) If the article lent is returned, but is returned deteriorated, it will not be held to be returned at all because it has been deteriorated, unless the loss is made good; for an article is properly said not to be returned, if it is returned in a deteriorated condition.

(2) In this action, as in other *bona fide* actions, the same oath shall be taken with reference to the claim, and so far as the value of the property is concerned, the time must be considered when the case was decided; although, in strict law, the time when issue was joined is that which must be taken into consideration.

(3) The heir of the party who received the loan can be sued for the same share which he has in

the estate, unless he should happen to have the power to return the entire property, and does not do so; for then judgment will be rendered against him for the whole amount, since this would be in accordance with the decision of a good judge.

(4) Where a loan is made to a son under paternal control or a slave, the action must only be brought for the *peculium*, but the creditor can have a direct action also against the son himself. Moreover, if the party made the loan to a female slave or to a daughter under paternal control, an action *De peculio* is the only one that could be brought.

(5) The father or the owner will not have judgment rendered against him solely on account of the wrongful act of either the son or the slave, as fraud only on the part of the father or owner himself will be considered; a distinction which is made by Julianus, with reference to the action on pledge, in the Eleventh Book.

(6) There can be no loan of an article which is consumed by use, unless the person borrowed it for the purpose of pomp or ostentation.

4. *Gaius, On Verbal Obligations, Book I.*

Loans of money are frequently made for the purpose of enabling them to take the place of payment.

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

Where an agreement is made that the article lent shall be returned at a certain place or time, it is the duty of the judge to take into consideration the place or time mentioned.

(1) Where anyone brings this action, and accepts an estimate of the damages which is offered, he makes the article loaned the property of the party who tenders the money.

(2) We must now examine what it is that is to be taken into consideration in an action on loan for use, whether fraud or negligence, or every kind of risk; and, indeed, in contracts we are sometimes guilty of fraud and sometimes of negligence; of fraud in the case of deposit, because, as no benefit will be derived by the party with whom the property is deposited, it is reasonable that only fraud should be considered, unless where compensation happens to be made, for then (as has been enacted), negligence is included; or where it was agreed upon in the beginning that the party with whom the article was deposited should be responsible for both negligence and accident. Where, however, the advantage of both parties was concerned in a case of sale, hire, dowry, pledge, or partnership, responsibility attaches for both fraud and negligence. With reference to a loan, the entire advantage which accrues is generally that of the party to whom the property is lent; and therefore the opinion of Quintus Mucius, who thought that the party must be liable for negligence, and must also use diligence, is the more correct one.

(3) And if the property had been appraised before it was delivered, the entire risk must be assumed by him who agreed to be responsible for the amount of the appraisement.

(1) But where deterioration occurs, either through old age or disease, or where the property is stolen by robbers, or anything of this kind takes place; it must be said that the party who received the loan is not to be blamed for any of these things, unless some negligence occurred on his part. Hence, if any damage resulted through fire or the fall of a building, or any inevitable loss took place, the party will not be liable; unless, when he could have saved the property which was lent, he preferred to save his own.

(5) It is beyond question that he must use diligent care with reference to the property loaned.

(6) But whether he must use this care, where a slave has been loaned, was doubted by the ancient authorities; for sometimes a watch must be kept upon a slave, as where he is chained when lent, or where his age requires that he should be guarded; but if it was certain that the understanding was that the party who asked for him should guard him, it must be held that this

should be done.

(7) Sometimes, however, the loss by death must be borne by the party who asked for the loan; since if I should lend you a horse for you to take to your villa, and you take it to war, you will be liable to an action on loan; and the same rule applies to the case of a slave. It is clear, however, that if I lent the horse to you in order that you might take it to war, the risk would be mine, for Nanusa says if I lend you a slave to plaster a wall, and he falls down from a scaffold, the risk is mine. I think, however, that this is true only where I lent him to you for the purpose of working on a scaffold; but if he should do his work on the ground, and you caused him to get up on a scaffold; or if, through some defect in the latter which was not built properly, even though not fastened by the party in question, or it happened through the age of the ropes or poles; I say that the party himself who requested the loan, must be responsible for the accident which occurred through his negligence. Mela stated that if a slave was lent to a stone-cutter and was killed by the fall of a scaffold, the artisan is liable to an action on loan, because he built the scaffold in a careless manner.

(8) Moreover, where a person uses the article lent to him in some other way than was intended, he is liable not only to an action on loan but also to one on theft; as Julianus states in the Eleventh Book of the Digest. He also says, "If I lend you a blank book and you cause your debtor to write therein a note to secure you, and I then erase this; if I lent the book to you in order that you might be secured, I am liable to you in a counter action." But if this is not the fact, and you did not inform me that the note was written, you will also be liable to me in an action on loan, and he says you will even be liable to an action on theft also; since you made use of the property loaned in a different way than you should have done, just as anyone is liable for theft if he uses a horse or a garment for a different purpose than that for which it was lent.

(9) To such an extent must diligence be exercised with reference to property loaned for use, that it must be employed even with respect to whatever follows the property in question; as, for instance, where I lent you a mare which was accompanied by a foal, the ancient authorities held that you were also obliged to use proper care in the treatment of the foal.

(10) It is evident that sometimes he who asked for a loan will be responsible only for malice displayed with reference to the property borrowed, as, for instance, where anyone entered into an agreement to this effect, or where the party made the loan only for his own benefit; for example, where he made it to his betrothed or to his wife, in order that she might be better attired when she was brought to him; or where the prætor exhibited games and made a loan to the actors, or someone voluntarily loaned things for this purpose to the Prætor.

(11) We must now examine in what particular instances an action on loan will be available; and the ancient authorities entertained doubts with reference to cases of this kind.

(12) I gave you something in order that you might pledge it to your creditor; you gave it in pledge; but you did not redeem it in order to return it to me. Labeo says that in this instance an action on loan will lie, and I think that this opinion is correct, unless I received some compensation, and then the action would be *in factum* on the contract of leasing and hiring. It is evident that if I give an article in pledge on your account and with your consent, an action on mandate will lie. Labeo also says, very properly, that if I am not guilty of negligence in redeeming the property pledged, but the creditor refuses to return it; you will then have a right of action on the loan only to the extent that I could assign to you my rights of action against him. It will, moreover, be held that I am not guilty of negligence if I have already paid the money, or I am prepared to pay it. It is clear that the costs of the proceedings and any other expenses must, in justice, be paid by the party who received the loan.

(13) If you ask me to lend you a slave with a dish, and the slave loses the dish, Cartilius says that you must assume the risk, since the dish is held to have been lent, and therefore you must also be responsible for negligence with reference to it. It is evident that if the slave takes to

flight with the dish, the party who received the loan will not be liable, unless he was guilty of negligence in connection with the flight of the slave.

(14) If you ask me to furnish a dining-room for you as well as plate for service, and I do so; and then you request that I do the same thing on the next day, and as I cannot conveniently take the silver back to my house I leave it there, and it is lost; what action can be brought, and who must assume the risk? Labeo states with reference to the risk, that it makes a great deal of difference whether I placed someone to guard the property or not, for, if I did so, the risk is mine; but if I did not, the party to whom the property was left is responsible. I think, however, that an action on loan will lie, but that the party with whom the property was left must provide for its safe custody, unless some other arrangement was expressly agreed upon.

(15) Where a vehicle is lent or hired to two persons, Celsus, the son, says in the Sixth Book of the Digest that the question may arise whether each of them is liable for the entire amount, or only for a part of the same? He states that the entire ownership of anything cannot belong to two persons, nor can they have the entire possession, nor can one party be the owner of a portion of an article, for he can only have partial ownership of the entire article by means of an undivided share. However, the use of a bath, of a portico, or of a field, may belong to each party in its entirety, for I do not enjoy the use of a thing any the less because another also uses it; but where a vehicle is loaned or hired, I do have the use of a part of it, in fact, because I do not occupy the whole space of the vehicle; but he says it is the better opinion that I shall be responsible for fraud and negligence, as well as for diligence and care, with reference to the whole of it; wherefore, the two parties will be considered as joint-debtors, and if one of them, having been sued, pays the damages, the other will be released, and both of them will be entitled to an action for theft:

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

So that, if either one of them brings suit, the right of action of the other against the thief will be extinguished.

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

Therefore the question arises if one of the parties brings the action for theft, should he only be sued for the loan? Celsus says that if suit should be brought against the other, namely, the one who did not bring the action for theft, and he is ready for the former — that is the one who, because of his bringing the action for theft, profited by the article lent — to be sued at his risk, he should be heard, and be discharged from liability.

(1) If the lender has a right of action against the other joint-debtor under the *Lex Aquilia*, it should be considered whether he should not assign it, if the other had committed some damage which the party sued may be compelled to make amends for in an action on loan; since, even if the lender had a right of action against him under the *Lex Aquilia*, it is perfectly just that, when he brings suit on the loan, he should release the other right of action; unless someone might say that by instituting proceedings under the *Lex Aquilia* he will recover less than he recovered on account of the loan; and this appears to be reasonable.

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

We retain both the possession and the ownership of property lent for use.

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

For no one, by lending anything, makes it the property of the party to whom he lends it.

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

Where a man who has received anything as a loan only uses it for the purpose for which he borrowed it, he will certainly not have to pay anything if he renders the article in no respect worse, through his own negligence; for if he does render it worse through his negligence, he

will be liable.

(1) If I give an article to some one to enable him to examine it, the question arises whether he occupies the same legal position as one to whom property is lent? If, indeed, I gave it to him on my own account, because I wished him to ascertain its value, he will only be responsible to me for fraud; but if I gave it to him on his own account, he will also be responsible for its safe-keeping, and hence he will be entitled to an action for theft. But if the article is lost while it is being returned, and I had directed him as to the party by whom he should return it, the risk will be mine; but if he committed it to the care of some one whom he himself selected, he will also be responsible to me for negligence, if he received it on his own account;

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

Because he did not select a suitable person in order that it might be carried securely.

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

But if he received it on my account, he will be responsible only for fraud.

(1) A slave who was sent to ask for an article which had been loaned, ran away after he had received it. If his master had directed that it should be given to him, he must sustain the loss; but if he sent the slave for the purpose of notifying the borrower to return the article lent, the party to whom it was lent will be responsible for the loss.

13. *Pomponius, On Sabinus, Book XL*

Where a person who received a loan has judgment rendered against him in an action on loan, on the ground that the property had disappeared; security must be furnished him that if the owner finds it, he will deliver it to him.

(1) Where a party receives something for the purpose of trying it, as, for instance, beasts of burden, and they are hired out by him, and he profits by this use; he must refund the actual amount which he obtained to him who let him have the animals on trial; for no one should be allowed to profit by anything before it is held at his risk.

(2) Where I lend an article to a free man who has been serving me in good faith as a slave, let us see whether I am entitled to an action on loan against him. Celsus, the son, says that if I had ordered him to do anything, I could proceed against him either by an action on mandate, or by an action for the construction of the contract, and therefore the same rule should apply in the case of a loan. It makes no difference whether, if we contract with a freeman who is serving us in good faith as a slave, we do not do so intending to place him under an obligation, for it frequently happens that a tacit obligation arises in addition to what is intended at the time; as, for instance, where money which is not due is paid by mistake for the purpose of discharging a debt.

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

If my slave lends you an article belonging to me, and you were aware at the time that I was unwilling that it should be lent to you; an action on loan, as well as one for theft, will lie in my favor, and I will be entitled to an action to recover the property on the ground of theft, as well.

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

We can lend even the property of others which is in our possession, even though we know that it belongs to another:

16. *Marcellus, Digest, Book V.*

So that even if a thief or a depredator lends property he will be entitled to an action on loan.

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

In a case of loan, an agreement that the bailee shall not be responsible for bad faith is not

valid.

(1) The counter action on loans can be instituted without the direct action, just as the others which are designated counter actions.

(2) Where an action on loan is brought on account of an act of the heir, judgment will be rendered against him for the entire amount, even though he may be heir only to a share.

(3) Just as the making of a loan for use is an act of free will or of kindness, rather than of necessity, so also it is the right of the party who confers the favor to prescribe terms and limits with reference to the same. When, however, this has been done, (that is to say, after the loan has been made), then the prescribing of terms and going back and unseasonably depriving the party of the property loaned, not only interferes with the kindness displayed, but also with the obligation created by giving and receiving the property. For the transaction is participated in by both parties, and therefore rights of action arise on both sides; so that it is apparent that what was originally an act of generosity and good will is changed into mutual obligations and civil rights of action, as happens in the case of a party who has begun to attend to the business of someone who is absent; for he cannot allow the business to be neglected with impunity, since, if he had not undertaken it, perhaps someone else would have done so, for the assumption of a mandate depends upon the will, but to execute it is a matter of necessity. Therefore, if you lend me tablets in order that my debtor may give me security, you cannot properly demand that they be returned at an improper time; for if you had refused to lend them, I would either have purchased others, or have obtained witnesses.

The same rule applies where you lent me timbers with which to prop up a house, and then removed them, or even knowingly lent me some which you knew to be decayed; for we should be benefited, and not deceived when a favor is granted. In instances of this kind it must be held that the counter action can also be brought.

(4) Where two articles have been lent, Vivianus states that the action on loan can properly be brought for either of them, and what Pomponius states would seem to be true, if they are separate; for where a party has lent, for instance, a chariot or a litter, he cannot properly bring an action for separate portions of the same.

(5) I lost an article which you lent me, and I gave you its value in lieu thereof, and then the article came into your hands. Labeo says that in a contrary action you must either deliver the property to me, or restore to me what you received from me.

18. *Gaius, On the Provincial Edict, Book IX.*

Where property is lent, the same diligence must be exercised as any very careful head of a household employs with reference to his own property, so that he is not responsible for an accident, except those that cannot be resisted; as, for instance, the deaths of slaves which occur without malice or negligence on his part, attacks' by robbers and enemies, the stratagems of pirates, shipwrecks, fires, and the escape of slaves whom it is not usual to keep under guard. With reference to what we have stated concerning robbers, pirates, and shipwreck, we must understand this to mean that where property has been lent to a man in such a way that he can take it with him on a journey; if, however, I should lend silver plate to anyone because he said that he was going to invite some friends to supper, and he takes it out of the country with him, there is no doubt that he will be responsible for anything that happens through the acts of pirates and robbers, or by reason of shipwreck. This is the case where the property was lent only as a favor to the borrower, but if it was done for the benefit of both parties, for example, where we invited a common friend to supper, and you take it upon yourself to manage the affair, and I lend you the plate; I am aware that certain authorities hold that you are only responsible for bad faith, but it should be considered whether you are not also liable for negligence, for the determination of negligence is ordinarily made on the same principle as where property is given in pledge or as dowry.

(1) Where property is pledged, loaned, or deposited, and it is deteriorated by the act of the party who received it, not only the actions which we have mentioned will lie, but also that under the *Lex Aquilia;* but where any one of these is brought, the right to the others will be extinguished.

(2) There may be good cause for an action to be brought against the person who lends the property; as, for instance, where this is done for expenses incurred, on account of the health of the slave, or for seeking him and bringing him back after he has run away; but the expenses of his maintenance must be borne by the party who received him in order to use him in accordance with natural law. But with reference to what we have stated concerning any expenses incurred on account of the health or the flight of the slave, this only applies to expenses which are larger in amount; for the better opinion is that moderate expenses, as, for instance, those of his support, must be borne by the same individual.

(3) Moreover, where anyone lends vessels which are defective, and the wine or oil which is put into them is spoiled, or runs out, judgment must be rendered against him on this account.

(4) Again, wherever a man can recover anything by a counter action he can retain it by the right of set-off, even when the direct action is brought against him. It may happen that what a party can recover on his part is of greater amount; or the judge may refuse to take the set-off into consideration; or proceedings are not instituted against him to obtain restitution of the article lent, because it has been destroyed by accident, or has been returned without judicial proceedings; so we say that a counter action is necessary.

19. *Julianus, Digest, Book I.*

There is no doubt that parties who agree to keep something safely, or receive it to be used, are not liable for unlawful damage committed by another; for how can we provide by either care or diligence against some one doing us wrongful injury?

20. *The Same, On Urseius Ferox, Book III.*

If I give silver lent by you to me to a slave of mine to be delivered to you, who is so reliable that no one would think that he would be imposed upon by any evil-minded persons, and if such persons obtain possession of the silver, the loss will not be mine.

21. *Africanus, Questions, Book VIII.*

You lent an article to me and then you took it away afterwards; you brought an action on loan, and I did not know that you had taken the article; the judge rendered a decision against me and I paid it. I afterwards ascertained that the article had been removed by you, and the question arose what kind of an action I could bring against you? The answer was that there could not be an action for theft, but that I would be entitled to a counter prætorian action on account of the loan.

(1) While in the army, I gave certain vessels to my companions to be used at the common risk, and my slave, having stolen them, deserted to the enemy, and was afterwards recovered without the vessels. It is established that I will be entitled to an action against my companions on the ground of loan, for their respective shares, but they can proceed against me for theft, on account of the act of my slave, since the claim for reparation follows the person. And if I lend you an article to be used at your own risk, and it is stolen by my slave, you can bring an action for theft against me on account of the act of the slave.

22. *Paulus, On the Edict, Book XXII.*

Where a slave whom I lent you commits a theft, the question arises whether a counter action on loan will be sufficient, just as this would lie if you had spent any money for the cure of the slave; or whether you can bring an action for theft? And, there is no doubt that the party who requested the loan can bring a noxal action for theft, and that the lender is liable to a counter

action on loan, since he made the loan knowing that the slave was dishonest, while the other party was ignorant of the fact.

23. *Pomponius, On Quintus Mucius, Book XXII.*

If I lend you a horse to be used for the purpose of travelling to a certain place, and, through no negligence on your part, the value of the horse is diminished by the journey, you will not be liable to an action on loan; but I, myself, was negligent because I lent for such a long journey a horse which could not endure the fatigue.

TITLE VII.

CONCERNING THE ACTION ON PLEDGE AND THE COUNTER ACTION.

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

A pledge can be contracted not only by delivery, but also by mere agreement, even if no delivery is made.

(1) Let us therefore consider where a pledge has been contracted by mere agreement, whether, when anyone exhibits some gold as if he intended to deliver it by way of pledge, and he delivers brass, he will bind himself to pledge the gold? If follows that he will bind himself for the gold, but not for the brass, as the parties did not make an agreement with reference to the latter.

(2) However, where anyone when he delivers brass by way of pledge, states that it is gold, and gives it in pledge, it should be considered whether he does not make the brass a pledge, and whether as an agreement was made as to what was to be given, it may not be held to be pledged? This is the better opinion; still, the party who gave it will be liable to a counter action on pledge, without taking into account the fraud which he perpetrated.

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

Where a debtor sold and delivered property which he had pledged, and you lent him money which he paid to the creditor to whom he gave the pledge, and you entered into an agreement with him that the article which he had already sold should be pledged to you; it is established that your act is void, because you accepted in pledge property which belonged to another; for, according to this arrangement, the purchaser has come to have in his possession an article which has been released from the pledge; and it makes no difference that the property pledged was released by the use of your money.

3. *The Same, On Sabinus, Book XVIII.*

When, having been assured by your debtor that you will receive the money he owes you immediately, you return him the property pledged, and he passes it out a window to some one whom he purposely stationed there to receive it; Labeo says that you can bring an action for theft, and also one for production against your debtor; and if you bring a counter action on pledge, and the debtor interposes an exception on the ground that the property pledged has been returned, a replication can be filed based on bad faith and fraud; since it is understood that the article was not returned but was removed by artifice.

4. *Ulpianus, On Sabinus, Book XLI.*

Where an agreement is made with reference to the sale of the property pledged, either in the first place or afterwards; then, not only is the sale valid, but the purchaser immediately obtains the ownership of the property. But, although nothing was agreed upon with reference to the sale of the property pledged, still, the law is that it can be sold, provided no agreement was entered into preventing it; but if an agreement was made that it should not be sold, and the creditor then sells it, he will be liable to an action for theft, unless the debtor was thrice notified to make payment, and did not do so.

5. *Pomponius, On Sabinus, Book XIX.*

The same rule of law applies whether it was agreed that no sale should be made at all, or where something has been done in violation of the agreement, either with reference to the amount, the condition, or the place where the property was to be sold.

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

Although an agreement may be entered into that you shall be at liberty to sell land which is pledged to you, nevertheless, you cannot be forced to sell it, although the person who gave it to you in pledge may be insolvent; because the security was given on your account. Atilicinus, however, says that where proper cause is shown, the creditor can be compelled to sell; for what if the amount which is due is much less than the value of the property pledged, and the latter can be sold at present for more than it will bring hereafter?

It would be better, however, to say that the person who gave the pledge could sell it and pay what he owed when he has received the purchase-money; provided the creditor can be required to exhibit the property pledged, in case it is movable, if the debtor previously furnished him with sufficient security to indemnify him; for it would be oppressive for a creditor to be compelled to sell the property against his will.

(1) Where the creditor sells land which has been pledged with him for a larger amount than the debt, and lends the excess at interest, he must pay the interest received on this money to the party who gave him the pledge; and if he, himself, makes use of the excess he must also pay interest on the same; but if he retains it as a deposit, he will not be required to do so.

7. *Paulus, Sentences, Book II.*

Where a creditor, after the lapse of some time, restores the surplus, which he held on deposit, then, on account of his default, he should be compelled to pay the debtor interest on the same because of the delay.

8. *Pomponius, On Sabinus, Book XXXV.*

If I incur some necessary expense on account of a slave or a tract of land which I received by way of pledge, I shall be entitled not only to retain the same, but also to bring a counter action on pledge; for suppose that the slave was ill, and I paid out money to physicians, and the slave died; or suppose that I propped up a building or repaired it, and afterwards it was destroyed by fire, and I had nothing which I could hold as a lien.

(1) Where several slaves are given in pledge, and the creditor sells some of them for a certain amount of money, with the understanding that he will guarantee their title to the purchaser, and he pays his debt with the proceeds; he can retain the remaining slaves until he has been furnished security that he will be indemnified with reference to what he promised the purchaser by way of guarantee of the title to the other slaves.

(2) Where one of the heirs of a debtor pays his share of the debt, the entire property given in pledge can still be sold, just as if the debtor himself had paid a portion of the debt.

(3) If I stipulate for payment at the end of one, two, and three years, and I receive a pledge, and agree that unless the money is paid at each of the times specified I shall have the right to sell the property pledged; it is settled that I cannot sell it before the day when all the sums are due; and this is the case because by these words all the payments are indicated, and it is not true that the money is not paid on each day appointed for it, until all the days have arrived. But when all the times for payment have passed, then, even if only one portion should not be paid, the property pledged can be sold. But where it was stated in writing, "That if any one payment should not be made on the day appointed for the same," suit on the agreement can then be brought at once by the creditor.

(4) An agreement relating to the sale of property held in pledge should be drawn up in such a

way that all the parties will be included in it; but if it only should have reference to the creditor himself, his heir also may legally sell the property, if nothing has been agreed upon to the contrary.

(5) Where a pledge can be sold on account of an agreement, this may be done not only on account of the unpaid principal, but also on account of other matters, as, for instance, interest and money expended on the property.

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

Where a debtor has given me in pledge property belonging to another, or has acted in bad faith with reference to the pledge, it should be said that the counter action will lie.

(1) A pledge can not only be given on account of money, but also for any other matter; as, for example, where a party gives a pledge to another that he will become his surety.

(2) We properly designate as a pledge something which is delivered to the creditor; and where not even possession passes to the creditor we call it hypothecation.

(3) In order for the action on pledge to be applicable, all the money must have been paid, or satisfaction be given with reference to the same. We understand by "satisfaction," such satisfaction as the creditor desires, even though no payment may be made; whether he wished that security should be given to him by other pledges so that he may relinquish the one he has, or by sureties, or by providing another debtor, or by the payment of money, or by mere agreement, the action on pledge will arise. And, generally speaking, whenever the creditor is willing to relinquish the pledge, it is considered to be satisfied if he has received such security as he wished, even though he may have been deceived with reference to it.

(4) Anyone who has given the property of another in pledge can proceed by an action on pledge, if the debt has been paid by him.

(5) Where a party brings the action on pledge before payment has been made, although he did not proceed properly in doing so, still, if he tenders the money in court, he has a right to recover the property pledged and his interest as well.

10. *Gaius, On the Provincial Edict, Book IX.*

But if he is ready not to pay but to give satisfaction in some other way, for instance, if he wishes to give another debtor in his stead, this will be of no advantage to him.

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

It is not considered to be payment where issue is joined with the debtor with reference to the debt, or where a surety is sued.

(1) Where the obligation of the debt is renewed, this destroys the pledge, unless it is agreed that the pledge shall be renewed.

(2) If I receive a pledge from you with the understanding that I shall pay you money, and I fail to pay it, I will be liable to an action on pledge; although no payment has been made. The same rule will apply where a receipt has been given for the money loaned, or the condition on account of which the pledge was given should not be fulfilled, or a lawful agreement has been entered into that no demand for the money shall be made.

(3) If the property was pledged only with reference to the principal or the interest, the action on pledge can be brought where the money with reference to which the property was encumbered has been paid. But whether the interest was expressly mentioned in the stipulation or not, if the property was pledged with reference to it also, the action on pledge will not lie so long as any of it is due. The case is different where a party has promised to pay interest above the lawful rate, for this is absolutely illegal.

(4) Where the creditor left several heirs, and one of them is paid his share, the other heirs of

the creditor should not suffer any injury, but having offered to the debtor what he has paid to their co-heir, they can sell the entire property. This opinion is not unreasonable.

(5) The money is understood to be paid not only where it was given to the party to whom the property was pledged, but where it was paid with his consent to someone else, or to one whose heir he is or to his agent, or to a slave appointed for the collection of claims. Therefore, if you rent a house and lease a part of it to me, and I pay the rent to your lessor, I can proceed against you by an action on pledge; for Julianus says that he can be paid. And if I pay a part of the rent to you and a part to him, the same rule must be said to apply. It is evident that the property which I brought into the house will be liable only for the amount of the rent of my room, as it is incredible that an agreement should have been made that my effects of trifling value should be liable for the rent of the entire house. It is held to have been tacitly agreed upon with the owner of the premises that the contract of the proprietor of the lodging-house should not benefit the former but that his own agreement should.

(6) An obligation by pledge through a free person is not acquired by us; and to such an extent does this principle apply that it cannot be acquired through an agent or guardian, and therefore they themselves can be sued in an action on pledge. Nor is this changed by what was decreed by our Emperor, namely, that possession may be acquired through a free person; for this is only applicable in order to enable us to obtain possession of property which has been pledged to us, but a free person will not always acquire the obligation itself for us.

(7) Where, however, my agent or guardian gives property in pledge, he himself can bring the action on pledge, and this applies to an agent if he had already been directed to give a pledge:

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

Or if the management of the entire property or the party who was accustomed to borrow money on pledges has been entrusted to him.

13. *Ulpianus, On the Edict, Book XXXVIII.*

If, when a creditor was selling a pledge, an agreement was entered into between him and the purchaser that if the debtor should pay the purchase-money to the buyer, he shall be entitled to have his property returned; Julianus says it is also stated in a rescript that, on account of this agreement, the creditor is liable by the action on pledge to transfer to the debtor his action on sale against the purchaser. The debtor himself, however, can bring an action to recover the property, or one *in factum* against the purchaser.

(1) Both malice and negligence may be the subject of this action, as in the case of a loan for use. Safe-keeping also is included, but irresistible violence is not within its scope.

14. *Paulus, On the Edict, Book XXIX.*

Therefore, the same diligence which a careful head of a household is accustomed to exercise in his own affairs is required of the creditor.

15. *Ulpianus, On the Edict, Book XXVIII.*

When the creditor returns the pledge he should give the debtor security against fraud, and if a tract of land was pledged, he must give him security with reference to his title, if servitudes happen to have been lost through the failure of the creditor to make use of them.

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

Where a guardian pledges the property of his ward without violation of the law, the pledge must be upheld; that is, if he receives the money for the benefit of the ward. The same rule applies in the case of the curator of a minor or insane person.

(1) It is certain that the creditor is entitled to a counter action on pledge. Hence, if the debtor gives property belonging to another, or which is pledged to a third party or to the State, he will

be liable, although he is also guilty of the crime of swindling. Is this the case only where he is aware of the facts, or also where he was ignorant of them? So far as the offence is concerned, ignorance will be a sufficient excuse; but, with reference to the counter action, Marcellus states in the Sixth Book of the Digest that ignorance does not excuse him. When the creditor knowingly receives property which belongs to some one else, or is pledged to another, or which is damaged, a counter action will not lie in his favor.

(2) Even land subject to a perpetual lease can be pledged as well as that whose surface only is involved; because, at present, equitable actions are granted to parties in whom surface rights are vested.

17. *Marcianus, On the Hypothecary Formula.*

The Divine Severus and Antoninus, however, stated in a Rescript that the pledge will be binding without affecting the rent of the land.

18. *Paulus, On the Edict, Book XXIX.*

If you and I have agreed that a claim against a debtor of mine shall be pledged to you, this agreement must be sustained by the Prætor, so that he will protect you if you bring suit for the money, and the debtor if I bring suit against him. Therefore, if the obligation was a pecuniary one, you must set off your claim against the money collected; but if it was for any specific property, whatever you receive you will retain instead of a pledge.

(1) If the mere ownership is pledged, an usufruct which subsequently accrues will be included to the pledge, and the same rule applies to alluvial deposits.

(2) If real-property which is pledged is sold, the condition of the pledge still remains, since the land passes together with what is connected with it; as, for instance, in the case of a child born of a female slave after the sale has been made.

(3) Where a party has provided that a wood shall be pledged to him, Cassius says that a ship built of this material cannot be pledged by this agreement, because the material is one thing, and the ship another, and therefore in giving the pledge it should be expressly added, "Whatever is made of or derived from this wood."

(4) Where a slave pledges property belonging to his *peculium*, the transaction must be sustained if he had the free management of the *peculium;* for he can also alienate such property.

19. *Marcianus, On the Hypothecary Formula.*

We must understand the same rules to apply to a son under paternal control.

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

The property of a third party can be given in pledge with the consent of the owner; and if it is given without his knowledge, and he ratifies the act, the pledge will be valid.

(1) Where property is pledged to several persons at the same time, they all have an equal right.

(2) If the creditor is to blame for not being paid, the action on pledge can properly be brought.

(3) Sometimes, even if the money has been paid, the action on pledge should be refused; for example, if the creditor had bought his pledge from the debtor.

21. *The Same, Abridgments, Book VI.*

Where a house is given in pledge, the site also is liable, for it is a part of the house; and, on the other hand, the right to the soil follows the building.

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

Where a pledge has been stolen, and the creditor brings an action for theft, Papinianus is of

the opinion that he must credit on the debt everything that he recovers; and this is correct, even though the theft was committed through the negligence of the creditor.

Much more should this be held with reference to what he obtains by a suit for recovery. But let us consider whether what the debtor himself paid to the creditor under an action for theft or one for recovery shall be credited on the debt; and, indeed, it has been frequently stated and handed down that he is not required to restore to him what he himself has paid under an action for theft. Papinianus says the same thing in the Ninth Book of Questions.

(1) Papinianus also says that, where the creditor, actuated by fear, returned to the debtor a slave who had been pledged, and whom he had received in good faith for that purpose, the same rule applies; for if he institutes proceedings because he had done this on account of duress, and he recovers quadruple damages, he will not return anything out of what he obtained, nor shall he credit it upon the debt.

(2) If a thief gives property in pledge, an action on pledge as well as for the profits can be brought by him, although he cannot make the profit his own; for a thief can be sued not only for the profits of property which is in existence, but also for the recovery of the value of that which has been consumed; and therefore the fact that the creditor was a *bona fide* possessor will be an advantage to him.

(3) If, after the pledge has been sold, the debtor who obtained possession of the property by sufferance, or who leased it, does not relinquish possession, he will be liable to a counter action.

(4) Where a creditor, when he sold the property pledged, promised double damages (for this is customary, and having been sued in a case of eviction he had judgment rendered against him) would he have a right to a counter action on pledge? It may be said that he would have such a right, provided he made the sale without fraud or negligence, and transacted the business as the diligent head of a household should do. Where, however, a sale of this kind was, in no wise, profitable, but the party sold it for as much as he could have obtained even if he had not given the promise, he cannot have recourse to this action.

23. *Tryphoninus, Disputations, Book VIII.*

For he will not be able to recover from the debtor more than the amount of the debt. If, however, there had been an agreement for interest, and, five years, for instance, after having received the price of the property pledged the creditor, having lost his case, makes restitution to the purchaser, he can recover from the debtor interest for the intermediate time, because it is evident that nothing has been paid to him in such a way that it cannot be deprived of it. Where, however, he has only paid the price received, he will be barred by an exception on the ground of fraud from a claim for interest, since he has had the use of the purchase-money which he received from the buyer.

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

The nice question has been asked me; if the creditor has obtained from the Emperor a Decree that he shall have possession of the pledge, and has been deprived of it by a better title, will he have a right to a counter action on pledge? It seems to me that the obligation growing out of the pledge is terminated, and that there is a withdrawal from the contract; nay more, there is an equitable action arising from the purchase of which he can avail himself, just as if the property had been given up to him by way of payment, so as to satisfy him for the amount of the debt or of the interest he had in the matter; and the creditor would be entitled to a set-off, if an action on pledge, or one based on any other ground, should be brought against him.

(1) The question arises whether anyone who has paid the creditor in counterfeit money can bring the action on pledge, because the money has been paid? It is established that he cannot bring an action on pledge, nor will he be released from the debt because counterfeit money

does not release the party who pays it; and, indeed, the money should be returned to him.

(2) Where a creditor sells a pledge for more than was due, but has not yet recovered the price from the purchaser, can he be sued in an action on pledge for payment of the surplus? Or must the debtor wait until the purchaser pays, or have a transfer of the rights of action against the latter made to him? I am of the opinion that the creditor should not be compelled to make payment, but that the debtor should wait, or, if he does not do so, that the rights of action against the purchaser should be assigned to him, but at the risk of the vendor. Where, however, he has already received the money he must surrender the surplus.

(3) Where the creditor has maltreated property which was pledged or has injured slaves, this must be taken into consideration in the action on pledge. It is evident, however, that, if he has employed force against them on account of their bad behavior, or has placed them in chains, or has brought them before the Prefect or the Governor; it must be said that the creditor is not liable to the action on pledge, therefore, if he has prostituted a female slave, or compelled her to perform any other improper act, the pledge of this slave is at once released.

25. *The Same, On the Edict, Book XXXI.*

Where a creditor has instructed pledged slaves in various trades, a counter action will lie if they have already acquired knowledge in these matters, or if the instruction was given with the consent of the debtor. But if neither of these was the case, and the trades were necessary, the counter action will lie, but not to the extent that the debtor will be compelled to lose the slaves on account of the amount of the expense; for, just as the creditor is not suffered to neglect the property through malice and negligence, so also he is not permitted to place what is pledged in such a condition that its recovery would be onerous to the debtor; as, for instance, where a large tract of land is given in pledge by a man who can hardly redeem it, and not even cultivate it, and you, having received it in pledge, cultivate it in such a way as to render it of great value; as, in fact, it is not just that I should be compelled to look for other creditors, or to sell what I wished to recover, or to leave it in your hands through the force of poverty. These matters should be considered by the judge, who should take a middle course, so as not to listen to the trifling objections of the debtor, or to the oppressive claims of the creditor.

26. *The Same, Disputations, Book III.*

There is nothing surprising that a pledge is created where, for any cause whatsoever, a magistrate places the party in possession; since our Emperor, together with his father, stated very frequently in Rescripts that a pledge can also be created by will.

(1) It should be remembered that where a pledge is created by order of a magistrate, this is not legally done until the property has actually come into possession.

27. *The Same, Opinions, Book VI.*

In the case where a creditor made a demand for money which had been loaned, and the debtor did not have the money on hand, he gave him certain articles of gold, in order that he might place them in pledge with another creditor. If the party who received them from the debtor holds them after they have been released by payment, he can be ordered to produce them; but if they are still in possession of the creditor, they are held to be liable with the consent of the owner; but the proper action can be brought by the owner of the property against his creditor to compel them to be delivered, as soon as they are released.

28. *Julianus, Digest, Book XL*

Where a creditor has received property in pledge and having lost possession of it proceeds by means of the Servian Action, and recovers damages; and the debtor afterwards brings suit for the same property, he will be barred by an exception, unless he offers him what was paid for it.

(1) Where a slave receives a pledge on account of his *peculium,* an action on pledge can be brought by the debtor against his master.

29. *The Same, Digest, Book XLIV.*

If you purchase the property of another in good faith, and give it to me in pledge, and request its return to be held by sufferance; and then the owner of said property appoints me his heir, it ceases to be a pledge, and merely the claim by sufferance will survive; and therefore your usucaption will be interrupted.

30. *Paulus, Epitomes of the Digest of Alfenus Verus, Book V.*

A party who had lent money to the owner of a boat, detained the boat in the river on his own authority, as the money was not paid at the appointed time; and the river afterwards rose and carried away the boat. The opinion was that, if the creditor had retained the boat against the consent of the owner, the boat was at his risk; but if the debtor had voluntarily agreed that he should retain it, he should only be indemnified for negligence, and not for superior force.

31. *Africanus, Questions, Book VIII.*

Where a slave given in pledge commits a theft against the creditor, the debtor has a right to relinquish the slave by surrendering him for reparation. But if he gave him to me in pledge, knowing him to be a thief, although he may be ready to surrender him to me by way of reparation, I will, nevertheless, be entitled to an action on pledge, in order that I may be indemnified. Julianus says that the same rules must be observed where a slave is deposited or lent, and commits theft.

32. *Marcianus, Rules, Book IV.*

A creditor can bring a counter action on pledge against a debtor who has pledged the property of another, even though the debtor may be solvent.

33. *The Same, On the Hypothecary Formula.*

Where a debtor has paid the money, he can make use of the action on pledge to recover property given in anmcrhoiV, for as there is a pledge he can make use of this term.

34. *Marcellus, Opinions.*

Where Titius lent money to Sempronius, and received a pledge for the same, and the creditor was about to sell the pledge because the money was not paid; the debtor requested him to purchase the land at a certain price, and, when he did so, he wrote a letter in which he intimated that he had sold the said land to the creditor. I wish to know whether the debtor can revoke this sale by tendering the principal and interest which are due? Marcellus answered that, according to the facts stated, he cannot revoke it.

35. *Florentinus, Institutes, Book VIII.*

Where something is due on account of both principal and interest from a party who owes money secured by pledges, whatever is received from the sale of the pledges must be credited upon the interest, which it is established is due at the time, and then, if there is anything left it must be credited on the principal. A debtor should not be heard if, when he is well aware that he is hardly solvent, he desires to make a choice as to the claim on which he prefers the pledge to be released.

(1) A pledge only transfers possession to the creditor the ownership of the property remaining in the debtor; the latter, however, can make use of his property by sufferance and also under a lease.

36. *Ulpianus, On the Edict, Book XI.*

The question arises how a person may be liable who delivers brass instead of gold to a

creditor by way of pledge? Sabinus states most properly in this instance, that if, where gold has been given, the party substitutes brass, he is liable for theft; but if, when the gold was given, he substituted brass, he is guilty of a base act, but is not a thief. I think, however, that in this case also, the action of pledge will lie, and Pomponius says the same. Moreover he can be judicially punished on the ground of swindling, as has been very frequently set forth in rescripts.

(1) Again if anyone knowingly and deliberately gives me property in pledge which belongs to another, or if he encumbers to me property already encumbered to another, and does not inform me of the fact, he can be punished for the same offence. It is evident that, if the property is of considerable value, and is pledged only for a small sum of money, it must be said that the offence of swindling does not exist, and also that the actions on pledge and on fraud will not lie, because the party who received the property as a second pledge was not taken advantage of in any way.

37. *Paulus, On Plautius, Book V.*

If I rent to the owner a pledge which was delivered to me I will retain possession of the same by renting it, because before the debtor leased it he did not have possession, while I have the intention of retaining it, and the party who leases it has not the intention of acquiring the same.

38. *Modestinus, Differences, Book I.*

The authority of a guardian is necessary to a ward who receives property in pledge, on account of the danger of an action on pledge.

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

Gaius Seius gave his land to Lucius Titius as a pledge for money loaned, and afterwards it was agreed between them that the creditor should have possession of the pledge for a certain time, by way of setoff against his money. But, before the time had expired, the creditor, in stating his last wish, provided by his will that one of his sons should have the said tract of land, and added, "which I bought of Lucius Titius," while in fact he had not bought it. Gaius Seius, who was the debtor, along with others signed this will. I ask whether, by the fact that he signed it he prejudiced himself in any way, since no instrument evidencing the sale was produced, but only the agreement that the creditor should be entitled to the crops for a certain time? Herennius Modestinus answered that the contract of pledge was not affected because the debtor had signed the will of the creditor in which he stated that he had purchased the pledge.

40. *Papinianus, Opinions, Book III.*

A debtor cannot legally purchase a pledge which he has given to a creditor, because the purchase of one's own property is void; for if he buys it for less than the amount of the claim and demands it, or brings suit for the ownership, the creditor is not obliged to restore possession to him unless he tenders payment of the entire debt.

(1) The son of a debtor, who is under the control of his father, cannot obtain possession of a pledge from a creditor with money belonging to his own *peculium;* and therefore if a patron of the debtor has obtained possession of the property of the estate contrary to the provisions of the will, he will acquire half of the ownership; for the pledge is released by the money which the son paid as a price out of the property belonging to his father.

(2) The money having been paid, the creditor should restore the possession of the pledge which was actually in his hands; nor can the debtor be compelled to pay anything more. Therefore, if the creditor has, in the meantime, himself given the pledge as security, and the owner of the same has paid the money which he owed, no action will be granted with reference to the second pledge, nor will the right of retention remain.

41. *Paulus, Questions, Book III.*

You gave the property of another in pledge, and afterwards you became the owner of the same; an equitable action on pledge is granted to the creditor. The same rule does not apply, if I become the heir of Titius who encumbered my property without my consent; for, under these circumstances, the right of recovery of the pledge is not granted the creditor; nor, by any means, is it sufficient, in order to render the equitable action on pledge applicable, that the owner should be the same party who also owes the money. But if he had agreed with respect to the pledge, so that his deceit can be established, he cannot properly resist the bringing of an equitable action against him.

42. *Ulpianus, Opinions, Book III.*

The creditor is legally bound to surrender the excess of the price together with interest, in an action brought relative to the giving of the pledge; and he should not be heard if he wishes to substitute the purchaser, since, in the sale, which is made in pursuance of an agreement, the creditor is transacting his own business.

43. *Scævola, Digest, Book V.*

A party encumbered a vacant tract of land as security to a creditor, and delivered to him an instrument of purchase. When he desired to build on said land, a controversy arose with a neighbor with reference to the width of the tract, and, as he could not otherwise prove it, he requested the creditor to produce the title-deed which had been delivered by him, and, as he did not do so, he erected a smaller building, and in this way suffered damage. The question arose whether, if the creditor demands the money or brings an action for the recovery of the pledge, and an exception based on fraud is filed, the judge ought to take this damage into consideration? The answer was that if the creditor did not intend to impose upon the debtor by depriving him of the production of the instrument, the debtor could bring an action on pledge when the money was paid; but that if this was done intentionally, an action would lie against the creditor for the amount of his interest at that time, and before payment of the money.

(1) Titius received a loan of money from Gaius Seius under a pledge of leathern sacks; and while Seius had these sacks in his granary, a centurion, who was sent from the office of the commissary, took the sacks away to be used in the public service; and they were afterwards recovered at the instance of Gaius Seius, the creditor. I ask whether Titius, the debtor, or Seius, the creditor, should be responsible for the wear and tear resulting from their use? The answer is that, according to the facts stated, the creditor was not liable for damage resulting from the wear and tear of the sacks.

THE DIGEST OR PANDECTS.

BOOK XIV.

TITLE I.

CONCERNING THE ACTION AGAINST THE OWNER OF A SHIP.

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

There is no one who is ignorant of the benefit of this Edict, for sometimes we enter into agreements with the masters of vessels concerning the necessities of the voyage, without being aware of their civil status or character; and it was only just that the party who appointed the master of a ship should be liable, just as one who has placed an agent in charge of a shop or a business; since, in fact, there is greater necessity in making the contract with the master than with an ordinary agent, as circumstances permit anyone to make an investigation of the standing of an agent, and contract with him accordingly; but this is not the case with a master of a ship, for frequently neither the place nor the time permits a satisfactory decision to be reached.

(1) We must understand the master of a ship to be a person to whom the charge of the entire ship is committed.

(2) But if the contract is made with one of the sailors, an action will not be granted against the ship-owner; although one will be granted against him on account of any offence perpetrated by one of those who are on board the vessel for the purpose of navigating the same; for the cause of action on a contract is one thing, and that arising out of an offence is another; since the party who appoints a master permits contracts to be made with him, but he who employs sailors does not allow contracts to be made with them, but he should take care that they are not guilty of negligence or fraud.

(3) Masters are appointed for the purpose of leasing vessels either for the transportation of merchandise or of passengers, or for the purpose of buying stores, but if a master is appointed for the purchase or sale of merchandise, he will render the owner liable also on this ground.

(4) It makes no difference what the civil condition of such a master is, whether he is free or a slave, and whether, if he is a slave, he belongs to the owner or to another person, nor will it make any difference what his age is, as the party who appointed him has himself only to blame.

(5) We consider the master to be not only the person whom the owner appointed, but also him whom a master appointed; and Julianus, having been consulted with reference to this matter, gave this opinion in a case where the owner was ignorant of the appointment; where, however, he knows of it, and allows the individual designated to discharge the duties of the master of the ship, he himself is held to have appointed him. This opinion seems to me to be reasonable; for he who appointed him must be responsible for all the acts of the master, otherwise, the contracting parties will be deceived; and this should be admitted the more readily for the sake of the public welfare in the case of a master than in that of another agent. How then if the owner appointed the master in such a way that the latter would not be permitted to appoint anyone else; should it be considered whether we ought to admit the opinion of Julianus in this instance? For suppose he expressly forbade him as follows, "You shall not employ Titius as master." It must be said, however, that the welfare of those who make use of ships demands that the rule should be applied to this extent.

(6) We must understand the word "ship" to mean vessels and even rafts, employed for navigating the sea, rivers, or lakes.

(7) The Prætor does not grant a right of action against an owner for every cause, but only with reference to the particular thing for which the master was appointed; that is to say, if he was

appointed for a certain kind of business, for instance, where a contract was made for the transportation of merchandise; or where an agreement was entered into or money expended for the purpose of repairing the ship; or where the sailors demand payment on account of their services.

(8) What if the master should borrow a sum of money, will this be held to be included in his powers? Pegasus thinks that if he borrowed the money with reference to the matter for which he was appointed, an action should be granted, and this opinion I think to be correct; but what if he borrowed it for the purpose of equipping or fitting out the ship, or for the employment of sailors?

(9) Wherefore, Ofilius asked if the master borrows the money for the purpose of repairing the ship, and converts it to his own use, will an action be granted against the owner? He says that if he received it with the understanding that he would expend it on the ship, and afterwards changed his mind, the owner will be liable, and can only blame himself for appointing a person of this kind. If, however, from the very beginning, he had the intention to defraud the creditor, and did not expressly state that he received the money on account of the ship, the contrary rule will apply. Pedius approves of this distinction.

(10) Where, however, the master is guilty of deceit with reference to the price of things which are purchased, the owner, and not the creditor, must suffer the loss.

(11) Moreover, where the master borrows money from another party, and with it satisfies the claim of him who lent him money for the purpose of repairing the ship; I think an action should be granted to the first-mentioned creditor, just as if he had lent the money to be expended on the ship.

(12) Therefore, the appointment prescribes certain terms to be observed by the contracting parties; and hence if the owner appointed the master of the ship only for the purpose of collecting the freight, and not that he might lease the ship, (although he may have actually leased it) the owner will not be liable if the master did this; and the same rule will apply where it was understood that he could only lease the ship but could not collect the freight; or if he was appointed for the purpose of contracting with passengers but not to offer the use of the ship for merchandise, or *vice versa;* then, if he exceeds his instructions, he will not bind the owner.

But if the master was appointed only to lease the ship for the transportation of certain merchandise, for instance, vegetables, or hemp, and he should lease it to transport marble or other materials, it must be held that he will not be bound. For certain ships are designed for freight and others (as is generally stated) are for the transportation of passengers, and I know that a great many owners give directions not to transport passengers, and also that business must be transacted only in certain regions and in certain waters; for example, there are ships which carry passengers to Brundisium from Cassiopa or from Dyrrachium, but are not adapted for freight, and some also are adapted to river navigation, but are not suitable for the sea.

(13) Where several masters are appointed, and their duties are not divided, any transaction entered into with one of them will bind the owner; but if their separate duties are designated, as, for instance, one has charge of leasing the vessel, and another is to collect freight, then the owner will be bound by the acts of any one of them provided he is in the discharge of his duty.

(14) If, however, the party made the appointment, as is often done, in such a way that one of them is not to transact any business without the other, he who contracts with one alone will only have himself to blame.

(15) When we make use of the word "*exercitor,*" we understand by it the party into whose hands all receipts and payments come, whether he is the owner of the ship, or whether he has leased it from the owner for a fixed amount for a certain time, or permanently.

(16) It makes but little difference whether the party who has control of the ship is a man or a woman, the head of a household, a son under paternal control, or a slave; but for a ward to have control of a ship we require the consent of his guardian to be granted.

(17) We have also the choice whether we would prefer to sue the person having control of the ship, or the master of the same.

(18) But, on the other hand, an action is not promised by the Prætor against those who contracted with the master, because he did not need the same assistance; he can, however, sue the master on the contract of hiring, if he is furnishing his labor for compensation; or, if he is doing this gratuitously, he can bring an action of mandate against him.

It is clear that the prefects, on account of the administration of supplies, and, in the province, the governors, who are accustomed to aid them by the exertion of extraordinary powers, can do so where contracts are made by the masters of vessels.

(19) If the party who has control of a ship is in the power of another, and manages the vessel with his consent, an action will be granted on account of business transacted with the master, against the party in whose power he is who has the management of the ship.

(20) But although an action is granted against the person under whose control he is who has the management of a ship, still, this is only done where he acts with the consent of the latter. Therefore, those who have control of the party having the management are liable for the entire amount, on account of their consent; because the ownership of vessels is a matter of the greatest importance to the public welfare.

The employment of agents is not so advantageous, for the reason that they who have transacted business, with a knowledge of the owner, using capital belonging to the *peculium*, only have a right to their share in the distribution of the same. But if the owner was only aware of the fact, and did not give his consent when the contract was made with the master, shall we grant a right of action for the entire amount, as in the case where the party consented; or shall we only give one resembling the tributorian action? Therefore, the question being doubtful, it is better to adhere strictly to the words of the Edict, and not make the mere knowledge of the father or master in the case of ships an excuse for oppression, nor, in the case of merchandise purchased with the money of the *peculium*, extend mere consent so as to cause an obligation to be contracted for the entire amount.

Pomponius also seems to indicate adherence to the principle that where one person is under the control of another and carries on business with his consent, he will be liable for the entire amount, but if he does not, that he will only be liable for the amount of the *peculium.*

(21) We must understand the term "under the control" to apply to both sexes, sons and daughters, and male and female slaves.

(22) Where a slave, who is part of a *peculium*, acts as the manager of a ship with the consent of a son under paternal control of whose *peculium* he forms a part, or where, a sub-slave manages a ship with the consent of the latter, the father or master who did not give his consent will only be liable for the amount of the *peculium*, but the son himself will be liable in full. It is clear if they manage the ship with the consent of the master or father, they will be liable for the entire amount, and, moreover, the son, if he gave his consent, will also be liable in full.

(23) But, although the Prætor only promises the action where the business is transacted with the master of the ship, still, (as Julianus has stated) the father or the master will be liable in full, even though the contract was entered into with the manager of the ship himself.

(24) This action is granted against the owner on account of the master of the ship, and therefore if suit has been brought against either of them, none can be brought against the other; but if any of the money has been paid, and this has been done by the master, the obligation is diminished by operation of law. If, however, it was paid by the manager in his

own behalf, that is on account of the honorary obligation, or is paid in behalf of the master, the obligation is diminished; since where another party pays for me he releases me from the debt.

(25) Where several parties have joint-ownership of a vessel, suit can be brought against any one of them for the entire amount;

2. *Gaius, On the Provincial Edict, Book IX.*

In order that a person who contracted with one may not be obliged to divide his claim among several adversaries,

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

Nor does it make any difference what share each of them has in the vessel, for the party who paid will recover from the others in the action on partnership.

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

Where, however, several persons have the management of a ship between them, they must be sued in proportion to their shares in the same, for they are not regarded as masters for one another.

(1) Where several persons having the management of a ship appoint one of their number to be the master, they can be sued on his account for the entire claim.

(2) Where a slave belonging to several persons manages a ship with their consent, the same rule applies as where there are several managers. For it is clear that if he acted with the consent of any one of them, the latter will be liable for the entire amount; and therefore I think that in the case above mentioned all of them are liable in full.

(3) If a slave who had control of a ship with the consent of his owner should be alienated, the party who alienated him will, nevertheless, be liable. Hence he would also be liable if the slave should die, for the owner of the ship will be liable after the death of the master.

(4) These actions are granted without limitation of time both in the favor of heirs, and against them. Hence, if a slave who has control of a ship with the consent of his master should die, this action will be granted after the expiration of a year, although an action *De peculio* is not granted after a year has elapsed.

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

If you have, as the master of your ship, someone who is under my control, an action will also lie in my favor against you if I enter into any contract with him. The same rule applies where he is owned in common by us. You will, however, be entitled to an action on lease against me, because you hired the services of my slave, as, even if he had contracted with another, you could proceed against me to obtain a transfer of the rights of action which I held on his account, just as you could have done against a freedman had you employed one; but if the services were gratuitous, you can bring an action on mandate.

(1) Moreover, if my slave has control of a ship, and I make a contract with his shipmaster, there will be nothing to prevent me from instituting proceedings against the shipmaster by an action which I can bring either under civil or prætorian law; for this edict does not prevent anyone from suing the master, as no action is transferred by this edict, but one is added.

(2) Where one of the owners of a ship makes a contract with the master, he can bring an action against the others.

6. *Paulus, Abridgments, Book VI.*

Where a slave has control of a ship without the consent of his master, if he is aware of this, a tributorian action will be granted; but if he is ignorant of the fact, an action *De peculio* will be

available. Where a slave owned in common has control of a ship with the consent of his masters, an action for the entire amount will be granted against them individually.

7. *Africanus, Questions, Book VIII.*

Lucius Titius appointed Stichus the master of a ship, and he, having borrowed money, stated that he received it for the purpose of repairing the ship. The question arose whether Titius was liable to an action on this ground only where the creditor proved that the money had been expended for the repair of the ship? The answer was that the creditor could properly bring an action if, when the money was lent, the ship was in such a condition as to need repairs; for, while the creditor should not be compelled to, himself, undertake the repair of the ship, and transact the business of the owner (which would certainly be the case if he was required to show that the money had been spent for repairs); still, it should be required of him that he know that he makes the loan for the purpose for which the master was appointed; and this certainly could not happen unless he also knew that the money was needed for repairs. Wherefore, even though the ship was in such a condition as to need repairs, still, if much more money was lent than was necessary for that purpose, an action for the entire amount should not be granted against the owner of the ship.

(1) Sometimes it should be considered whether the money was lent in a place in which that for which it was advanced could be obtained; for, as Africanus says, what would be the case if someone lent money for the purchase of a sail in an island of such a description that a sail could not be obtained there under any circumstances? And, in general, a creditor is obliged to exercise some care in the transaction.

(2) Almost the same rule applies where inquiry is made with reference to the institorian action; for, in this instance also, the creditor must know that the purchase of the merchandise for which the slave was appointed was necessary; and it will be sufficient if he made the loan to this end, but it should not also be required that he should himself undertake the task of ascertaining whether the money was spent for this purpose.

TITLE II.

CONCERNING THE RHODIAN LAW OF JETTISON.

1. *Paulus, Sentences, Book II.*

It is provided by the Rhodian Law that where merchandise is thrown overboard for the purpose of lightening a ship, what has been lost for the benefit of all must be made up by the contribution of all.

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

When anything has been thrown overboard on account of the distress of a ship, the owners of the lost merchandise must sue the master of the ship on the contract for transportation, if they had entered into an agreement for the carriage of the same; and he can then bring suit against the others whose merchandise was saved, so that the loss may be distributed proportionally. Servius, indeed, answered that they should proceed against the master of the ship under the contract for transportation to compel him to return the merchandise of the others, until they make good their share of the loss. Even though the master does retain the merchandise, he will, in any event, be entitled to an action under the contract for transportation against the passengers.

What is to be done if there are passengers who have no baggage? It evidently will be more convenient to retain their baggage, if there is any; but if there is not, and the party has leased the entire ship, an action can be brought on the contract, just as in the case of passengers who have rented places on a ship; for it is perfectly just that the loss should be partially borne by those who, by the destruction of the property of others, have secured the preservation of their own merchandise.

(1) If the merchandise is saved, and the ship is damaged, or has lost part of her equipment, no contribution should be made, for the condition of the things provided for the use of the ship is different from that on account of which the freight has been received; since, if a blacksmith breaks an anvil or a hammer, this will not be charged to him who hired him to do the work. Where, however, the loss occurred with the consent of the passengers, or on account of their fear, it must be made good.

(2) Where several merchants collect different kinds of goods in the same ship, and, in addition, many passengers, both slaves and freemen, are travelling in it, and a great storm arises, and part of the cargo is necessarily thrown overboard; the question was with respect to the following point, namely, whether it was necessary for all to make good what was thrown overboard; and whether this must also be done by those who had brought on board such merchandise as did not burden the ship; as, for instance, precious stones and pearls, and if this was the case, what portion of the same must be contributed; and whether it was necessary for anything to be paid for freemen, and by what kind of an action proceedings could be instituted? It was held that all those to whose interest it was that the goods should be thrown overboard must contribute, because they owed that contribution on account of the preservation of their property, and therefore even the owner of the ship was liable for his share. The amount of the loss must be distributed in proportion to the value of the property; no appraisement can be made of the persons of freemen; and the owners of the lost property have a right to proceed on the contract for transportation against the sailor, that is the master. An agreement also arose as to whether an estimate was to be made of the clothing and rings of each person, and it was held that this should be done, and that everything should be taken into account for contribution, except what had been brought on board for the purpose of consumption, in which would be included all kinds of provisions; and there is all the more reason in this, for if, at any time during the voyage, such articles should be lacking, each one would contribute what he possessed to the common stock.

(3) If the ship has been ransomed from pirates Servius, Ofilius, and Labeo state that all should contribute; but with reference to what the robbers carried away, the loss must be borne by the party to whom it belonged, and no contribution should be made to him who ransomed his property.

(4) The share is generally contributed in accordance with the valuation of the property which is saved, and of that which is lost; and it makes no difference if that which was lost might have been sold for a higher price, since the contribution relates to loss and not to profit. With reference, however, to those things on account of which contribution must be made, the estimate should be based upon not what they had been purchased for, but upon what they could be sold for.

(5) No estimate should be made of slaves who are lost at sea, any more than where those who are ill die on the ship, or throw themselves overboard.

(6) If any of the passengers should be insolvent, the loss resulting from this will not be suffered by the master of the vessel; for a sailor is not obliged to inquire into the financial resources of everybody.

(7) Where property which has been thrown overboard is recovered, the necessity for contribution is at an end; but if it has already been made, then those who had paid can bring an action on the contract for transportation against the master, and he can proceed under the one for hiring, and return what he recovers.

(8) Any articles thrown overboard belong to the owner of the same, and do not become the property of him who obtains them, because they are not considered as abandoned.

3. *Papinianus, Opinions, Book XIX.*

Where a mast, or any other part of the equipment of a ship is thrown overboard for the

purpose of removing a danger common to all, contribution is required.

4. *Callistratus, Questions, Book II.*

If, for the purpose of lightening an overloaded ship because she could not enter a river or reach a harbor with her cargo, a certain portion of the merchandise is placed in a boat to prevent the vessel from being in danger outside the river, or at the entrance of the harbor, or in the latter, and the boat is sunk, an account should be taken between those who have their merchandise preserved on the ship and those who lost theirs in the boat, just as if the latter had been thrown overboard. Sabinus also adopts this view in the Second Book of Opinions. On the other hand, if the boat is saved with part of the merchandise, and the ship is lost, no account should be taken with reference to those who lost their property in the ship, because jettison necessitates contribution only where the ship is saved.

(1) But where a ship, which has been lightened in a storm by throwing overboard the goods of a merchant, is sunk in some other place, and the goods of certain merchants are recovered by divers for compensation; Sabinus also says an account must be taken between the party whose goods were thrown overboard during the voyage for the purpose of lightening the ship, and those who subsequently recovered their goods by means of divers. But, on the other hand, no account must be presented by the party whose merchandise was thrown overboard during the voyage to those whose merchandise was not thereby preserved, if any of it was recovered by divers; for it cannot be held to have been thrown overboard for the purpose of saving the ship which was lost.

(2) But where jetsam is made from the ship, and the merchandise of anyone which remained on board, is damaged; it is a matter for consideration whether he should be compelled to contribute, since he ought not to be oppressed by the double loss of contribution and deterioration of his property. The point, however, may be maintained that he should contribute in proportion to the present value of his property. Thus, for example, where the merchandise of two persons was each worth twenty *aurei*, and that of one of them became only worth ten, on account of having been wet; the party whose property was not damaged should contribute in the proportion of twenty and the other in the proportion of ten.

An opinion can, however, be given in this instance, if we make a distinction as to the cause of the deterioration; that is to say, whether the damage resulted on account of the exposure resulting from throwing the merchandise overboard, or for some other cause; for example, where the merchandise lay somewhere in a corner, and the waves reached it. In this instance the owner will be compelled to contribute, but in the former one, ought he not to be released from the burden of contribution because the jetsam also injured him? Or ought he to be liable even if his goods were deteriorated by the splashing of water on account of the jetsam?

A still finer distinction should be made, namely, as to whether the greater loss is sustained through the damage, or through the contribution; for example, if the merchandise is worth twenty *aurei*, and the contribution is assessed at ten, the damage, however, amounts to two, and this having been deducted because of the loss, must the owner contribute the remainder? How then if the damage amounted to more than the contribution? For example, if the property was damaged to the amount of ten *aurei*, and the contribution amounted to two, there is no doubt that the party should not bear both burdens. But here let us see whether a contribution should not be made to him; for what difference does it make whether I lose my property by its being thrown overboard, or have it deteriorated by being exposed? For just as relief is granted to a party for the loss of his property, so, also, it should be granted to him whose property has become deteriorated on account of the jetsam. Papirius Fronto also stated this in an opinion.

5. *Hermogeniamis, Epitomes of Law, Book II.*

The contribution of those who saved their merchandise from shipwreck does not indemnify anyone for the loss of the vessel; for it is held that the equity of this contribution is only

admitted when, by the remedy of jetsam, during the common danger, the interest of the others is consulted, and the ship is saved.

(1) If the mast is cut away in order that the ship with its merchandise may be freed from danger, there will be an equitable claim for contribution.

6. *Julianus, Digest, Book LXXXVI.*

A ship beaten by a storm and with her rigging, mast, and yards burned by lightning, was carried into Hippo. Having been provided while there with a hasty and temporary equipment, she sailed for Ostia, and discharged her cargo uninjured. The question was asked whether those to whom the cargo belonged were obliged to contribute to the master of the ship in proportion to the loss? The answer was that they were not obliged to do so, as the expense was incurred rather for the purpose of equipping the ship, than to preserve the cargo.

7. *Paulus, Epitomes of the Digest of Alfenus, Book III.*

Where a ship is sunk or stranded, the opinion was given that whatever each one saves out of his own property he can keep for himself, just as in case of fire.

8. *Julianus, On Minicius, Book II.*

Those who throw any property overboard for the purpose of lightening a ship, do not intend to consider it as abandoned; since if they should find it they can carry it away, and if they have any idea of the place where it has been cast by the sea, they can claim it; so that they are in the same condition as anyone who oppressed by a burden throws it down on the road, expecting to return presently with others and remove it.

9. *Volusius Mœcianus, On the Rhodian Law.*

A petition of Eudaimon of Nicomedia to the Emperor Antoninus; "Lord Emperor Antoninus, having been shipwrecked in Icaria we have been robbed by farmers of the revenue inhabiting the Cyclades Islands." Antoninus answered Eudaimon as follows: "I am, indeed, the Lord of the World, but the Law is the Lord of the sea; and this affair must be decided by the Rhodian law adopted with reference to maritime questions, provided no enactment of ours is opposed to it." The Divine Augustus established the same rule.

10. *Labeo, Epitomes of the Probabilities of Paulus, Book I.*

If you have made a contract for the transportation of slaves, freight is not due to you for a slave who died on the ship. Paulus says that, in fact, the question is what was agreed upon, whether freight was to be paid for those who were loaded on the ship, or only for those who were carried to their destination? And if this cannot be established, it will be enough for the master of the ship to prove that the slave was placed on board.

(1) If you hired a ship on condition that your merchandise was to be transported by her, and the master of the ship, without being compelled by necessity, placed your property on an inferior vessel, being aware that you did not wish this to be done; and your merchandise was lost, together with the ship in which it was last transported, you will be entitled to an action on the contract of leasing and hiring against the master of the first ship.

Paulus, on the other hand, says that this is not true, provided both ships were lost on the voyage, since it occurred without the malice or negligence of the sailors. The rule is the same if the first master, having been detained by public authority, was prevented from sailing with your merchandise. This rule is also applicable if he entered into a contract with you under the condition that he would pay you a certain penalty if he did not, by a day agreed upon, land your goods in a place to which he had agreed to transport them, and he was not to blame if he did not wait; even though the penalty was remitted to him. We must observe the same rule in a similar imaginary case, where it is proved that the master, having been prevented by illness, was unable to sail, if his ship became unfit for navigation without any malicious intent or

negligence of his.

(2) If you hire a ship capable of transporting two thousand jars and place jars on board, you are liable for the freight of two thousand jars. Paulus says that the fact is, if you hire the entire capacity of the ship, the freight for two thousand jars will be due, but if the freight was agreed upon according to the number of jars placed on board, the contrary rule will apply; for you owe for the transportation of as many jars as you placed on board.

TITLE III.

CONCERNING THE INSTITORIAN ACTION.

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

It appeared just to the Prætor that, as we obtain advantages from the acts of agents, so also we should be bound by, and liable to be sued on, contracts made by them. He does not, however, provide the same with reference to the party who is appointed an agent, so that he also may institute proceedings. When, indeed, he employs his own slave as agent, he can be secure, as the rights of action are acquired for him; if, however, he employs either the slave of another or some freeman, he will not be entitled to an action, but he can sue the agent himself or his master, either on the ground of mandate, or on that of business transacted. Marcellus, however, says that an action should be granted to the party who appointed the agent against those who have made contracts with him,

2. *Gaius, On the Provincial Edict, Book IX.*

In the same form in which the agent made the contract, provided he cannot protect himself in any other way.

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

An agent is so called because he interposes in the transaction of business, and does it make much difference whether he is appointed to conduct a shop, or to engage in any other kind of employment:

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

As they sometimes take goods to the houses of honorable persons, and sell them there. The place where the property is sold or purchased does not change the cause of action, since in each instance it is true that the agent has bought or sold.

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

Therefore, no matter what business he has been appointed to transact he will be properly styled an agent.

(1) For Servius also, in the first book on Brutus, says that where any business is transacted with a person who has charge of a house, or with some one who has been appointed to superintend the building or to buy grain, he will be liable for the entire amount.

(2) Labeo also stated that where anyone has appointed a person to lend money at interest, to cultivate land, to engage in commerce, or to make contracts, he is liable in full.

(3) Moreover, where anyone has appointed his slave to have charge of a broker's table, he will be liable on his account.

(4) It is also settled that those who are appointed by clothing merchants or weavers of linen to go about for the sale of clothing, whom we ordinarily call *circitores*, should also be designated as agents.

(5) Anyone may also properly call muleteers agents,

(6) As well as those who are appointed by fullers and tailors. Stable-keepers should likewise

be considered as occupying the place as agents.

(7) Labeo also says that if a shop-keeper despatches his slave to a distance for the purpose of purchasing merchandise and sending it to him, he must be considered to occupy the place of an agent.

(8) He also says that, if an undertaker has a slave whose duty it is to prepare corpses for burial, and he robs a corpse; a proceeding similar to the Institorian Action should be granted against him, although the suit for theft and that for injury will both lie.

(9) Labeo also says that, where a baker was accustomed to send his slave to a certain place for the purpose of selling bread, and he, having accepted money to deliver bread to certain parties every day, neglected to do so; there is no doubt that the baker will be liable, if he permitted the money to be given to him in this manner.

(10) Where a fuller, being about to start on a long journey, requested that directions should be given to his apprentices, to whom he had delivered his shop thoroughly equipped; and, after his departure, an apprentice had received clothing and taken to flight; the fuller will not be liable if the slave was left as an ordinary agent, but if this was done in a way to make him the manager of the business he would be liable. It is evident that if he stated to me that I might trust his workmen, he will not be liable to an Institorian Action, but to one on a contract for hiring.

(11) It is not, however, everything which is transacted with the business-agent which will bind the party who appointed him, but only where the contract was made with respect to the matter on account of which he was appointed, that is to say, only that for which he was appointed.

(12) Hence, if I appoint anyone to sell merchandise, I shall be liable on his account to the action on purchase; and likewise, if I should happen to have appointed him for the purchase of merchandise, I shall be liable to the action on sale; but a party will not be bound if the appointment was made to purchase and he sells, nor if he was appointed to sell and he purchases; and this opinion is approved by Cassius.

(13) But where anyone lends money to a business-agent appointed to purchase merchandise, there is ground for the Institorian Action, and, in like manner, if he was appointed to pay the rent for the shop; and I think that this is true unless he was forbidden to borrow.

(14) Where, however, a loan of oil is made to a party whom I have appointed to buy and sell oil, it must be said that the Institorian Action will lie.

(15) Likewise, if an agent, when he sold oil, received a ring as earnest, and does not return it, his master is liable to an Institorian Action; for the contract relates to the business which he was appointed to transact, unless he should have been directed to make sales for cash. Wherefore, if the agent should have accepted a pledge instead of money, an Institorian Action will lie.

(16) Moreover, the Institorian Action can be brought by a surety who had interposed in behalf of the agent, for this is a result of the transaction.

(17) If an agent has been appointed by anyone, and he who appointed him should die, leaving an heir who employs the same agent; there is no doubt that he will be liable. Again, if a contract was made with him before the estate was entered upon, it is but just that the Institorian Action should be granted to one who is ignorant of the facts.

(18) If, however, my agent, guardian, or curator, should appoint a business manager, it must be said that an Institorian Action ought to be granted, just as if he had been appointed by me.

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

The Institorian Action should also be granted against the agent himself, if he was one appointed for the transaction of all kinds of business.

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

Moreover, if anyone who is transacting my business makes an appointment, and I ratify it, the same rule will apply.

(1) It makes little difference who the business-agent may be, whether male or female, freeman or slave, your own slave, or that of another. It is also of no consequence who appointed him; for if a woman made the appointment, the Institorian Action will lie, just as the Exercitorian Action against the party having control of a ship; and if a woman is appointed, she herself will be liable. Again, if a woman under parental control, or a female slave is appointed, the Institorian Action can be brought.

(2) When the business-agent is a minor, he will bind the person who appointed him by the Institorian Action, as he must blame himself for appointing him.

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

For many persons appoint boys and girls for the management of shops.

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

But where a minor himself makes the appointment, he will be liable if this was done with the consent of his guardian, otherwise not.

10. *Gaius, On the Provincial Edict, Book IX.*

An action will, nevertheless, be granted against him to the extent that he has pecuniarily profited by the transaction.

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

Where, however, a minor becomes heir to the party who made the appointment, it is perfectly just that the minor should be liable so long as he retains his appointment; for he ought to have been removed by his guardians if they were unwilling to make use of his services.

(1) But if he who made the appointment was under twenty-five years of age, he can only claim relief on account of his age after proper investigation has been made.

(2) A party is not deemed to occupy the position of one appointed to take charge of a business, if notice has been publicly given that no contracts shall be made with him, for it should not be permitted to transact business with him as an agent, and anyone who does not wish contracts to be made with him may prohibit it; but the party who appointed him will be bound by the appointment itself.

(3) To give public notice we understand to mean that it shall be made in plain letters, so as to be easily read from the ground; that is to say, in front of the shop or place where the business is carried on, not in a retired place, but in one which is conspicuous. Shall the notice be in Greek or in Latin letters? I am of the opinion that this depends upon the character of the place, so that no one can plead ignorance of the letters. It is certain that if anyone alleges that he is unable to read, or did not observe the notice, as many persons can read, and the notice was conspicuously posted, he will not be heard.

(4) It is essential that the notice should be permanently posted; for if the contract was made before the notice was set up, or it was concealed, the Institorian Action will be available. Hence, if the owner of merchandise posted *a* notice, but someone removed it, or through age, rain, or something of this kind, the result was that there was no notice, or it did not appear; it must be said that the party who made the appointment will be liable. If, however, the agent himself removed it for the purpose of deceiving me, his malicious act should prejudice the party who appointed him, unless he who made the contract also participated in the fraud.

(5) Any condition upon which the appointment depended must also be considered, for what must be done if the party desired business to be transacted with him under a certain condition,

or through the intervention of a certain person, or under a pledge, or with reference to a certain matter? It is perfectly just that whatever the party was appointed for should be taken into account. Likewise, where the principal has several agents, and desired contracts to be made with all of them at once, or with one alone; and if he warned anyone not to contract with him, he should not be liable to the Institorian Action, for we can forbid either a certain person or a certain class of men or merchants from making a contract, or we can permit certain persons to do so. But where the principal has forbidden a contract to be made, sometimes with one man and sometimes with another, the changes being continual, the action should be granted to all of them against him, as parties who make contracts should not be deceived.

(6) Where the principal absolutely prohibited any contract to be made with him, he is not considered to occupy the position of an agent appointed for business purposes, since he is rather occupying the position of a custodian than of an agent, and therefore he cannot sell merchandise, not even the most paltry article, out of the shop.

(7) Where the Institorian Action has been properly brought, the Tributorian Action is excluded by operation of law, for the Tributorian Action with reference to the merchandise of the owner will not be available. If, however, the party was not the business-agent for the owner's goods, the Tributorian Action will survive.

(8) Where I hire from your slave the services of his slave, and make him the business agent for my merchandise, and he sells you any goods, this constitutes a purchase; for when a master buys from his slave it is a purchase, even though the master may not be liable, to the extent that the master can, as a purchaser, possess and acquire property by usucaption.

12. *Julianus, Digest, Book XI.*

Therefore an Institorian equitable action can be brought by you against me; or, on the other hand, I can sue you either for the *peculium* of the slave who is managing the business, and also on the contract for hiring, if I desire to do so; or for the *peculium* of the sub-slave, because I gave him directions to sell the goods, and the price at which you made the purchase may be held as having reference to your affairs for the reason that you became a debtor to your own slave.

13. *Ulpianus, On the Edict, Book XXVIII.*

A certain man appointed a slave for the management of an oil business at Aries, and authorized the said slave to borrow money, and he

did so. The creditor, supposing the money had been borrowed on account of the business, brought the action of which we are treating, but was unable to prove that the slave had received it for that purpose. Although the right of action is extinguished, and he could not proceed further as being authorized to obtain loans of money, still, Julianus says that an equitable action will lie in his favor.

(1) It is important to remember that the master is only liable to the Institorian Action where no one renews the obligation, whether this be done by the agent or by some other party who stipulates with the intention of renewing it.

(2) Where two or more persons are conducting a shop, and they appoint as business-agent a slave whom they own in unequal shares, Julianus asks whether they are liable in proportion to their shares in the slave, or equally, or in proportion to their shares in the merchandise, or indeed, for the entire amount? He says that the better opinion would seem to be, as in the case of parties who have control of a ship, as well as the action *De peculio,* that any of them can be sued for the entire indebtedness, and that whatever he who is sued has paid, he can recover by the action on partnership, or by that for the partition of property held in common. This opinion we have also approved above.

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

The same rule will apply if a slave belonging to another has been appointed to manage a business owned in common; for an action for the entire amount should be granted against either of the owners, and what either of them has paid he can recover a share of, either by the action on partnership, or by that for the partition of property held in common. It is certain that, wherever the action on partnership or that for the division of common property does not lie, it is established that each party can only have judgment rendered against him for his share; as, for example, where one to whose slave money was lent, having appointed two heirs, gave the slave his freedom; for each heir can only be sued for his share, because the action for the division of property held in common cannot be brought between them.

15. *Ulpianus, On the Edict, Book XXVIII.*

In conclusion, it should be remembered that these actions are granted without reference to time, and both in favor of and against heirs.

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

Where a contract is made with the steward of anyone, an action is not granted against his master, for the reason that a steward is appointed for the collection of revenue, and not for profit. If, however, I have a steward who is also appointed for the sale of merchandise, it is not unjust that I should be liable to an action similar to the institorian one.

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

Where anyone is appointed for the purpose of purchasing and selling slaves, beasts of burden, or cattle, not only the Institorian Action will lie against the party who appointed him, but also the action for rescission of contract, as well as that on the stipulation for double or single damages for the entire amount should be granted against him.

(1) If you have the slave of Titius as your business-manager, I can proceed against you under this Edict, or against Titius under the Edicts hereinafter mentioned; but if you have forbidden any contracts to be made with him, suit can only be brought against Titius.

(2) Where a child under puberty becomes the heir of a father who had business-agents, and then contracts are made with them; it must be held that an action can be granted against the child for the sake of the benefit of ordinary commerce; just as where, after the death of a guardian with whose consent an agent has been appointed, business is transacted with him.

(3) Pomponius also stated that an action should certainly be granted on account of a contract which was concluded before the estate was entered upon, even though the heir should become insane; for he is not to blame who, being aware that the principal is dead, contracts with the agent managing the business.

(4) Proculus says that if I notify you not to make a loan to a slave appointed by me, the exception, "If he did not notify him not to lend to that slave," may be granted. But if he has any property of his own, or anything arising from the contract has been employed in my business, and I am not willing to make payment to the amount to which I have been pecuniarily benefited, a replication based on malicious intent should be filed, for I must be held to be guilty of malicious intent through attempting to profit by the loss of another.

(5) It is true that a personal action for recovery will also be available in this instance.

18. *The Same, Various Passages.*

A business-agent is one who is appointed to take charge of a shop or a place to purchase or sell, or one who is appointed for such a purpose without any place being designated.

19. *Papinianus, Opinions, Book III.*

A prætorian action will be granted, as in the case of an Institorian Action, against a party who appointed an agent to borrow money; and this also is the case where the agent, who promised

money to a party entering into a stipulation, is solvent.

(1) Where a master had a slave as business-manager at a table for receiving money, and after he had given him his freedom carried on the same business by his freedman, the fact of responsibility will not be removed by the change of civil condition.

(2) Where a son who was appointed by his father to have charge of his shop, borrowed money for the purpose of the business, and his father became his surety; he can be proceeded against by means of the Institorian Action, since, by becoming surety, he connected the act of borrowing the money with the business of the shop.

(3) A slave appointed solely for the purpose of lending money at interest does not, in the capacity of business manager, render his master liable in full, under Prætorian law, by assuming a debt as surety; but so far as money which he promised to another (in consideration of the substitution of liability) at interest is concerned, an action can properly be brought against the master on the ground of money lent to the party who made the substitution.

20. *Scævola, Digest, Book V.*

Lucius Titius had a freedman appointed to take charge of a money-broker's table, which he was conducting; and the said freedman gave an obligation to Gaius Seius in these words: "Octavius Terminalis transacting the business of Octavius Felix to Domitius Felis, Greeting. You have a thousand *denarii* in the bank of my patron, which I shall be bound to pay you the day before the *Kalends* of May." The question arose whether Lucius Titius having died without an heir, and his property having been sold, Terminalis could lawfully be sued on account of this letter? The answer was that he was not legally bound by these words, nor was there any ground of equity on which he could be sued; as he wrote this in the performance of his duty as a business agent, for the purpose of maintaining the credit of the bank.

TITLE IV.

CONCERNING THE TRIBUTORIAN ACTION.

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

The advantage of this Edict is far from being of trifling importance, as a master, who, otherwise, enjoys a privilege in the case of contracts made by a slave (since he is liable only for the amount of the *peculium*, the estimate of which is made after what is due to the master has been deducted), is, nevertheless, called upon by this Edict to contribute like any other creditor, if he was aware that the slave was transacting business with property belonging to the *peculium.*

(1) Although the term "merchandise" is one of limited signification, and does not apply to slaves who are fullers, tailors, weavers, or dealers in slaves, still, Pedius says in the Fifteenth Book that the Edict must be held to embrace transactions of every description.

(2) Merchandise of the *peculium* we do not understand to mean the same as the *peculium* itself, for the latter is considered to indicate the remainder after what has been due to the master has been deducted; but merchandise of the *peculium* renders a master liable to the Tributorian Action, even though there may be nothing whatever in the *peculium*, only however, where the business is transacted with his knowledge.

(3) In this instance we understand the word "knowledge" to signify that which includes consent, but (as I think) not merely consent but tolerance, for the master need not wish it, but he must not be unwilling. Hence, if he is aware of the facts, and does not protest and evince opposition, he will be liable under the Tributorian Action.

(4) The term "control" must be extended to both sexes, and also to all such as are subject to the power of others.

(5) The Tributorian Action will be applicable not only to slaves, but also to such as are

serving us in good faith, whether they are free born, the slaves of others, or those in whom we have an usufruct,

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

Provided that the merchandise which is handled with the money of the *peculium* belongs to us.

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

Where, however, a slave is held in common, and both owners are aware of the fact, an action will be granted against either of them, but if one of them knows and the other is ignorant, an action will be granted against the one who knows; and whatever is due to the one who was ignorant will be deducted in full. But if anyone should sue the owner who is ignorant, since proceedings are brought against him on the *peculium*, what was due to the party who knew will be deducted, and, indeed, in full; for if he himself was sued in the action on the *peculium*, what is owing to him would be deducted in full. This Julianus stated in the Twelfth Book of the Digest.

(1) If the slave of a ward or of an insane person, with the knowledge of his guardian or curator, employs the funds of the *peculium* in business transactions, I am of the opinion that the fraud of the guardian or of the curator should not prejudice the ward, or the insane person, nor should it be a source of gain to him; and hence he ought not to be liable to the Tributorian Action, on account of the fraud of the guardian, only so far as he may have derived any advantage from it. I think that the same rule applies to an insane person, although Pomponius, in the Eighth Book of Epistles, stated that if a guardian is solvent, his ward is liable on account of his fraud, and it is evident that he will be liable to such an extent that he must assign the right of action which he has against his guardian.

(2) Again, if fraud was committed by the ward himself, and he is of such an age as to be capable of it, it has the effect of rendering him liable; although his knowledge may not be sufficient for the transaction of business. What course must then be pursued? The knowledge of the guardian and curator should furnish ground for this action, and I have shown to what extent fraud may cause injury.

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

If the ward, whose guardian was aware of the facts, is guilty of fraud after reaching puberty, or the insane person when he becomes of sound mind, they will be liable under this Edict.

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

Pomponius does not doubt, however, neither do we, that the knowledge and the malicious intent of an agent prejudice the principal.

(1) Where the sub-slave of my slave transacts business, and I am aware of the fact, I shall be liable to the Tributorian Action, but if I am not aware of it, and the chief slave is, Pomponius states in the Sixtieth Book, that an action *De peculio* should be granted, and that nothing should be deducted from the *peculium* of the sub-slave for what he owes to the chief slave, while what is due to me should be deducted.

But if both of us were aware of the facts, he says that both the Tributorian Action and the one on the *peculium* will lie; the Tributorian Action on account of the sub-slave, and that on the *peculium* on account of the chief slave; but the plaintiff must decide under which action he would rather proceed, but in such a way that contribution shall be made of both what is due to me and what is due to the chief slave, while if the latter was ignorant of the facts, whatever was due to him from the sub-slave should be deducted in full.

(2) Moreover, where a female slave transacts business, we hold that the Tributorian Action will lie.

(3) Again, it makes little difference whether the contract is entered into with the slave himself or with his business manager.

(4) The terms, "On account of the business," are added with good reason, in order to prevent every kind of transaction carried on with him from affording ground for the Tributorian Action.

(5) By means of this action it is established that everything connected with the merchandise, or which has been received on account of it, shall be subject to contribution.

(6) Those who have slaves under their control are called upon to contribute, together with the creditors of the business.

(7) The question arose, however, whether the master has a right to share in the division of the merchandise only to the extent of what is due to him on account of the same; or whether he can do so on account of other matters? Labeo says that this is the case where money is due to him for any reason whatsoever; and that it makes very little difference whether the slave became indebted to him before or after the business was transacted, for it is sufficient that he has lost the privilege of deduction.

(8) What would be the case, however, if those who contracted with the slave received the merchandise itself by way of pledge? I think

that it should be said that they will be preferred to the master by the right of pledge.

(9) Whether the debt is owing to the master or to those who are under his control, contribution must be made in every instance.

(10) Where there are two or more masters, contribution should be made to each of them in proportion to his debt.

(11) The entire *peculium*, however, is not subject to contribution, but only that which is connected with the business, whether it consists of merchandise, or whether the price of the latter has been received and placed in a *peculium.*

(12) Again, if money was due for merchandise from parties to whom the slave was accustomed to make sales, this also will be subject to contribution to the extent of the receipts.

(13) If, in addition to merchandise, this slave has in the shop utensils belonging to the business, are these also subject to contribution? Labeo says that they are, and this is perfectly just, for generally, and in fact always, such tools are derived from the stock. Other articles, however, which he had in the *peculium* will not be liable to contribution, as for instance, if he had silver or gold, except where he acquired them with money obtained from trade.

(14) Moreover, if he employed slaves in the business who had been acquired with the proceeds of the same, these also will be subject to contribution.

(15) If the slave had several creditors, but some of them were engaged in certain branches of commerce, are all of them to be brought in and called upon to share in the contribution; for example, if he was engaged in two kinds of business, such as cloak making and the weaving of linen, and had separate creditors? It is my opinion that they should be called upon separately to share in the contribution, for each of them gave credit rather to the business than to the party himself.

(16) Moreover, if he had two shops devoted to the same kind of business, and I, for example, purchased goods at the shop in the *Bucinum*, and someone else made purchases in that across the Tiber; I think it would be perfectly just that the contributions should be made separately, to avoid having one set of creditors indemnified out of the property of the other, and the latter suffer loss.

(17) It is evident that if merchandise is offered for sale in the same shop, even if what was

there had been obtained with the money of one of the creditors, it will all be subject to contribution, unless it was pledged to the creditor.

(18) If, however, I have delivered my merchandise to be sold, and it is still in existence, let us consider whether it will not be unjust that I should be called upon for contribution? If, however, I have only a claim against the slave, there will be ground for contribution, but if this is not the case, for the reason that property which is sold does not cease to belong to me, even though I have disposed of it, unless the money has been paid, or a surety furnished, or satisfaction made in some other manner; it must be said that I can bring an action for recovery.

(19) Contribution, however, is made in proportion to the amount which is due to each one; and therefore if one creditor appears asking for contribution, he will obtain his share in full, but since it may happen that there is one other or several other creditors of the business conducted with a *peculium,* this creditor must furnish security that he will refund *pro rata* if other creditors should appear.

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

For this action does not, like that on the *peculium*, make the condition of the prior claimant the better, but it makes that of all of them the same, no matter when they file their claims.

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

He should also furnish security that, if anything else should be found to be due to the master, he will refund it to him *pro rata;* for suppose that a conditional debt is about to be due, or that there is one which has been concealed; this also must be admitted, for the master should not suffer injury, even though he may be called to share in the contribution.

(1) What, however, must be done if the master refuses to make contribution, or to take this trouble, but is prepared to surrender the *peculium* or the goods? Pedius states that he should be heard, and this opinion is equitable; and generally, the prætor should appoint an arbiter, by whose intervention the goods belonging to the *peculium* may be distributed.

(2) Where, through the malicious contrivance of anyone, the result is that the proper contribution was not made, the Tributorian Action is granted against him, in order to compel him to make good the amount by which what was contributed is less than it should have been. This action acts as a restraint upon the malicious intent of the master. It is held that too little is contributed, if nothing is contributed. Where, however, he, being ignorant of what the slave has invested in merchandise, contributes too little, he is not held to have acted with malicious intent; but if, having ascertained the facts, he neglects to make proper contribution, he is now not free from fraud. Hence if he obtains payment to himself out of the merchandise, he is, in fact, held to have fraudulently contributed too little.

(3) Again, if he permitted the property to be destroyed, or to be converted to an improper purpose, or intentionally sold it at too low a price, or did not require payment from the purchasers; it must be held that he will be liable to the Tributorian Action, if fraudulent intent existed.

(4) Moreover, if the master denies that anything is due to anybody, it should be considered whether there is ground for the Tributorian Action. The opinion of Labeo that this action will lie is the better one; otherwise it will be expedient for the master to set up a denial.

(5) This action is both perpetual and granted against the heir, but only for the amount which conies into his hands:

8. *Julianus, Digest, Book XI.*

Because the proceeding is not based upon fraud, but includes the prosecution of a claim, and therefore, even if the slave is dead, the master, as well as his heir, should be held perpetually liable for the act of the deceased; although the action will not lie except where fraud has been

committed.

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

What we state with respect to the heir will also apply to other successors.

(1) A party must elect by what kind of an action he will proceed, whether by the one on the *peculium*, or by the Tributorian Action, since he knows that he can not have recourse to the other. It is clear that if anyone desires to bring the Tributorian Action for one claim, and the one *De peculio* for another, he should be heard.

(2) Labeo says that if the *peculium* is bequeathed to a slave manumitted by will, the heir should not be liable to the Tributorian Action, as neither has obtained anything nor has been guilty of fraud. Pomponius, in the Sixtieth Book, states that the heir is liable to the Tributorian Action, unless he took care to obtain security for himself from the slave, or deducted from the *peculium* what should have been contributed. This opinion is not unreasonable, since he who acted in such a way as to avoid contribution is himself guilty of malicious contrivance. For the action against the heir with reference to what comes into his hands will be granted by us, as often as he is sued on account of the fraud of the deceased, but not when he is sued on account of his own.

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

The action *De peculio* can also be brought against a purchaser of the slave; but the Tributorian Action can not.

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

It is sometimes more expedient for parties to bring suit by the action *De peculio* than by the Tributorian Action, for in the one of which we are treating that alone is subject to division which forms part of the merchandise with which the business is transacted, and whatever has been received on account of the same; but, in the action *De peculio* the entire amount of the *peculium* (in which also the merchandise is included) must be taken into consideration, and it may happen that the business is being conducted perhaps with a half, or a third, or even a smaller portion of the *peculium;* and it also may happen that nothing is owing by the party to his father or owner.

12. *Julianus, Digest, Book XII.*

One man brings a suit against the master on account of the slave, only on the *peculium*, another institutes proceedings under the Tributorian Action; the question arises whether the master ought to deduct from the *peculium* what he will have to make good to the plaintiff in the Tributorian Action? The answer is that proceedings can be instituted under the Tributorian Action only where the master, in distributing the value of the merchandise, did not comply with the terms of the Prætor's Edict; that is, when he has deducted a greater part of his own debt than he has apportioned among the creditors; as, for instance, where the merchandise was worth thirty *aurei* of which he himself had lent fifteen, and two other creditors had lent thirty, he deducted the entire fifteen, and gave the creditors the remaining fifteen, when he should only have deducted ten, and have given each of the creditors ten. Therefore, when he has acted in this way, it is not to be understood that he has released the slave from liability to him, for the reason that he still must pay five *aurei* on his account in the Tributorian Action. Wherefore, if he institutes proceedings with reference to the *peculium*, (if by chance there should be other *peculium* than that invested in the business) he has a right to deduct five *aurei* as being still a creditor of the slave.

TITLE V.

CONCERNING TRANSACTIONS SAID TO HAVE TAKEN PLACE WITH A PERSON UNDER THE CONTROL OF ANOTHER.

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

The Proconsul takes every precaution to enable one party who has contracted with another that is under the control of a third, where the above mentioned actions (that is to say the exercitorian, the institorian, and the tributorian) do not apply, to still obtain his rights, so far as circumstances permit, on the grounds of equity and justice. For if the business was transacted by the order of the party under whose control the person in question is, he promises an action for the entire amount with reference to the same; but if this did not take place under his direction, but he, nevertheless, profited by it, the Proconsul introduces an action to the extent to which this has been done, and if neither of these conditions exist, he establishes an action for the amount of the *peculium.*

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

The Prætor says: "After proper cause is shown I will grant an action for the amount that the party is able to pay against anyone who is emancipated or disinherited, or who has rejected the estate of the person under whose control he was at the time the former died; whether the business was transacted on his own responsibility, or with the consent of the party to whose control he was subject; and whether this was done for the benefit of his own *peculium*, or for that of the estate of him under whose control he was."

(1) Further, if he had become his own master without emancipation, or was given in adoption and his natural father afterwards died, and, moreover, if he had been appointed heir to a very small share of the estate, it is perfectly just that, after investigation, an action should be granted against him for the amount that he is able to pay.

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

Should it be discussed in this instance whether what is due to others should be deducted? And, indeed if the parties who contracted with him when he was under the control of another are creditors, it may properly be held that the position of the prior claimant is the preferable one; except where there is a privileged creditor, for, not without reason consideration will be paid to this prior creditor. But if there are creditors who contracted with him after he became his own master, I think that they should be considered.

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

But where the son is appointed heir of a larger portion of the estate, it is in the choice of the creditor whether he will sue him for the share of the estate to which he is entitled, or for the entire amount of the claim. In this instance also it is the duty of the judge to decide whether he should be sued only for the amount which he is able to pay.

(1) Sometimes, however, if the son is disinherited or emancipated, an action will be granted against him for the entire amount; for example, if, when the contract was made with him, he denied that he was the head of the household; for Marcellus stated in the Second Book of the Digest that an action can be brought against him on account of his falsehood, even if he is not able to pay.

(2) Although an action can be brought against him on his contracts only for the amount that he is able to pay, still, he may be sued for the entire amount on account of his offences.

(3) Relief is granted to the son alone, and not to his heir also; for Papinianus states in the Ninth Book of Questions that an action for the entire indebtedness should be granted against the heir of the son.

(4) But ought not the lapse of time be considered, so that, if proceedings are instituted without delay against the son, the action may be granted for what he is able to pay, but if many years have elapsed he should not be indulged in this way? It seems to me that it ought to be considered, for the investigation of the case will include this.

(5) Where a party brings suit on the *peculium* when he could have brought an action on the ground of having been expressly authorized, he is in the position of not being able subsequently to bring an action on the ground of special authority given; and this is the opinion of Proculus. But if the plaintiff, having been deceived, brings the action *De peculio*, Celsus thinks that he is entitled to relief, and this opinion is reasonable.

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

Where a son under paternal control is sued and has judgment rendered against him during the lifetime of his father, an action on the judgment should be granted against him to the extent of his ability to pay, if he has been subsequently emancipated or disinherited.

(1) If the estate of his father has been restored to a disinherited son under the Trebellian Decree of the Senate, judgment should not be rendered against him to the extent of his capacity to pay, but for the entire amount, because, in fact, he is, in some respects, an heir.

(2) But if, having been forced to do so, he has interfered with the estate for the purpose of transferring it, the same proceedings should be taken as if he had rejected it.

6. *Ulpianus, Disputations, Book II.*

Marcellus states that a person who pretends to be the head of a family and enters into a stipulation under the direction of any one, is liable to an action on mandate, even though he cannot make good the amount; and, in fact, it is true that he should be liable, because he has been guilty of fraud. This also can be said with reference to all actions based on good faith.

7. *Scævola, Opinions, Book I.*

A father allowed his son to borrow money, and directed the creditor by letter to lend it to him, and the son became an heir to his father for a very small portion of the estate. I answered that the creditor could decide whether he would prefer to sue the son, to whom he had lent the money, for the entire amount, or the heirs, each in proportion to the share to which he had succeeded. Judgment was rendered against the son to the extent of his capacity to pay.

8. *Paulus, Decrees, Book I.*

Titianus Primus appointed a slave for the purpose of lending money and taking pledges; and the said slave was also accustomed to bind himself for, and to pay the obligations of persons who dealt in barley. The slave having run away, and the party to whom he had been substituted to pay the price of the barley having sued his master on account of the business manager, he denied he could be sued on this ground, because he had not been appointed for the transaction of this business. But as it was proved that the same slave had transacted other business and had rented granaries, and paid money to many people, the Prefect of Subsistence rendered a decision against the master.

We stated that he appeared to be a kind of surety, since he was paying the debts of another, for he assumed payment in behalf of others, but that it was not usual for an action to be granted against a master for a reason of this kind, nor did it appear that the master had directed him to do this. But as he seemed to have appointed the slave to act in his behalf in all these transactions, the Emperor confirmed the decision.

TITLE VI.

CONCERNING THE MACEDONIAN DECREE OF THE SENATE.

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

The words of the Macedonian Decree of the Senate are as follows: "Whereas, among the other causes of crime which nature bestowed upon him, Macedo also added indebtedness, and as he who lends money on doubtful security (without saying any more) often furnishes material for wrong-doing to parties who are evilly disposed; it is hereby decreed that no action or claim

shall be granted to anyone who has lent money to a son under paternal control, even after the death of the parent to whose authority he was subject, so that those who, by lending money at interest, set an extremely bad example, may learn that the obligation of no son under paternal control can become a valid claim by waiting for the death of his father."

(1) If the question as to whether the son is under parental control is in abeyance, for instance, because his father is in the hands of the enemy, the question as to whether the Decree of the Senate has been violated is itself in abeyance; for if he should again come under parental control, the Decree of the Senate will become operative, but if he does not, it will not apply; and therefore in the meantime an action should be refused.

(2) It is certain that if a party who has been arrogated borrows money and afterwards obtains restitution, so that he can be emancipated, the Decree of the Senate will be available, for he was a son under paternal control.

(3) Any office held by a son under paternal control will not cause the Macedonian Decree of the Senate to become inoperative; for even though he be Consul, or hold any other office, the Decree of the Senate applies, unless he should have *castrense peculium*, for in this instance the Decree of the Senate will not be applicable.

2. *The Same, On the Edict, Book LX1V.*

To the extent that this has reference to the *castrense peculium,* since sons under paternal control perform the functions of heads of families, so far as the *castrense peculium* is concerned.

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

Where anyone believed an individual to be the head of a family, not having been deceived by vain folly or ignorance of law, but because he was publicly considered by most persons to be such, and acted, made contracts, and performed the duties of offices as the head of a household, the Decree of the Senate will not be applicable.

(1) Wherefore, Julianus states in the Twelfth Book of the Digest that the Decree of the Senate will not apply in the case of a party who was accustomed to farm out the public revenues, and this has been frequently decided by the Emperor.

(2) Hence, where a person could not know whether another was a son under paternal control or not, Julianus says, in the Twelfth Book, that the Decree of the Senate will not be applicable; as, for instance, in the case of a ward or a minor under twenty-five years of age.

But so far as the minor is concerned, relief should be granted by the Prætor after investigation, but in the case of the ward, he should say that the Decree of the Senate was not operative for another reason, that is, because the money which the ward pays without the authority of his guardian does not become a loan; just as Julianus himself states in the Twelfth Book of the Digest, that if a son under paternal control makes a loan the Decree of the Senate is not applicable, since the money does not become a loan even if he had the unrestricted management of the *peculium.* For the father, when he granted him the management of the *peculium*, did not give him permission to waste it, and therefore he says the right to bring suit for the recovery of the money remains with the father.

(3) Only he, however, violates the Decree of the Senate who lent money to a son under paternal control, not one who contracted otherwise, for example, one who has sold, leased, or entered into a contract of another kind, for it was the giving of money which was held to be dangerous to their parents. And therefore, even though I have become the creditor of a son under paternal control, either because of purchase, or on account of some other contract in which I have not paid down any money, but in which I made a stipulation; although the transaction has become a loan, still, as the payment of money did not take place, the Decree of the Senate will not be applicable.

This, however, can only be said where no fraud on the Decree of the Senate is intended; so that the party who could not lend money preferred to sell to him, in order that he might have the price of the property instead of a loan.

(4) If I entered into a stipulation with a son under paternal control, and lent him money after he became the head of the household, whether his change of civil status had occurred through the death of his father, or he had become his own master in some other way without affecting his civil rights; it should be held that the Decree of the Senate is not operative, because the loan was made to one who was already the head of a family;

4. *Scævola, Questions, Book II.*

For what is commonly stated, namely: that it is not lawful to lend to a son under paternal control, does not relate to the terms of the transaction, but to the payment of the money.

5. *Paulus, Questions, Book III.*

Therefore, in this instance, judgment will be rendered against him for the entire amount, and not for what he is able to pay.

6. *Scævola, Questions, Book II.*

On the other hand, it is very properly stated that, if you have entered into a stipulation with the head of a family, and afterwards lend the money to him when he has become a son under paternal control, the power of the Decree of the Senate should be exercised, because the substantial part of the obligation was completed by the payment of the money.

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

Also, if a son subject to paternal control becomes a surety, Neratius states in the First and Second Book of Opinions that the Decree of the Senate is not applicable. Celsus says the same thing in the Fourth Book, but Julianus adds that if a pretext is sought, in order that a son under paternal control, who was about to receive a loan, may become a surety, another party appearing as the principal debtor; the fraud committed against the Decree of the Senate causes prejudice, and that an exception should be granted to the son under paternal control as well as to the principal debtor, since relief is granted also to the surety of a son.

(1) He also says that if I accept two debtors, a son under paternal control and Titius, when the money was to come into the hands of the former, but I accept Titius as the principal debtor, in order that, as surety, he might not take advantage of the Decree of the Senate; an exception based upon this fraudulent act should be granted.

(2) Moreover, if a son under paternal control when his father had been exiled or was absent for a long time, promised a dowry for his daughter, and gave property of his father in pledge; the Decree of the Senate will not apply, and the property of the father will not be liable. It is evident that if the son becomes the heir of his father, and brings an action to recover the pledge, he will be barred by an exception on the ground of fraud.

(3) It should be considered whether we ought to hold that a loan is not only the payment of money, but, in fact, the delivery of everything which can be lent. The words, however, seem to me to refer to money paid, for the Decree of the Senate says, "Has lent money." But if a fraud has been committed on the Decree of the Senate, for example, where grain, wine, or oil is lent, so that, these things having been sold, the money obtained from them may be used, relief should be granted to a son under paternal control.

(4) Where the son was under the control of one party when the loan was made, and is now under that of another, the intention of the Decree of the Senate remains, and an exception will therefore be granted.

(5) But if it was not the death of the father, but something else which happened to him, through which his civil status was changed, it must be said that the Decree of the Senate will

be operative.

(6) The action should be denied not only to the party who lent the money, but also to his successors.

(7) Hence, if one person paid the money and another made the stipulation, the exception would be granted against the latter, even though he did not make the payment. But if one or the other of them was not aware that he was under the control of his father, the severe rule that the rights of both are prejudiced, is applicable. This is also the case where two debtors enter into the stipulation.

(8) Moreover, if I accepted two sons under paternal control as debtors, but thought that one of them was the head of a family; it will make a difference which of them got the money, so that, if I was aware that the one to whom the money went was a son under paternal control, I shall be barred by an exception; but if I did not know into whose hands it came, I will not be barred.

(9) The Decree of the Senate will apply whether the money was lent at interest, or without it.

(10) Although the Senate does not state to whom it grants the exception, still, it must be remembered that the heir of a son under paternal control, if he dies the head of a family, and his father, if he dies under paternal control, can make use of the exception.

(11) Sometimes, however, even though there is ground for the Decree of the Senate, still, an action will be granted against a third party; as, for instance, if a son under paternal control, who is a business manager, borrowed money; for Julianus states in the Twelfth Book that the business manager himself can make use of the exception based on the Decree of the Senate, if suit is brought against him; but the Institorian Action will lie against the party who appointed him.

He further says that if the father himself had appointed him to carry on his business, or he was permitted to manage his own *peculium* the Decree of the Senate would not be available, since he would be held to have contracted with the consent of the father; for if the latter knew that he was transacting business, he may be held to have permitted this also, if he did not expressly forbid it.

(12) Thus, if he has borrowed money and employed it in his father's business, the Decree of the Senate will not apply, for he borrowed it for his father and not for himself. But if in the beginning he did not borrow it for this purpose, but afterwards employed it in the business of his father, Julianus says in the Twelfth Book of the Digest that the Decree of the Senate does not apply, and that he must be understood to have received it in the first place with the intention of employing it in his father's business. He will not, however, be held to have employed it in this manner if he pays to his father, for the settlement of his own debt, money which he has borrowed; and therefore, if his father was not aware of it, the Decree of the Senate will still be operative.

(13) Where it is stated that the Decree of the Senate does not apply in the case of a person who, being absent for the purpose of prosecuting his studies, borrowed money; it will be applicable if he, when borrowing the money, did not exceed a moderate limit, or, at all events, the amount with which his father was accustomed to provide him.

(14) If a son has borrowed money in order to satisfy someone who, if he should bring suit could not be barred by an exception, an exception based on the Decree of the Senate will not be available.

(15) Again, the Decree of the Senate will not apply if the father begins to pay what the son has borrowed, just as if he ratified the act.

(16) If, after he has become the head of a family, he pays part of the debt, the Decree of the Senate will not apply, and he cannot recover what he paid.

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

If, however, payment has been made through ignorance by a curator, the amount can be recovered.

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

But if, when he has become the head of a family, he gives property by way of pledge, it must be said that the exception based on the Decree of the Senate should be refused him, to the extent of the value of the pledge.

(1) Where the son pays the creditor money which has been given to him, can a father claim said money as belonging to him, or can he recover it by a personal action? Julianus says that if, in fact, the money was given to him on the condition that he should pay it to the creditor, it must be held to have passed immediately from the donor to the creditor, and to have become the property of him who received it, but if it was merely given to him, the son had no right to dispose of the money, and therefore, if he paid it, an action for its recovery will lie in behalf of the father, in any event.

(2) This Decree of the Senate has reference also to daughters under paternal control, nor does it signify if they are said to have obtained ornaments with the money; for an action is refused by a Decree of the most eminent Order of the State to a party who has lent money to a son under paternal control; and it makes no difference whether the coins have been consumed, or still exist as part of the *peculium.* Much more, therefore, should a party who has lent money to a daughter under paternal control have his contract disapproved by the severity of the Decree of the Senate.

(3) Relief is not only granted to a son under paternal control and to his father, but also to his surety, and to the party under whose direction he acted, and who themselves may have recourse to the action on mandate, unless they have intervened with the intention of making a gift; for then, as they have no recourse to him, the Decree of the Senate will not be applicable. If, however, the parties intervened, not with the intention of making a gift, but at the wish of the father, the entire contract will be held to have been approved by the latter.

(4) Those also have intervened in behalf of a son under paternal control without the consent of the father, cannot recover after they have made payment; for this was decreed also by the Divine Hadrian, and it may be said that they will not recover their money. Still, however, they are protected by a perpetual exception, and so is the son himself, but he does not recover, for the reason that those only cannot regain what they have paid who are released from an action by way of penalty on the creditors, and not because the law intended that they should be absolutely discharged from liability.

(5) Although they cannot recover after having paid,

10. *Paulus, On the Edict, Booh XXX.* Because the natural obligation remains;

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

Still, if not having pleaded an exception, they have judgment rendered against them, they can make use of the exception based on the Decree of the Senate. Julianus stated this in the case of a son who was himself under paternal control, just as in the case of a woman who becomes a surety.

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

Where money is lent to a son with the mere knowledge of his father, it must be said that the Decree of the Senate is not applicable. But if the father directed the loan to be made to the son, and afterwards changed his mind without the creditor being aware of the fact, there will be no ground for the Decree of the Senate, as the beginning of the contract should be considered.

13. *Gaius, On the Provincial Edict, Book IX.*

If we enter into a stipulation with a son under paternal control, for the payment of a loan made to a third party for the purpose of renewal, Julianus says that the Decree of the Senate will be no impediment.

14. *Julianus, Digest, Book XII.*

I have a son, and a grandson by him; a loan was made to my grandson under the direction of his father, the question arose whether this was done in violation of the Decree of the Senate? I stated that even though sons are included in the terms of the Decree of the Senate, still, the same rule should be observed also in the case of a grandson; but the direction of his father will not prevent the loan of the money from being considered as made in violation of the Decree of the Senate, as he himself is in such a position that he cannot borrow money if his father is unwilling.

15. *Marcianus, Institutes, Book XIV.*

It makes no difference who has made a loan to a son under paternal control, whether it is a private individual or a city; for the Divine Severus and Antoninus stated in Rescript that the Decree of the Senate is also operative in the case of a city.

16. *Paulus, Opinions, Book IV.*

If a son under paternal control during the absence of his father, borrows money as having received a mandate from his father, and enters into an obligation, and sends letters to his father to pay the money in a province; his father, if he disapproves of the act of his son, should immediately send a statement of his wish to the contrary.

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

Where a son under paternal control borrows money for the purpose of giving it as a dowry for his sister, his father will be liable to an action for property employed in his affairs; for he will have a right to recover the dowry if the girl dies during marriage.

18. *Venuleius, Stipulations, Book II.*

Julianus states that the creditor of a son under paternal control cannot receive a surety after the death of the latter, because no civil or natural obligation with which the surety is connected survives; but it is evident that a surety can be properly received from the father on account of the action on the *peculium* which may be brought against him.

19. *Pomponius, Various Passages, Book VII.*

Julianus states that an exception based on the Macedonian Decree of the Senate offers no hindrance to anyone except to a party who knew, or could have known, that he to whom he made the loan was a son under paternal control.

20. *The Same, On the Decrees of the Senate, Book V.*

If a person to whom money was lent while he was under the control of his father, after he himself becomes the head of the family, through ignorance makes a promise of the money in such a way that a new obligation is created, and suit is brought on the stipulation, an exception founded on the facts should be filed.

THE DIGEST OR PANDECTS.

BOOK XV.

TITLE I.

CONCERNING THE ACTION ON THE PECULIUM.

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

The Prætor judged it to be the proper way to first explain the contracts of those who are subjected to the authority of another which give a right of action for the entire amount, and then to come to the present one, where an action is granted on the *peculium.*

(1) This Edict, moreover, is threefold, for from it arises an action on the *peculium*, one for property employed in the affairs of another, and one based upon the order of another.

(2) The words of the Edict are as follows: "Whatever business is transacted with him who is under the control of another."

(3) Mention is made of him and not of her, still, however, an action is granted by this Edict on account of one belonging to the female sex.

(4) Where a contract is made with a son under paternal control or a slave who has not yet reached puberty, the action on the *peculium* is granted either against the master or the father, if the *peculium* of either of them has been increased in value.

(5) The word "control" is understood to be applicable both to the son and to the slave.

(6) The ownership of slaves should not be given greater consideration than the right of having authority over them; for we may be sued not only on account of our own slaves but also on account of those who are held in common, as well as of those who serve us in good faith as slaves, whether they are freemen, or the slaves of others.

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

The action arising out of the *peculium* and the other prætorian actions are only granted against the person entitled to the usufruct or use, where the slave subject to usufruct or use would generally acquire, and in other cases against the owner of the property.

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

Although the Prætor promises this action where business was done with a party who is under the control of someone, still, it must be remembered that the action on the *peculium* is granted even if he is under the control of no one; for instance, where a contract is made with a slave belonging to an estate before the estate is entered upon.

(1) Wherefore Labeo says that if a slave is substituted in the second or third degree, and a contract is made with him while the heirs of the first degree are deliberating, and, afterwards, when they reject the estate, he himself becomes free and an heir, it may be said that an action can be brought against him on the *peculium*, as well as on the ground of property employed in the affairs of another.

(2) It is of little importance whether a slave belongs to a man or a woman, for a woman can also be sued in an action on the *peculium.*

(3) Pedius states that even owners under puberty can be sued in the action on the *peculium*, for the contract is not made with the minors themselves, and the authority of the guardian must be considered. He also says that a ward cannot give his *peculium* to a slave without the authority of his guardian.

(4) We say also that the action on the *peculium* should be granted against the curator of an insane person; for even the slave of the latter may have a *peculium*, not where it has been

conceded that he should have it, but where he was not prohibited from having it.

(5) It has been discussed, whether if a son under paternal control or a slave becomes surety for anyone, or incurs liability in any other way, or gives a mandate, an action on the *peculium* will lie? The better opinion is that in the case of a slave the cause for giving the security or the mandate should be considered; and Celsus in the Sixth Book approves of this opinion in the case of a slave who is a surety. Therefore, where a slave intervenes as surety, and not as managing property belonging to the *peculium*, his master will not be bound on account of the *peculium.*

(6) Julianus also stated in the Twelfth Book of the Digest that where a slave directs that a payment be made to my creditor, it should be ascertained what reason he had for giving this mandate. If he directed him to make payment to the party as to his own creditor, the master will be liable on the *peculium*, but if he only performed the duty of a voluntary surety, the master will not be liable on the *peculium.*

(7) What the same Julianus stated agrees with the following, namely; if I accept a surety from my son, whatever I receive from the said surety I shall be compelled to make good, not on the ground of property employed for my benefit, but in an action on mandate to the amount of the *peculium.*

You may understand that the same rule applies in the case of the surety of a slave, and where another person pays me in behalf of my son who is my debtor. He also stated that if my son was not my debtor, the surety will be entitled to make use of an exception on the ground of fraud, and to bring a personal action for recovery if he has made payment.

(8) Where a slave who is assuming to be a freeman, consents to arbitration, the question arises whether an action on the *peculium* should be granted for the penalty for non-compliance with the award, this being, as it were an instance of voluntary agency, just as it is granted in the case of a maritime loan? The better opinion seems to both Nerva, the son, and myself to be that an action on the *peculium* arising from a reference to arbitration by a slave should not be granted, since an action is not granted against him if the slave is condemned in court.

(9) Where a son is accepted as a surety, or is voluntarily bound in any way, the question arises whether he makes his father liable on the *peculium?* The correct opinion is that of Sabinus and Cassius, who think that the father is always liable on the *peculium*, and that the son differs in this respect from the slave.

(10) Wherefore, the father will always be liable where a reference to arbitration is made. Papinianus also makes *a* similar statement in the Ninth Book of Questions; and he says that it makes no difference what point was referred to arbitration, whether it was one on which a party could have brought an action on the *peculium* against the father, or one on which he could not have done this, as suit is brought against the father on the stipulation.

(11) He also says that the father is liable to an action on a judgment to the amount of the *peculium*, and this view Marcellus likewise holds, even in a case on account of which a father would not be liable to a suit on the *peculium;* for just as in a stipulation a contract is made with the son, so also a contract is made in a case in court; hence the origin of the proceeding should not be considered as the source of the obligation, but the liability under the judgment. Wherefore, he is of the same opinion where the son, acting as a defender of another, has a decision rendered against him.

(12) It is established that a personal action for recovery on the ground of theft can be brought against a son under paternal control. The question arises, however, whether the action on the *peculium* should be granted against the father or the master, and the better opinion is that the action on the *peculium* should be granted for the amount by which the master has been pecuniarily benefited by the theft which was committed. Labeo approves of this opinion, for the reason that it is most unjust that by the theft of the slave, the master should profit without

being accountable. For the action on the *peculium* will also lie in a case where property has been carried away, and an action is brought on account of a son under paternal control to the amount which has come into the hands of the father.

(13) If a son under paternal control who is a *duumvir*, did not take care that security be given to insure the safety of the property of a ward, Papinianus says in the Ninth Book of Questions that the action *De peculio* will lie. I do not think that the question whether the son was made a decurion with the consent of his father changes anything, for the father was obliged to provide for the public welfare.

4. *Pomponius, On Sabinus, Book VII.*

The *peculium* is not what the slave keeps an account of separately from his master, but is what the master himself has set aside, keeping a distinct account from that of the slave; for since the master can take away the entire amount of *peculium* from the slave, or increase or diminish it, the question to be considered is not what the slave, but what the master has done for the purpose of creating a *peculium* for the slave.

(1) I think this to be true, however, where a master wishes to release the slave from a debt, so that if the master has remitted what the slave owed by his mere will, the slave ceases to be his debtor, but if the master keeps his accounts in such a way that he makes himself appear indebted to the slave, when in fact he is not his debtor, I think that the contrary opinion is correct, for a *peculium* should be increased not by words but by business matters.

(2) From these rules it is apparent that not what a slave has without the knowledge of his master belongs to the *peculium*, but whatever he has with his consent, otherwise what a slave steals from his master will become a part of the *peculium*, which is not true.

(3) It often happens, however, that the *peculium* of a slave suffers diminution without the knowledge of his master; for example, where a slave damages his property, or commits theft.

(4) If you commit theft against me with the aid of my slave, this must be deducted from the *peculium* to the amount by which it is less than what I can recover on account of the stolen property.

(5) If the *peculium* of the slave is exhausted by the debts due to the master, the property nevertheless remains in the condition of *peculium;* for if the master should give a debt to the slave, or some other party should pay the master in the name of the slave, the *peculium* will be filled up, and there will be no need of a new grant by the master.

(6) Not only is that to be included in the *peculium* of any slaves of which they keep an account separate from the master, but also that which they have separate from the property of a slave to whose *peculium* they belong.

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

The father or master can be sued on account of a deposit only to the extent of the *peculium*, and where advantage has been taken of me through any wrongful conduct of theirs.

(1) Moreover, the father or master is liable only to the amount of the *peculium*, where any property has been delivered to a son under paternal control, or to a slave to be held on sufferance.

(2) Where a son under paternal control has tendered an oath, and it has been taken, an action on the *peculium* should be granted, as if a contract had been entered into; but it is different in the case of a slave.

(3) The *peculium* is so called on account of its being a trifling sum of money or a small amount of property.

(4) Tubero, however, defines *peculium* to be (as Celsus states in the Sixth Book of the Digest)

what the slave has separate and apart from his master's accounts with the permission of the latter, after deducting therefrom anything which may be due to his master.

6. *Celsus, Digest, Book VI.*

Labeo says that the definition of *peculium* which Tubero gave does not include the *peculium* of sub-slaves, but this is not correct, for, by

the very act that a master has granted *peculium* to his slave it must be understood that he has also granted it to the sub-slave.

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

Celsus himself approves of this opinion of Tubero.

(1) And he adds that a ward of an insane person cannot grant a *peculium* to his slave, but the *peculium* which has been previously granted (that is before the insanity occurred, or where it was created by the father of the ward), will not be taken away by these conditions. This opinion is correct, and agrees with what Marcellus added in a note on Julianus, namely: that it can happen that where a slave has two masters he may have a *peculium* with reference to one, but not with reference to the other; for instance, where one of the masters is insane or a ward, if, as he says, some hold that a slave cannot have a *peculium* unless it is granted by his master. I think, however, that in order for the slave to have a *peculium*, it is not necessary that it should be granted by his master, but that it cannot be taken away. The free administration of the *peculium* is a different matter, for this must be explicitly granted.

(2) It is evident, however, that it is not necessary for him to know all the details of the *peculium*, but to be generally informed as to them; and Pomponius inclines to this opinion.

(3) Pedius states in the Fifteenth Book that a minor, as well as a son and a slave, can have a *peculium*, since he says that in this instance, everything depends upon the grant of the master, and therefore if the slave or the son should become insane, he will retain the *peculium.*

(4) Property of all kinds, both chattels and land, may be included in the *peculium;* the party may also have in his *peculium* sub-slaves as well as the *peculium* of the latter, and, in addition to this, even claims due from their debtors.

(5) Moreover, if anything is owing to the slave in an action of theft or in any other action, it is counted as part of the *peculium*, and as Labeo says, an estate and a legacy likewise.

(6) Again, he will have in his *peculium* whatever his master owes him, for suppose he has expended money in the business of his master, and the latter is willing to remain his debtor, or his master has brought suit against one of his debtors. Wherefore, for example, if the owner has recovered double damages for eviction on account of a purchase by the slave, the amount must be turned into his *peculium*, unless the master should happen to have had the intention that this should not form part of the *peculium* of the slave.

(7) In like manner, if a fellow-slave owes him anything, it will belong to the *peculium*, provided he has a *peculium*, or shall acquire one afterwards.

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

Any of his own property which the master desires to belong to the *peculium*, he does not at once render such, but only after he has delivered the same, or, if it was in the possession of the slave, has treated it as delivered; for property requires actual delivery. On the other hand, however, whenever he manifests unwillingness, the possessions of the slave cease to be *peculium.*

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

But if the master causes any damage to his slave, this will not be credited to the *peculium*, any more than if he stole it.

(1) It is clear that if a fellow-slave has committed any damage to property, or stolen it from the other, this will be considered to form part of the *peculium*, and Pomponius holds the same opinion in the Eleventh Book, for if the master either has recovered or can recover anything from a party who has stolen property from the *peculium*, this, Neratius says, in the Second Book of Opinions, must be credited to him.

(2) The *peculium*, however, is to be computed after what is due to the master has been deducted, for the master is presumed to have been more diligent, and to have proceeded against his slave.

(3) To this explanation Servius adds: "Where anything is due to those who are under his control," for no one doubts that this also is owing to the master.

(4) Moreover, that also will be deducted which is due to those persons who are under the guardianship or care of the master or father, or whose business he is attending to, provided he is free from fraud; since if he destroys or diminishes the *peculium* by fraudulent acts, he will be liable; for if the master is always presumed to be more diligent and to bring suit, why may he not be said also to have proceeded against himself in this instance, in which he would be liable either on the ground of guardianship, or of business transacted, or in an equitable action? For, as Pedius very properly says, the amount of the *peculium* is diminished by what is owing to the master or father, because it is not probable that the master would consent to the slave having in his *peculium* what is owing to him. And, indeed, since, in other instances, we say that one who is attending to business for another or who is administering a guardianship, has recovered money from himself, why should he not in this case of *peculium* also have recovered what he ought to have done? Therefore this opinion may be defended, just as if he had paid the amount to himself, where anyone attempts to bring an action on the *peculium.*

(5) The creditor of the slave who has become the heir of his master, also deducts from the *peculium* whatever is owing to him, if he is sued, whether the slave has received his freedom or not. The same rule applies if the slave is bequeathed absolutely; for he can deduct what is due to him in this way, as if he had appeared and proceeded against himself, although he had, at no time, the ownership of the slave who was manumitted or bequeathed unconditionally; and this Julianus states in the Twelfth Book of the Digest. Julianus says in the same place, more positively, that it is certain if the slave has received his freedom on some condition, the heir can make the deduction, for he has become the master. To confirm his opinion, Julianus also states that if I become the heir of a party who, after the death of the slave or the son, could have been sued within a year on the *peculium*, there is no doubt that I can deduct what is owing to me.

(6) The master will make the deduction, whether the slave owes anything to him on a contract, or on accounts which remain unpaid. And also if he owes him because of some offence, as, for instance, on account of a theft which he has committed, the deduction will be made.

It is a question, however, whether the amount of the theft itself, that is, only the loss which the master has sustained, shall be deducted, or in fact only so much as could be demanded if the slave of another had committed the offence; that is to say, with the penalties for theft. The former opinion is the more correct one, namely, that only the amount of the theft itself can be deducted.

(7) Where a slave has wounded himself, the master should not deduct this damage, any more than if he had killed himself or thrown himself over a precipice; for even slaves have a natural right to inflict injuries upon their bodies. But if the master has cared for the slave who has been wounded by himself, I think that he is indebted to his master for the expenses incurred; although if he had cared for him when he was ill, he would rather have been seeing after his own property.

(8) Again, if a master has bound himself on account of a slave, or, having done so has made

payment, this will be deducted from the *peculium;* so, likewise, if money has been lent to him by the direction of his master; for Julianus states in the Twelfth Book of the Digest that this should be deducted. I think that this is true only where what was received did not come into the hands of the master or father, otherwise, he ought to charge this against himself. If, however, he becomes security for his slave, Julianus states in the Twelfth Book of the Digest, that this should be deducted; Marcellus, however, says that, in both instances, if the master has not yet lost anything, it is better that the money should be paid to the creditor, provided he gives security to refund it, if the master is sued on this account and pays anything; than that the deduction should be made in the first place, so that the creditor, in the meantime may profit by the interest on the money.

Where, however, the master, having been sued, has judgment rendered against him, a deduction should be made in a subsequent action on the *peculium*, as the master or father has become liable on the judgment; for, if not having had judgment rendered against him, he should have paid the creditor anything on account of the slave, he could deduct this also.

10. *Gaius, On the Provincial Edict, Book IX.*

If, however, the first action on the *peculium* is still in suspense, and judgment is rendered in the subsequent action, no account of the first action should be taken in any way in the decision of the second; because the position of the first creditor in an action on the *peculium* is the better one, for, not he who first joined issue, but he who first obtained a decision of the court, is held to be entitled to the preference.

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

Where a master who has been sued in a noxal action has paid the damages assessed, this ought to be deducted from the *peculium;* but where he surrendered the slave by way of reparation, nothing should be deducted.

(1) Moreover, if the master bound himself to pay something on account of the slave, this should be deducted; just as if the slave had promised to assume the obligation of a debtor to his master. The same rule applies if he has assumed an obligation to his master in consideration of his freedom, he, having become, to a certain extent, a debtor of his master, but only where suit is brought against him after he has been manumitted.

(2) Where, however, a slave has exacted payment from a debtor of his master, the question arises whether he has made himself a debtor to his master? Julianus, in the Twelfth Book of the Digest, says that the master will not be entitled to make a deduction, unless he ratified the collection of the money, and the same must also be said in the case of a son under paternal control. I think that the opinion of Julianus is correct, for we take into account natural debts in deductions from the *'peculium;* for natural equity requires that a son or a slave should be released from liability because he seems to have exacted what was not due.

(3) It is a question, however, whether, what the master has once deducted, when he has been sued, he should again remove from the *peculium,* if suit is brought against him; or whether, where deduction has once been made, it should be held that he has been satisfied. Neratius and Nerva think, and Julianus also states in the Twelfth Book of the Digest, that if he really removed it from the *peculium* it should not be deducted, but if, in fact, he left the *peculium* in the same condition he should make a deduction.

(4) He further says that, if a slave has in his *peculium* a sub-slave worth five *aurei*, and he owes the master five, on account of which the master deducted the sub-slave, and the latter having afterwards died, the slave purchased another of the same value; he does not cease to be a debtor to the master, just as if the sub-slave had been a loss to the latter, unless he happened to die after he had taken him away from the slave and had paid himself.

(5) The same author very properly says that, if when the sub-slave was worth ten *aurei*, the

master having been sued on the *peculium* paid five on account of the slave, because five were due to himself, and that afterwards the sub-slave died; the master can deduct ten *aurei* against another plaintiff on the *peculium*, because he had made the slave his debtor with reference also to the five *aurei* which he had paid on his account. This opinion is correct, unless he took the sub-slave away for the purpose of paying himself.

(6) What we have said, however, that is, that what is due to him who is sued on the *peculium* should be deducted, must be understood to mean if he could not recover this in any other way.

(7) Julianus then says that if a vendor who has sold a slave together with his *peculium*, is sued on the *peculium*, he should not deduct what is due to him, for he could have deducted this from the account of the *peculium;* and he can now bring a personal action to recover it as not having been due, since what is owing to the master is not to be included in the *peculium.*

He can also, so he says, bring an action on sale. This is to be approved where there was so much in the *peculium* when it was sold that the master could satisfy his debt, but if afterwards there was an addition made to his claim, and the condition of the debt having been fulfilled, which debt the master has not satisfied, the contrary opinion must be held.

(8) He also asks, if anyone has obtained a slave on account of whom he had an action on the *peculium*, can he deduct what is owing to him since he is entitled to an action *De peculio* against the vendor? He says very properly that he can, for any other person, likewise, can choose whether he will bring suit against the vendor or the purchaser, and this party therefore selects deduction instead of suit. I do not see what the creditors have to complain of, since they themselves can sue the vendor if they think that perhaps there may be something in the *peculium.*

(9) But, not only what is owing to the party who is sued should be deducted, but also what may be owing to his partner, and Julianus holds this opinion in the Twelfth Book of the Digest; for, accordance with the same principle on which either may be sued for the entire amount, he has a right to deduct what is due to the other. This opinion is accepted:

12. *Julianus, Digest, Book XII.*

For the reason that in this instance proceedings can be instituted against the one with reference to whom there is no *peculium.*

13. *Ulpianus, On the Edict, Book XXIX.*

But that neither party can deduct what is due to the other is not true in the case of purchaser and vendor, of usufructuary and the mere owner, and in that of others who are not partners, as well as the sole proprietor and the *bona-fide* purchaser; and this Julianus states in the Twelfth Book.

14. *Julianus, Digest, Book XII.*

Moreover, where it is directed by a will that a slave shall immediately become free, suit on the *peculium* should be brought against all the heirs, and none of them can deduct more than is due to himself.

(1) Again, where the slave died during the lifetime of his master, and the master then died within the year, leaving several heirs, both the action on the *peculium* and the right of deduction are divided.

15. *Ulpianus, On the Edict, Book XXIX.*

But if there are two *bona fide* possessors, it must still be said that neither can deduct more than is due to him; and the same rule applies where there are two usufructuaries, because they have no partnership between them. The same rule sometimes also applies to the case of partners, if they should happen to have separate *peculia* among themselves, so that one of them cannot be sued on account of the *peculium* of the other. Where, however, the *peculium* is

in common, they may be sued for the entire amount, and what is owing to each one of them shall be deducted.

16. *Julianus, Digest, Book XII.*

What then would be the case where the *peculium* of a common slave belongs to one of his masters alone? In the first place, if any one sells a half share in a slave, and grants him no *peculium*, and then, if any one gives money or property of any description to a slave owned in common, in such a way as to retain the ownership of said property, but to grant the slave the management of the same; Marcellus says in a note that this is an instance where one owner has taken away the *peculium*, or where an owner has actually granted one, but the grant is applicable to the obligations of his debtors.

17. *Ulpianus, On the Edict, Book XXIX.*

If my ordinary slave has sub-slaves, can I deduct from the *peculium* of my ordinary slave what the sub-slaves owe me? And the first question is, whether their *peculia* are included in that of the ordinary slave. Proculus and Atilicinus think that as the sub-slaves belong to the *peculium* together with their own *peculia*, and indeed, what their owner (that is to say the ordinary slave) owes me can be deducted from their *peculium,* but that, however, which the sub-slaves themselves owe, can only be deducted from their own *peculium.*

Moreover, if they are indebted, not to me but to the ordinary slave, the amount due will be deducted from their *peculium* as owing to a fellow-slave. That, however, which the ordinary slave owes to them will not be deducted from the *peculium* of the former, because their *peculium* is included in his. Servius was of this opinion, but I hold that their *peculium* will be increased, just as if a master is indebted to his slave.

18. *Paulus, Questions, Book IV.*

The result of this is that if his own *peculium* is left to Stichus, and he brings suit under the will, he will not be compelled to surrender what his sub-slave owes to the testator, unless the sub-slave has a *peculium.*

19. *Ulpianus, On the Edict, Book XXIX.*

Hence the question arises whether, if an action is brought on a *peculium* on account of the ordinary slave, proceedings can also be instituted with reference to the sub-slave, and I think this cannot be done. But where an action has been brought on the *peculium* of a sub-slave, one can also be brought on the *peculium* of the ordinary slave.

(1) There may be in my hands a *peculium* held by two different legal titles; as, for instance, if there is a dotal slave, he may have a *peculium* in which I am interested, and he may also have one in which my wife is interested, for what he has obtained through the business of the husband, or by his labor, belongs to the husband; and hence, if he has been appointed an heir, or a legacy has been bequeathed to him with reference to the husband, Pomponius says that he is not obliged to give it up. Therefore, if an action is brought against me on a contract in which I am interested, can I deduct everything that is owing to me, whether connected with my own business or with that of my wife? Or do we separate the cases of the husband and wife so far as the two *peculia* are concerned, to enable the origin of the debt for which suit is brought to be considered; so that if, in fact, proceedings are instituted with reference to the *peculium* in which the wife is concerned, I can deduct what is due from that contract, if on a contract in which I am interested I can deduct what belongs to me?

This question is more clearly treated in the case of an usufructuary, whether suit on the *peculium* can be brought against him only on the contract which concerns him, or whether it can be brought on any contract? Marcellus states that the usufructuary is also liable, and on any contract, for he who makes the contract considers the entire *peculium* of the slave to be his own property. He says that it is evident that it must be admitted, in any event, that when

the party who is interested in the matter has been first sued, he who has not obtained anything may be sued for the remainder. This opinion is the more reasonable one, and is approved by Papinianus. It must also be held in the case of two *bona-fide* purchasers. But in the case of the husband, it is better to say simply that he is liable to the action on the *peculium.* If, however, the husband had paid something on account of a slave of this kind, can he deduct it as against the wife bringing an action on account of her dowry? And he says that if what was paid to the creditor relates to the *peculium* of each kind, it should be deducted *pro rata* from the *peculium* of both, and from this it may be understood that if the contract had reference to either *peculium*, there will be, on the one hand, a deduction made for the wife alone, and on the other, none will be made, if the contract had reference to that *peculium* which remained with the husband.

(2) Sometimes an action on the *peculium* is granted to the usufructuary himself against the master; as, for instance, if the slave has a *peculium* with reference to the former but with reference to the latter he has none, or less than what is due to the usufructuary. Conversely speaking, the same thing takes place, although in the case of two owners an action on partnership or one for the partition of common property will be sufficient;

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

For partners cannot bring the action on *peculium* against one another. . 21. *Ulpianus, On the Edict, Book XXIX.*

The Prætor has also, for the best of reasons, charged to the *peculium* whatever the master had done with malicious intent through which the *peculium* is diminished. We must, however, understand malicious intent to signify where he has deprived him of the *peculium,* and also where he has permitted him to involve the affairs of the *peculium* to the prejudice of creditors; and Mela writes that this is an act performed with malicious intent.

Moreover, if when anyone entertains the idea that some other party is going to bring an action against him, and transfer the *peculium* to someone else, he is not free from fraud. If, however, he pays the debt to a third party, I have no doubt that he is not liable, as he pays a creditor, and it is lawful for a creditor to be diligent in recovering what belongs to him.

(1) If the act is committed through the fraud of a guardian, the curator of an insane person, or an agent, it should be considered whether the ward, or the insane person, or the principal should be sued on the *peculium?* I think that if the guardian is solvent, the ward should make good what has been lost through his fraud, and especially is this the case if anything has come into his hands; and so Pomponius states in the Eighth Book of the Epistles. The same must be said in the case of a curator or an agent.

(2) A purchaser will not be liable for the fraud of the vendor, nor will the heir or other successor, except to the extent that property has come into his hands by reason of it.

(3) Whether the fraud has been committed before or after issue has been joined, it comes within the jurisdiction of the court.

(4) If the master or father refuses to answer in the action on *peculium*, he should not be heard, but he must be compelled to join issue as in the case of any other personal action.

22. *Pomponius, On Sabinus, Book VII.*

If the master has given security against threatened injury with reference to a house which is part of the *peculium*, this should be taken into account, and therefore security should be furnished by the party who is bringing suit on the *peculium.*

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

The party giving security against threatened injury with reference to a house belonging to the *peculium*, must furnish it for the entire amount, just as a noxal action on account of a sub-

slave must be defended for the full amount, because the plaintiff, if the defence is not properly made, removes the property, or holds it in possession as a pledge.

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

The curator of an insane person can both give and refuse the management of the *peculium* to the slave, as well as to the son of the said insane person.

25. *Pomponius, On Sabinus, Book XXIII.*

Any clothing is included in the *peculium* which the master has given for the slave to make use of permanently, and has delivered it to him with the understanding that no one else shall use it, and that it will be kept by him in compliance with these conditions. Clothing, however, which the master had given to the slave for temporary use and only to be employed for certain purposes at certain times, for example, when he is in attendance upon him, or waits upon him at the table, does not become part of the *peculium.* 26. *Paulus, On the Edict, Book XXX.*

If the master has once, in a case of this kind, that is to say, where he has been guilty of fraud, made good the amount of the *peculium* after he has been sued; he will not be compelled to pay anything to others on the same ground. And, moreover, if the slave owes him as much as that by which he has fraudulently diminished the amount, judgment should not be rendered against him. It follows from what has been said that also where the slave has been manumitted or alienated, he will be liable also on the ground of fraud, within the year.

27. *Gaius, On the Provincial Edict, Book IX.*

The action on the *peculium* is granted on account of both female slaves, and daughters under paternal control, and especially where the woman is a tailoress or a weaver, or conducts any ordinary trade, this action can be brought against her. Julianus says that the action on deposit, and also that on loan for use, should be granted with reference to them, and that the contributory action should be granted if they have transacted business with merchandise belonging to the *peculium* to the knowledge of the father or the master. This is still more certain where property has been employed for the benefit of the father or master, and the contract was made under his direction.

(1) It is established that the heir of the master should also deduct such property belonging to the estate as the slave, on whose account suit on the *peculium* is brought against him, had either removed, consumed, or damaged before the estate was entered upon.

(2) Where a slave has been alienated, although the Prætor promises an action on the *peculium* within a year, against the party who alienated him, still, an action is granted against the new master; and it makes no difference whether he has acquired another *peculium* with him, or whether he has granted to the same slave what he bought or received as a gift along with him at the time.

(3) It has also been decided (and Julianus approves of it) that creditors are, in any event, to be allowed to bring suit either for shares against individuals, or against any one party for the entire amount.

(4) Julianus, however, does not think that the party who sold the slave should be permitted to bring an action on the *peculium* against the purchaser with reference to what he lent to the slave before the sale.

(5) Moreover, if I make a loan to the slave of another, and buy him, and then sell him, he also does not think that an action should be granted me against the purchaser.

(6) He holds, however, that an action should be granted to me against the vendor, but only within a year to be computed from the day of the purchase, for the amount which I loaned him while he still belonged to another, that being deducted from what the slave has, as *peculium*, with reference to me.

(7) But as Julianus does not think that when he has been alienated, an action should be granted to me against the purchaser, with reference to what I myself have lent to my own slave; so also he denies that I should be allowed to institute proceedings against the purchaser on account of what my own slave has lent to another of my own slaves, if he to whom the loan was made has been alienated.

(8) Where anyone has contracted with a slave belonging to two or more persons, he should be allowed to bring suit for the entire amount against anyone of the owners he wishes; for it is unjust that he who contracted with one should be obliged to divide up his action against several adversaries, and an account should be taken not only of the *peculium* which the said slave has with reference to the party against whom proceedings are instituted, but also of that in which the other owner or owners are interested. No loss, however, will result from this to the party against whom judgment was rendered, as he can himself recover from his partner or partners by the action of partnership, or by that for the division of common property, whatever he has paid over and above his share.

Julianus says that this will apply where the other owner was entitled to any *peculium*, for, in this instance, each one, by paying, will be held to have released his partner from debt; but where there is no *peculium* in which the other is interested, the contrary rule applies, because he is not understood to release him from debt in any way.

28. *Julianus, Digest, Book XL*

Wherefore, if no one has become the heir or possessor of the estate of the partner, he against whom the action was brought should have judgment rendered against him for the amount of whatever *peculium* he may be entitled to in addition to as much as he can obtain out of the estate.

29. *Gaius, On the Provincial Edict, Book IX.*

Where anyone has, by will, ordered that a slave shall be free, and has left as heirs persons who have contracted with said slave, the coheirs may proceed against one another by the action *De peculio*, for each one is liable to anyone else who brings suit for the amount of the *peculium* to which he is entitled.

(1) Even though a master prohibits a contract to be made with a slave, an action on the *peculium* will lie against him.

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

The question arises whether the action on the *peculium* may be brought, even if there is nothing in the *peculium* when proceedings are instituted, provided only there is something in it at the time that judg-

ment was rendered? Proculus and Pegasus say that it will, nevertheless, lie, for the claim is properly set forth, even though there may be nothing in the *peculium.* It has been established that the same rule applies with reference to an action for production, and an action *in rem.* This opinion is also approved by us.

(1) Where the action is brought against one who is heir to a share of the estate of his master or father, judgment must be rendered against him only to the amount of the *peculium* to which the heir who is sued is entitled. The same rule applies where property has been employed for his benefit, proportionately, unless he has used something for the benefit of the heir himself, nor can the heir be sued like one of the joint-owners, but only for his share.

(2) But if the slave himself is appointed heir to a share, the action may also be brought against him, in like manner.

(3) Where, however, the son is appointed, although only for a share, he will, nevertheless, be liable to an action for the entire amount, but if he wishes to obtain the proportionate obligation

of his co-heir, he should be heard; for what if the property has been employed for the benefit of the father? Why should not the son recover from his co-heir what is included in the estate of his father? The rule is the same where the *peculium*, is very valuable.

(4) He who has once brought an action on the *peculium*, can again bring suit for the remainder of the debt if the *peculium* has been increased.

(5) Where a creditor has been beaten by a vendor by means of an exception grounded on the lapse of a year, relief should be granted him against the purchaser; but if this has been effected by any other exception, he should only be relieved to the extent that, where the amount which he could have obtained from the vendor has been deducted, he may recover the remainder from the purchaser.

(6) Where fraud is alleged, account must be taken of the time, for the Prætor might not permit fraud to be pleaded in bar after the term for bringing an action on fraud has elapsed, since this action is not granted after the expiration of the time established by law.

(7) In the case of the heir, however, the clause relating to fraud ought to be drawn up with reference to what has come into his hands, and not for more than this.

31. *Paulus, On the Edict, Book XXX.*

Where, however, the heir himself has committed fraud he must make good the entire amount.

32. *Ulpianus, Disputations, Book II.*

Where one of two or more heirs of a party who could have been sued within a year, has an action brought against him, and the slave has been manumitted, or this has been directed to be done, or he has been sold or died, all the heirs will be released from liability; even though the party who is sued may not have judgment rendered against him for a larger amount than that of the *peculium* which he has in his hands, and this Julianus also stated. The same rule applies where the property was employed for the benefit of any of the heirs. Where, however, there are several usufructuaries or *bona-fide* possessors, and one is sued, he releases the others, although he should not have judgment rendered against him for a greater amount of the *peculium* than that which he has in his possession. But although this takes place in accordance with the strict rule of law, still, equity demands that an action should be granted against those who are released by an accident of the law, so that recovery rather than the bringing of the suit should discharge them; for he who makes the contract with the slave has in his mind, as his property, the entire amount of his *peculium*, wherever it may be.

(1) But although in this action the former one is restored, still, an account should be taken of both the increase and the decrease; and, therefore, whether at present there is nothing in the *peculium* or something has accrued to it, the present state of the *peculium* must be considered. Hence, so far as both the vendor and the purchaser are concerned, this seems to us to be the better opinion, namely: that we can recover from the purchaser what has accrued to the *peculium* and the claim of the purchaser is not to be regarded as retroactive, to the time when the vendor was sued, and as included in the same legal proceeding.

(2) If the vendor of the slave sells him along with the *peculium,* and delivers the *peculium*, suit cannot be brought against him on the same, even within a year; for, as Neratius has stated, this price of the slave is not *peculium.*

33. *Javolenus, On Cassius, Book XII.*

But where anyone has sold a slave with the understanding that he was to receive a price for the *peculium*, the *peculium* is held to be in the hands of the party to whom the price of the same was paid.

34. *Pomponius, Various Passages, Book XII.*

And not in the hands of him who holds the property constituting the *peculium.*

35. *Javolenus, On Cassius, Book XII.*

But where the heir was directed to deliver the *peculium* on receipt of a certain sum, the *peculium* is not held to be in the hands of the heir.

36. *Ulpianus, Disputations, Book II.*

It is a question whether, in contracts entered into in good faith, the father or master should be liable merely for the *peculium*, or for the entire amount; just as had been discussed in the action on dowry, where a dowry is given to a son, whether the father can only be sued for the amount of the *peculium?* I, however, think that the action can be brought not only for the amount of the *peculium*, but also to the extent that the woman has been deceived and defrauded by the malicious contrivance of the father; for, if he holds the property and is not ready to surrender it, it is only just that he should have judgment rendered against him for the amount that it is worth; for Pomponius said that what is expressly stated in a case of a slave to whom property has been given in pledge must also be understood to apply to other *bona-fide* actions. For if property has been given in pledge to a slave, the action can be brought not only for the *peculium*, and for what has been employed in the business of the master, but it has also this additional sentence: "To the extent that the plaintiff has been deceived and defrauded by the malicious contrivance of the master." The master is held to have acted fraudulently if he is unwilling to make restitution when he has the power to do so.

37. *Julianus, Digest, Book XII.*

If a creditor of your son appoints you his heir, and you sell the estate, you will be liable for the *peculium* under this clause of the stipulation, namely: "Whatever sum of money derived from the estate that shall come into your hands."

(1) If you permit your slave to purchase a sub-slave for eight *aurei,* and he purchases him for ten, and writes to you that he has bought him for eight, and you allow him to pay eight out of your money, and he pays ten, you can recover only two *aurei* on this ground, and these will be made good to the vendor only to the amount of the *peculium* of the slave.

(2) I sold to Titius a slave which I held in common either with him or with Sempronius. Before an action *De peculio* was brought against me because of said slave, the question arose whether, in a suit on the *peculium* against Titius or against Sempronius, an account should be taken of the *peculium* which was in my hands? I stated that, if the action was brought against Sempronius, under no circumstances, should an account be taken of the *peculium* in my hands, because he would have no right of action against me by which he could recover what he had paid.

Moreover, if an action should be brought against Titius more than a year after I have made the sale, in like manner, the *peculium* in my hands should not be considered, for an action *De peculio* cannot now be brought against me. If, however, the action is brought within the year, then an account ought also to be taken of this *peculium*, for it is established that where the slave has been alienated, the creditor should be permitted to proceed against both the vendor and the purchaser.

(3) Where an action on the *peculium* has been brought against a party who has an usufruct in the slave, and the creditor has recovered less than the amount due to him, it is not unjust that he should obtain what he is entitled to out of the entire *peculium*, whether this is in the hands of the usufructuary or of the owner. It makes no difference whether the slave has hired his own services from the usufructuary, or has borrowed money from him. Therefore, an action should be granted him against the owner of the property, and that should be deducted which the slave has, as *peculium*, with reference to the usufructuary.

38. *Africanus, Questions, Book VIII.*

I deposited ten *aurei* with a son under paternal control, and I bring an action of deposit on the

peculium. Although the son owes the father nothing, and holds these ten *aurei* he thought, nevertheless, that judgment should no more be rendered against the father than if there was no *peculium* besides this, for as this money remains mine, it is not included in the *peculium.* He also says that if any other person whosoever brings suit for the *peculium*, there should not be the least doubt that it must not be computed. Therefore I ought to bring an action for production, and when the property is produced, bring one to recover it.

(1) Where a girl who is about to marry a son under paternal control promises him a certain sum of money as dowry, and a divorce having been obtained, she brings an action for the whole amount against the father; should she be released from the entire promise, or ought what the son owes the father be deducted? He answered that she should be released from the entire promise, since if an action was brought against her on the promise, she could certainly protect herself by the exception based on malicious intent.

(2) Stichus has in his *peculium* Pamphilus, who is worth ten *aurei*, and the said Pamphilus owes the master five *aurei.* If an action on the *peculium* is brought on account of Stichus, it was held that the value of Pamphilus should be estimated, and, indeed, the entire value, without deducting what Pamphilus owes to the master, for no one can be understood to be himself in his own *peculium;* and therefore in this instance the master will suffer a loss, just as he would if he had made a loan to any other of his slaves who had no *peculium.* He says that it will appear more evident that this is true, if it is stated that the *peculium* was left to Stichus, who, if he brings suit under the will, will certainly not be compelled to suffer a deduction for the amount that his sub-slave owes, unless this is taken out of his own *peculium;* otherwise the result will be that if the sub-slave owes the master just as much, and he himself will be understood to have nothing in the *peculium*, which is certainly absurd.

(3) I lent money to a slave whom I had sold to you. The question arose whether the action *De peculio* should be granted to me against you, in order that what remained in my hands out of the *peculium* should be deducted. This, in fact, is not in the slightest degree true, nor will it make any difference whether I institute proceedings within a year from the time that I made the sale, or afterwards; for, indeed, an action against me will not be granted to others who contracted with him at that time. Again, on the other hand, where those who had contracted previously with this slave bring an action against me, I cannot deduct what he began to owe me afterwards. From this it is apparent that the liability of the *peculium* which remained in my hands is not, in any way, affected by contracts made at a later date.

39. *Florentinus, Institutes, Book XI.*

The *peculium* also consists of what anyone has saved by his own economy, or what he has, by the performance of any service, merited as a gift from someone, where the donor intended that the slave should have this as his own property.

40. *Marcianus, Rules, Book V.*

The *peculium* is created, grows, decreases, and dies, and therefore Papirius Fronto very properly says that the *peculium* resembles a man.

(1) The question arose how a *peculium* is created. The ancients made a distinction in this respect, for if the slave has acquired what the master was not bound to furnish, this is *peculium*, but if he has acquired tunics or anything of this kind with which the master is bound to provide him, it is not *peculium.* Therefore *peculium* is created in this way, it grows when it is increased, it decreases when sub-slaves cease to exist or property is destroyed, it dies when it is taken away.

41. *Ulpianus, On Sabinus, Book XLIII.*

A slave cannot owe anything, nor can anything be due to a slave; but when we make a misuse of this word we are rather indicating a fact, than referring the obligation to the Civil Law.

Hence the master can rightfully demand from strangers what is owing to a slave, and with respect to what the slave himself owes, an action for this cause is granted against the master, on the *peculium;* and also to the extent that property has been employed in the affairs of the master.

42. *The Same, On the Edict, Book XII.*

Some authorities very properly hold that an action on the *peculium* should be granted against an arrogator; although Sabinus and Cassius think that an action on the *peculium* should not be granted on account of business previously transacted.

43. *Paulus, On the Edict, Book XXX.*

If, after I have brought an action against you on the *peculium,* and, before the case has been decided, you have sold a slave; Labeo says that judgment ought to be rendered against you with reference also to the *peculium* which he has acquired while in the hands of a purchaser, and that relief should not be granted you; for this happened through your own fault since you sold the slave.

44. *Ulpianus, On the Edict, Book LXIII.*

Where anyone has made a contract with a son under paternal control, he has two debtors, the son for the entire amount, and the father only to the amount of the *peculium.*

45. *Paulus, On the Edict, Book LXI.*

And, therefore, if the father has taken the *peculium* away from the son, the creditors can, nevertheless, bring suit against the son.

46. *The Same, On the Edict, Book LX.*

He who grants the management of the *peculium* is understood to permit generally what he would be willing to permit specifically.

47. *The Same, On Plautius, Book IV.*

Whenever a notice is placed in a shop as follows: "I forbid any business to be transacted with my slave Januarius," it is established that the master has only obtained a release from liability under the Institorian Action, and not under that on the *peculium.*

(1) Sabinus gave the opinion that where a slave had become a surety, an action *De peculio* should not be granted against the master, unless the security had been furnished for the business of the master, or concerning property belonging to the *peculium.*

(2) If the action *De peculio* has once been brought, although when judgment is rendered there is found to be less in the *peculium* than he owes, it has, nevertheless, been established that there is no ground for giving security with reference to a future increase in the *peculium*, as this takes place in the action on partnership, because the partner owes the entire amount.

(3) Where a creditor of the slave has recovered a portion of the debt from the purchaser, Proculus says that an equitable action can be brought against the vendor for the remainder, but the plaintiff must not be allowed, in the beginning, to divide the action, so as to proceed at the same time against the purchaser and the vendor; since it is enough that this alone should be granted to him; so that when, having selected one defendant, he recovers less than the debt, an action will be granted him against the other, the former action having been rescinded. This is the modern practice.

(4) Not only any creditor whosoever can institute proceedings against the vendor on account of business previously transacted, but the purchaser himself can also do so, (and this opinion was held by Julianus), although he himself can make a deduction against another plaintiff, provided he makes allowance for what he has in his hands.

(5) Where a slave is sold without his *peculium*, the result is that the vendor can make use of the deduction; and if, after the sale, the slave becomes indebted to the vendor, this does not diminish the *peculium,* because he does not owe his master.

(6) What we have stated with reference to purchaser and vendor is the same as if ownership was changed in any other way, as by a legacy or by the gift of a dowry; for the *peculium* of the slave, wherever it may be, is understood to resemble the property of a freeman.

48. *The Same, On Plautius, Book XVII.*

The free management of the *peculium* does not remain in the case of a fugitive or of a slave who has been stolen, nor in case of one who is not known to be either alive or dead.

(1) Anyone, to whom the management of the *peculium* has been given, can substitute his own debtor.

49. *Pomponius, On Quintus Mucius, Book IV.*

Not only is that *peculium* which an owner has granted to his slave, but also whatever has been acquired without his knowledge, but which, if he had known of it, he would have permitted to be in the *peculium.*

(1) If my slave, without my knowledge, transacts my business, he will be considered to be my debtor to the same extent as he would have been liable, if, being a freeman, he had attended to it.

(2) In order that a slave may be considered a debtor to the master or the master to the slave, attention must be paid to the regulations of the Civil Law; and therefore, if the master has stated in his account that he is indebted to his slave, when, in fact, neither had he borrowed money, nor had any other cause for debt previously existed, the mere statement of account does not render him a debtor.

50. *Papinianus, Questions, Book IX.*

At the time when there is nothing in the *peculium*, the father conceals himself, I, being about to bring an action *De peculio* against him, cannot be placed in possession of his property for the purpose of preserving it, because he who would be entitled to be discharged from liability if he had joined issue, is not concealing himself for the purpose of committing fraud. Nor does it make any difference if it should happen that a judgment against him may result; for, also, if a debt is due at a certain time, or under some condition, the party is not held to conceal himself on account of fraud, although he may be unjustly condemned by the judge. Julianus, however, thinks that a surety given at the time when there is nothing in the *peculium* is liable, since the surety can be accepted for a future right of action if he is accepted in this way.

(1) If a creditor appoints as heir a father who is liable on the *peculium*, since the time of death is regarded with a view to the operation of *Lex Falcidia*, the *peculium* in existence at that time will be taken into consideration.

(2) Even after the master has been sued on the *peculium*, a surety can be taken in behalf of the slave; and therefore, for the same reason as that for which if a slave should pay the money after issue has been joined in an action, he cannot recover it any more than if issue had not been joined, a surety will be held to have been lawfully accepted, because the natural obligation, which even a slave is held to incur, is not made an issue in the controversy.

(3) A slave belonging to another, while he was serving me in good faith, paid me money borrowed from Titius, in order that I might manumit him, and I did so; the creditor asked whom he could sue on the *peculium.* I said that, although in other instances the creditor would have the choice, yet in the one stated suit should be brought against the master, and he could bring an action against me for production of the money which had been obtained by him, and had not been alienated on account of the transaction which was said to have taken place with

reference to the civil condition of the slave; nor should the distinction of those be admitted who think that if I do not manumit the slave, the money should belong to his master, but if the manumission takes place, the money is deemed to have been acquired by me, since it is given to me, rather on account of my business, than as being derived from my property.

51. *Scævola, Questions, Book II.*

With reference to what is due to a slave from strangers, the master should, by no means, have judgment rendered against him for the amount of the debt, where anyone brings suit on the *peculium;* since both the expense incurred in bringing the action and the result of the execution may be uncertain, and the delay of time granted to those who have been held judicially liable, or that consumed in the sale of the property, should be considered, if this is the better thing to do; therefore, if the party is ready to assign his rights of action he will be discharged.

What is said where an action is brought against one of several partners, namely: that the entire *peculium* must be computed, because the proceeding is against the partner, will have the same result if the party is ready to assign his rights of action; and, in the case of all those whom we say are liable on this account since they have a right of action, the substitution takes the place of legal payment.

52. *Paulus, Questions, Book IV.*

A question is asked with reference to an actual occurrence, namely: . where a party who was administering a guardianship as a freeman was pronounced to be a slave, whether, if his master was sued by the ward whose claim has been stated by rescript to be preferable to those of other creditors of the slave, what is owing to the master should be deducted from the *peculium.* And if you think it can be deducted, whether it makes any difference if he became indebted to the master while he was still enjoying his freedom, or afterwards; and will the action on the *peculium* lie in favor of a boy who has not reached puberty? I answered that no privileged claim could take preference over that of the father or master, if he was sued on the *peculium* on account of the son or the slave. It is evident that in the case of other creditors account should be taken of privileged claims, for what if a son has received a dowry or has managed a guardianship? This has been very properly stated in a rescript, with reference to a slave who was acting as guardian, and, for the reason that the position of the more diligent creditor is usually better than that of the others, so far as they are concerned, the action will be barred. Clearly if he has loaned money out of property belonging to the ward or has deposited money in a chest, an action for the recovery of the same will be granted him, as well as an equitable action against the debtor; that is to say, if they have used up the money, for he had no power to alienate it. This also should be held in the case of any guardian.

Nor do I think it makes any difference whether, when he became indebted to the master, he was in possession of his freedom, or whether this happened subsequently; for if I make a loan to the slave of Titius, and then become his master, I can deduct what I have previously lent him, if suit is brought against me on the *peculium.* What course must then be pursued? Since proceedings cannot be instituted on the *peculium*, an equitable action founded on that on guardianship, should be granted against the master, so that what this party had as his own property may be understood to be his *peculium.*

(1) If a dowry is given to a son under paternal control, or he has administered a guardianship, an account should be taken of the privileged claims in an action on the *peculium*, and, in the meantime, continuance having been granted in the action of other creditors, or security furnished, if those who have no privilege institute proceedings first, what they have received shall be restored, if suit on the privileged claim is afterwards brought against the father.

53. *The Same, Questions, Book XL*

If Stichus was not deprived of the *peculium* when he was manumitted, it is held to have been

granted; he cannot, however, sue debtors unless the rights of action have been assigned to him.

54. *Scævola, Opinions, Book I.*

A testator bequeathed to one of his heirs, in addition to his share, certain lands already equipped, together with the slaves; these slaves were the debtors of the master. The question arose whether an action on the *peculium* would lie against him in favor of the other heir? The answer was that it would not.

55. *Neratius, Opinions, Book I.*

He whom I was suing on the *peculium* was forcibly carried away by you; what was the *peculium* at the time that you removed him by force must be considered.

56. *Paulus, On Neratius, Book II.*

What my slave has promised to pay to me for one of my debtors should be deducted from the *peculium*, and is, nevertheless, due from the debtor. But let us see whether the obligation of him for whom the promise was made should not be held to become a part of the *peculium.* Paulus says that if, when anyone brings an action on the *peculium* the master wishes to deduct this, he undoubtedly makes the claim part of the *peculium.*

57. *Tryphoninus, Disputations, Book VIII.*

Where a son or a slave, with reference to whom an action on the *peculium* alone has been brought, dies before the case is terminated, that *peculium* will be taken into consideration which any of the parties possessed when he died.

(1) Julianus says that where anyone by his will directs that his slave shall be freed, and bequeaths to him his *peculium*, he is understood to bequeath it at the time when he becomes free; and therefore all increase of the *peculium*, of whatever description, acquired before the estate was entered on, will belong to the manumitted slave.

(2) But where anyone bequeaths the *peculium* of the slave to a stranger, the question is as to the supposed intention of the testator; and the more probable opinion is, that whatever was in the *peculium at* the time of his death is bequeathed, with the understanding that any accessions which may be made to the property of the *peculium* when the estate is entered upon, as, for instance, the offspring of female slaves and the increase of flocks, are owing, but that whatever was given to the slave or he acquires by his own labor, does not belong to the legatee.

58. *Scævola, Digest, Book V.*

A party left to one of his heirs certain lands as they were equipped, together with slaves and other property, and whatever was there. These slaves were indebted to the master with reference to their monthly accounts, as well as for other reasons. The question arose whether the action on the *peculium* would lie in favor of the other heirs against him for the money owed by them? The answer was that it would not lie.

TITLE II.

WHEN THE ACTION ON THE PECULIUM IS LIMITED TO A YEAR.

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

The Prætor says: "After the death of him who was under the control of another, or after he has been emancipated, manumitted, or alienated, I will grant an action only to the amount of the *peculium*, within a year from the time when proceedings could first have been instituted with reference to the matter, where anything has been done through the malicious intent of him under whose control the party was, on account of which the value of the *peculium* is diminished."

(1) So long as the slave or the son is under control, the action on the *peculium* is not limited by time, but after his death, or after he has been emancipated, manumitted, or alienated, it becomes limited by time, that is to say to a year.

(2) The year will, however, be computed to the extent that it is available, and therefore Julianus says that if the obligation is conditional, the year must be computed, not from the time when the party was emancipated, but from that at which, if the condition was complied with, suit could be brought.

(3) The Prætor, with good reason, made the action temporary in this instance, for, as the *peculium* is extinguished by death or alienation, it is sufficient for the obligation to be extended for a year.

(4) Alienation and manumission, however, relate to slaves, and not to sons, but death refers to slaves as well as sons, emancipation, however, to sons alone. Moreover, if he ceases to be under control in some other way, without emancipation, the action will only lie for the term of a year. Also if the son becomes his own master through the death or deportation of his father, the heir of his father, or the Treasury, will be liable to the action on the *peculium* within a year.

(5) In case of alienation, a vendor is undoubtedly included, who is liable to an action on the *peculium* within a year.

(6) But also, if he has given away the slave, or exchanged him, or bestowed him by way of dowry, he is in the same position.

(7) So, likewise, is the heir of one who has bequeathed the slave, but not with his *peculium;* for if he had bequeathed him with his *peculium*, or had directed him to be free, a question might arise; and it seems to me to be the better opinion that the action *De peculio* should not be granted against a manumitted slave, nor against him to whom the *peculium* was bequeathed. Will the heir then be liable? Cæcilius says that he will be liable, because the *peculium* is in the hands of him who released himself from obligation by delivering it to the legatee.

Pegasus, however, says that security should be furnished to the heir by him to whom the *peculium* has been bequeathed, because the creditors apply to him, and therefore if he delivers it without security, suit can be brought against him.

(8) Where the heir is asked to deliver up the estate the slave and the *peculium* being reserved, and an action on the *peculium* is brought against him, he cannot make use of the Trebellian exception; as Marcellus, when discussing this point, admits. He, however, to whom the estate is delivered, is not liable, as Scævola says, since he has not the *peculium*, nor has committed any fraudulent act to avoid having it.

(9) Pomponius also, in the Sixty-first Book, says that if an usufruct is extinguished, the action should be granted against the usufructuary within a year.

(10) The question was raised by Labeo whether if you, during the lifetime of the son whom you believed to be dead, brought an action, and, because the year had elapsed, were defeated by an exception; you should be permitted to again institute proceedings after the mistake had been discovered? He says you should be permitted to do so only for the amount of the *peculium*, but not for what had been employed for the benefit of the property of the other party; for in the former case the action with reference to any advantage which had been obtained by its employment was properly brought, because the exception based on the lapse of a year relates to the *peculium*, and not to what had been used for the benefit of the property.

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

Since, after the death of a son under paternal control, an action, limited to a year, will lie

against the father, just as a perpetual action will lie during the lifetime of the son; therefore, if an action *De peculio,* in a case involving a rescission of contract, is brought, it must be within six months after the death of the son; and the same should be said with reference to all other actions which are of a temporary character.

(1) Where a slave, to whom money has been loaned, is in the hands of the enemy, the action on the *peculium* against the master is not limited to a year, so long as the slave can return under the law of *postliminium.*

3. *Pomponius, On Quintus Mucius, Book IV.*

The term *peculium* must sometimes be employed even if the slave has ceased to exist in the course of nature, and the Prætor grants an action on the *peculium* within a year; for, in this instance also, both increase and diminution are to be taken into consideration, as belonging to the *peculium*, although it has ceased to exist, as such, through the death or manumission of the slave; so that there may be an accession to it as to a *peculium*, by crops, or by the yield of flocks, or by the offspring of female slaves, and a diminution, as, for instance, where an animal has died, or has been lost in any other way.

TITLE III.

CONCERNING THE ACTION BASED ON THE ADVANTAGE DERIVED BY A FATHER OR A MASTER WITH REFERENCE TO HIS PROPERTY.

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

Where those who are under the control of another have nothing in the *peculium*, or have something, but not the entire amount; the persons having them under their control are liable if what was received has been used for the benefit of their property, the contract being held to have been rather made with them.

(1) Nor does the action having reference to the employment of property in the affairs of another, seem to have been promised without effect, as that on the *peculium* would be sufficient; for Labeo very properly says that the property may be so applied, and the action on the *peculium* not be applicable; for what should be done if the owner had taken away the *peculium* without malicious intent? What if the *peculium* is put an end to by the death of the slave, and the year in which the suit can be brought has elapsed? For the suit having reference to the employment of property in the affairs of another is perpetual, and will lie whether the party has taken away the *peculium* without malicious intent, or the action on the *peculium* is terminated by the lapse of a year.

(2) Moreover, if several are bringing suits on the *peculium*, he should be benefited whose money has been employed in the business of the master, so that he will have the more profitable action. If someone has come forward and brought an action on the *peculium*, it should certainly be considered whether the action founded on the employment of property for another's benefit will not lie. Pomponius states that Julianus is of the opinion that the action on the ground of the employment of property for another's benefit is destroyed by the action on the *peculium*, because what has been employed for the benefit of the master and paid on account of the slave, has been bought into the *peculium*, just as if it had been paid by the master to the slave himself, but only so far as the master has paid in the action on the *peculium* what the slave had used in his affairs; otherwise, if he has not paid it, the action based on the employment of the property remains.

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

The action founded on the employment of property for another's benefit cannot be brought against anyone who has liberated a slave in consideration of money received; because, by granting him his freedom, he is not enriched by the money.

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

If, however, the slave pays his master a certain sum of money which he has borrowed from me, in order that he may be manumitted, the said sum of money should not be computed as forming part of the *peculium*, but there is held to have been employed in the business of the master any amount in excess of the value of the slave which the latter paid.

(1) Property is held to have been employed in the business of the master, if the slave uses in his master's business the very article which he received; as, for instance (where he received wheat and used it up as food for the slaves of his master) or where he pays to one creditor of his master money which he has borrowed from another creditor. But if he made a mistake in paying, and thought a party to be a creditor who was not one, Pomponius says in the Sixty-first Book that this also is property employed for the benefit of the master, so far as the right of the latter to recover it as not being due is concerned; or where the slave, for the sake of transacting or managing the business of his master, performed any act (for example, if he borrowed money for the purpose of purchasing grain for the maintenance of his slaves, or in order to clothe them) or, when, having borrowed for the *peculium*, he afterwards uses the money for his master's benefit; for the law which is at present in force provides that there may be an action on the ground of property employed for another's benefit, even though he employs it at first for the benefit of the *peculium*, and afterwards in the business of his master.

(2) We state, as a general rule, that an action founded on the employment of property in the business of another will lie in those cases in which an agent would be entitled to an action on mandate, or a person who had transacted business without being empowered to do so, could bring suit on the ground of voluntary agency; and wherever the slave has consumed anything in order that the property of the owner might be improved, or not deteriorated.

(3) Thus, if a slave has obtained money in order to support, feed, and clothe himself, according to the custom of his master, that is to say, to the extent to which his master was in the habit of furnishing him with these necessaries; Labeo states that he will be held to employ the money for his master's benefit and therefore this will be the case with reference to a son.

(4) But where, having borrowed money, he adorns his master's house with stucco work and certain other things which are more for the purpose of pleasure than for that of utility, he will not be held to have employed the money in this manner; for the reason that an agent could not have charged this, unless he had happened to have the order of the master or his consent, nor should the master be burdened on account of what he himself would not have done. What course then should be pursued? The master should permit the creditor to remove these things — of course without injury to the house — lest the owner should be forced to sell it in order to make good the amount by which its value had been increased.

(5) Labeo also says that if a slave having borrowed money from me lends it to another, the owner is liable to the action based on property used for another's benefit, because an obligation has been acquired by him; and this opinion is approved by Pomponius, if he did not make the obligation a liability of the *peculium*, but treated it as acquired on the account of his master. For which reason the master will be bound to the extent that if he did not think it was advantageous to himself to hold the obligation of the debtor, he could assign the rights of action to his creditor, and make him his agent.

(6) Labeo says that it is also an instance of the employment of property for the business of the master where a slave, having borrowed money, uses it with his master's consent to purchase articles of luxury, for example, ointments, or anything which he may have obtained for pleasure, or for some dishonorable purpose; for we do not consider whether what was consumed was for the good of the master, but whether it was employed in his affairs.

(7) Hence, it is very properly said also that if a slave has procured grain for the purpose of feeding the slaves of his master, and has deposited the same in his master's granary, and it has

been destroyed, or spoiled, or burned, it is held to have been employed in the affairs of the master.

(8) Moreover, if he purchased a necessary slave for his master, and the slave died, or he propped up a building and it fell down; I should say that an action for property employed for the benefit of another will lie.

(9) Where, however, he received it for the purpose of employing it in the affairs of his master, but did not do so, and deceived the creditor; it is not held to be so employed, nor is the master liable, lest the credulity of the creditor prejudice the master or the craftiness of the slave injure him. What, however, would be the case if the slave was one who was in the habit of employing what he received in the affairs of his master? Even in this instance, I do not think that this injures a master if the slave receives it with a different intention, or if he received it with this intention but afterwards employed it for another purpose; since the creditor should be careful to ascertain the way in which it was employed.

(10) If the slave borrowed money for the purpose of purchasing clothing and the money is lost, who can bring the action for property employed for the benefit of another, the creditor or the vendor? I think, however, that if the price has been paid, the creditor will be entitled to the action based on the ground of property employed for another's benefit, even though the clothing has been destroyed; but if the price has not been paid, but the money was given for the purpose that clothing should be purchased, and the money was lost, but the clothing has been divided among the slaves, the creditor will undoubtedly be entitled to the action for money employed in the business of another.

But has not the vendor also a right of action, because his property has been used in the affairs of the master? Reason demands that he should be liable, hence the result is that the master will be liable to two parties on account of one transaction. Therefore, even if both the money and the clothing have been destroyed, it must be said that the master will be liable to both, since both intended to employ the articles in his affairs.

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

But it must be said that the position of the more diligent party should be the better one, for it is unjust that the master should have judgment rendered against him in favor of both on the ground of the employment of property for his benefit.

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

If a slave purchases articles, which are not necessary, as if they were required by his master, as, for instance, slaves; Pomponius says that they will be held to have been employed in his affairs to the extent of the true value of the slaves; but if he should purchase articles which were really necessary, the master will be held liable for the entire amount for which they were sold.

(1) He also says that, whether the master ratifies the contract of the slave or not, the action on the ground of property employed for his benefit will lie.

(2) An action based on his order can be brought for what the slave purchased for his master, if he did so at his desire, but if he did not make the purchase at his desire, but the master indeed ratified his act; or, on the other hand, if he purchased something necessary or beneficial to the master, an action for property employed for his benefit will lie; but if none of these conditions exist, an action on the *peculium* will lie.

(3) It is established that not only the money which passes at once from the creditor to the master is employed for the benefit of the latter, but also that which was in the *peculium* in the first place. This, however, is true in every instance in which the slave transacting his master's business makes him more wealthy with the money of the *peculium.* Otherwise, if the master deprives the slave of the *peculium*, or sells him along with it, or disposes of the property

belonging to the *peculium* and collects the price of the same, this is not held to be employed in the business of the master.

6. *Tryphoninus, Disputations, Book I.*

For, if this were true, he would be liable to the action for property employed for his benefit, even before he sold what composed the *peculium;* because by this very fact that the slave had the property in the *peculium* he would become more wealthy, which is manifestly false.

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

And, therefore, also, if the slave gives his master things forming part of the *peculium*, the action for property employed in his affairs will not lie; and this is true.

(1) It is evident that, if the slave should borrow money, and pay it to his master with the intention of giving it to him; provided he does not wish to make him a debtor to the *peculium*, an action for property employed in the affairs of the master can be brought.

(2) What Mela says is not true, namely, that if you give silver to my slave in order that he may make cups out of any silver he chooses, and then, after the cups have been made, the slave dies; you will be entitled to an action for property employed for the benefit of another against me, since I can bring an action to recover the cups.

(3) What Labeo says is entirely true, that is, if the slave purchases perfumes and ointments and uses them at a funeral which concerned his master, he will be held to have employed them in his master's business.

(4) He also says that if I purchase from your slave an estate which belonged to you, and I pay money to the creditors, and then you deprive me of said estate, I can recover it by an action on purchase; for it would be held that it was employed in your affairs. Moreover, if I purchase an estate from a slave in order that I may set off what is due to me from said slave, even though I paid nothing, still I can recover in an action on purchase what has come into the hands of the master.

I, however, do not think that the purchaser is entitled to an action for property employed in the business of another, unless the slave had the intention of employing it in his master's affairs.

(5) If a son under paternal control, having borrowed money, gives it as dowry for his daughter, it is held to have been employed in the affairs of his father to the extent that the grandfather was about to give the dowry for the granddaughter. This opinion seems to me to be correct, only where he gave the money with the intention of transacting the business of his father.

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

And Pomponius says that it makes no difference whether he gives it for his daughter, or his sister, or a granddaughter, the issue of another son. We shall, therefore, say the same where a slave has borrowed money, and given it as dowry, on account of the daughter of his master.

9. *Javolenus, On Cassius, Book XII.*

If, indeed, the father was not about to give a dowry, it is not held to have been employed in his business.

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

Where a son has become surety for his father and has paid the creditor, he is held to have employed the money in the affairs of his father, because he released the latter from liability.

(1) What Papinianus states in the Ninth Book of Questions is an instance similar to this, namely: where a son undertook the conduct of a case as the voluntary defender of his father, and judgment was rendered against him, his father is liable to an action for property employed in his behalf, for the son released him from liability by undertaking his defence.

(2) Papinianus also discusses the case in which I stipulated with the son for what the father was compelled to pay, and then I brought suit against the son; for, in this instance, also, an action will lie for money employed for another's benefit, unless the son, when he bound himself, intended to make a gift to his father.

(3) Wherefore, it can be said that if he appears in an action on the *peculium* as the defender of his father, the latter will be liable to the action for property employed for his benefit, to the extent of the *peculium;* and the benefit to be derived from this opinion will be that if the action *De peculio* should be terminated, he can be sued in that for money employed for his benefit. I think that the father is liable to an action for money employed for his benefit, even before an adverse decision was rendered, after issue has been joined in behalf of the father.

(4) Property is held to have been employed in the affairs of a father to the extent that any use of the same is made; and hence if a part has been employed, an action can be brought for that part.

(5) But will the master be held liable only for the principal, or for the interest as well? And, indeed, if the slave promised interest, Marcellus states in the Fifth Book of the Digest that the master must pay it, but if he did not promise it, it certainly is not due, because it was not included in the agreement. It is evident that if I, having the master in mind, paid money to a slave who was not managing his master's business, but I myself was managing it, I shall be able to institute proceedings to collect the interest also, by an action based on voluntary agency.

(6) We understand property to be employed in the business of a master when it continues to be so employed; and hence an action on the ground of property employed in his affairs will only lie where payment has not been made by the master to the slave or the son. If, however, this has been done to the prejudice of the creditor, that is to say, if the money has been paid to the slave or the son who is liable to lose it, since it has been paid, it ceases to have been employed for this purpose; but it is perfectly just that the action on the ground of malicious intent should lie either against the father or the master; for a debtor to the *peculium*, also, is not released from liability, if he fraudulently pays the slave what he owed him.

(7) Where the slave is a debtor of the master, and, having borrowed money from another pays him; he does not employ it in the business of the latter to the extent to which he is indebted to him, but he does so as far as the excess is concerned. Hence, if, when he owed his master thirty *aurei,* having borrowed forty, he paid the sum to his creditor, or spent it on the slaves; it must be said that an action for the employment of money in the business of another to the amount of ten *aurei* will lie; but if he owes the whole amount, it is not held to have been employed in this manner; for, (as Pomponius says), it is considered that relief is granted against the profit of the master, and therefore, if he was indebted to the master when he used the property in his affairs, it is held that nothing was employed for that purpose, but if afterwards he became indebted to him, it ceases to be employed for that purpose; and the same rule will apply if he should pay him.

He says moreover, that if a master makes him a present of an amount equal to that which he paid the creditor in his behalf, and this was done with the intention of remunerating him, the money will not be held to have been employed for his benefit. If, however, he gave it to him in any other way, the use of the money for this purpose will still exist.

(8) He also makes the following inquiry. If he employed ten *aurei* in the business of his master, and afterwards borrowed the same amount from the latter, and, in addition to this, he has a *peculium* of ten *aurei,* should it be considered that the employment of the money in his master's affairs has ceased? Or shall we, indeed, not take away the right of action for property employed in his affairs, as there is *peculium* from which the debt can be paid; or should we preferably make the deduction from each, *pro rata?* I think, however, that the action for money employed for the benefit of the master has ceased to be available, since he has become

a debtor to the master.

(9) He also asks whether, if he has employed money in your affairs, and has become your debtor, and then your creditor for the same amount that he owed you, the action based on the employment of money for the benefit of another is revived, or whether it cannot be reestablished retroactively? The latter opinion is correct.

(10) He also discusses the point whether a son can employ property in the affairs of his father in accordance with what may transpire; for example, if the father and son are co-debtors, and the son, having borrowed money, pays it in his own behalf; or if you have lent money to the son under the direction of the father, and the son has paid you the debt. It seems to me that if the money had actually come into the hands of the father, it will be held to have been employed in his business; but if this was not the case, and the son paid while transacting his own affairs, an action on the ground of property employed in the business of another will not lie.

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

Whatever a slave has borrowed for this purpose, namely, in order to pay it to his own creditor, will not be employed in his master's business, although the latter is released from liability to an action on the *peculium.*

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

If a son under paternal control or a slave purchases land for his father or master, this will be held to have been employed in his affairs; but in this way, that, if it was worth less than the sum for which it was purchased, it would be held to have been employed in his business to the amount of what it is worth; if, however, it is worth more, no greater sum will be held to have been employed for that purpose than that for which it was purchased.

13. *Ulpianus, On the Edict, Book XXIX.*

If property has been used in the business of one of two masters, the question arises whether he alone for whose benefit it was employed can be sued, or his partner as well? Julianus says that he alone should be sued in whose affairs the money was employed, just as where he alone directed the contract to be made; and I think this opinion to be correct.

14. *Julianus, Digest, Book XI. — Note by Marcellus.* Sometimes, also, the action for property employed in the affairs of another can be brought against one joint-owner; for the reason that such employment of property has taken place, and he, having been sued, can recover from his partner the amount for which judgment has been rendered against him. What shall we say, however, if the slave has been deprived of the *peculium* by one of the owners? Paulus says that this question only arises where an action on the *peculium* does not lie.

15. *Ulpianus, Disputations, Book II.*

Where a son under paternal control has agreed to pay what his father owed, it should be considered whether the action for the employment of property in the affairs of another ought to be granted. He did not, however, release his father, for he who makes such an agreement binds himself, indeed, but does not discharge his father from liability. It is evident that, if he pays after making the agreement, although he may be held to have done so in his own behalf, that is on account of his having made the agreement, he will, nevertheless, be properly said to have employed the property in the affairs of his father.

16. *Alfenus, Digest, Book II.*

A certain party leased a tract of land to his slave for cultivation, and gave him oxen, and as these oxen were unsuitable for the work, he ordered them to be sold and others to be obtained by means of the money received. The slave sold the oxen, and bought others, but did not pay the money to the vendor, and afterwards became financially embarrassed. He who sold the

oxen brought suit against the master in an action on the *peculium,* and for money which had been employed in his business, as the oxen on account of which the money was demanded were in possession of the master.

The answer was, that no *peculium* was held to exist, except what remained after what the slave owed to the master had been deducted, and that it seemed to him that the oxen were, in fact, employed in the master's affairs, but that he had paid on this account the amount that the first oxen had been sold for; and that judgment should be rendered against the master for the excess of the value of the last oxen.

17. *Africanus, Questions, Book VIII.*

A slave, having borrowed money for the business of his master, lost it without negligence; it was held that, notwithstanding this, an action for money employed in the business of another could be brought against the master. For, in like manner, if my agent, being about to spend money in my business, and having borrowed money lost it without negligence, he can properly bring an action against me on the ground of mandate, or on that of business transacted.

(1) I entered into a contract with Stichus the sub-slave of your slave Pamphilus; the action on the *peculium* and that for property employed in the affairs of another ought to be granted in such a way that whatever had been employed in your business or with reference to the *peculium* of Pamphilus, should be included in the same; that is to say, even if it was brought after Stichus had died, or been alienated.

If, however, I bring suit after the death of Pamphilus, the better opinion is that, even though Stichus may be living, still, with reference to what has been employed for the benefit of the *peculium* of Pamphilus, the action should not be granted, except within a year from the time when he died; for I should then be held to be, as it were, instituting proceedings with reference to the *peculium* of Pamphilus, just as where I brought suit for what I lent by his direction.

It should not concern us that Stichus, on whose *peculium* suit is brought, is living, since this property cannot be in his *peculium,* unless that of Pamphilus still remains. The same principle will compel us to hold that what has been employed for the benefit of the *peculium* of Pamphilus, must be made good in such a way that what Pamphilus owes you shall first be deducted, but what has actually been used in your business shall be made good even if what Pamphilus owes you had not been deducted.

18. *Neratius, Parchments, Book VII.*

Although you have become surety for my slave in a contract which was made with reference to my business, for example, if where a slave had purchased grain for the maintenance of the entire body of slaves, you gave security to the vendor of the grain; still, the better opinion

is that you may bring the action *De peculio* on this account, but not an action based on the employment of property in the affairs of another; so that an action on the latter ground will lie in any contract solely in favor of the person who loaned the very property which has been employed in the affairs of the matter.

19. *Paulus, Questions, Book IV.*

A son under paternal control purchased a toga; and afterwards, having died, his father being ignorant of the fact, and supposing it to be his, used it at his funeral. Neratius states in the Second Book of Opinions that this is held to be employment of property in the affairs of the father, but that, in the action on the *peculium*, what does not exist should be computed only in one instance, that is where this is occasioned by the malicious fraud of him against whom suit is brought.

If, however, the father was obliged to purchase a toga for his son, it was employed in the

affairs of his father, not now when it was used at the funeral, but at the time he purchased it, for the funeral of the son is a debt of the father. Neratius, also, who thought that the father was liable on the ground of property employed in his business, explains that this transaction (that is to say the burial and the funeral of the son) constitute a debt of the father and not of the son. He, therefore, having become a debtor to the *peculium*, although the property is not in existence, can also be sued on the *peculium;* and in this action is also included what has been employed in his affairs; which addition is, however necessary, after a year has elapsed from the death of the son.

20. *Scævola, Opinions, Book I.*

A father promised a dowry for his daughter and agreed that he would support her; and, as he did not keep his promise, the daughter borrowed money from her husband, and died during marriage. I gave it as my opinion that, if what had been lent had been expended for something without which she could not support herself, or could not maintain her father's slaves, an equitable action should be granted on the ground of property employed in the business of the father.

(1) The slave of a party who was absent on public business lent money to the slaves of a ward, the guardian signing the stipulation, which stated that the latter was responsible for the contract. The question arose whether an action would lie against the ward? I answered that, if the property was given for the business of the ward it was employed for that purpose; and although, in order that the contract with reference to the slaves might be the better confirmed, the guardian had made the promise, it should, nevertheless, be said that an action for property employed in the business of another might be brought against the ward.

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

A man married a girl under paternal control, the father having promised a dowry, and it was agreed between all the parties that either

the father, or she herself, should meet the expenses of her support. The husband lent her money, as he very properly thought that the father would give her an allowance to the amount that he had proposed to give his daughter. She used this money for necessary purposes for herself and for the slaves which she had with her, and the management of his domestic affairs having been committed to her, she used a certain amount of the money of her husband for the same purpose. Then, before the father had paid the allowance, the daughter died, the father refused to pay the expenses, and the husband retained the property of his wife.

I ask whether an action for money employed for his benefit will lie against the father? The answer was that if what was lent was expended for articles without which she could not maintain herself, or support the slaves of her father, an equitable action for property employed for another's benefit should be granted.

TITLE IV.

CONCERNING THE ACTION BASED ON THE AUTHORIZATION OF THE FATHER OR THE MASTER.

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

An action is very properly granted against a master for the entire amount, on the ground that he has authorized a contract; for, to a certain extent, a contract is entered into with the party who ordered it to be made.

(1) Authority must, however, be understood, whether anyone gives it in the presence of a witness, or by a letter, or verbally, or by a messenger, or whether the authority was given in a specified contract, or in general terms; and therefore, if a party made a statement as follows: "Transact what business you desire with my slave Stichus, at my risk," he is held to have

directed that everything be done, unless a special agreement prohibits something.

(2) I ask, however, whether he can revoke this sanction before a debt is incurred. I think that he can do so, just as if he had given a mandate, and afterwards, having changed his mind, before the contract had been made, he had revoked the mandate and notified me.

(3) Also, if a father or a master has given a mandate, he is held to have conferred authority.

(4) And, moreover, if a master has signed the written contract of the slave, he will be liable in the proceeding aforesaid.

(5) But what if he becomes surety for the slave? Marcellus says that he is not liable to this action, for he intervened as a stranger; and he does not say this for the reason that the master is liable on the ground of security, but because to give authority is one thing, and to become surety is another; and he further says that even though the security may be worthless, he will not be liable on account of having given authority; and this is the more correct opinion.

(6) If anyone should ratify a transaction made by his slave or his son, an action on this ground will be granted against him.

(7) Where a ward, who is the owner, grants authority, he is undoubtedly not liable, unless he did so with the consent of his guardian.

(8) Where a contract is entered into with a slave by authority of the usufructuary, or with that of a person whom he is serving in good faith as a slave; Marcellus thinks that this action should be granted against him, and I also approve this opinion.

(9) Where a contract is entered into with a slave by authority of the curator of a minor, or of an insane person, or of a spendthrift; Labeo thinks that the action should be granted against the party whose slave he was, and the same applies to a veritable agent. If, however, the latter is not a genuine agent, Labeo also says that the action should preferably be granted against the party himself.

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

Where a loan is made to the slave of a ward, with the sanction of his guardian, if the loan was for the benefit of the ward, I think that an action on the ground of the guardian's sanction should be granted against the ward.

(1) Where a loan is made by the authority of the master of a female slave, or by that of the father of a girl, an action on this ground should be granted against him.

(2) If a contract is made with a slave of another by my authority, and I afterwards purchase the slave, I will not be liable to this action; lest a proceeding which, in the beginning, was of no effect, be rendered valid by the occurrence.

3. *Ulpianus, Opinions, Book II.*

A master who has directed money to be loaned to his slave at six per cent interest, is liable for the amount which he has authorized; and an obligation of pledge does not affect lands which a slave has encumbered without the consent of his master.

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

If any business is transacted with a slave belonging to a city, by the authority of the official appointed for the management of its affairs, Pomponius says that an action on this ground can be brought against him.

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

If a master, or a father, being about to receive a loan of money, directs it to be paid to his slave or his son, there is no doubt that a personal suit for recovery can be brought against him, himself; and it is certain that, in this instance, the present action will not lie.

(1) Where one of the masters of a slave directed a contract to be entered into with him, he alone will be liable; but if two directed this to be done, an action can be brought against either of them for the entire amount, because they resemble two parties who have given a mandate.

THE DIGEST OR PANDECTS.

BOOK XVI.

TITLE I.

ON THE VELLEIAN DECREE OF THE SENATE.

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

The Velleian Decree of the Senate very fully provides that women cannot become sureties for anyone.

(1) For as, by our customs, women are deprived of civil office and very many things which they do are void by mere operation of law, much more should they be deprived of the power to perform an act in which not only their services and the mere employment of the same are involved, but also the risk of their entire private property.

(2) It seems to be just to come to the relief of a woman in this manner, so that an action should be granted against an old debtor, or against a party who had rendered a woman liable in his behalf, for the reason that he, rather than the creditor, had taken advantage of her.

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

In the first place, during the reign of the Divine Augustus, and subsequently during that of Claudius, it was forbidden by Imperial Edicts that women should become sureties for their husbands.

(1) Afterwards, a Decree of the Senate was enacted by which relief was granted in the most perfect manner to all women. The terms of this Decree of the Senate are as follows: "Whereas, Marcus Silanus and Velleius Tutor, Consuls, have made statements concerning the obligations of women who have become responsible for the debts of other persons, and have given advice on this subject, as to what was necessary to be done; and, whereas this matter relates to securities and the making of loans in behalf of others for whom women had become bound, and although it appears to have been formerly decided by law that no demand, on this account, could be made upon them, nor any action be brought against them when they performed the duties of men, and as it is not just for them to be liable to obligations of this description; therefore, the Senate has decreed that those to whom application is made in court must act properly and in conformity with the established mode of procedure, and exert themselves so that the will of the Senate with respect to this matter may be observed."

(2) Therefore, let us examine the terms of this Decree of the Senate, after having previously eulogized the forethought of this most distinguished body of men which has brought relief to women on account of the weakness of their sex, in many supposed, as well as actual instances.

(3) Relief is only granted to them, however, where they have not been guilty of deceit, and this the Divine Pius and Severus stated in a Rescript, for assistance is rendered to those who have been deceived, but not to such as are guilty of fraud; and this is set forth in the Rescript of Severus, written in the Greek language, which says that this Decree of the Senate is not for the purpose of aiding women who are guilty of deception, for it is the infirmity of women, and not their cunning, that deserves assistance.

(4) Every kind of obligation is included in the Velleian Decree of the Senate, whether women have rendered themselves liable verbally, by the delivery of property, or by any other contract whatsoever.

(5) Where a woman even appears voluntarily in defence of anyone, there is no doubt that she binds herself in his favor, for she assumes the obligation of another, since she exposes herself to have judgment rendered against him in a matter of this kind. Hence a woman is not permitted to undertake the defence of her husband, her child, or her father.

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

Where, however, a woman appears for the defence of a party who, if he has judgment rendered against him, will have recourse against her, (as, for instance, where she appears in defence of the vendor of an estate which she has sold to him or to a surety of hers) she is not held to have bound herself in his behalf.

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

If, however, I make a contract in the beginning, when I am ignorant for whom she wishes this to be done, the Decree of the Senate undoubtedly will not apply; and this the Divine Pius and our present Emperor stated in a Rescript.

(1) Hence, if when she wished to make a gift to Titius, she borrowed a sum of money from me, and gave it to Titius, the Decree of the Senate will not apply; but if she was about to give it to you, and pays the money to your creditor, she does not bind herself, for the Senate intended to give relief to a woman who had obligated herself, and not to one who had made a donation; and this was done for the reason that a woman incurs an obligation with more facility than she makes donations.

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

It makes no difference whether the woman has paid the money for the purpose of discharging the debt, or has given in payment any of her property whatsoever, for even if she had sold her property and either paid the price received for the same in behalf of another, or substituted the purchaser to another creditor, I do not think that the Decree of the Senate will be operative, so far as the creditor of another party is concerned.

6. *Ulpianus, On the Edict, Book XXIX.*

Where persons bind themselves as sureties in behalf of the defender of a son who is absent, by the direction of his mother; the question arises whether relief will be granted them also by this Decree of the Senate? Papinianus says, in the Ninth Book of Questions, that they can make use of an exception, nor does it make much difference that they have given security for the defender, since they did so having in mind the direction of the mother. He says that it is evident that, if the party who accepted the said sureties was ignorant that the mother directed them to assume the obligation, the exception based on the Decree of the Senate can be met with a reply on the ground of fraud.

7. *Papinianus, Questions, Book IX.*

Therefore, although the surety, having filed a replication on the ground of fraud, loses the defence based on the exception, he will, nevertheless, not be entitled to a replication as against the woman, because he cannot allege ignorance of the facts. It would not be unjust, however, for an action on the ground of business transacted to be granted against a defender; because it is established by the Decree of the Senate that a proceeding on the ground of mandate is void, and he is released by payment of the money by the surety.

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

Although the giving of a pledge establishes an obligation, still, Julianus states in the Twelfth Book of the Digest that the restoration of a pledge does not constitute the giving of security, if a woman, who is the creditor, releases to the debtor the property which she received in pledge.

(1) Where a woman appears before the guardians of her son to prevent them from selling his land, and promises to indemnify them; Papinianus, in the Ninth Book of Questions, does not think that she bound herself as surety, for she did not accept either the old or new obligation with reference to another, but she herself contracted this obligation.

(2) Where a woman binds herself to Primus in behalf of Secundus, and afterwards binds herself in behalf of Primus to his creditor; Julianus states in the Twelfth Book of the Digest

that she has bound herself twice, once for Primus to Secundus, and again for Primus to his creditor, and therefore she has contracted an obligation both for Primus, and against him.

Marcellus, however, notes that a difference exists here, that is, whether it must be understood that the woman, in the beginning, has been substituted in the place of another, and has undertaken to assume the burden of the debtor from whom the creditor desired the obligation to be transferred; or whether she was substituted as a debtor, so that, if this was the case, there is but one giving of security. Hence, in accordance with this distinction, which existed at first sight where she has, so to speak, been substituted as a debtor, Marcellus will not grant her an exception based on the Decree of the Senate. However, after having judgment rendered against her, or even before this takes place, she will certainly be entitled to a personal action against the party by whom she has been substituted.

(3) Sometimes a suit for recovery will lie in favor of a woman who gives security, to recover what she has paid, or if she has not yet paid anything, to obtain her release from liability, for example, where, having bound herself in violation of the Decree of the Senate, she substitutes her debtor; as, in this instance, a personal action for recovery will lie in her favor against her creditor, just as if she brought suit for money which she had paid, for anyone who substitutes a debtor makes payment.

(4) But if he who has been substituted by the woman is not indebted to her, he can avail himself of the exception based on the Decree of the Senate, as he could have done if he had been her surety.

(5) It is evident that if a woman, being about to bind herself, substitutes her debtor, the Decree of the Senate will not apply, because, even though she paid the money, it will not be applicable; for the woman is granted relief by the Decree of the Senate, but does not make restitution of property which has been lost.

(6) If, however, she has substituted some one who was not her debtor, a fraud is held to have been committed against the Decree of the Senate, and therefore an exception will be granted.

(7) Where a woman becomes bound for a debtor, the former action is granted against him, even though he may have been discharged from liability by a release before the woman obligated herself.

(8) Where a creditor has agreed with his debtor that the latter shall provide some one in his place, and this proposition having been accepted, he is thereupon released, and he then gives a woman as surety who can have recourse for aid to the Decree of the Senate, a personal action can be brought against him, just as if he had not given any surety; for what difference is there between not giving any, and giving one of this kind? Therefore, a prætorian action will not be necessary, since a personal action for recovery will lie.

(9) Marcellus also states that, if a creditor releases a woman after she has become a surety, an action for restitution should, nevertheless, be granted to the creditor, for he has released an obligation which is void.

(10) If a woman, after having become a surety, makes payment in such a way that she cannot recover, the former debtor can very properly refuse to defend an action brought against him; but, as the principal debtor is released, and the woman makes payment in such a way that she cannot recover, he cannot recover from her either, if he should pay, and the creditor should release him in the same manner.

(11) Although the action is restored against all those who are released, this is, however, not done in favor of all creditors; as, for instance, where there are two creditors who enter into a stipulation, and a woman becomes surety to one of them, the obligation is restored in the case of him alone to whom she became surety.

(12) Where a creditor becomes the heir of a woman who has assumed an obligation of this

kind, it should be considered whether the action for restitution will not be available. Julianus says in the Twelfth Book that he is, nevertheless, entitled to the action for restitution, and this is not unreasonable, as he in fact succeeded to a woman not legally bound, and therefore this debt will not be taken into account in the administration of the *Lex Falcidia.*

(13) It is evident that, if you propose to me the case of a woman who has succeeded as heir to an original debtor, it must be said that she can be sued in an action for restitution as well as in a direct action, for it makes no difference whatever under which action proceedings are brought.

(14) If, when I am about to make a contract with you, a woman appears, and I prefer to make a contract with her, she is held to have bound herself as surety, and, in this instance, an action will be granted against you, the effect of which is rather to originate than to restore an obligation; so that, in consequence, you will be bound by the same kind of an obligation as that by which the woman is bound; for example, if the woman is bound by a stipulation, you also can be sued as under a stipulation.

(15) It should be considered whether, if a woman offered herself as a surety for a party who was not bound when a contract was made with him, he should be liable to this action; as, for instance, where a woman became surety for a ward without the sanction of his guardian. I think that the ward would not be bound unless he profited pecuniarily by the contract. Moreover, he for whom the woman became a surety, if he is under twenty-five years of age, can demand complete restitution, or if, while a son under paternal control, he entered into a contract in violation of the Decree of the Senate, he will be entitled to the same privilege.

9. *Paulus, Rules, Book VI.*

Where a woman becomes surety for the slave of another, the action will be restored against the master, just as it would have been against the head of the family as the principal debtor.

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

These actions which are granted against those in whose behalf a woman has become surety, and against their heirs, are perpetual; for they have in view the recovery of the property, and they will be granted also in favor of prætorian successors as well as against them.

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

Where a woman borrows money under the pretext of using it for her own purposes, but in fact with the intention of lending it to another; there is no ground for the application of the Decree of the Senate, otherwise, no one would contract with women, because he would be ignorant what their intentions were.

12. *The Same, Abridgments, Book VI.*

The Decree of the Senate will, however, certainly be operative when the creditor is aware that the woman has become a surety.

13. *Gaius, On the Provincial Edict, Book IX.*

Sometimes, although a woman may have assumed an obligation in behalf of another, she is not assisted by this Decree of the Senate, which happens when a woman assumes an obligation which, at first sight, appears indeed to be that of another, but is, in reality her own; as for instance, where a female slave has provided another debtor on account of an agreement connected with her freedom, and, after her manumission, assumes the very obligation which the debtor owes; or where a woman purchases an estate, and assumes the debts of the estate herself, or where she becomes the guarantor of her own surety.

(1) A creditor has no need of a new action with reference to the pledges of a former debtor, as the Servian Action (which is also designated the hypothecary action) is available in instances of this kind; since it is true that an agreement has been made with reference to pledges, and

that the money has not been paid.

(2) If a woman appears as surety for another party under a certain condition, or with reference to a certain time; while the condition is pending, an action for restitution should be granted to the creditor against the former debtor, if he wishes it; for what advantage will it be to wait for the fulfillment of the condition, or for the expiration of the time, since the former debtor is in such a position that he must, by all means, defend the action brought against him?

14. *Julianus, Digest, Book XII.*

Where a woman has become surety for another in violation of the Decree of the Senate, it is but just that the action should be restored for the benefit of the creditor not only against the original debtor, but also against his sureties; for when the responsibility of the woman was taken away from the creditor on account of the Decree of the Senate, the former cause of action should be restored unimpaired.

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

Where I pay a woman what I owe you, and I stipulate with her that you will ratify her act, and you do not do so; I can institute proceedings based on the stipulation, and the exception founded on the Decree of the Senate which was enacted with reference to the obligations of women, will not be of any advantage to her; for she cannot be considered as refusing to assume the obligation of another, when I remain bound for the debt, and she herself profits by the transaction; and she may rather be held to have returned what was not due, than to have paid it out in behalf of another.

16. *The Same, On Urseius Ferox, Book IV.*

If a woman has become surety for me to Titius, in violation of the Velleian Decree of the Senate, and Titius sues her for the money which I have paid her, she cannot avail herself of the exception based on the Decree of the Senate, for she was in no danger of losing the money, since she already has it in her possession.

(1) If I have accepted a surety for a woman who has bound herself in violation of the Decree of the Senate, Gaius Cassius answered that an exception should be granted to the said surety, only to the extent that the woman had asked him to be responsible for her.

Julianus, however, thinks very properly than an exception should be granted to the surety, even though he is not entitled to an action on mandate against the woman; for the reason that the Senate disapproves of the entire obligation, and the liability of the former debtor to the creditor is reestablished by the Prætor.

17. *Africanus, Questions, Book IV.*

A husband, desiring to make a present to his wife, sold her property at a very low price, and substituted her for that price to one of his creditors. The answer was that the sale was of no force or effect, and if the creditor sued the woman for the money, an exception would be available, even if the creditor has thought that the woman was the debtor of her husband. This does not seem to be contrary to the established principle, in accordance with which if a woman has borrowed money for the purpose of lending it to her husband, an exception cannot be interposed if the creditor was ignorant with what intention she borrowed it; since, indeed, it makes a great deal of difference whether anyone contracts with a woman in the first place, or transfers the obligation of another to her, for then the creditor should be more diligent.

(1) If a woman should say that she had received certain property in pledge to secure her dowry as well as the payment of a sum of money, and a creditor who was about to take the same property in pledge, should see that the dowry was paid, and, being in possession, opposes her when she brings the Servian Action on the ground that the pledge had not been given with her consent; a replication, based on the Decree of the Senate, will be of no advantage to the

woman, unless the creditor was aware that other money, exclusive of that of the dowry, was also due to her.

(2) A woman and Titius borrowed money for the purpose of *expending* it upon property belonging to them in common, and they became joint-debtors for the said money. I said that the woman could not, by any means, be held to have given security for the share of her partner; for if they had borrowed money for a purpose for which the creditor did not lend it, the woman would sustain the greater loss, (as, for instance, where a house jointly owned by them was not propped up, or where a tract of land held in common was confiscated) and it should rather be considered that there was no ground for the application of the Decree of the Senate. But where the borrowed money was obtained for some purchase, then she would be held to have become surety for her share, and therefore the creditor could only collect part of the money from her; because, if he claimed the entire amount, he would be barred by an exception with reference to a portion of the same.

18. *Paulus, On Plautius, Book VIII.*

The same rule applies where Titius and the woman become sureties, as two debtors, for my debtor.

19. *Africanus, Questions, Book IV.*

The guardian of a ward died after having appointed Titius his heir. The latter hesitated to accept the estate, because the guardianship was supposed to have been badly administered, and the mother of the ward having persuaded Titius to enter upon the estate at her risk, he did so, and made an agreement with her that she would indemnify him against any loss he might sustain. If Titius should be compelled to pay anything to the ward on account of the estate, and should sue the mother, it was denied that an exception based on the Decree of the Senate would be available, for it is scarcely to be supposed that any woman would become surety for a party in his presence.

(1) A proposition not unlike the one above mentioned was proposed, namely: A certain man of Prætorian rank died leaving two sons, one of whom had not arrived at puberty, and the other who was the legal guardian of the first. The former wished to reject his father's estate, but was prevailed upon to accept it by the wife of the deceased, who was the mother of the ward, the latter having refused it.

Julianus says that he would have given a similar opinion if the guardian had had judgment rendered against him in a case brought by the ward on this account; and that he would not have been prevented by the Decree of the Senate from recovering damages from the woman.

(2) In this connection, the following point should be discussed, that is, if he who had entered upon the estate by the direction of the woman, suffers any loss because the debtors of the estate are insolvent, would the Decree of the Senate be applicable, since the woman had, to a certain extent, assumed their obligations?

The better opinion is, however, that the Decree of the Senate would not be available on this ground, since she did not intend to become surety for them, but her intention was to guarantee the guardian against the ward, and perhaps the estate against other creditors.

(3) Finally, if we suppose that the woman suffered some loss on account of the purchase of the estate, because the debtors of the same were not solvent; I do not think that there can be any doubt that the Decree of the Senate will not apply, even though she was obliged to pay a certain amount to the creditors.

(4) But what if Titius should hesitate to enter upon the estate, because the obligations of the debtors seem to be of doubtful value; and the woman promised that she, herself, would make good whatever he failed to collect from any of said debtors? It is probable that, in this instance, she has become liable.

(5) You have Titius for your debtor, and the woman desires to become surety for him, and you did not accept her on account of the Decree of the Senate; whereupon she applied to me for the purpose of borrowing money with which to pay you, and I, being ignorant of the reason for her making the loan, she made a promise to me to pay it, and directed me to pay you the money. Then, for the reason that I did not have the sum on hand, I bound myself to pay it to you.

The question arose whether I could collect that money from the woman, or whether an exception based on the Decree of the Senate could be effectually pleaded by her?

The answer was, that it should be considered whether it might not reasonably be said that I could be held liable in the place of the party who had become surety for the woman, and that, just as an exception is granted against a creditor, although he may be ignorant that a woman has become security for him, lest an action on mandate may be available against the woman, so a valid exception can be granted against you, and an action against the woman will be refused me, since this obligation would be at her risk. This can the more readily be stated if, before I had paid you the money, I should discover that the woman had become the surety; but if I should have previously paid you, it should be considered whether or not, an exception would, nevertheless, be granted the woman against me, and I can bring a personal action against you to recover the money; or whether, in fact, it should be held that in the beginning I had lent the money to the woman, and afterwards you had made a loan to me. This indeed was held to be the better opinion, so that there was no ground for the Decree of the Senate, just as where a woman substitutes her debtor there is no ground for considering this as security. The authority states that these two examples cannot properly be compared with one another, since, when the substitution of the debt is made, the woman is not bound; but in the case stated she transfers the obligation of another to herself, which it is certain the Senate did not wish to be done.

20. *The Same, Questions, Book VIII.*

If a woman becomes surety for one debtor, where there are two, the action is restored to the creditor as against both.

21. *Callistratus, Institutes, Book III.*

Where a woman becomes surety for another party, and what has been paid is employed for her benefit, the exception based on the Decree of the Senate will not apply, because she has suffered no loss.

(1) Likewise, a woman will not be protected by the Decree of the Senate, if she has committed a generous act; as, for instance, where she binds herself for her father to prevent his being annoyed by the payment of a judgment which has been rendered against him, for the Senate gives relief to the burdens of such persons.

22. *Paulus, Rules, Book VI.*

If I give money to a woman in order that she may pay my creditor, or she promises to pay the debt; Pomponius states that where she makes such a promise the Decree of the Senate will not be available, because she has rendered herself liable to an action on mandate, and is held to have bound herself with reference to her own affairs.

23. *The Same, On the Velleian Decree of the Senate.*

Where a woman interrogated in court answered that she was the heir, and she did so well knowing that she was not the heir; she will, by no means, be held to have bound herself to another, because she was guilty of deception; but if she thought that she was the heir, and, being deceived as to this, answered in this way; many authorities are of the opinion that an action will be granted against her, but that she can have recourse to an exception based on the Decree of the Senate.

24. *The Same, Concerning the Obligations Contracted by Women for Others.*

Where a woman who was substituted as a debtor by a creditor, made a promise in behalf of the party for whom she was substituted, she cannot avail herself of an exception,

(1) But if she promised to pay money in order to avoid being substituted, she is held to have obligated herself, and can do so.

(2) In a case where the benefit of the Decree of the Senate is available, the question arises whether an action will lie against the former debtor at the time when the woman obligated herself, or whether the latter can bring suit for the recovery of what was paid? I think that this can be done at once, and that it is not necessary to wait for payment.

(3) Where a woman binds herself for a party who was liable to an action limited by time, this temporary action will be restored to the creditor, so that the time will run after the date of the restitution of the action growing out of the preceding circumstances, although he could have availed himself of it at the very instant that the woman became surety.

25. *Modestinus, On Undertakings.*

Where a woman orders credit to be given to her slave, she will be liable to a prætorian action.

(1) If she has given security for him, and suit has been brought against her, she can protect herself by means of the exception under the Velleian Decree of the Senate, unless she did this on account of some affair of her own.

26. *Ulpianus, On the Edict, Book XXXVII.*

Where a woman, with the intention of obligating herself for another, states in court that the slave of someone else belongs to her, she can avail herself of the aid of the Decree of the Senate on the ground of having bound herself for another. It is evident that if she made this answer with reference to one who was serving her as a slave in good faith, she will not be considered to have bound herself for another.

27. *Papinianus, Opinions, Book III.*

Where a party having made a contract with a woman in good faith proceeds against her because the money which he borrowed has been employed in transactions between husband and wife; he will not be barred by an exception based on the Decree of the Senate.

(1) Where slaves who have been appointed for the transaction of business, in contracting with another, bring suit against a woman whose obligation they think to be valid, an exception based on the Decree of the Senate will bar their owner; nor will the position of the latter be held to be prejudiced by the act of the slave, for nothing has been obtained by the owner, any more than when a slave buys land which is in litigation, or a man who is free.

(2) A wife substituted another woman as her debtor to her husband, and the husband paid the money to her creditor. If she guaranteed the solvency of the woman who was substituted to her husband, the exception based on the Decree of the Senate will not be available, because the woman is transacting her own business.

28. *Scævola, Opinions, Book I.*

Seia bought some slaves, and having borrowed money with her husband as surety, paid the vendor. Her husband afterwards died insolvent, and, for the purpose of defrauding his creditor, stated in his will that he owed the entire amount; and the question arose whether the woman could be held to have bound herself in behalf of another? I answered, that in accordance with the facts stated, she had not bound herself.

A husband, in order to secure a lease, pledged to Sempronius a tract of land belonging to his wife. The woman having afterwards borrowed money from Numerius on her own account, with the encumbrance of the same tract of land, immediately paid Sempronius for her

husband. The question arose whether she contracted this obligation in violation to the Decree of the Senate. I answered that, if Numerius was aware that she had obligated herself for another, the Decree of the Senate would apply in the case stated.

29. *Paulus, Opinions, Book XVI.*

A certain man wished to contract with the heirs of Lucius Titius and to lend them money, but as he suspected that they were not solvent, he preferred to lend it to the widow of the testator, and take a pledge for her. The woman lent the same money to the heirs, and took a pledge from them. I ask whether she is held to have obligated herself for another, and whether the pledges which she took are liable to the creditor? Paulus answers that if the creditor who desired to make a contract with the heirs of Lucius Titius avoided doing so with them, and preferred to have the widow as his debtor, the Decree of the Senate which was enacted with reference to the obligations contracted by women for others, will be available against him, and that the pledges given by her will not be liable. The property which the woman received by way of pledge from those in whose behalf she became bound will be liable to the creditor of the woman, and the prætor will not act unreasonably if he grants an action against the principal creditors, for the purpose of relieving the woman from responsibility, as well as against the property which had been encumbered by them to her.

(1) Paulus states that everything which can be proved to have been planned to evade the provisions of the Decree of the Senate enacted with reference to the obligations incurred by women for others, should not be considered valid.

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

Where a woman becomes surety for another with the intention to deceive, or when she knew that she could not be held liable, an exception based on the Decree of the Senate will not be granted her; for the most Noble Order of the Senate does not exclude the action which will lie on account of fraud committed by a woman.

(1) If an agent obligates himself for another by the direction of a woman, he can have recourse to the exception based on the Velleian Decree of the Senate, lest, otherwise, the right of action may be extinguished.

31. *The Same, On Neratius, Book I.*

Paulus says if a woman does not wish to recover what she paid on account of her becoming bound to another, but prefers to bring an action on mandate, and to reimburse herself for indemnifying the debtor, she should be heard.

32. *Pomponius, Decrees of the Senate, Book I.*

Where a woman enters upon the estate of anyone in order to assume payment of the debts due from it, it will be difficult for her to obtain relief, unless this has been contrived by the fraud of the creditors; for a woman ought not to be considered as, in every respect, occupying the position of a minor under twenty-five years of age who has been overreached.

(1) When a woman wishes to recover property given in pledge by her at the time she became surety for another, she should also receive the crops and the offspring of slaves, and, if the property has been deteriorated, a larger sum should be paid on this account. Where, however, the creditor who received the pledge to secure the obligation has sold it to a third party, the true opinion is that of those who think that an action should be granted to her, even against a purchaser in good faith; because the position of a purchaser should not be better than that of the vendor.

(2) Likewise, if a woman sells a tract of land to the creditor of her husband, and delivers it on condition that the purchaser will apply the money received to the payment of her husband's debt, and she brings suit to recover said land, she can be met by an exception on the ground of

property sold and delivered; but she can reply that the sale has been made against the provisions of the Decree of the Senate.

This can be done whether the creditor himself purchases the property, or whether he has employed someone else to do so, in order that the woman may be deprived of it in this manner. The same rule applies where the woman has transferred her property, not in behalf of her husband, but in behalf of some other debtor.

(3) Where a woman, to avoid binding herself for another, directs a third party to do this for her, will the Decree of the Senate apply to this person who has acted at the request of the woman? The entire substance of the Decree of the Senate has reference to the denial of the suit against the woman herself, and I think a distinction should be made here; as, for instance, where a creditor, to whom I have bound myself at the direction of a woman, has devised this plan for the purpose of evading the Decree of the Senate, as the woman does not seem to have bound herself in violation of that Decree, but offered someone else; he should be barred by an exception based on fraud committed against the Decree of the Senate. If, however, he should be ignorant of the facts, but I should be aware of them, then, if I bring an action on mandate against the woman, I will be barred, but I will still be liable to the creditor.

(4) Where a woman is ready to join issue in behalf of the party for whom she obligated herself, in order that an action may not be granted against the first debtor, as she can plead the exception based on the Decree of the Senate, she must give security that she will not avail herself of the exception, and then proceed to trial.

(5) A woman is also understood to bind herself for another, even when she does this for one who cannot be bound; as, for instance, where she obligates herself for a slave belonging to another, but her obligation will be extinguished if the action should be restored against the master of the slave.

TITLE II.

CONCERNING SET-OFF.

1. *Modestinus, Pandects, Book VI.*

Set-off is a contribution made between a debt and a credit.

2. *Julianus, Digest, Book XC.*

Any one can bar his creditor, who is also his debtor, when he brings an action against him if he is prepared to set off his claim.

3. *Pomponius, On Sabinus, Book XXV.*

Set-off is therefore necessary, because it is more to our interest not to pay, than to bring an action to recover what has been paid.

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

The opinion of Neratius, which is also held by Pomponius, is correct, namely: that what the principal debtor can retain as set-off the surety is released from liability for, by operation of law, in every contract; just as if when I bring suit for the entire amount against a debtor I do not proceed properly, and thus the security is not liable in strict law for a larger amount than the principal debtor can be compelled to pay as a judgment.

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

Where a claim is demanded from a surety, it is perfectly just for the latter to choose whether he prefers to set off what is due to himself or what is due to the principal debtor. He should also be heard if he wishes to make a set-off against the claims of both,

6. *Ulpianus, On Sabinus, Book XXX.*

Whatever is due in consequence of a natural obligation can also become the subject of set-off.

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

What is due at a certain time cannot be set off before the time arrives, even though it may be necessary for it to be paid.

(1) Where the judge does not consider the set-off, the right of action is saved to the creditor, for an exception based on the ground of a decision rendered cannot be interposed.

I hold that the case is different if the judge has refused to consider the set-off on the ground that no debt existed; for then an exception based on a decision rendered will prejudice my case.

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

That also is included in a set-off for the recovery of which suit has already been brought against the plaintiff, in order to prevent the condition of the more diligent party from becoming worse if the set-off should be refused him.

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

Where a partnership has been contracted with a son under paternal control or a slave, and the father or the master brings suit, we include the whole amount in a set-off; although if we should bring suit, only that which has reference to the *peculium* must be made good.

(1) But where suit is brought against a son under paternal control, the question arises whether the son can, by way of set-off, claim, what is owing to the father? It is better to hold that he can, because there is only one contract, but this should be done under the condition that he gives security that his father will ratify his act, that is to say, that he will not, in the future demand what his son has set off.

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

Where two of us, being partners, have been guilty of the same negligence in matters affecting the partnership, it must be said that we cease to be bound to one another, set-off for the negligence in this instance, taking place by operation of law. In like manner, it is held that, where one partner has appropriated something which belongs to the common property and the other has been guilty of such negligence that it may be estimated at the same amount, set-off is held to have taken place, as well as the release of liability of both parties to one another by operation of law.

(1) Therefore, where anyone, being able to make a set-off pays, he can bring suit to recover the money as having been paid when it was not due.

(2) Whenever a right of action arises from a breach of the law, as, for instance, from theft and other offences, if only a suit involving money is brought, a set-off can be admitted. The same rule applies where an action is brought for the recovery of stolen property. But if a party is sued in a noxal action, he can claim a set-off.

(3) Set-off can also take place in stipulations which resemble certain forms of action, that is to say, prætorian ones; and, according to Julianus, set-off can be claimed as well with reference to a stipulation itself, as in the action based upon it.

11. *The Same, On the Edict, Book XXXII.*

When one party owes another a sum of money without interest, and the latter owes the other a sum bearing interest; it was decreed by the Divine Severus that interest was not due on the sums owed to one another by the two parties respectively.

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

This law is applicable not only to the affairs of private individuals, but also those connected

with the Treasury. Where, however, the money borrowed by the parties from one another bears interest, but the interest is at different rates, a set-off can, nevertheless, take place with reference to the sums due to the parties respectively.

13. *The Same, On the Edict, Book LXVI.*

Labeo says, and not without reason, that where a set-off is expressly intended to be made against a certain claim, opposition should not be made to its application to other claims.

14. *Javolenus, On Cassius, Book XV.*

Any claim that can be destroyed by an exception cannot be included in a set-off.

15. *The Same, Epistles, Book II.*

I stipulated for a certain sum of money to be paid by Titius at a certain place, he demands of me a sum of money which I owe him; I ask whether the interest I had in having the amount paid to me in a certain place, as aforesaid, should be included in the set-off? The answer was, that if Titius makes the demand, the sum also which he promised to pay in a certain place must be included in the set-off; but this must be done with reference to his case also, that is to say, the interest Titius had in having the sum of money owing to him paid in a place agreed upon must be taken into consideration.

16. *Papinianus, Questions, Book III.*

Where a soldier has two heirs, one of whom inherits his *peculium castrense*, and the other the remainder of his property, a party who is indebted to one of the heirs, who wishes to set off what is due to him from the other, shall not be heard.

(1) Where a party against whom judgment has been rendered in favor of Titius, brings an action against the same Titius within the time granted for the execution of the judgment, who, himself, had previously had judgment rendered against him in favor of the other party, set-off will be admitted; for it is one thing for the day of the obligation not to arrive, and another to grant time for payment through motives of humanity.

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

An ædile, who has had judgment rendered against him because he distributed a smaller supply of provisions during his term of office than he should have done, cannot be held to be a debtor for money spent for grain; he will therefore be entitled to set-off.

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

Where an agent is appointed to conduct his own case in court, and, after issue has been joined, suit is brought against him for a loan, he will justly be entitled to a set-off.

(1) A creditor is not obliged to set off what he owes to anyone else than his debtor, even though the creditor of him in whose behalf the party is sued for his own debt may desire to make use of a set-off.

19. *The Same, Opinions, Book XI.*

Where a debtor who has paid a tax to a public slave, but without the consent of those to whom he should properly have paid the debt, the former obligation will continue to be in force; but a set-off will be granted to the extent of the *peculium* which the public slave has in his possession.

20. *The Same, Opinions, Book XIII.*

Where a person having charge of furnishing supplies to troops in an expedition, has judgment rendered against him on this account, it is held that he cannot retain the money by the right of set-off, as it is not subject to it.

21. *Paulus, Questions, Book I.*

Since it has generally been held that what persons owe one another is set off by mere operation of law, if the agent of a person who is absent is sued, he need not give security that his act will be ratified, because nothing can be set off, but a smaller sum can be demanded from him in the beginning.

22. *Scævola, Questions, Book II.*

If you owe anyone ten thousand sesterces or a slave, whichever he may choose, set-off of the debt will be admitted, if he states openly which he prefers.

23. *Paulus, Opinions, Book IX.*

Where a guardian makes a demand in the name of his wards for what is due to them, the debtor cannot ask that his debt be set-off against one that the guardian himself owes him.

24. *The Same, Decrees, Book III.*

The Emperor ordered that a party should be heard who desired to prove that an amount was owing to him from the Treasury equal to that for which he himself was sued.

TITLE III.

CONCERNING THE DIRECT AND CONTRARY ACTIONS ON DEPOSIT.

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

A deposit is what is given to another for safe-keeping. It is derived from the word *ponere*, to place, and the preposition *de* adds to the meaning of the term, and indicates that everything which pertains to the safe-keeping of the article in question is entrusted to the good faith of the party.

(1) The Prætor says: "Where property has been deposited, I will grant an action for simple damages, for any other cause than a tumult, a fire, the ruin of a building, or a shipwreck. I will grant one for double damages against the depositary in those cases which are mentioned above. I will grant one for simple damages against the heir of him who is alleged to have been guilty of bad faith with reference to the property deposited, and I will grant an action for double damages where the heir himself has been guilty of fraud."

(2) The Prætor, very properly placed by themselves those cases of deposit which result from necessity occasioned by accidental circumstances, and which do not depend upon the will of the party making the same.

(3) A person is understood to have made a deposit on account of a tumult, or of a fire, or for other causes, when he has no other reason to make it than the imminent danger arising from the above mentioned catastrophes.

(4) This distinction of causes is reasonable, since when anyone relies upon the faith of the depositary, and the deposit is not returned, he should be content with an action for the mere recovery of the property, or its value. When, however, he makes a deposit through necessity, the crime of perfidy increases in its seriousness, and the public welfare demands retribution, for it is injurious to violate a trust in cases of this kind.

(5) The accessories to property which is deposited are not included; as, for instance, where a slave who is clothed is deposited this does not apply to his garments, nor is a halter deposited with a horse, for the horse alone is deposited.

(6) If it is agreed upon that the party shall be responsible for negligence with reference to the deposit, the agreement is valid, for the law of contracts depends upon the agreement.

(7) It will not be held that damage resulting from fraud shall not be made good, even if this should be agreed upon; for a contract of this kind is contrary to good faith and good morals,

and therefore should not be observed.

(8) Where clothing given to the keeper of a bath to be taken care of is lost, if he received no compensation for the care of it, I am of the opinion that he will be liable for the deposit only where he has been guilty of bad faith; but if he received compensation, an action can be brought against him on the ground of hiring.

(9) Where anyone compels a slave, who has been entrusted to him for safe-keeping, to work in a mill, and he receives any remuneration for guarding him, I think that an action on hiring will lie against the miller. If, however, I myself received pay for the slave whom the miller took into the mill, suit can be brought against me for leasing him. Where the labor of the slave was set off against the compensation for his custody, a certain kind of leasing and hiring arises, but because no money is paid, an action will be granted on the terms of the contract. If, however, the party furnished the slave nothing else but food, and no agreement was made with reference to his labor, an action on deposit will lie.

(10) In leasing and hiring, and in matters in which an action should be granted on the terms of the contract, the parties who received the slave will be responsible for fraud and negligence; but, if they only furnished him with food, they will merely be responsible for fraud, since, (as Pomponius says), we must follow what was prescribed or agreed upon, provided we know what it is; and if anything was prescribed, the parties who received the slave will only be responsible for any fraud which is involved in the deposit.

(11) If I request you to take some article of mine to Titius, in order that he may take care of it; Pomponius asks by what action I can institute proceedings against you? He thinks that I would be entitled to an action on mandate against you, but to one on deposit against the party who received the property; if, however, he received it in your name, you and he will be liable to me in an action on mandate, and he will be liable to you in an action on deposit, and this right of action you can assign to me when I sue you on mandate.

(12) Where I have given you any property on condition that you will take care of it if Titius should not be willing to receive it, and he does not receive it; it should be considered whether merely an action on deposit, or also one on mandate will lie. Pomponius is in doubt on this point, but I think that an action on mandate will lie, because the mandate is of greater scope with reference to the condition of safe custody.

(13) Pomponius also asks if I direct you to keep safely some property received from another in my name, and you should do this, will you be liable to an action on mandate, or to one on deposit? He rather holds that there should be an action on mandate, because this is the first contract.

(14) Pomponius also asks, where you are willing for me to make a deposit with you, and you direct it to be made with your freedman, whether I can proceed against you by an action on deposit? He says if I had deposited the property in your name, that is to say, with the understanding that you are to take charge of it, I will have an action against you on deposit, but if you persuade me that I should rather make a deposit with the freedman, no action will lie against you, since the action on deposit must be brought against him; or will you be liable on mandate because I was transacting my own affairs? But if you directed me to make the deposit with the freedman at your risk, I do

not see why an action on mandate will not lie. Labeo says that it is evident that if you have given security, the surety will, by all means be liable, not only if the party who received the deposit was guilty of fraud, but even if he is not, the property is still in his hands; for what if he, with whom the deposit was made, should become insane, or a ward, or should die without leaving an heir, a possessor of, or a successor to his estate? He will, therefore, be liable to make good what is customary in an action on deposit.

(15) The question arises whether an action on deposit can be granted against a ward with

whom a deposit has been made without the authority of his guardian? It must be held that he can bring an action on the ground of fraud, if the deposit was made with him when he was old enough to be guilty of the offence, for an action will be granted against him for the amount by which he would have been pecuniarily benefited if he had not been guilty of fraud.

(16) Where the property deposited is returned in a deteriorated condition, an action on deposit can be granted, just as if it had not been returned at all; for when property is returned in a worse condition than it was in the first place, it can be said that it has not been returned at all on account of fraud.

(17) If my slave has made a deposit, I will, nevertheless, be entitled to an action on deposit.

(18) If I make a deposit with a slave, and bring suit against him after he has been manumitted, Marcellus says that the action will not lie; although we are accustomed to hold that anyone should be liable for fraud committed even in servitude, because both crimes and damages follow the person of the guilty, and therefore, in this instance recourse must be had to other actions which can be brought.

(19) This action will lie in favor of the possessor of property and other possessors, as well as in favor of him to whom restitution of an estate is granted under the Trebellian Decree of the Senate.

(20) Not only is fraud previously committed involved in an action on deposit, but also that which may be committed subsequently, that is to say, after issue has been joined.

(21) Hence, Neratius states that if property which has been deposited is lost without fraudulent contrivance, and is recovered after issue has been joined, the defendant will nevertheless, properly be required to make restitution, and that he should not be released from liability unless he does so.

Neratius also says that even though the action on deposit may have been brought against you at a time when you did not have power to make restitution, as, for instance, when the warehouses were closed; still, if you had power to make restitution before judgment was rendered against you, you should be condemned unless you do so, because the property is in your hands; for inquiry should then be made whether you acted in bad faith since you did not have the property.

(22) It is stated by Julianus in the Thirteenth Book of the Digest, that anyone who deposits property can immediately bring an action on deposit, since he who received it is guilty of an act of bad faith because

he does not return it when demanded. Marcellus, however, stated that he who does not return it to the person who claims it, cannot always be held to have acted fraudulently; for what if the property was in the province, or in a warehouse which could not be opened at the time judgment was rendered, or the condition upon which the deposit depended had not been fulfilled?

(23) There is no doubt that this action is a *bona-fide* one.

(24) And, for this reason, the crops, all accessories, and the yield of flocks should be embraced in this action, lest only the bare article itself should be included.

(25) If you sold the property which was deposited, and you subsequently purchased it on account of the deposit, even if it should afterwards be destroyed without bad faith on your part, you will be liable for the deposit, because you once acted fraudulently when you sold the property.

(26) In an action on deposit also, a judicial oath is taken with reference to the value of the property.

(27) It seems to be perfectly just that I should be granted this action, not only if my slave, but

if one who is serving me as a slave in good faith, deposited the property, if he deposited it as belonging to me.

(28) In like manner, I can bring this action if I have an usufruct in a slave, and what he deposited was part of his *peculium*, which belonged to me or was my property.

(29) Moreover, if a slave belonging to an estate makes a deposit, the heir, who afterwards enters upon the estate, can bring the action.

(30) Where a slave makes a deposit, whether he lives or dies, the master can properly bring this action; if, however, the slave is manumitted he cannot bring it. But if the slave should be alienated, he who owned him at the time when the deposit was made will still have a right of action, for the beginning of the contract must be taken into account.

(31) Where a slave belonging to two parties makes a deposit, each of his masters can bring an action on deposit for his share.

(32) If you restore property to Titius which has been deposited with you by a slave of whom you thought Titius to be the master, when he was not; you will not be liable to an action on deposit, so Celsus says, because there is no fraud on your part; but the master of the slave can bring an action against Titius to whom the property was delivered. If he produces the property, it can be recovered by an action, but if he used it up when he knew it belonged to someone else, judgment will be rendered against him, because he acted fraudulently to avoid remaining in possession.

(33) The following question is very appropriately asked by Julianus. If a servant deposited money with me in order for me to pay it to his master for his freedom, and I paid the money, will I be liable to an action on deposit? He states in the Thirteenth Book of the Digest that if I pay money in this manner which was, as it were, deposited with me for this purpose, and I notify you of the fact, you will not be entitled to an action on deposit, because you, knowing the fact, received the money, and therefore I have not been guilty of fraud; but if I pay the money, as if it was mine, for the purpose of obtaining the freedom of the slave, I will be liable.

This opinion appears to me to be correct; for, in this instance, not only did the depositary not restore the property without bad faith, but he did not restore it at all, for it is one thing to restore it, and another to pay it out as if it was one's own.

(34) Where money has been deposited with you with the understanding that you can use it, if you think best, you will be liable to an action on deposit before you make use of it.

(35) It frequently happens that property or money which is deposited, is left at the risk of the party to whom it is entrusted, for example, where the parties have especially agreed to this. Julianus states, however, that if anyone has offered himself as a depositary, he assures the risk of the deposit, so that he must be responsible not only for fraud, but also for negligence and safe-keeping, but not for accidents.

(36) Where money is deposited in a bag which is sealed, and one of the heirs of the person who made the deposit appears and claims it; it should be considered in what way the depositary must satisfy him. The money ought to be taken out of the bag either in the presence of the Prætor, or in that of respectable persons, and the claimant paid in proportion to his share of the estate. If, however, the depositary breaks the seal, this will not be done contrary to the intention of the deposit, since it took place by the authority of the Prætor, or in the presence of respectable persons. So far as to what remains in his hands is concerned, if he wishes to retain it after new seals have been placed upon it either by the Prætor or by the parties in whose presence the other seals were broken he can do so; or if he refuses to retain it, it may be deposited in a temple.

Where, however, the property is such that it cannot be divided, the depositary should deliver it

all to the claimant, after he has given proper security that he will be responsible for all above his share; but where security is not furnished, the depositary should place the property in a temple, and be released from liability to any action.

(37) Another example is given by Julianus in the Thirteenth Book of the Digest. He says that if the depositor dies, and two persons appear disputing with each other, each one asserting that he is the sole heir, the property should be delivered to him who is ready to defend it against the other claimant, that is to say, he who has received the deposit. If, however, neither will accept this responsibility, he says that it is most convenient that he should not be compelled by the Prætor to undertake the defence. Therefore, it is necessary for the property to be deposited in some temple until the right to the estate is judicially decided.

(38) Where anyone, in the presence of several persons reads a will which has been deposited with him, Labeo says that an action on deposit can properly be brought against him on account of the will; but I am of the opinion that an action for injury can also be brought, if the contents of the will were read in the presence of those parties with the intention that the secret provisions made by the testator should be divulged.

(39) If a depredator or a thief makes a deposit, Marcellus states in the Sixth Book of the Digest that either of them will lawfully be entitled to an action on deposit; for it is to his interest to have it, because he may be held liable.

(40) Where anyone demands a deposit of gold or silver should the article only be designated or should the weight also be included? The better opinion is that both should be included; as, for instance, the dish, or cup, or bowl should be mentioned, and the material and weight should be added. Where, however, the article is purple which has not been used, or wool, the weight should in like manner be added; except where uncertainty exists as to the amount of the weight, and recourse is had to an oath.

(41) Where a chest which has been sealed is deposited, but the chest alone is claimed, should its contents be included? Trebatius says that the chest can be claimed, and that an action should not be brought for the individual articles of the deposit; but if the property is first exhibited and then deposited, the description of the clothing must be added. Labeo, however, says that the party who deposited the chest is held to have also deposited the separate articles contained therein, and therefore we must bring suit for the property. Then what if the party who received the deposit was ignorant that the property was there? It does not make much difference, since he received the deposit; and I think that an action can be brought for the property forming the deposit, even though the chest was sealed when placed in the hands of the depositary.

(42) It is established that a son under paternal control is liable for a deposit, because he is liable to other actions; but suit can also be brought against his father, but only with reference to the son's *peculium.* The same rule applies to a slave, for he can be sued along with his master. It is evident, as Julianus stated and as it appears to us, that if suit is brought on account of persons who are under the control of anyone, the case may be tried; so that if any deceit or fraud has been committed by him under whose authority they are, or by the parties with whom the contract was made, their bad faith may become apparent.

(43) Where property is deposited with two persons, an action can be brought against either of them, nor will one of them be released if suit is brought against the other, for they are discharged from liability not by the choice of the depositor but by payment. Hence, if both are guilty of fraud, and one of them pays the amount of the claim, the other cannot be sued; just as in the case of two guardians. Where, however, one of them can either not pay anything, or an amount less than the claim, recourse can be had to the other.

The same rule applies where one of them was not guilty of fraud, and therefore was discharged, for, in this instance, recourse can be had to the other.

(44) Where, however, two parties made a deposit, and both of them bring suit, if, indeed, they made the deposit with the understanding that one could remove all of it, he can bring an action for the entire amount; but if the understanding was that only the share in which each of them was interested could be removed by him, then it must be said that judgment should be rendered against a depositary for the share of each.

(45) If I make a deposit with you with the understanding that it shall be returned after your death, I can bring an action on deposit against you, and against your heir, for I can change my mind, and claim the deposit before your death.

(46) Hence, if I make a deposit with you to be returned after my death, both I and my heir can bring an action on deposit, if I have changed my mind.

(47) For the reason that only bad faith is involved in this proceeding, the question arose whether, if the heir sold the property deposited with the testator or lent to him for use, he being ignorant that the said property had been deposited or lent, will he be liable. For the reason that he did not act in bad faith, he will not be liable for the property. Will he, nevertheless, be liable at least for the price of it which came into his hands? The better opinion is that he will be liable, for he was guilty of bad faith in not giving up what came into his hands.

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

But what if he had not yet collected the purchase-money, or had sold the property for a smaller sum than he should have done? He must only assign his rights of action.

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

It is clear that, if he could buy the property back, and return it, and does not wish to do so, he is not free from negligence; just as if he was unwilling to return it if it had been bought back or had come into his possession in any other way, alleging as an excuse that he sold it once while ignorant of the facts.

4. *Paulus, On Plautius, Book V.*

Even if the person is not the heir, but thinks that he is, and sells the property, the profit he has obtained must be wrested from him in the same way.

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

The counter action of deposit is granted in favor of the party with whom the deposit is alleged to have been made, and in this action it is not necessary for an oath to be taken as to the amount; for proceedings are instituted, not on account of broken faith, but in order that the party who received the deposit may be indemnified.

(1) An action on deposit can be brought against a sequestrator, if, however, an agreement is made with the latter that he should produce the property deposited, at a certain place, and he does not do so, it is clear that he will be liable. But, if the agreement had reference to several places, it is in his discretion at which of them he will produce it, but where no agreement was made, he must be notified to produce the property before the Prætor.

(2) If the sequestrator wishes to relinquish his office, what course must be taken? Pomponius says that he must appear before the Prætor and having with his consent notified the parties who selected him, he must return the property to the one who appeared.

I do not think, however, that this is always correct, for he frequently should not be allowed to relinquish an office which he has once undertaken, which would be contrary to the understanding with which the deposit was made, unless a very just cause arises; and when it is permitted, the property should be very rarely restored to the party who appears, but it ought to be deposited in some temple in accordance with the decision of a court.

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

A deposit is properly made with a sequestrator which is delivered in its entirety by several persons, to be kept safely and returned under a certain condition.

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

Where a slave is deposited with a sequestrator in order that he may be put to the torture, and because of his being chained or confined in an uncomfortable place, he, induced by pity, released him; I am of the opinion that this act very nearly resembles fraud, for, as he knew the purpose for which the slave was destined, he displayed his compassion at an improper time, since he should rather not have undertaken such a task than to have been guilty of deceit.

(1) The action on deposit is granted for the whole amount against an heir on account of the bad faith of the deceased, for even though we are not usually liable for the fraudulent act of a deceased person, except with reference to that portion of the estate which comes into our hands; still, in this instance, the bad faith descends from a contract which gives rise to an action to recover the property, and therefore a single heir will be liable for the entire amount, but where there are several heirs, each one will be liable for his share.

(2) Whenever bankers become bankrupt, the accounts of the depositors must, in the first place, be considered; that is to say, those of such as have money on deposit which they have not placed at interest with the said bankers, or left with them to make use of. Therefore, if the property of the bankers is sold, the depositors will be entitled to their money before the privileged creditors; but this will only be done where the parties have not afterwards received interest, as they will be considered to have renounced their deposits.

(3) The question also arises whether the order in which the parties made their deposits shall be considered, or whether all the deposits together shall be taken into account. And it has been established that they were all on the same footing, for this has been settled by an Imperial Rescript.

8. *Papinianus, Questions, Book IX.*

The depositary can exercise his privilege, not only with reference to the remainder of the deposit which may be found among the assets of the banker, but also with reference to all other property of the banker who has been guilty of fraud; and this rule has been adopted on the ground of public utility. It is evident that the expenses necessarily incurred are always preferred claims, for, after they have been deducted, it is customary to make an appraisement of the property.

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

Where, in the action on deposit, suit is brought against one of several heirs on account of an act of the deceased, I must sue him for his share of the estate; but if, on account of an offence which he has committed, I do not sue him for a share, this is reasonable, because the measure of damages has reference to the act of bad faith which the heir himself committed.

10. *Julianus, On Minicius, Book II.*

The action on deposit does not lie against co-heirs who are not guilty of fraud.

11. *Ulpianus, On Sabinus, Book XLI.*

Where a slave makes a deposit, the party with whom it is made is authorized by good faith, and most justly, to return the property to the slave; for it is not consistent with good faith to refuse to deliver what anyone has received, but it should be returned to him from whom he obtained it, and this should be done in such a way as to restore it without any bad faith, that is to say, that there may not be even a suspicion of negligence.

Sabinus further explains this, by adding that there should be no cause for the depositary to

think that the master was unwilling for the property to be returned to the slave; and this is correct, unless he was influenced by some good reason to suspect the slave, but it is sufficient if he displayed good faith. If, however, the slave had previously been guilty of theft, and the party with whom the deposit was made was ignorant of the fact, or believed that the master was not unwilling for the delivery of the property, he will be released from liability, for good faith is always required.

Not only will the depositary be released by returning the property to the slave if the latter remained in servitude, but also if he was manumitted or alienated, provided he did so for good and sufficient reasons; for instance, if he returned it not knowing that the slave had been manumitted or alienated. Pomponius states that the same rule should be observed in the case of all debtors.

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

Where a deposit was made in Asia to be returned at Rome, it is held that the intention was that this should be at the expense of the party who made the deposit, and not at that of him with whom it was. placed.

(1) A deposit should be returned to the place in which it is found, without any fraudulent act of the party with whom the property was deposited. It, indeed, makes no difference where the deposit was made. The same principles apply generally to all *bona fide* actions. It must be said, however, that if the plaintiff wishes the property to be transported to Rome at his expense and risk, he should be heard; for this is also done in the action for production.

(2) An action on deposit can properly be brought against a sequestrator, and it is also granted against his heir.

(3) Just as where property which must be delivered in compliance with the terms of a stipulation or a will, is destroyed after issue has been joined; so, also, a deposit from the day on which it was made will be at the risk of the party in whose hands it was placed, if, at the time issue was joined, the defendant could have restored it, but did not do so.

13. *Paulus, On Sabinus, Book XXXI.*

Where a person refuses to return property, not to the owner of the same but to someone who demands it, and whom he does not think to be the genuine agent or heir of the person who made the deposit, he is not guilty of bad faith. However, if he should afterwards learn that the claimant had authority, an action can be brought against him, since he now begins to be guilty of bad faith, if he refuses to return the property.

(1) A personal action for recovery will also lie on account of property deposited, but not before fraud has been committed; for no one is liable to a personal action for recovery merely because he has received the deposit, but only when he has been guilty of fraud.

14. *Gaius, On the Provincial Edict, Book IX.*

Where there are several heirs of the party who made the deposit it is held that if the majority of them appear the property should be returned to those who are present. The majority should be understood to mean, not the larger number of persons, but the greater amount of the shares of the estate, and proper security must be furnished.

(1) Whether proceedings are instituted against him with whom the property was deposited or against his heir, and the property naturally perished before a decision is rendered, for instance, if a slave whose ownership was in dispute should die; Sabinus and Cassius say that the party against whom the action was brought ought to be discharged, because it is only just that the natural loss of the property should be borne by the plaintiff, since it would have perished even if it had been returned to him.

15. *Julianus, Digest, Book III.*

He who allows his own property to be deposited with him or requests permission to use it, is not liable to an action on deposit or on one of loan for use, just as in the case of a party who rents his own property, or asks to hold it by sufferance, for he is not liable in either instance.

16. *Africanus, Questions, Book VII.*

If he with whom you deposit property makes a deposit of the same with another, and the latter is guilty of fraud; he with whom you deposited the property will be liable for the bad faith of him with whom it was subsequently deposited, to the extent that he must assign his rights of action to him.

17. *Florentinus, Institutes, Book VII.*

It is lawful for several persons, just as it is for one, to make a deposit; nevertheless, only several persons can make one with a sequestrator, for this is done when property is in dispute, and therefore, in this instance, each one is held to have made the deposit in its entirety. The case is otherwise where several joint-owners deposit property held in common.

(1) Ownership of the article deposited remains with the depositor, as well as possession, unless it is deposited with a sequestrator; for then the latter has possession; for in making the deposit it is the intention that neither shall have possession during the time that it is so held.

18. *Neratius, Parchments, Book II.*

In case a deposit is made on account of a tumult, a fire, the destruction of a house, or a shipwreck, the action brought against the heir on account of the fraud of the deceased is for his share of the estate, and for simple damages, and it also must be brought within a year; but where it is brought against the heir himself it is granted for the entire amount, for double damages, and without reference to time.

19. *Ulpianus, On the Edict, Book XVII.*

Julianus and Marcellus are of the opinion that a son under paternal control can properly bring an action on deposit.

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

If you, without having been guilty of fraud, have lost property which has been deposited with you, you will not be liable to an action on deposit, nor should you give security to return the property if you should again obtain possession of it. If, however, it should come into your hands a second time, you will be liable to an action on deposit.

21. *The Same, On the Edict, Book LX.*

Where property has been deposited with a son under paternal control, and he still retains it after having been emancipated, the father cannot be sued on the *peculium* within a year, but the son can be.

(1) Trebatius goes still farther, for he thinks that if the deposit was made with the slave, and he, having been manumitted, retains the property, an action should be granted against him, and not against his master; although an action is not granted against a manumitted person • in other cases.

22. *Marcellus, Digest, Book V.*

Where two heirs fraudulently interfere with property which has been deposited with the deceased, they will, in some instances, only be liable for a portion of the same, for if they divide ten thousand *aurei* which were deposited with the deceased, and misappropriate five thousand of them, and both are solvent, they will each be liable for half, because the plaintiff has no further interest. But where they have melted a plate or permitted this to be done by someone else, or have committed any other kind of fraud, they can be sued for the entire amount, just as if they themselves had been charged with the safekeeping of the property; for

it is certain that each one of them is guilty of fraud, and unless they were liable for the whole amount, restoration of the property could not take place. Nor does it appear absurd for one to think that unless restitution of the entire property is made, he against whom suit has been brought cannot be released but must have judgment rendered against him, if the property was not restored in proportion of the share of the estate to which he was heir.

23. *Modestinus, Differences, Book II.*

Where anyone is sued in an action on deposit, he can properly institute proceedings before the same judge on account of food which has been furnished a slave.

24. *Papinianus, Questions, Book IX.*

Lucius Titius to Sempronius Greeting: "I notify you by this letter written by my own hand, that the hundred pieces of money which you loaned to me this day, and which have been counted by the slave Stichus, your agent, are in my hands, and that I will pay them to you on demand, when and where you desire me to do so."

The question arises whether any increase by way of interest is to be considered? I answered that an action on deposit will lie, for what is the loaning of anything for use but the depositing of it? This is true, if the intention was that the very same coins should be returned, for if it was understood that only the amount should be paid, the agreement exceeds the limits of the deposit.

If, in the case which has been stated, an action on deposit will not lie, since it was only agreed to pay the same sum, and not the identical coins, it is not easy to determine whether an account of the interest should be taken. It has, in fact, been established that, in *bona fide* actions, it is the duty of the judge to decide that, with reference to interest, only such can be paid as the stipulation provides for. But is contrary to good faith and the nature of a deposit, that interest should be claimed before the party who granted the favor by receiving the money, is in default in returning it. If, however, the agreement was that interest should be paid from the beginning, the condition of the contract shall be observed.

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

Where a father received the presents given to his daughter, who was her own mistress, on the day of her betrothal, or afterwards, his heir can properly be sued in an action on deposit to compel him to produce the property.

(1) Anyone who converts to his own use money which had been deposited with him, but not sealed up, with the understanding that he should return the same amount, and should have judgment rendered against him, in an action on deposit, for the interest from the time when he was in default.

26. *Paulus, Opinions, Book IV.*

Publia Mævia, when about to depart to visit her husband, entrusted to Gaia Seia a closed box containing clothing and written documents, and addressed her as follows: "If I come back safe and sound you will return this to me, but if anything should happen to me, give it to my son whom I had by my first husband." The woman having died intestate, I wish to know to whom the property which she had entrusted to the other should be delivered, to her son, or to her husband? Paulus answered, to her son.

(1) Lucius Titius made the following statement: "I have received, and have in my hands as a deposit the sum of ten thousand *denarii* of silver, and I promise and bind myself to return all the said amount, as agreed upon between us; and, in accordance with the contract entered into, I will pay you every month four *oboli* for each pound by way of interest, until payment of the entire sum has been made." I ask whether interest can be demanded? Paulus answers that the contract to which reference has been made exceeds the limit of a deposit of money, and

therefore, in accordance with the agreement, interest can be claimed in an action on deposit.

(2) Titus, to the members of the family of Sempronius, Greeting: "I have received from you the weight of about ten pieces of gold, two discs, and a sealed sack, on which you owe me ten pieces, which you have deposited with Titius, and you also owe ten to Trophimas; and you also owe ten on an account of your father, and something more besides."

I ask whether any obligation arises from a written paper of this kind, and especially anything which has reference to this money? The answer was that, in fact, no obligation seems to have arisen from the letter which was the object of the inquiry, but that it could only serve to prove that a deposit of property was made. The judge must determine whether the party, who bound himself for ten pieces of gold in the same letter, can prove what he wrote.

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

Lucius Titius had a daughter named Seia under his control, he gave her in marriage to a slave named Pamphilus, who did not belong to him, and he gave the latter the dowry, taking an acknowledgment from him that it was only left in his hands by way of deposit; and then, the master of the slave not having been notified of said deposit, the father died, and soon afterwards Pamphilus, the slave, also.

I ask, by means of what action can Seia recover the money, as she was the heir of her father? Paulus answered that, since the dowry was not actually constituted, the money could be recovered by an action *De peculio* on the ground of a deposit. 28. *Scævola, Opinions, Book I.*

Quintus Cæcilius Candidus wrote a letter to Paccius Rogatianus in the following terms: "Cæcilius Candidus to his friend Paccius Rogatianus, Greeting. I notify you by this letter that I have received and entered in my account-book the receipts of the twenty-five pieces of money which you have remitted to me, and at the first opportunity I will take care that this money shall not be idle, that is to say, that you will receive interest thereon."

The question arose whether interest can also be collected on account of this letter. I answered that interest will be due in a *bona fide* action, if the party collected it, or used the money for his own purposes.

29. *Paulus, Sentences, Book II.*

If I make a deposit of silver in a bag or sealed, and the person with whom I deposited the same makes use of it without my consent, I will be entitled to an action on deposit, as well as one for theft against him.

(1) If he with whom the deposit was made uses it with my permission, he will be compelled to pay me interest on this account, just as in other *bona fide* actions.

30. *Neratius, Opinions, Book I.*

If your surety has judgment rendered against him for damages on account of property deposited with you, the said property becomes yours.

31. *Tryphoninus, Disputations, Book IX.*

Good faith, which is required in contracts, demands the greatest degree of equity; but should we estimate that equity with reference to the Law of Nations, or in accordance with civil and prætorian precepts? For instance, a party accused of a capital crime deposited a hundred *aurei* with you, he was banished, and his property confiscated. Should the deposit of this money be returned to him, or be placed in the Public Treasury? If we only have in view the Law of Nature and of Nations, it should be returned to him who gave it; but if the Civil Law and the provisions of legal enactments are considered, it must be turned over to the Public Treasury, for he who has deserved ill of the people should be oppressed by poverty, in order to serve as an example to others for the prevention of crime.

(1) Another point comes up here for examination, that is, whether we should hold that good faith ought to be limited to the parties who have contracted with one another, without paying any attention to other persons who are interested in the matter under consideration. For example, a thief deposited with Seius, who was not aware of his criminality, some plunder which he had taken from me, should Seius restore the property to the thief, or to me?

If we only consider the giver and the receiver, good faith requires that he who gave the property in charge of another should receive it; but if we look at the equity of the matter which is due to all the persons concerned in this transaction, that should be returned to me of which I have been deprived by a most wicked act. I believe that to be justice which gives to every one his own, in such a way that any person who has a better claim may not be deprived of it. Therefore, if I do not appear to claim the property, it must, nevertheless, be returned to him who deposited it, even though he did so after having wrongfully obtained it. Marcellus states the same thing with reference to a depredator and a thief.

Where, however, the thief, not being aware who was the father or master of the son or the slave from whom he took the property, deposits it with either of them, they being ignorant of the facts, this does not constitute a deposit according to the Law of Nations; because the character of a deposit is such that a man's own property must be given as that of another, for safe keeping, to some person who is not its owner. If a thief deposits with me my own property, which he took without my knowledge, I being ignorant of his crime, it is rightly held that no deposit is made; for it is not in accordance with good faith for an owner to be compelled to surrender his own property to a thief. But where, in a case of this kind, property placed on deposit is given up by its owner who was not aware of the facts, a personal action for the recovery of something that was not due will lie.

32. *Celsus, Digest, Book XL*

While a statement of Nerva that gross negligence is fraudulent, is not accepted by Proculus, it seems to me to be perfectly true. For, even if anyone is not as diligent as human nature requires, still, he will not be free from fraud if he does not display that solicitude with respect to a deposit which is customary with him; for good faith will not be maintained if he shows less diligence with reference to said deposit than he exhibits concerning his own property.

33. *Labeo, Last Epitomes of Javolenus, Book VI.*

Your slave deposited, in sequestration, a certain sum of money with Attius at the house of Mævius, on condition that it should be delivered to you if you proved that it was yours, but if you did not, that it should be delivered to Attius. I stated that suit could be brought for an unascertained amount against him with whom the money was deposited, that is, for its production, and having been produced, an action could be brought for its recovery, because your slave, in making the deposit, could not prejudice your rights.

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

You can bring an action on deposit against anyone who refuses to return your deposit on any other terms than that you pay him money, even though he may be willing to return it, on this condition, without delay and uninjured.

THE DIGEST OR PANDECTS.

BOOK XVII.

TITLE I.

CONCERNING THE ACTION ON MANDATE AND THE COUNTER ACTION.

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

The obligation of mandate is based upon the consent of the contracting parties.

(1) Hence a mandate can be received by means of a messenger, as well as by a letter.

(2) Moreover, an action on mandate will lie where the party either says I ask, or I wish, or I direct, or where he puts it in writing in any other language whatsoever.

(3) The obligation of mandate can also be contracted to become operative at a certain time, and under a certain condition.

(4) A mandate is void unless it is gratuitous, as it derives its origin from duty and friendship, hence compensation is opposed to duty; for, where money is involved, the transaction rather has reference to leasing and hiring.

2. *Gaius, Diurnal or Golden Matters, Book II.*

The obligation of mandate is contracted between us whether I entrust you only with my business, or whether I charge you only with that of another party, or with his along with mine, or with my business and yours or with yours and that of another. Where I direct you to attend to a matter which concerns you alone, the mandate is superfluous, and no obligation whatever arises from it.

(1) A mandate only has reference to an affair of mine where, for instance, I direct you to transact my business, or to purchase a tract of land for me, or to become my surety.

(2) It only has reference to the affairs of another where, for example, I direct you to transact the business of Titius, or to purchase a tract of land for him, or to become his surety.

(3) It has reference to my affairs and those of another, where, for example, I direct you to transact the business of Titius and myself, or to purchase a tract of land for myself and Titius, or to become surety for him.

(4) It has reference to your affairs and mine where, for instance, I direct you to lend money at interest to someone who is negotiating a loan on my account.

(5) It has reference to your affairs and those of another, where, for instance, I direct you to lend money at interest to Titius, but if I direct you to lend it to him without interest, the obligation of mandate is only contracted in favor of a third party.

(6) The obligation of mandate is only contracted in favor of you, where, for instance, I direct you to rather spend your money for the purchase of land than to lend it at interest; or, on the other hand, to rather lend it at interest than to invest it in land. A charge of this kind is, properly speaking, rather advice than a mandate, and on this account it is not obligatory, for the reason that no one is bound by advice, even though it may not be beneficial to the party to whom it is given; because every one is free to investigate whether the advice will be advantageous to him or not.

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

Moreover, in the case of mandate, it happens that sometimes the condition of the party giving it may not be improved, and sometimes when it may be improved, but it can never become worse.

(1) In fact, if I directed you to purchase something for me, and did not say anything about the price, and you purchase the article, there will be a right of action on both sides.

(2) If I fixed the price, and you bought the article for more, certain authorities deny that you will be entitled to an action on mandate, even though you are ready to pay the amount of the excess; for it is unjust that I should have an action against you if you were unwilling to make the payment, but that you should have one against me if you are willing to do so.

4. *Gaius, Diurnal or Golden Matters, Book II.*

Proculus, however, thinks that he can bring an action for the amount of the established price; and this opinion is indeed the more indulgent one.

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

Therefore, the limits of the mandate must be diligently observed, for a party who exceeds them is held to have done something else than what he was directed to do.

(1) And if he does not execute what he undertook, he will be liable.

(2) Hence, if I direct you to buy the house of Seius for a hundred *aurei*, and you buy that of Titius for a much larger price, or for a hundred *aurei*, or even for a smaller sum; you will not be held to have executed the mandate.

(3) Again, if I direct you to sell my land for a hundred *aurei,* and you sell it for ninety, and I bring an action to recover the land, I will not be barred by an exception, unless you pay me the balance which is lacking on the mandate, and indemnify me for all loss.

(4) Moreover, if a master directs his slave to sell property for a certain amount, and he sells it for less, the master can also bring an action to recover it; nor will he be barred by an exception, unless he is indemnified.

(5) The position of the mandator can be improved, for example, if I direct you to purchase Stichus for ten *aurei*, and you purchase him for less, or for the same amount and receive some accession to the slave; as, in either instance, you have made the purchase not for more than the price agreed upon, but within that price.

6. *Ulpianus, On the Edict, Book XXXI.*

If an honor is bestowed by way of remuneration, an action on mandate will lie.

(1) Where anyone has been directed to transact certain business, he can be sued by means of this action, and proceedings on the ground of voluntary agency cannot properly be instituted against him, for he is only bound to the extent that he transacted the business; but in this instance, because he accepted the mandate he will be liable, even if he did not transact the business.

(2) Where I permitted anyone to become my surety, or to intervene in any other way for my benefit, I am liable to an action on mandate. And, unless a party bound himself for another who was unwilling that he should do so, or with the intention of making him a present, or of transacting his business, an action on mandate will lie.

(3) There can be no mandate of a dishonorable transaction, and therefore proceedings cannot be instituted by this action.

(4) If I direct you to attend to something with which I have no concern, as, for instance, to become surety for Seius, or to make a loan to Titius, I will have a right of action on mandate, as Celsus states in the Seventh Book of the Digest, and I will be liable to you.

(5) It is evident that if I direct you to do something in which you are interested the action on mandate will not lie, unless I, also, have an interest in the matter; or, if you would not have transacted the business unless I had directed you to do so, even if I had no interest in it, an action on mandate will, nevertheless, be available.

(6) The question is asked by Julianus in the Thirteenth Book of the Digest, whether, if a principal directs his agent to take a certain sum of money and lend it at interest at his risk, provided he pays the said principal certain interest, and the agent can lend it at a higher rate,

he himself will be entitled to the profit; for, as Julianus says, he is held to have received the money as a loan.

It is evident, however, that if he was charged with the administration of the entire business he would also be liable to an action on mandate, just as a debtor who transacts the business of his creditor, is ordinarily held liable to an action on mandate.

(7) A certain Marius Paulus became surety for a party named Daphnis, and it was agreed that he should be compensated for doing so. It was also provided that a certain sum of money should be paid to him, under another name, in case of a favorable termination of the suit. He was ordered by Claudius Saturninus, the Prætor, to pay a much greater amount than that above mentioned, and the same Saturninus forbade him to appear in court as an advocate. It seemed to me that he had given security for the payment of the judgment, and that he appeared as the purchaser of the suit, and Marius Paulus seemed to desire that an action on mandate should be brought against Daphnis for the amount for which judgment has been rendered against him.

The Divine Brothers, however, most properly stated in a Rescript that, on account of his deceitful conduct, he was not entitled to an action, because he had agreed, for a pecuniary compensation, to assume the responsibility. On the other hand, Marcellus says with reference to the party who had made a promise in consideration of the money that if, in fact, the intention was to bind himself at his own risk, he could not bring an action, but if this was not the intention, a prætorian action could more properly be brought. This opinion seems to conform to the public welfare.

7. *Papinianus, Opinions, Book II.*

Where an attorney is appointed to conduct a case, and demands a larger fee, it must be considered whether his client desired to remunerate him for his services, and, in this instance, he must comply with what had been agreed upon; or whether the attorney had purchased the right of action with the expectation of realizing a larger sum of money, which is contrary to good morals.

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

If I appoint an attorney, and he does not return to me the documents relating to the case, in what action will he be liable to me? Labeo thinks that he will be liable to an action on mandate, and that the opinion of those who think that on this ground an action on deposit can be brought, is not the correct one; for the origin of every contract and its cause should always be taken into consideration.

(1) But where the adversary of the attorney is released through collusion, the latter will be liable to an action on mandate; but if the attorney is not solvent, then he says that an action on the ground of fraud should be granted against the party who was released through collusion.

(2) It is established that where an attorney does not proceed with a case which he undertook to conduct, he is liable to an action on mandate.

(3) Where one person directs another to transact the business of him who himself had charged him to do so, he will be entitled to an action on mandate, because he himself is also liable; for, although it is commonly stated that one attorney cannot appoint another before issue is joined, still an action on mandate will lie, for he can only do this for the purpose of conducting the case.

(4) Where certain guardians directed their fellow-guardian to purchase a slave for their ward, and he does not do so, will an action on mandate be available? And will one on mandate only lie, or can one also be brought on guardianship? Julianus makes a distinction here, as he says that the kind of slave which the guardians directed one of their number to purchase should be taken into consideration, for if the slave was superfluous, or even burdensome, the guardian will be liable only to an action on mandate, and not to one on guardianship.

Where, however, the slave was necessary, he will then be liable to an action on guardianship, and not only himself but the others as well; for if they did not direct him to make the purchase, they will be liable to an action on guardianship, for the reason that they did not purchase a slave who was necessary for their ward; they are therefore not released for having commissioned their fellow guardian, because they should have made the purchase themselves. It is evident that they will, nevertheless, be entitled to an action on mandate, because the mandate was not complied with.

Julianus also says that, on the other hand, a guardian who makes a purchase, will be entitled to an action on mandate against his fellow-guardians.

(5) Where a man who is free and is serving as a slave in good faith, directs Titius to buy him, and gives him money from his *peculium* for that purpose, which *peculium* should follow him, and ought to be left in the hands of a *bona fide* purchaser; and Titius, after the price was paid, manumitted the freeman who subsequently was judicially declared to have been born free; Julianus says he will be entitled to an action on mandate against the party whom he directed to buy him; but that all he can gain in this action on mandate will be to compel the party to transfer to him the rights of action which he possesses against him from whom he purchased the slave.

It is evident that, if he gave him money derived from the *peculium* belonging to a *bona fide* purchaser, he cannot transfer any rights of action to him (so Julianus says), because he has none, since the purchaser gave him his money; and he says further that he is bound on account of the sale, and this action is of no effect, for the reason that whatever he recovered he would have to make good in an action on sale.

(6) The action on mandate will then lie when the interest of the person who gave it begins to exist, but if he has no interest, the action will be inoperative, for it will lie only to the extent of his interest; as, for instance, where I directed you to purchase a tract of land for me, since, if I had an interest in making the purchase, you will be liable, but if I myself purchased the same land or another party did so for me, as I have no interest, the action on mandate will not be available.

I ordered you to transact my business, but even though no one transacted it, if no loss resulted, an action will not lie, but if someone else transacted the business properly, the action on mandate will not be available. This same rule is applicable in similar cases.

(7) Where sureties, who were not aware that their debtor had made payment, or had been released by means of a receipt, or under an agreement, have again paid the claim due from the debtor, they will not be liable to an action on mandate.

(8) This also applies to the action to which the surety is entitled, which can be ascertained from a Rescript of the Divine Brothers, addressed to Catullus Julianus as follows: "If the parties who have become your sureties have judgment rendered against them for a larger amount than the debt claimed; and if they, being intelligent and informed of the facts, neglected to take an appeal, you can protect yourself by having recourse to the equity of the court, if they bring an action on mandate."

Therefore, if they were ignorant of the facts, their ignorance is excusable, but if they were aware of them, it was incumbent upon them to take an appeal, and they were guilty of bad faith in not doing so. But what if they were prevented by poverty? Their indigence should then be their excuse, but if they had made an agreement with the principal debtor, in the presence of witnesses, that he should take an appeal if he thought it was advisable, I am of the opinion that they have acted properly.

(9) He is held to have acted in bad faith who does not return what he has the power to restore.

(10) Hence, if I directed you to purchase a slave, and you did so, you will be liable for his delivery. But if you fraudulently neglected to purchase him, (or, perhaps, having received money for that purpose, you gave it to another that he might make the purchase) or if you

were guilty of gross neglect (for instance, if induced by favor, you should permit another to purchase him) you will be liable. If, however, the slave whom you purchased should run away, you will be responsible, if this occurred through your bad faith. But if neither bad faith or negligence existed, you will not be liable except to the extent that you must furnish security to deliver up the slave if he should come into your power. But if you should deliver him up, you must give me possession of him; and if security is furnished against his recovery by eviction, or you have a right to ask that security should be furnished to you, I think that it will be sufficient if you assign this right of action to me, so that you may appoint me your agent to act in my own affairs, and you will not be obliged to make good any more than you actually will obtain.

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

You should also furnish security with reference to your acts.

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

The same rule also applies to real-property, where the agent purchases a tract of land; for the party who appointed him is not responsible for anything more than good faith.

(1) Where, however, security is given to the agent with reference to the health of a slave, or such security can be given, or where it is done with reference to other defects, the same rule will apply; or the party will have judgment rendered against him, if, through negligence, he does not provide for security.

(2) Where crops are gathered from land which my agent has purchased for me, it is the duty of the judge to compel these also to be made good.

(3) Where my agent has money belonging to me in his hands, he will owe me interest from the date of his default in paying it. Where, however, he has lent money on interest, and has collected the interest, we hold, in consequence, that he is obliged to make good any profit

which he has obtained from it; whether I directed him to lend said money or not, because it is required by good faith that he should not profit by the property of another.

If, however, he did not make use of the money, but appropriated it for his own use, he can be sued for the interest at the legal rate customary in that district. Finally, Papinianus says that, even if the agent should collect interest and appropriate it for his own use, he must make it good.

(4) If anyone should direct Titius to borrow money from those who employ him, an action on mandate cannot be brought against him, (as Papinianus states in the Third Book of Opinions) because he is liable on account of the loan, and therefore he cannot be sued for interest as it were on the ground of mandate, if this was not expressly set forth in the stipulation.

(5) Papinianus also says in the same Book that, where a surety who assumed responsibility because his principal directed him as his agent to borrow the money, has judgment rendered against him; an equitable action in the nature of an institorian proceeding should be granted, because he may be held, as it were, to have appointed him for the purpose of making the loan.

(6) Where I direct anyone to stipulate for a sum from Titius, I can bring an action on mandate against the party whom I directed to do this, in order to compel him to release him, if I desire to do so; or, if I prefer, I can bring an action to compel him to make a substitution to me, or to anyone else that I may wish.

Papinianus states in the same Book that, if a mother gives a dowry in behalf of her daughter, and then, under the direction of her daughter, makes a stipulation at that time, or even afterwards; she will be liable to an action on mandate, although she herself is the one who gave the dowry.

(7) Where anyone asserts that the business which he has directed his agent and his slave to transact will only be ratified if Sempronius is present when this is done, and a bad debt should

be contracted, Sempronius, who was not guilty of fraud, will not be liable; and it is true that he who attends to the affairs of another without the intention of acting as an agent, but solely through motives of affection and friendship, for the purpose of advising agents and stewards and directing them by his counsel, is not liable to an action on mandate; but if he should be guilty of bad faith, he will be liable, not to an action of mandate, but to one on the ground of fraud.

(8) If I direct my agent to lend my money to Titius without interest, and he does not lend it to him without interest, let us examine whether he should refund the interest to me? Labeo states that he should refund it, even though I directed him to lend the money without interest; although if he lent the money at his own risk, Labeo says that an action to recover the interest will not lie.

(9) Labeo also says, and it is correct, that this action also permits reimbursement, and as a party who acts as agent is required to deliver the crops, he can also deduct any expense which he may have incurred in gathering them; but if he expended anything for transportation while he was going over the land, I think that such expense should also be made good to him, unless he was employed on a salary, and it was agreed that he shall pay his own expenses on journeys of this kind, that is to say, he should pay them out of his salary.

(10) He also says that if an agent incurs any expense for the sake of pleasure, outside his mandate, his principal should permit him to remove the object for which it was incurred, if this can be done without injury to him, unless the principal wishes him to be accountable for said expense.

(11) Sureties and mandataries are entitled to an action on mandate, even though they have made payment without the institution of judicial proceedings.

(12) Julianus says that, generally speaking, if a surety has neglected to interpose an exception which was a personal one, and of which the principal debtor could not avail himself, he will still be entitled to an action on mandate; if, indeed, the exception could not have been honorably employed. If he did this knowingly in a case in which the principal debtor could have made use of the proceeding, he will not be entitled to an action on mandate, provided that he had the power of settling the matter, and of asking the party whether he preferred to undertake the defence of the case in his own behalf, or by means of an attorney.

(13) Where a receipt is given by a creditor to a surety by way of gift, I think that if the creditor desired to remunerate the surety, the latter would be entitled to an action on mandate; and much more would this be the case if the creditor gave him the receipt on account of death, or bequeathed him a release.

11. *Pomponius, On Plautius, Book III.*

If I should subsequently become the heir of a party in whose favor judgment has been rendered against me on account of security, I will be entitled to an action on mandate.

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

If, however, not for the sake of remuneration, but mainly as a gift, a creditor dismisses the suit against a surety, the latter will not be entitled to an action against the debtor.

(1) Marcellus, however, holds that where anyone, with the intention of making a gift to a surety, pays a creditor in his behalf, the surety will be entitled to an action on mandate.

(2) It is evident, he says, that where a son under paternal control or a slave is the surety, and I make payment for him, I give him a present; and neither the father nor the master can bring an action on mandate. This is the case because the party who made the payment did not intend to make a donation to the father.

(3) It is clear that if a servant, who is a surety, should pay the creditor, his master will be entitled to an action on mandate.

(4) Marcellus also says, in the same place, that where a son under paternal control became security without the authority of his father, an action on mandate will not lie, if there is nothing in the *peculium;* but if he became security by the order of his father, or payment was made out of the *peculium*, there is still more reason that his father should be entitled to an action on mandate.

(5) If I directed a son under paternal control to make payment for me, Neratius says that his father would be entitled to an action on mandate, whether he himself made payment, or his son did so out of the *peculium,* and this is reasonable, for it makes no difference to me who pays my debts.

(6) If I direct a son under paternal control to make payment for me, and he does so after being emancipated, it is true that an action *in factum* should be granted to the son, but the father will be entitled to an action on the ground of voluntary agency, if he pays after the emancipation of his son.

(7) They proceed by the counter action who have accepted the mandate; as, for instance, those who have undertaken the agency of matters in general, or of a single transaction.

(8) Hence Papinianus asks whether a patron who has bought a tract of land and paid two thirds of the purchase-money, and ordered the said land to be delivered to his freedman, so that he may pay the remainder, and, after this has been done, and the freedman has consented that the land shall be sold by the patron, can the freedman recover the third of the purchase-money? He says if the freedman accepted the mandate in the beginning, he did not receive a gift, and he can recover the third of the purchase-money by means of the counter action after having deducted the profits which he had collected in the meantime; but if the patron bestowed this as a gift upon his freedman, the latter will be held to have afterwards donated it to his patron.

(9) If you have directed me to purchase something for you, and I purchase it with my own money, I will be entitled to an action against you to recover the price of the same; but if I pay for it with your money, and there is still some *bona fide* balance due for the purchase of the article, or if you refuse to receive it after it has been bought, the contrary action on mandate will lie.

The case will be similar if you direct me to do anything else, and I incur expense for that purpose; for I can not only recover the amount which I have disbursed but also interest on the same. The interest, moreover, should not only begin to run from the time of the default, but the judge should also make an estimate of the expense, if a party demands payment from his debtor and the latter pays, where he obtains a very high rate of interest (for it is perfectly just that reason should be considered in matters of this kind), or where the debtor himself has borrowed money at a high rate of interest and pays it.

If, however, the agent did not release the principal debtor from the payment of interest, but the interest itself is lost; or if he released him from a low rate of interest, and, in order to execute his trust, received a higher rate; I have no doubt that he can recover the interest by an action on mandate, and, (as has already been determined) a judge should decide all this in accordance with the principles of equity and good faith.

(10) I gave you money in order that you might pay my creditor, you did not do so, and you will owe me interest; in this instance, my creditor can recover the money due from me with interest, as was stated by the Emperor Severus in a Rescript directed to Hadrianus Demonstratus.

(11) If a dissolute young man directs you to become security for a harlot, and you, having knowledge of her character, undertake to carry out the mandate, you will not be entitled to an action on mandate; because the case is similar to the one where you lend money to a party being well aware that he will lose it. But if he still further directly charges you to lend money to a harlot, you will not be bound by the mandate, as it was given contrary to good faith.

(12) Where a certain man wrote a letter to his friend as follows: "I ask you to consider Sextilius Crescens, my friend, as recommended to you," he will not be liable to the action of mandate, because the letter was written rather for the purpose of recommending the man than on account of the mandate.

(13) Where one party directs another to lend money to a son under paternal control, the latter should not be considered as borrowing it in violation of the Decree of the Senate; but, for the reason that the father will be liable either to an action on the *peculium*, or for money expended for his own benefit, or on the ground of an act performed by his order, the mandate will be valid.

I further say, that if I should be in doubt as to whether he was accepting the loan in opposition to the Decree of the Senate, or not, and I refuse to lend him the money in violation of the Decree of the Senate, and someone should then appear who alleges that this is not the case, and he also says to the creditor, "Make the loan at my risk, you will make a good loan." I think that there is ground for a mandate, and that the party will be liable to the action.

(14) If I direct the creditor to make a loan after the money has already been lent; Papinianus says, very properly, that there is no mandate. It is evident that if I direct you to grant a delay to the debtor, in order that you may wait and not urge him to payment, and I state that the money will be at my risk; I think it is true that the entire risk of the claim should attach to the party giving the mandate.

(15) He also says that if a guardian directs that an obligation which he has incurred shall be accepted or approved, he will be liable to an action of mandate, that is, to one who has been his ward, or to his curator.

(16) If I direct money to be collected, and then change my mind, can an action on mandate be brought against me or against my heir? Marcellus says that the action on mandate will not lie, because the mandate is extinguished by the change of mind. If, however, you direct the money to be collected, and then forbid this to be done, and it is, nevertheless, collected; the debtor will be released.

(17) Marcellus also says that if anyone directs a monument to be erected to himself after his death, his heir can proceed in an action on mandate. But if the party who received the mandate erected the monument with his own money, I think that he can bring an action on mandate, even if he was not charged to erect the monument with his own money; for the action will also lie in his favor against him who directed him to employ his own money in constructing the monument, and especially is this the case if he had already made preparations for that purpose.

13. *Gaius, On the Provincial Edict, Book X.*

The rule is the same if I have directed you to purchase a tract of land from my heirs after my death.

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

There is no doubt that the heir of a surety is entitled to an action on mandate, if he has made payment. If, however, he has sold the estate, and the purchaser has made payment, the question arises, will he be entitled to an action on mandate? Julianus says, in the Thirteenth Book, that the heir can bring such an action, because he is liable to be sued on the ground of purchase, to compel him to assign his rights of action, and therefore an action on purchase will lie, since he has the power to do so.

(1) Where a surety leaves two heirs, and one of them purchases the estate from his co-heir, and then pays to the stipulator all that the deceased became surety for, he can hold his co-heir liable either on the stipulation, or on the purchase. He will therefore be entitled to an action of mandate.

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

If I direct you to purchase a tract of land, and afterwards write to you not to do so, and you have made the purchase before you learned that I had countermanded it; I will be liable to you in an action on mandate, because he who undertook to execute the mandate should not suffer loss.

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

If anyone should direct me to incur some expense on my own property, and I do so, the question arises whether an action on mandate will lie. Celsus says, in the Seventh Book of the Digest, that he gave the following opinion, when Aurelius Quietus is said to have directed a physician with whom he lodged, to build, at his own expense, a tennis-court, a hot bath, and other buildings for his health in the gardens which he had at Ravenna, to which he was accustomed to repair every year.

Celsus therefore held, that, after having deducted whatever had a tendency to render his buildings more valuable, an action on mandate could be brought against him to recover the balance.

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

If I direct you to collect ten *aurei* from Titius, and before they are collected, I bring an action on mandate against you, and you collect • the amount before the case is decided; it is established that judgment should be rendered against you.

18. *Ulpianus, On Sabinus, Book XL.*

Where anyone allows himself to be directed by another to lend him money, he is understood to have received a mandate.

19. *The Same, On Sabinus, Book XLIII.*

If my slave directs someone to purchase him in order that he may be ransomed; Pomponius very aptly discusses the question whether he who has ransomed the slave voluntarily, can bring an action against the vendor to compel him to take him back; since the action of mandate is a reciprocal one. Pomponius says, however, that it is most unjust to compel me to take back a slave on account of the act of said slave, whom I wish to dispose of permanently; nor should I be liable to an action of mandate in this instance, any more than if I had sold him to you.

20. *Paulus, On Sabinus, Book XL*

He who has undertaken to carry out a mandate cannot profit to any extent on account of it; just as he ought not to suffer any loss if he could not collect money lent at interest.

(1) An action on the ground of business transacted may be brought by a surety if he bound himself for a party who was absent, for an action on mandate will not lie when the mandate did not precede it.

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

If I become surety for you by the direction of another, I cannot bring an action on mandate against you, just as happens when someone makes a promise having in view the mandate of another. But if I do this with reference, not to the mandate of one person but to that of two, I will also be entitled to an action of mandate against you, just as, if two parties had directed me to lend you money, I would be entitled to an action against both.

22. *Paulus, On the Edict, Book XXXII.*

If I direct you to become surety for me for a certain time, and you do so absolutely, and make payment; the proper answer will be that you will not be entitled to an action on mandate until the time has expired.

(1) It has also been discussed whether, if you become security by my direction for a certain time, for a sum which I owed during that time, and you pay it before the period has elapsed,

will you at once be entitled to an action on mandate? Certain authorities think that the right of action is immediately acquired, but for less than the amount of my interest in having payment made on the day when it was due. It is better, however, to say that, in the meantime, the action on mandate for this sum cannot be brought, when it is not convenient for me to pay it before the appointed time.

(2) It happens, sometimes, that if I transact my own business I will also be entitled to a prætorian action on mandate; for instance, where my debtor substitutes one of his own in my favor at his own risk, or where I institute proceedings against the principal debtor at the request of the surety; for although I am collecting my own debt, still, I am transacting his business, and therefore what I fail to collect I can recover by an action on mandate.

(3) Where persons, whose property has been given in pledge and sold, introduce fraudulent purchasers, and direct them to buy the property, the mandate is understood to have been given, although a mandate does not exist under circumstances of this kind; because, when you buy your own property, such a purchase is null and void.

(4) Julianus said that the obligation of mandate also has reference to the property of him who undertook its performance, and, on this account, should by all means, be proved; because if I direct one of several heirs, who are making a sale, to purchase for me the property of the estate, the said heir will be liable to an action on mandate for the share of the estate to which he is entitled, and the obligation will be reciprocal; for, in fact, if he, on this account, (that is, because he has undertaken the performance of the mandate) will not surrender the property to another bidder, good faith requires that he should pay him the price for which it could be sold.

On the other hand, if the purchaser was not present at the sale for the purpose of buying property which he needed, as he had instructed the heir to purchase it for him; it will be perfectly just that he should have an action on mandate to indemnify himself for the interest he had in having the property purchased.

(5) A person whose property has been confiscated can direct anyone to purchase it, and if he should do so, an equitable action on mandate will lie, if he does not keep faith. This rule has been established because, where property has been confiscated and anything is afterwards acquired, it does not go to the Treasury.

(6) Where anyone has undertaken to carry out a mandate directing him to rob a temple, or wound or kill a man, he cannot recover anything in an action on mandate, on account of the infamous nature of the mandate.

(7) If I give you a hundred *aurei* in order that you may give them to Titius, and you do not do so, but use them yourself; Proculus says that you will be liable both to an action on mandate, and to one of theft; but if I should give them to you in such a way that you can turn them over to anyone you please, only an action on mandate will lie.

(8) If I direct your slave to pay, on my account, a sum of money which I owe you; Neratius says that, although the slave may have borrowed the money and entered the payment on your books as having been received from me, still, if he did not receive it from the creditor to be placed to my credit, I will not be released, and you cannot bring an action on mandate against me; but if he borrowed it with the understanding that he was to pay it on my account, on the other hand both these circumstances will take place; for it makes no difference whether some other slave, or the same one, received the money to be paid on my account in your name, and this is the more correct, since whenever the creditor receives his own money, the release of the debtor does not occur.

(9) A fugitive slave of mine, while in the hands of a thief, obtained some money and purchased other slaves with it, whom Titius received by delivery from the vendor. Mela says that I can cause Titius to make restitution to me by an action on mandate, because my slave is held to have directed Titius to receive the slaves by delivery, provided that he did so at the request of the slave. But if the vendor made the delivery to Titius without his consent, I can

then bring an action on purchase to compel the vendor to deliver the slaves to me, and the vendor will have a personal action for recovery against Titius for the delivery of slaves which he did not owe him, although he believed that he did.

(10) Where the curator of property makes a sale, but does not pay the proceeds of the same to the creditors, Trebatius, Ofilius, and Labeo are of the opinion that an action on mandate will lie against him in favor of those creditors who appear, and that an action on the ground of business transacted can be brought by those creditors who are absent; but if, having executed the mandate of those who are present, he proceeds with the sale, an action on the ground of business transacted cannot be brought by the absent creditors, unless perhaps against those who directed the curator to sell the property, just as if they had transacted the business of the former. But if they directed him to do this, believing that they were the only creditors, an action *in factum* should be granted in favor of the absent creditors against those who gave the mandate.

(11) However, just as one is free not to accept a mandate, so if it is accepted it must be executed, unless it is revoked. Moreover, it can be revoked in such a way that the right will be reserved unimpaired to the party giving the mandate to conveniently dispose of the matter, either by himself or by someone else; or where he who undertook the performance of the mandate might be taken advantage of. And if the party to whom the mandate was given to purchase something does not do so, and does not state that he will not purchase it, he will be responsible for his own negligence, and not for that of another; and it is settled that he will be liable to an action on mandate.

He will still further be liable (as Mela also has said) if he should fraudulently revoke the mandate at a time when he could not properly make the purchase.

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

If, however, the mandatary alleges as an excuse for not complying with the mandate the existence of illness, or the deadly enmity of his adversary.

24. *Paulus, Sentences, Book II.*

Or that the actions brought against the debtor will be of no force or effect.

25. *Hermogenianus, Epitomes of Law, Book II.* Or any other just cause, he should be heard.

26. *Paulus, On the Edict, Book XXXII.*

The death of the person giving the mandate is included among the causes for negligence to comply with it, for a mandate terminates with death. If, however, it is executed by a party ignorant of this fact, it is held that the action will lie for the sake of convenience. Julianus also stated that a mandate was terminated by the death of the party who gave it, but that the obligation arising therefrom sometimes continued to exist.

(1) Where a party directed his debtor to pay Titius for him, and the debtor paid the money after the death of Titius; although he was ignorant of the fact, he must be released.

(2) Money is understood to have been lost by a surety, where a debtor has been substituted by him for the benefit of the creditor, even though he was not solvent; because the creditor who accepts a debtor who has been substituted, makes the security good.

(3) Where a party who wishes to make a present to a surety discharges his creditor, who is his own debtor, the surety can immediately bring suit on mandate, as it makes no difference whether he paid the money to the creditor or released the latter from his obligation.

(4) It should also be borne in mind that a surety cannot recover more in an action on mandate than he has paid.

(5) I became your surety for the amount of ten *aurei*, by your direction, and I paid the agent of the creditor. If the latter was the true agent, I am immediately entitled to an action on mandate, but if he was not, I can bring an action for recovery against him.

(6) A mandator cannot make a charge of all the expenses which he may have incurred; as, for instance, where, because he has been robbed by thieves, or has lost property by a shipwreck, or he, or the members of his family, have been attacked by disease, he has been compelled to incur expense; for these things should be rather attributed to accident than to mandate.

(7) Where, however, a slave steals from you what you had purchased by my direction, Neratius says that you can bring an action on mandate to compel the slave to be surrendered to you by way of reparation, if this happened without your fault; but if I knew that the slave was dishonest, and did not warn you, so that you could provide against it, I must then make good to you the amount of your interest.

(8) A workman, by the direction of a friend, bought a slave for ten *aurei*, and taught him his trade; he then sold him for twenty *aurei,* which he was compelled to pay by an action on mandate. Afterwards, he had judgment rendered against him in favor of the purchaser, on the ground that the slave was not sound. Mela says that the mandator will not be obliged to make good to him what he paid, unless, after he made the purchase, the slave became unsound without bad faith on his part. If, however, he had given him instructions by order of the mandator, the contrary would be the case, for then he could recover what he had expended, as well as what had been paid for the maintenance of the slave, unless he had been asked to instruct him gratuitously.

27. *Gaius, On the Provincial Edict, Book IX.*

If anyone should write to another to release his debtor, and that he himself will pay him the money which he owes him, he will be liable to an action on mandate.

(1) If I have delivered to you a slave with the understanding that you will manumit him after my death, the obligation will be established. Moreover, I will, myself, be entitled to an action against you, if, having changed my mind, I should wish to recover the slave.

(2) Where a party has undertaken the performance of a mandate, and can execute it, he should not fail to do what he has promised, otherwise, judgment will be rendered against him for the amount of the interest of the mandator.

If, however, he is aware that he cannot perform the service, he should notify the mandator of that fact, as soon as he can, that the former may employ some one else if he should desire to do so. If he failed to notify him when he could have done so, he will be liable for the amount of interest of the mandator, but if, for some reason he was unable to notify him, he will be secure.

(3) A mandate is terminated by the death of the party to whom it was given, if he died without having, in any way, complied with it; and his heir, even though he may have executed the mandate, will not be entitled to an action on mandate on this account.

(4) The expenses incurred through the performance of the mandate, if they were incurred in good faith, should by all means be paid; and it makes no difference if he who gave the mandate would have paid less if he had been transacting the business himself.

(5) If you make a loan to Titius by my direction, and bring an action of mandate against me, I should not have judgment rendered against me, unless you assign to me the rights of action which you have against Titius. But if you should sue Titius, I myself will not be released, but I shall be liable to you only to the extent that you have not been able to recover from Titius.

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

Papinianus says, in the Third Book of Questions, that the mandator of a debtor who pays does not release the principal debtor by operation of law; for he pays on account of his own mandate in his own behalf, and therefore he thinks that the rights of action against the principal debtor should be assigned to the mandator.

29. *The Same, Disputations, Book VII.*

Where suit has been brought against a surety, and he, not being aware that the money has not been actually delivered to the debtor, makes payment on account of his suretyship; the question arises whether he can recover the amount that he has paid in an action on mandate? And if, indeed, being aware of the facts, he neglects to file an exception on the ground of fraud, or because the money was not paid, he will be held to have participated in the fraud, for gross negligence very nearly resembles fraud. Where, however, he was ignorant of the facts, no responsibility can attach to him. On the same principle, if a debtor is entitled to an exception, for instance, on the ground of an agreement, or for some other reason, and he, not knowing this, does not avail himself of this exception; it must be said that he will be entitled to an action on mandate, for the principal debtor could have warned his surety, and ought to have done so, in order to prevent him from ignorantly paying what was not due.

(1) It is a point susceptible of discussion, where a surety, not being aware that he has bound himself illegally, makes payment, whether he will have an action on mandate? If, indeed, he was ignorant of the facts, his ignorance will be an excuse, but if he was ignorant of the law the contrary opinion must be held.

(2) If the surety, not being aware that the debtor has paid, makes payment himself, I think that he will be entitled to an action of mandate; for he should be excused if he had not divined that the debtor has paid, for the latter should notify his surety as soon as he has paid, to prevent the creditor from overreaching him, and, by taking advantage of his ignorance, obtain from him the amount for which he became surety.

(3) This also should be discussed with reference to the surety, namely: if when he paid he did not notify the principal debtor, and the latter then satisfied the obligation, which he should not have done. I think that when he could have notified him, and did not do so, if the surety brings suit on mandate he should be barred; for if he did not notify the debtor after he made payment, he is guilty of an act resembling fraud. Moreover, the principal debtor should assign his right of action to the surety, to prevent the creditor from receiving double payment.

(4) Even though the surety should fail to perform certain acts, he is not guilty of fraud; as, for example, where he neglects to avail himself of an exception based on agency, whether he knew, or was ignorant of his right. For, in this instance, good faith is concerned, and it is not agreeable to it, to quibble concerning nice distinctions of the law, but only to ascertain whether the party is a debtor or not.

(5) In all the examples above mentioned, where the creditor has received money which was not actually lent to the debtor, or has been paid a second time, an action for recovery will lie against him, unless the money was paid to him on a judgment; for, in this instance, an action for recovery will not lie on account of the authority of the judgment, but he himself, because of his duplicity, should be punished for the crime of swindling.

(6) If a surety who is released by lapse of time, nevertheless, pays the creditor, he will legally be entitled to an action against the principal debtor; for, although he has already been released by keeping faith, he has released the debtor. Therefore, if he is ready to defend the principal debtor against his creditor, it is perfectly just that he should recover what he paid by an action on mandate. And this opinion was also held by Julianus.

30. *Julianus, Digest, Book XIII.*

If I give you a slave with the understanding that you will manumit him, and afterwards my agent should forbid you to manumit him, can I bring an action on mandate, if you grant him his freedom?

(1) I answered that, if the agent had good reason for preventing the manumission of the slave whom I had received for the sole purpose of manumitting him; for instance, if he should have subsequently ascertained that he had forged accounts, or that he had plotted against the life of his former master, I will be liable, if I do not pay attention to the notice of the agent. But, if the notice was given by the agent without any good reason, but merely in order to prevent the

manumission of the slave, an action cannot be brought against me, even though I should give him his freedom.

31. *The Same, Digest, Book XIV.*

If I commit the transaction of my business to a party who is liable to me in an action for quadruple damages (within a year), and, after the lapse of the year, for only simple damages; even though I should begin suit against him on mandate after the year has elapsed, he will be bound to pay me quadruple damages; because a party who undertakes the management of another's business is required to pay him what he would have been compelled to pay others.

32. *The Same, On Urseius Ferox, Book III.*

If I should be unwilling to enter upon an estate unless security is furnished me that I will be indemnified for any loss, and, under such circumstances, a mandate is given; I think that an action on mandate will lie. If, however, a party has directed another not to reject a legacy, the case is very different; for where a legacy is acquired, it cannot cause any loss to the person receiving it, but the acceptance of an estate is sometimes injurious. In a word, whenever such contracts are made, and every time a surety is bound in behalf of the parties, I think that the obligation of mandate is established; for it does not make much difference who the individual is, who, after being interrogated, became surety, or whether one who is absent directs this to be done. Moreover, it is proper to notice that it is a matter of common occurrence for estates thought to be insolvent, to be entered upon by the direction of creditors; and there is no doubt that this creates liability to an action on mandate.

33. *The Same, On Minicius, Book IV.*

Where a party is asked to become a surety, and obligates himself for a smaller sum, he is legally liable; but if he becomes bound for a larger sum, Julianus very properly thinks — and this is also the opinion of many authorities — that he will not be liable to an action on mandate for a larger amount than he was asked to become surety for, but only for the sum contained in the request; because he did what he was directed to do; since it is held that the party who requested him relied upon his good faith to the extent to which he was asked to be responsible.

34. *Africanus, Questions, Book VIII.*

A man was in the habit of transacting the business of Lucius Titius, as his agent, and, after he had collected money from the debtors of the former, he sent him a letter in which he stated that a certain sum derived from his management of his business remained in his hands, and that he himself had borrowed the same, and was indebted for it with interest at six per cent. The question arose whether an action could be brought for this money, as lent, under these circumstances, and whether interest could be collected? The answer was that the money was not lent, otherwise it could be alleged that money would be considered loaned in every contract where there was no consideration.

This case is not similar to the one where an agreement is made that you shall have, as a loan, money which has been deposited with you, and it is lent, because then the money which was mine becomes yours.

Moreover, if I order you to borrow money from my debtor, it becomes a loan, for this is the indulgent interpretation; and the proof of this is that where a party who wishes to loan money to another gives him silver to be sold, he cannot legally bring an action for money loaned, and nevertheless, the money obtained for the silver will be at the risk of the party who received the silver. In the case stated, it must therefore be held that the agent will be liable to an action on mandate, so that, although the money was at his risk, he must still pay the interest which was agreed upon.

(1) I directed you, being heir to a share of an estate, to purchase for me a tract of land belonging to said estate at a specified price, and you did so. There is no doubt that an action

on mandate will lie between us with reference to the shares of the other co-heirs. So far as your share is concerned, however, a doubt may arise whether an action on purchase or on mandate should be brought, for it is not unreasonable to believe that the purchase was made conditionally with regard to this share; because, in fact, the question is very important whether, if I should die before the bargain was concluded, and you, being aware of my death, refused to sell to another on account of my mandate, my heir would be liable to you on this account?

And, on the other hand, if you should sell to another party, would you be liable to my heir? For if the purchase should be held to have been made under a condition, proceedings can be instituted in the same way as where any other condition had been complied with after death. If, however, proceedings had been begun under mandate, for example, if I had directed land belonging to someone else to be purchased, and death had taken place, as you were aware of this fact, and the mandate having been terminated, no action in your favor could be brought against my heir; but if action had been taken under the mandate, the course of procedure would be the same as in a case of purchase.

35. *Neratius, Parchments, Book V.*

If I directed you to purchase for me a tract of land in which you have a share, it is true that, in compliance with this mandate, you are also required to deliver me your share, after the remaining shares have been purchased. If, however, I should direct you to purchase the said shares at a certain price, and you have bought some of them at any price whatsoever, your share of the proceeds will be subject to diminution, so that the total amount will not exceed that for which I directed the property to be purchased. But if I directed you to make the purchase without fixing any price, and you buy the shares of the other parties at different prices, you should also sell your shares for a sum which would be approved by the judgment of a good citizen.

36. *Javolenus, On Cassius, Book VII.*

A person of this kind should bring all the amounts, large and small, together, and in that way ascertain the share to be paid by the party who received the mandate. Many authorities adopt this rule.

(1) In like manner, in the following instance, where I directed you to purchase something for me at a certain price, and you transacted the business profitably with reference to the other joint-owners, and made the purchase at a low figure, you will have for your share the amount of your interest, provided it is within the sum contained in the mandate; but what if the parties who held the land in common with you were compelled to dispose of it at a low price, either on account of the bad condition of their affairs, or for some other reason? You should not make the same sacrifice, nor should you profit by this circumstance, as a mandate ought to be gratuitous, nor should you be permitted, on this account, to prevent the sale, because you knew that the purchaser was more anxious to obtain the property than he was at the time he directed you to purchase it.

(2) If I should direct you to purchase for me a tract of land, which is sold by certain parties, in such a way, however, that I shall not be bound by the mandate unless you purchase the entire tract, and you are unable to purchase it all; you will be transacting your own business with reference to the shares you have bought, whether you have an interest in the land or not. The result will also be that he to whom a mandate of this kind has been given, will, in the meantime, purchase the different shares at his own risk, and, unless he buys them all, they will remain in his hands, even though he does not want them. It is more probable that, since a party can undertake the execution of a mandate attended with such inconveniences, and has done so voluntarily, he should discharge his duty by purchasing the different shares, just as he ought to do in purchasing all of them together.

(3) If I direct you to purchase a tract of land for me, and do not add that I shall not be liable under the mandate unless you buy it all, and you purchase one, or several portions of the

same; we will then undoubtedly be entitled to actions on mandate against one another reciprocally, even though you could not purchase the remaining portions of the land.

37. *Africanus, Questions, Book VIII.*

I became surety for you that a certain slave should be delivered, and I complied with the agreement. When I bring an action of mandate against you, reference should be had to the time when I made payment, and not to that when the action was brought; and therefore, even though the slave should afterwards die, an equitable action will, nevertheless, lie.

(1) The rule is different in the case of a stipulation, for then the time when the action was brought is considered, unless it should happen that the promisor is responsible for not having made payment at the proper time, or the creditor neglected to receive it, for the failure of neither of the parties should benefit him.

38. *Marcellus, Opinions.*

Lucius Titius permitted Publius Mævius, his son, to mortgage a house held in common to his son's creditor, but not with the intention of making him a present of the same; and afterwards Mævius, having died leaving a minor daughter, the guardians of the latter joined issue against Titius, as Titius did in proceedings instituted to collect a loan. I ask whether the part of the house which Titius permitted his son to encumber should be released by a decision of court?

Marcellus was of the opinion that the judge should determine whether it should be released, by taking into consideration the character of the debtor and the intention of the contracting parties, as well as the time when the property in dispute was hypothecated, for, the disposal of a legal question of this kind depends upon a judicial decision.

(1) There is a point which is not dissimilar, and which very frequently arises, that is, whether a surety can institute proceedings to obtain his release before he has made payment. One should not always wait until he makes payment, or until judgment is rendered against him after issue has been joined; as, if the principal debtor has delayed payment for a long time, or wasted his property, and especially if the surety has not the money in his hands ready to be paid to the creditor, he may then proceed against the debtor by an action of mandate.

39. *Neratius, Parchments, Book VII.*

It was held by both Aristo and Celsus, the father, that property could be deposited, and the performance of a mandate assumed, under the following condition, namely: "That the property should be at the risk of the party who received the deposit, or undertook the performance of the mandate." This appears to me to be correct.

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

If I should become surety for you in your presence, and in spite of you, neither an action on mandate, nor one on the ground of business transacted will lie. Some authorities hold that an equitable action should be granted, but I do not agree with them, and think that the opinion held by Pomponius is correct.

41. *Gaius, On the Provincial Edict, Book III.*

An action on mandate can sometimes only be granted on one side; for if the party who undertook to perform the mandate exceeds its limitations, he will not be entitled to an action on mandate, and the one who gave him the mandate will be entitled to an action against him.

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

If I direct you to investigate the circumstances of an estate, and you purchase it from me, representing that it is of less value than it actually is; you will be liable to me in an action on mandate. This will also be the case if I direct you to ascertain the financial condition of a party to whom I am about to make a loan, and you falsely represent to me that he is solvent.

43. *The Same, On the Edict, Book XXIII.*

A person who undertakes the performance of a mandate, "To place money for a certain time," and does so, can be sued on the mandate, and must assign any rights of action acquired by delay.

44. *The Same, On the Edict, Book LXII.*

It is a fraudulent act for anyone to refuse to proceed against a debtor whom he can sue, or where he does not require payment when it can be exacted.

45. *Paulus, On Plautius, Book V.*

If you have purchased a tract of land by my direction, can you bring an action on mandate against me, after you have paid the purchase money, or before you do so, in order to avoid selling your own property?

It is rightly held that an action on mandate will lie, in this instance, to compel me to assume the obligation by which you are bound to the vendor; for I myself could bring an action against you to force you to assign your rights of action against the vendor.

(1) If, by my direction, you have undertaken the defence of a case which is still in court, you cannot take legal measures to transfer the defence to me, without good reason, for you have not yet executed the mandate.

(2) Moreover, if, while you are transacting my business, you bind yourself to one of my creditors, it must be said that before you make payment, you will be entitled to an action against me to compel me to assume the obligation, and if the creditor refuses to change the obligation, I will be obliged to furnish security to defend you against him.

(3) If I give an undertaking that you will appear in court, and I do not produce you, or, if I have assumed your liability, I can bring an action on mandate to compel you to release me before I make payment.

(4) If I should direct you to pay my creditor, and you should bind yourself to do so, and, in consequence, have judgment rendered against you; the more humane opinion is that, in this instance, an action of mandate will lie in your favor against me.

(5) Wherever we have stated that an action on mandate can be brought before the money has been paid, the mandatary will not be liable for non-payment, but only for his act; and as it is just that, where we have obtained a right of action against a mandatary, we should be compelled to assign it to the mandator; so, on the same principle, we should be bound in an action of mandate to release him from liability.

(6) If the surety should, on account of reasonable expenses incurred, pay a larger sum than that for which he bound himself, he for whom he became surety must make good the entire amount.

(7) I entered into an agreement with your debtor for the payment of what you owe me, at your risk. Nerva and Atilicinus say that I can bring an action on mandate against you with reference to what I have not previously been able to collect from him, even though the mandate had reference to your affairs. This is reasonable, for then he who substituted the debtor is not released if his creditor follows the claim, and it is not stipulated by him that this is at the risk of the debtor.

(8) The rule is the same if I should bring an action against the principal debtor by the direction of the surety, because, through executing the mandate, the surety would be released from his former liability.

46. *The Same, On the Edict, Book LXXIV.*

Where anyone binds himself for a party who promises as follows, namely: "If I do not deliver Stichus, I will pay a hundred thousand sesterces," and he purchases Stichus at a lower price and makes payment, in order that the stipulation for a hundred thousand sesterces, may not take effect; it is established that he can bring an action on mandate. It is, therefore, most

convenient that the proper form should be observed in all cases of mandate, so that whenever the mandate is certain, its terms should not be violated; but when it is uncertain, or includes several alternatives, then, although its provisions may have been carried out by the performance of other acts than those prescribed by the mandate itself, still, if this was advantageous to the mandator, the action on mandate will lie.

47. *Pomponius, On Plautius, Book III.*

Julianus says that, if a wife promises her dowry to her surety, because she is indebted to him on account of his suretyship, after the marriage has taken place the husband can at once bring an action on mandate against the debtor; for the reason that he is understood to have lost money by means of which he could have paid expenses incurred during marriage.

(1) Where a party has become surety to deliver a slave for you, and he delivers another slave to the stipulator, he will not himself be released, nor will he release you; and therefore he will not be entitled to an action on mandate against you. But if the stipulator has obtained the said slave by usucaption, Julianus says that it must be held that there has been a release, and, in consequence of this, an action of mandate will lie, but only after usucaption has taken place.

48. *Celsus, Digest, Book VII.*

Quintus Mucius Scævola says that if anyone has given security for money lent at interest, and the principal debtor, having been sued, attempts to deny that the money was lent at interest, and the surety, by paying the interest, deprives the principal debtor of the opportunity of refusing payment, he cannot recover this money from the principal debtor. If, however, the latter had notified the surety that he would refuse to pay what is due with interest, and the surety was not willing to refuse payment on account of his reputation, he can recover from the principal debtor whatever he paid on this account.

This opinion Sca3vola thought to be well founded; for, in the former instance, the surety paid but little attention to good faith, when he appeared to deprive the principal debtor of the power to avail himself of his right; but, in the latter instance, he should not have been a source of injury to the surety if he had had any regard for his own sense of honor.

(1) If I direct you to transact business for me by lending money, with the understanding that you are to transfer the claim to me at my risk, and that the profit, if any, will be mine; I think that the mandate will stand.

(2) But if I direct you to transact the business for yourself, so that the claim will remain in your possession; that is to say, that you may lend money to anyone you please, and receive the interest, and that I alone will assume the risk; this transaction is outside the terms of the mandate, just as if I should direct you to purchase any kind of a tract of land for me.

49. *Marcellus, Digest, Book VI.*

I purchase a slave of Titius in good faith, and have possession of him. Titius sold him by my direction, not being aware that he really belonged to him; or, on the other hand, I myself sold him at the direction of Titius, who became the heir of the party who purchased him; the question arises whether an action on the ground of superior title, and one on mandate will lie?

I am of the opinion that Titius, although he made the sale as agent, is liable to the purchaser; and that he would not be entitled to an action for recovery, even if he had delivered the property, and therefore that an action on mandate will lie, if he was interested in the slave not being sold.

On the other hand, the mandator, if he wishes to receive the property from him, will be barred by an exception on the ground of fraud, and will be entitled, as heir, to an action based on the purchase of the testator, who left him the property, against the vendor.

50. *Celsus, Digest, Book XVIII.*

If anyone who is transacting the business of a surety, paid the stipulator with the

understanding that he would release the debtor and the surety from liability, and he does this in compliance with law, he can hold the surety liable in an action on the ground of voluntary agency; nor does it make any difference whether or not the surety has ratified his act, for he will, nevertheless, be entitled to an action on mandate, as soon as he does ratify it, and even before he pays the money to the agent.

(1) Where a certain amount of grain is due, and the surety delivers African grain, or, impelled by the necessity of payment, he gives something of greater value than the price of the property to be delivered, or he transfers Stichus, and the latter dies, or becomes worthless either through weakness or vice; the amount can be recovered by an action of mandate.

51. *Javolenus, On Cassius, Book IX.*

A surety, although he may have paid the money by mistake before it is due, can not, nevertheless, bring suit against the creditor; nor can he, indeed, bring an action on mandate to which he may be entitled against the principal debtor, before the day of payment arrives.

52. *The Same, Epistles, Book I.*

Where a party has become surety for another for a certain quantity of wheat, without any reference to its quality; I think that he will release the principal debtor by furnishing any kind of wheat whatsoever, but he cannot recover any other kind of wheat from the principal debtor, except that of the most inferior quality, by the delivery of which he could have released himself from the claim of the stipulator. Therefore, if the principal debtor is prepared to give to the surety the same kind of wheat, by giving which to the creditor, he himself could have been released, and the surety brings an action for the same kind of wheat which he furnished, that is to say, grain of superior quality, I think that he can be barred by an exception on the ground of fraud.

53. *Papinianus, Questions, Book IX.*

Where anyone becomes surety for another, relying on the honor of a third party who is present and does not object; he can hold both of them liable to an action on mandate. But if, in compliance with a mandate of one of the parties, he becomes surety unwillingly or in ignorance of the facts, he can only sue the one who gave him the mandate, and not him who incurred the obligation. It does not affect me, because the principal debtor is released by the money of the surety, for this happens even if you make payment in behalf of another by my direction.

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

Where a slave directs someone to purchase him, the mandate is void. But if the mandate was given for the purpose of manumitting the slave, and the party in question does not manumit him, the master and vendor can sue for the recovery of the purchase-money, and an action on the ground of affection can be brought, for suppose that the slave was a natural son, or a brother. It was held by persons learned in the law that, in *bona fide* cases, attention should be paid to the consideration of affection.

Where the purchaser paid the price out of his own money, (for, otherwise he could not be released from liability to an action on sale), it is frequently asked whether he can properly bring an action on the *peculium?* The more correct and judicious opinion seems to be that the praetor did not have in mind contracts of this kind made by slaves, by which they attempted to escape the bad treatment of their masters.

(1) If a freeman serving in good faith as a slave should direct someone to ransom him, and this is done with the money of the purchaser, it is established that the contrary action on mandate will lie; provided, however, that the rights of action which the purchaser has against the vendor are assigned, supposing that the purchaser did not manumit the free person aforesaid.

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

An agent who does not appropriate property which is locked up, but fails to return after it has been delivered to him, is liable to an action of mandate, but not to one of theft.

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

Where anyone has directed money to be loaned, the mandatary can sue the mandator without having recourse to the principal debtor, and without selling the pledges, and the creditor can even have recourse to him, if it is stated in the letter that he has a right to do so, even if the pledges are sold; for whatever is inserted in a contract for the purpose of removing all doubt, does not in any way restrict the effect of the Common Law.

(1) Where a surety has tendered the money in court, and, on account of the age of the party who is bringing the suit, has sealed it up, and publicly deposited it, he can immediately proceed by an action on mandate.

(2) It is none the less necessary to investigate the good faith of the mandatary during the entire time, where the owner of the property returns to the province after five years absence, having been compelled to leave on business for the State; although he may have renewed the mandate without having received an accounting. Hence, as it is the duty of the agent to transfer all that has been done during the first administration of the business into the account of the second, he will combine the matters attended to during the first period with those of the second.

(3) A salary which is dependent upon an uncertain promise cannot legally be collected by a resorting to extraordinary proceedings, nor have you the right to have it established by means of an action on mandate.

(4) It is necessary for an action on mandate to be brought for the recovery of *bona fide* expenses necessarily incurred; even though the agent may not have finished the business entrusted to him.

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

It is settled that a mandate for the sale of slaves is terminated by the death of the party who undertook the execution of the same; still, although the heirs, through mistake, and not with the intention of theft, but of performing a duty which the deceased had imposed upon himself, should sell the slaves, it is held that they could be acquired by the purchasers through usucaption, but that after the slave-dealer had returned from the province, he could not legally avail himself of the Publician Action, where, on proper cause shown, an exception would be granted him on the ground of his legal ownership of the slaves; for it is not proper that he who had relied upon the good faith of a certain individual, should sustain loss on account of the mistake or inexperience of the heirs.

58. *Paulus, Questions, Book IV.*

If you defend Titius in accordance with a mandate which has previously been given you, even if he were dead and you were ignorant of the fact; I think that you will be entitled to an action on mandate against the heir of Titius, because a mandate is terminated by the death of the mandator, but the action on mandate is not. If, however, you undertook the defence of the case without any mandate, you began, as it were, to transact the business of the deceased, and you will be entitled to an action against him on the ground of voluntary agency, just as if you had released him from liability.

It can also be said that his heir will be liable to the same action.

(1) Lucius Titius gave a mandator to his creditor, the debtor having afterwards died and the majority of the creditors having consented, it was decreed by the Prætor that they should receive a portion of their claims from the heir, the creditor in whose behalf the mandator had been given, being absent at the time.

I ask if this mandator were sued would he be entitled to the same exception as the heir of the debtor? I answered that, if he himself had been present before the Prætor, and had given his

consent, the agreement would be held to have had proper foundation, and that this

exception should be granted to both the surety and the mandator. But, as in the case stated he was absent, it is unjust to deprive him of his right of choice, since, if he had been present, he could have demanded his pledge or privilege, and refused to accept the decree of the Prætor. For no one can say that, if the creditor were barred, the heir would be benefited, but the mandator or the surety would be, as he would be compelled to make good to them the same portion in an action on mandate. But if the creditor had received his share of the indebtedness from the heir, would there be any doubt that he would be permitted to bring an action against the surety for the remainder? By the mere fact of bringing suit against the heir he would be held to have consented to the decree.

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

If Calpurnius stipulated for the payment of money which had been lent by the direction of Titius, but had not been given with the intention of making a present of the same, an action on mandate can be brought against him by the heir of Titius, to compel him to assign his rights. The same rule applies where the money was exacted from Calpurnius.

(1) Paulus held that, if the surety purchased from the creditor property given in pledge by the debtor, an action on mandate could be brought against him by the heir of the debtor for its recovery, and that he could be compelled to surrender the profits together with the entire debt; for he should not be considered as resembling a stranger who had become the purchaser, since he was required to display good faith in every contract.

(2) Paulus also gave it as his opinion that, when the day on which Lucius Titius stated in writing that he would deliver the property is inserted in the mandate, this offers no obstacle to the bringing of an action on mandate against him after the time has elapsed.

(3) He also says that one of two mandataries who are bound for the entire amount can be selected, even if this has not been mentioned in the mandate; but that, after judgment has been rendered against both, execution can, and should be issued against each one of them for only half of the judgment.

(4) A creditor sold a pledge; I ask, if the purchaser was deprived of possession under a superior title, whether the creditor can have recourse to the mandator? And does it make any difference whether he made the sale under his right as creditor, or guaranteed the title in accordance with the Common Law?

Paulus gave it as his opinion that if the creditor could not realize enough from the sale of the pledges to discharge the indebtedness, the surety would not seem to be released.

From this opinion it is apparent that he will not be liable on the ground of eviction, but that this will contribute to his release.

(5) So-and-So to So-and-So, Greeting: "I direct you to lend eight *aurei* to Blæsius Severus, my relative, under such-and-such a pledge, and I will be accountable for the said sum, as well as any addition to it by way of interest; and you will be indemnified for the same as long as Blæsius Severus lives." The mandator having been afterwards frequently sued, did not answer, and I ask whether he will be released by the death of the debtor? Paulus replied that the obligation growing out of the mandate was a perpetual one, although it may have been inserted in the mandate that, on account of it the mandatary would be indemnified for the amount as long as Blæsius Severus lived. (6) Paulus also stated that a person was not held to have complied with the conditions of a mandate, when it was inserted in the latter that proper security should be required of the debtor, if neither surety nor pledges had been received.

60. *Scævola, Opinions, Book I.*

A creditor sued a mandator, and judgment having been rendered against the latter he appealed. The question arises whether the debtor can be sued by the creditor while the appeal is pending? I answered that he could be.

(1) Titius wrote to a party who was about to be married, as follows : "Titius to Seius, Greeting. You know the conditions of my mind toward Sempronia, and therefore, since you are about to marry her with my approbation, I wish that you may be satisfied that you are contracting marriage in accordance with your rank. And although I am aware that Titia, her mother, will promise the girl a suitable dowry, still, I do not hesitate to become your surety in order to better secure your friendship toward my household. Therefore, take notice that I will indemnify you for whatever you may have stipulated with her on this account, and that I have ordered this to be done in accordance with my good faith."

In this manner, Titia, who had not directed Titius to do what he had promised in writing, nor had afterwards ratified it, promised a dowry to Seius. I ask whether, if the heir of Titius should make payment, he would be entitled to an action on mandate against the heir of Titia? I answered that, according to the facts stated, he would not be entitled to the action.

The question also arose whether he would have a right of action on the ground of business transacted? I answered that he could not bring an action on this ground, for it was evident that Titius had given the mandate, not so much in behalf of Titia, as because he has consulted his own inclination. The inquiry was also made whether, if the husband should bring an action against the mandator, he would be barred by an exception? I answered that nothing had been stated by which he could be barred.

(2) The question arose, where anyone has authorized two persons to transact his business, whether each of them can be sued for the entire amount in an action on mandate? I answered that each of them could be sued separately for the entire amount, provided no more was recovered from both than was due.

(3) Where it was agreed upon, or tacitly understood, between a husband and his father-in-law, that the burden of the support of the wife should be borne by the husband, if the father paid interest on the dowry; the husband will have no action for the recovery of what he had not consumed, but if the father of the girl proves that he had directed his son-in-law to support his daughter, an action on mandate will lie.

(4) Lucius Titius committed the management of his business to his brother's son, in the following words: "Seius to his son, Greeting. I think that, in accordance with nature, a son should transact business for his father and his brother, without any express concession. I, however, give you authority to transact all of my business that you may wish, where any necessity arises, whether you desire to make sales, or enter into agreements, or make purchases, or attend to anything else whatsoever; just as if you were the owner of all my property, and I will ratify all that you have done, without opposing you in any of your acts."

The question arose whether, if the party should alienate property or give a mandate, not with the intention of transacting the business, but fraudulently; would his act be valid? I answered that he who had given the mandate in question had certainly allowed great latitude, but that he had expected that the business would be conducted in good faith.

I also ask whether, when Seius had contracted obligations in performing the duties of a magistrate, Lucius Titius could be sued on that ground, or whether his property would be liable on account of the above-mentioned words of the letter? I answered that he could not be sued, and that his property would not be liable.

61. *Paulus, On Neratius, Book II.*

If I have directed a son under paternal control to bring an action for a debt, and, having been emancipated, he collects it; I can properly bring an action on the *peculium* within a year; but Paulus says the action must be brought against the son himself.

62. *Scævola, Digest, Book VI.*

Where a controversy has arisen with reference to the estate of a deceased person between the appointed heir on the one hand, and Mævius, the paternal uncle, and the paternal aunts of the

testator on the other; Mævius stated in a letter which he wrote to his sisters that whatever he obtained in case of a favorable judgment, would belong to all of them in common; but no stipulation was entered into in accordance with the terms of the letter.

The question arose whether, if Mævius had made an agreement with the heir in such a way that certain real estate and other property would come into his hands as the result of the same, a suit based on his letter could be brought against him by his sisters? The answer was that it could.

(1) I gave a mandate in the following words: "Lucius Titius to his friend Gaius, Greeting. I beg and direct you to offer yourself as surety to Sempronius in behalf of Publius Mævius, and whatever is not paid to you by Publius I will make good; and I notify you by this letter written with my own hand."

I ask whether, if Gaius should not become surety, but should merely direct the creditor, and act differently from what was set forth in the mandate, he would be liable in an action on mandate? The answer was that he would be liable.

TITLE II.

CONCERNING THE ACTION ON PARTNERSHIP.

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

A partnership can be formed either perpetually, that is, to say during the life of the parties, or for a certain time, or to begin at a certain time, or under some condition.

(1) In the formation of a general partnership, the entire property of the partners immediately belongs to them all in common.

2. Gams, *On the Provincial Edict, Book X.*

Because, although delivery does not actually take place, still, it is tacitly presumed to do so.

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

The existing debts remain in the same condition, but the rights of action should be reciprocally assigned.

(1) When a general partnership has been expressly entered into, estates, legacies, donations, and property acquired in any way whatsoever, are acquired in common.

(2) The question arises, when a lawful estate falls to any of the partners to be held in common, what is meant by the term "lawful estate"? Must this be understood to be one that descends to a party by law, or one which is bequeathed by will? It is more probable that it only refers to an estate which descends by law.

(3) Where a partnership is contracted fraudulently, or for the purpose of committing fraud, it is void by operation of law, because good faith is opposed to fraud and deceit.

4. *Modestinus, Rules, Book III.*

There is no doubt that a partnership can be formed by delivery of the property, verbally, and by means of a messenger.

(1) Partnerships are dissolved by renunciation, by death, by the forfeiture of civil rights, and by poverty.

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

Partnerships are formed either generally, where all the property is held in common, or specially, for some particular kind of business, for the collection of taxes, or even for a single transaction.

(1) Moreover, a valid partnership can be formed by parties who have not the same means; since frequently one who is less wealthy, makes up by his labor what he lacks in property.

(2) A partnership cannot legally be contracted for the purpose of making a donation.

6. *Pomponius, On Sabinus, Book IX.*

If you form a partnership with me with the understanding that you are to have control of the shares of the partnership, this control should be such as would be exercised by a good citizen, and should be according to the judgment of one, as we may not be equal partners; for instance, where one of us has placed more labor, industry, or capital in the partnership.

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

It is lawful to contract a simple partnership, and then, if no other provision is made, it is held to be one including everything acquired by gain, that is to say, where any profit is obtained from purchase, sale, leasing, and hiring.

8. *Paulus, On Sabinus, Book VI.*

Profit is understood to be whatever is derived from the industry of each of the partners.

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

Sabinus does not add that such a partnership should include an inheritance, a legacy, a donation *mortis causa*, or *non mortis causa,* and this is perhaps for the reason that these things do not come without a cause, but are granted on account of merit.

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

And for the reason that very often an inheritance passes to us as a debt from a parent or from a freedman.

11. *Ulpianus, On Sabinus, Book XXX.*

Quintus Mucius renders the same opinion with reference to inheritances, legacies, and donations.

12. *Paulus, On Sabinus, Book VI.*

A debt due to a partner is not included in the capital of the partnership, unless it is derived from the profit obtained by one of the partners.

13. *The Same, On the Edict, Book XXXII.*

If it is stated in the articles of partnership that the gains and profits shall be in common, it is clear that this is to be understood only to apply to such profits as come from the efforts of the partners.

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

If it is agreed by the partners that the property in common shall not be divided until a certain period has elapsed, they are not held to have agreed not to withdraw from the partnership before that time has passed. What would be the effect, however, if an agreement was made not to withdraw? Would it be valid?

Pomponius very properly states that such an agreement would be void, for if it were not made, and one of the partners should withdraw at an inopportune time, an action on partnership will lie against him; and even if an agreement is made not to withdraw from the partnership within a certain period, and a partner should withdraw before it had elapsed, his withdrawal would be valid; nor would he be liable in an action on partnership who withdrew on the ground that the condition was not fulfilled under which the partnership was formed, or that his partner had caused him so much injury and loss that it was not advantageous for him to endure it;

15. *Pomponius, On Sabinus, Book XIII.*

Or because it was not possible for him to enjoy the property on account of which the business of the partnership was undertaken.

16. *Ulpianus, On Sabinus, Book XXX.*

The same rule applies where a partner withdraws from the partnership because he, even against his will, is obliged to be absent for a considerable time in the public service; although sometimes he can be opposed, since he may be able to conduct the transactions of the partnership through another person, or charge his partner with it; still, this cannot be done unless his partner is especially qualified for the business, or another can be easily obtained for the management of the partnership, by the partner who is obliged to be absent.

(1) Therefore, where it is agreed that the partnership property is not to be divided, unless some good reason arises, it cannot be sold, or disposed of in any other way so that a division may be made. And, in fact, it may be said that a sale is not absolutely forbidden, but an exception can be filed against the purchaser if he divides the property before the vendor had a right to do so.

17. *Paulus, On Sabinus, Book VI.*

A partner who alienates property under such circumstances violates the agreement relative thereto, and is liable to an action on partnership, or for the division of property held in common.

(1) If a partnership is dissolved in the absence of a partner, the ownership remains in common until the latter ascertains what he who withdrew from the partnership has acquired, for any loss should be borne by him alone who withdrew; but what the absent partner may have acquired belongs exclusively to him, and any loss resulting therefrom must be apportioned in common.

(2) In the formation of a partnership, nothing is gained by the partner giving security not to withdraw; because an inopportune withdrawal causes liability for damages by operation of law, in an action on partnership.

18. *Pomponius, On Sabinus, Book XIII.*

Where a slave forms a partnership, it will not be sufficient for him to be ordered by his master to withdraw from it, but his partner must be notified of his renunciation of the same.

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

Where anyone is admitted into a partnership he alone is his partner who admitted him. This is perfectly proper, for, since a partnership is formed by consent, he cannot be my partner whom I am unwilling should be such. What would be the case, however, if my partner should admit him? He would be his partner alone;

20. *The Same, On the Edict, Book XXXI.* For the partner of my partner is not mine.

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

And whatever such a partner may obtain from our partnership he will share with the one who admitted him; for we will not hold our share in common with him, and he who admitted him will be responsible for him to the partnership; that is to say, the said partner will have a right of action against him, and will pay to the partnership whatever he recovers.

22. *Gaius, On the Provincial Edict, Book X.*

On the other hand, he who has admitted him will be responsible to him for the acts of the other partners as well as for his own, because he himself has a right of action against them.

It is also certain that there is nothing to prevent proceedings in an action on partnership from being instituted between the partner who admitted him and him who was admitted, before this is done between the other partners and the one who admitted him.

23. *Ulpianus, On Sabinus, Book XXX.*

Pomponius is in doubt as to whether it will be sufficient for the said partner to assign to his

associates the right of action which he has against the newcomer, in case of loss, if the latter should not prove to be solvent, or whether he should fully indemnify them. I think that he who admitted the new partner will be liable to indemnify them entirely, because it would be difficult to deny that he was to blame for doing so.

(1) He also asks whether any profits which may have accrued on account of the admission of the said partner can be set off against a loss which was caused by his negligence?

He answered that they should be set off, which is not correct; for Marcellus states, in the Sixth Book of the Digest, that, if the slave of one of several partners having been placed in charge of the affairs of the partnership by his master, conducts them in a negligent manner, he who placed him in charge must make good the loss to the partnership; nor can any profits which may have accrued to the partnership through the slave be set off against the loss.

He also says that the Divine Marcus decided that one partner could not say to another: "Relinquish the profits which have accrued through your slave, if you desire to be indemnified for the loss."

24. *The Same, On the Edict, Book XXXI.*

It is evident that if two partners place the slave of one of them in charge of the business of the partnership, the master of said slave will not be responsible except to the extent of the *peculium;* for both of them should be liable to the same risk, as they both appointed him.

25. *Paulus, On Sabinus, Book VI.*

A partner is none the less liable for any loss suffered by his fellow-partners on account of his negligence; even though the value of the partnership property may have been increased in many other ways by his industry. The Emperor Antoninus rendered this decision in a case brought before him on appeal.

26. *Ulpianus, On the Edict, Book XXXI.*

And, therefore, if a partner transacts business relating to the partnership in a negligent manner, but in many respects benefits the partnership pecuniarily, the profit will not be set off against the negligence; as Marcellus stated in the Sixth Book of the Digest.

27. *Paulus, On Sabinus, Book VI.*

All debts contracted during the existence of the partnership must be paid out of the common fund, even though payment was not made until after the partnership has been dissolved. Therefore, if a partner entered into a contract under a condition, and the condition took place after the partnership had been dissolved, the indebtedness must be discharged out of the common property. Hence, if the partnership is dissolved in the meantime, security should be furnished to one another by the partners.

28. *The Same, On the Edict, Book LX.*

If we are partners, and one of us owes a sum of money payable within a certain time, and the partnership is dissolved; the partner

cannot deduct this sum as if it was due at that time, but it must be divided among all the partners, who should give security to defend their other partner when the day of payment arrives.

29. *Ulpianus, On the Edict, Book XXX.*

Where the apportionment of shares is not mentioned in the formation of the partnership, it is held that they are equal. If, however, it should be agreed upon that one should have two shares, or three, and another, one, will this be valid?

It is established that it will be, provided that the parties have furnished more money or labor to the partnership, or where any other good reason whatsoever exists.

(1) Cassius holds that a partnership can be formed in such a way that, while one of the partners will not be liable for any loss, the profit will be common to all. This, however, will only be valid (as Sabinus says) where the value of the services of the partner will be equal to the loss; for it frequently happens that the industry of one partner is of greater advantage to the partnership than the capital invested.

The same rule applies if one partner alone makes a voyage by sea or land, as only he is exposed to danger.

(2) Aristo states that Cassius was of the opinion that a partnership could not be formed in such a way that one partner would take the profit and the other assume the loss, and a partnership of this description is usually called a "leonine" one. We, also, think that a partnership of this kind is void, where one of the partners takes the profit, and the other does not receive any gain at all, but sustains the loss; a partnership is extremely unjust where one partner suffers the loss, and receives no benefit whatever from it.

30. *Paulus, On Sabinus, Book VI.*

Mucius states in the Fourteenth Book, that a partnership cannot be formed in such a way that one partner will suffer a certain part of the loss, and another receive a different share of the profit. Servius says in his Notes on Mucius, that such a partnership cannot legally be formed, for that only is understood to be profit which remains after all loss has been deducted, nor does loss exist unless all the profit has been previously deducted.

A partnership can, however, be formed in such a way that different amounts of the profits remaining in the funds of the partnership, after all loss has been deducted, can be paid to the partners; and, in like manner, where loss has been sustained, different shares of it may be apportioned among the several partners.

31. *Ulpianus, On Sabinus, Book XXX.*

In order for an action on partnership to be brought, the partnership must intervene in the proceedings, for it is not sufficient for the property to be in common, unless the partnership appears as a party to the suit, for an action can be brought in common even outside the partnership; as, for instance, where we happen to own property together without the intention of forming a partnership, which occurs where property is bequeathed to two parties, and also where an article is bought by two persons at the same time; or where an estate or donation passes, or is given to us in common, or where we purchase separately the shares of two joint-owners, without the intention of becoming partners:

32. *The Same, On the Edict, Book II.*

For when a partnership is formed by express agreement, an action on partnership will lie; but where there is no agreement, an action can be brought with reference to the property itself, and the business is held to have been transacted in common.

33. *The Same, On the Edict, Book XXXI.*

As in the case of farmers of the revenue, as well as where there are several purchasers; for where they are unwilling to contend with one another, they are accustomed to purchase the property in common by means of messengers, and this is very different from a partnership. Therefore, where a ward enters into a partnership without the authority of the guardian, he will still be liable to an action on the ground of business transacted in common.

34. *Gaius, On the Provincial Edict, Book XX.*

In those instances where one party happens to have expended money on the common property, or collected the crops or profits of the same, or has diminished its value, there is no ground for an action on partnership; but among co-heirs an action for partnership of the estate will lie, and among others an action for the division of property owned in common. An action for the division of property held in common can also be brought between those to whom it

belongs by hereditary right.

35. *Ulpianus, On Sabinus, Book XXX.*

No one can enter into a partnership in such a way that his heir may become a partner therein. An action, however, can be brought against the heir of a partner to compel him to fulfill the obligation of the deceased;

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

And he must also make good the effects of any negligence of the party of whom he is the lawful successor, even though he himself may not be a partner.

37. *Pomponius, On Sabinus, Book XIII.*

It is clear that, if the heirs of partners have the intention of forming a partnership in the estate by new consent, whatever they afterwards do will furnish ground for an action on partnership.

38. *Paulus, On Sabinus, Book VI.*

The arbiter in an action on partnership should see that security is given for future loss or gain during the existence of the partnership.

Sabinus thinks that this should be done in all *bona fide* cases, whether they are in general terms, for example, such as arise from partnership, or from voluntary agency, or from guardianship; or whether they are of a special character, as, for instance, where they are based on mandate, on loan for use, or on deposit.

(1) If you and I have formed a partnership, and the property derived from it is held in common, Proculus says that I can recover any expense I may have incurred on account of said property, and any profit you may have obtained from the same, by an action on partnership, or by one for the division of common property; and that one of these actions puts an end to the other.

39. *Pomponius, On Sabinus, Book XIII.*

Where you and I own a field in common, and you bury a dead body therein, I can bring an action on partnership against you.

40. *The Same, On Sabinus, Book XVII.*

The heir of a partner, although he is not a partner, should nevertheless finish what has been left incomplete by the deceased; and, in this instance, any bad faith of which he may be guilty can be taken into consideration.

41. *Ulpianus, On the Edict, Book XX.*

Where one partner has entered into a stipulation with another with reference to a penalty, he cannot bring an action on partnership if the amount of the penalty was only equal to that of his interest.

42. *The Same, On Sabinus, Book XLV.*

If, however, he has obtained the penalty of the stipulation after the action on partnership has been brought, he will be entitled to that much less, as the penalty will be charged against him to the principal.

43. *The Same, On the Edict, Book XXVIII.*

Where suit has been brought for the division of property held in common, the right of action on partnership is not extinguished, for the latter has reference to the partnership and the obligations thereby contracted, and does not admit of adjudication; but if, an action on partnership is afterwards brought, less will be recovered by it than by the former one.

44. *The Same, On the Edict, Book XXXI.*

If I should give you pearls to be sold, with the understanding that if you dispose of them for ten *aurei* you must pay me ten, but if you sell them for more, you can have the surplus; it seems to me that if this was done with the intention of forming a partnership, an action on partnership will lie, otherwise, one on a verbal contract can be brought.

45. *The Same, On Sabinus, Book XXX.*

An action for theft on account of common property can be brought against a partner where, either through fraud or malicious intent, he has removed said property or disposed of it for the purpose of concealment, but he will also be liable to the action on partnership, for one action does not destroy the other.

The same rule is applicable to all *bona fide* actions.

46. *Paulus, On Sabinus, Book VI.*

The same rule also applies to a tenant, and to a party who is transacting the business of another, as well as to one who is executing a mandate of ours, and to a guardian.

47. *Ulpianus, On Sabinus, Book XXX.*

If I bring suit for the recovery of stolen property, the right of action on partnership is extinguished, unless I have still further interest in the matter.

(1) Where a partner has caused damage to property held in common, Celsus, Julianus, and Pomponius say that he will be liable under the *Lex Aquilia;*

48. *Paulus, On Sabinus, Book VI.*

But he will, nevertheless, also be liable to an action on partnership,

49. *Ulpianus, On the Edict, Book XXXI.*

If he has injured the partnership by his act; as, for example, if he has wounded or killed a slave belonging to it and who transacted its business.

50. *Paulus, On Sabinus, Book VI.*

The result of bringing the action on partnership is that the partner must be satisfied with one or the other of the two proceedings; because both have in view the recovery of the property, and not, as in an action for theft, merely the collection of the penalty.

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

It is also very properly added: "That an action for theft will only lie if the partner removed the property fraudulently, and with malicious intent," because if he did so without malicious intent he would not be liable to an action for theft. And, indeed, it is generally held that a party who owns a share of the property would prefer to lawfully enjoy the same, rather than to form an intention to steal it.

(1) Therefore, let us see whether he will be liable under the *Lex Fabia;* and, although reason suggests that he should not be held responsible, still, if he has kidnapped the slave, or concealed him, he will be liable under the *Lex Fabia.*

52. *The Same, On the Edict, Book XXXI.*

Where a tract of land adjoining two others is to be sold, and one of the parties asks another to purchase it so that he can transfer to him that part which joins his own premises, and soon after he himself purchases the tract, his said neighbor not being aware of the transaction; the question arises whether the neighbor has any right of action against him.

Julianus stated that this involved a perplexing question of fact, for if the intention was that the neighbor should buy the land of Lucius Titius, and convey it to me, the neighbor would have no right of action against me who made the purchase; but if the intention had really been that a purchase of common property was to be made, I would be liable to an action on partnership

to compel me to transfer to you the remainder of the land after having deducted that portion which I directed you to buy.

(1) Good faith is an important element in this action on partnership.

(2) The question arises whether a partner is only liable for fraud, or whether he is also liable for negligence? Celsus states in the Seventh Book of the Digest, that partners are responsible to one another for negligence as well as fraud. And he says that, if, in forming a partnership, one of them promised to furnish his skill and labor, as, for instance, where a flock held in common is to be pastured; or we give a field to a party to be improved, and from which the crops are to be gathered in common; in this case he will surely be liable for negligence, for the consideration is the value of his labor and skill. Where a partner damages the common property, it is held that he is also liable for negligence.

(3) Partners are not responsible for unforseen accidents, that is to say, for those that are unavoidable. Therefore, if a flock, after having been appraised, is delivered to a partner and it is lost through an attack by robbers, or by fire, the loss must be borne in common, if no fraud or negligence attaches to the party who received the said flock after it had been appraised. Where, however, it was stolen by thieves, the loss must be sustained by the party to whom it was entrusted, because he who received the flock after its valuation was obliged to take care of it.

These opinions are correct, and an action on partnership will lie, provided that the flock, even though it had been appraised, was delivered to be pastured with the intention of forming a partnership.

(4) Two parties formed a partnership in the business of manufacturing soldiers' cloaks. One of them, having undertaken a journey for the purpose of purchasing materials, fell among thieves, and his money was taken, his slaves were wounded, and he lost his private property. Julianus says that the loss must be borne in common, and that, therefore, the partner will be entitled to an action on partnership for half of the loss not only of the money, but also of the other property which the partner did not take with him, unless he made the journey for the purpose of purchasing merchandise on account of the partnership. Julianus very properly holds that if any expense was incurred for physicians the other partner is liable for his share.

Hence, if property is lost by shipwreck, and merchandise was involved which it is not customary to transport by vessel, both parties must sustain the loss; for it, as well as the profits must be divided in common when it does not occur through the negligence of a partner.

(5) Where two bankers are partners, and one of them profits by a transaction separately, and appropriates the gain therefrom, the question arises whether the gain should be divided? The Emperor Severus gave the following reply in a Rescript to Flavius Felix: "Where a partnership to carry on a banking business has been expressly formed for that purpose, any profit which a partner obtains in any way not connected with said banking business, has been determined by law not to belong to the partnership."

(6) Papinianus also says in the Third Book of Opinions: "Where brothers retain undivided the estates of their parents, in order to share among themselves the profits and losses of the same, any acquisitions which they obtain from any other source do not belong to the common fund."

(7) He likewise states in the Third Book of Opinions that, having been consulted with reference to certain facts, he gave the following opinion: "An agreement was made between Flavius Victor and Vellicus Asianus that land having been purchased with the money of Victor, certain buildings should be erected by the labor and skill of Asianus, and, after the said buildings were sold, Victor should receive the money which he had invested and a certain sum besides, and Asianus, who had contributed his labor to the partnership, should be entitled to the remainder." In this instance an action on partnership will lie.

(8) Papinianus also states in the same Book that where a voluntary partnership was formed

between two brothers, the salaries and other compensations should be brought into the common fund of the partnership; although a son who is emancipated would not be compelled to give what he obtained in this way to his brother who remained under the control of his father, because, he says, even if he should remain under paternal control, these things would still be his private property.

(9) He also gave it as his opinion that a partnership could not last beyond the death of the partners; and therefore that anyone could not be deprived of the power of testamentary disposition, or of transferring his estate to a more distant cognate than others who were more nearly related.

(10) Papinianus also gave it as his opinion that, where a partner repaired certain parts of a building belonging to the partnership which was falling into ruin, or had become dilapidated, that he could, as a privileged creditor, either recover the principal expended together with the interest within four months after the work had been completed, or he could acquire said building as his own after that time, and that he had a right, nevertheless, to bring an action on partnership for the recovery of his interest; for example, if he preferred to obtain what belonged to him rather than the ownership of the property. An Address of the Divine Marcus fixed the term of four months for the interest to cease, because, after that time, the partner would acquire the ownership.

(11) Where persons form a partnership in order to purchase something, and afterwards the property is not purchased on account of the fraud or negligence of one of them, it is established that an action on partnership will lie. It is clear that if this condition is added, namely, "If the property is sold within a certain time," and the period elapses without the partner being guilty of negligence, the action on partnership can not be brought.

(12) Cassius stated that the action on partnership is also available for the recovery of expenses incurred by one of the partners in repairing a water-course owned in common.

(13) Mela also says that where two neighbors each contributed half a foot of land for the purpose of constructing a party-wall together, which was intended to support buildings belonging to each of them, and after said wall was built, one of them would not permit the other to use its support, an action on partnership would lie.

The same authority held that, where two parties purchased a vacant lot to avoid their light being shut off, and it was delivered to one of them who would not allow the other to have what was agreed upon, an action on partnership can be brought.

(14) Where several partnerships are formed by the same persons, it is established that one judgment will be sufficient to decide all controversies which may arise with reference to them.

(15) Where one partner makes a journey connected with the business of the partnership, as for instance, for the purchase of merchandise, he will only be reimbursed for the expenses incurred by him on account of the partnership. He can, therefore, properly charge reasonable travelling expenses he incurred for hotel accommodations, for beasts of burden and the hire of vehicles, as well as for the transport of himself and his bales of goods, including the price of the same.

(16) Neratius says that where anyone is a general partner, he should place all his property in the partnership fund; and therefore he gives it as his opinion that the partnership will be responsible, under the Aquilian law, for any injury inflicted upon himself, or where any personal wrong has been inflicted upon him or his son.

(17) He also says that a partner, who has entered into a general partnership, is not required to bring into the common fund anything which he has acquired by unlawful means.

(18) On the other hand, it is also discussed by the ancient authorities whether a general partner who had had judgment rendered against him in an action for injury committed, could, by

means of legal proceedings, compel the partnership to make good the judgment? Atilicinus, Sabinus, and Cassius answered that if he had been unjustly condemned, he would be entitled to recourse of this kind; but if the said injury resulted from some illegal act of his own, he himself alone must sustain the loss; which agrees with what Aufidius states was the opinion of Servius, that is, where there were two general partners, and one of them had judgment rendered against him for not appearing in court, he could not recover the amount of the judgment out of the partnership property; but if he, while present, suffered an unjust decision, he must be reimbursed from the partnership fund.

53. *The Same, On Sabinus, Book XXX.*

It is clear that the proceeds of a theft or of any other breach of the law should not be placed in the partnership property, because a partnership in crime is base and dishonorable. Still, it is evident that if property obtained in this way becomes a part of the common fund, the gain must be divided:

54. *Pomponius, On Sabinus, Book XIII.*

For the reason that where a partner places the proceeds of a crime in the partnership fund, he cannot recover it, except where he is compelled to surrender it by a judicial decision.

55. *Ulpianus, On Sabinus, Book XXX.*

Therefore, if a party who committed an illegal act is sued, he can either surrender only what he misappropriated, or he can do this with a penalty. He can give up the property, which was taken, alone, in case the other partner was ignorant that he had placed it with that of the partnership. If, however, he was aware of the fact, he, also, will be liable to the penalty, for it is but just that he who participated in the profit should also share the loss.

56. *Paulus, On Sabinus, Book VI.*

Nor does it make any difference whether the partner is compelled to surrender the property obtained by theft while the partnership is still in existence, or after it has been dissolved. The same rule applies to all actions which arise from dishonorable conduct, as, for instance, those based on injury, robbery with violence, the corruption of slaves, and others of this kind, as well as to all pecuniary penalties imposed in prosecutions for crime.

57. *Ulpianus, On Sabinus, Book XXX.*

Pomponius says the fact must not be lost sight of that these rules only apply where a partnership has been formed for an honorable and lawful purpose; for if it has been formed in order to break the law, it will be void, as it is generally held that there can be no partnership in matters which are dishonorable.

58. *The Same, On the Edict, Book XXXI.*

It should be considered whether an action on partnership can be brought where the property which one of the partners brought into the common fund has been lost. This point was discussed by Celsus in the Seventh Book of the Digest, with reference to a letter of Cornelius Felix as follows: "You have three horses, and I have one; we form a partnership with the understanding that you will take my horse, sell the four horse team and pay me one-fourth of the proceeds." Therefore, if my horse dies before the sale is concluded, Celsus says that he does not think that the partnership will continue to exist, and that no portion of the value of your horses is due, for the partnership was not entered into to form a team of four horses, but to sell one. But if the intention of the parties was stated to be the formation of a four horse team, and the holding of the same in common, and that you should be entitled to a three fourths interest, and I to a one fourth interest in the same, there is no doubt that we are partners to that extent.

(1) Celsus also discusses the point, where we have contributed money for the purchase of merchandise, and my money has been lost, at whose risk would this be? He says that if the

money was lost after it had been placed in the partnership fund, which would not have taken place unless the partnership had been formed, both parties must bear the loss; just as in the case where money is lost which was being taken to some distant place for the purchase of goods. If, however, the money was lost before it had been placed in the common fund, but after you had destined it for that purpose, he says that you can recover nothing on that ground, because it did not belong to the partnership when it was lost.

(2) Where a son under paternal control enters into a partnership, and is afterwards emancipated by his father, the question is asked by Julianus whether the same partnership continues to exist? Julianus states in the Fourteenth Book of the Digest, that the partnership does continue to exist, for the reason that in contracts of this kind the beginning of the transaction must be considered.

There is ground, however, for two actions, one against the father, and the other against the son. The one against the father should be brought for what he ceased to be liable for on the day before the emancipation, for he is not liable for the time the partnership existed after the emancipation; the one against the son, however, includes both periods, that is to say, the entire time embraced by the partnership; for he says that if the partner of the son was guilty of any fraudulent act after the emancipation of the latter, an action on that ground should be granted to the son and not to the father.

(3) If my slave form a partnership with Titius, and it continues after the alienation of the slave, it can be said that the first partnership was terminated by the alienation of the slave and that an entirely new one began, and, therefore, that an action on partnership will lie both in my favor and in that of the purchaser of the slave.

An action should also be granted against me as well as against the said purchaser, for any causes which arose before the alienation of said slave; but with reference to anything which took place afterwards, an action should be granted against the purchaser alone.

59. *Pomponius, On Sabinus, Book XII.*

To such an extent is a partnership dissolved by death, that we cannot even admit that an heir may succeed to the partnership. Sabinus states that this applies to private partnerships, but in such as have for *their* object the collection of taxes, the partnership, nevertheless, continues to exist after the death of a partner; but only provided that the share of the deceased has been transferred to the heir, so that the other partner also must divide with the heir, and this also depends upon circumstances; for what if he on account of whose services the partnership was especially formed, or without whom its affairs could not be managed, should die?

(1) What a partner loses by gambling, or as the result of adultery, cannot be charged to the partnership property, but if a partner has lost anything on account of our fraudulent acts he can recover it from us.

60. *The Same, On Sabinus, Book XIII.*

Labeo says that a partner who fails to report to the partnership the profit which he has obtained, or one who uses the money for his own benefit, must pay interest on it, not as ordinary interest, but by way of indemnity for what his partner has suffered by reason of his default.

If, however, he did not make use of the money, or was not in default, the contrary rule applies. Moreover, after the death of a partner, no estimate of damages can be made on account of any act of his heir, because the partnership was dissolved by the death of the partner.

(1) A partner, while attempting to prevent slaves, who formed part of the stock of the partnership from escaping, was wounded; Labeo says that the expense which he incurred for medical services, in consequence, cannot be recovered by an action on partnership, because it was not actually caused by the partnership business, although it was done on account of it; just as if where someone had avoided appointing a party an heir, or had passed him by in

bequeathing a legacy, or had managed his property more negligently on account of a partnership, for any gain which he himself had obtained on account of the partnership he would not be obliged to place in the common fund; as, for example, if he had been appointed an heir on account of the partnership, or anything had been given to him for this reason.

61. *Ulpianus, On the Edict, Book XXXI.*

According to Julianus, however, he can recover what he paid out for himself for medical services in a case of this kind; and this is true.

62. *Pomponius, On Sabinus, Book XIII.*

If Titius, with whom I have formed a partnership should die, and I am of the opinion that his estate belongs to Seius, and I sell the common property and take half of the proceeds of the sale, and Seius takes the other half; you, who are in reality the heir of Titius, cannot recover from me, in an action on partnership, the money which I have paid out; as was held by Neratius and Aristo, because I have only received the value of my share. Nor does it make any difference whether I dispose of my share separately, or together with that which the other party alleges is his.

Otherwise, the result would be that, even if two partners should sell the property of the partnership, either one of them would be liable to the other in an action on partnership for half of whatever had come into his hands. But you would not be obliged to make good to me in a suit for the estate anything that you might have obtained from Seius, because what came into his possession was the price of your share, and nothing could be recovered from him by me, since I have already obtained what was mine.

63. *Ulpianus, On the Edict, Book XXXI.*

The opinion of Sabinus is correct, namely, that if the parties are not general partners, but only associated for a particular purpose, or where they have acted in bad faith to avoid responsibility, they can still have judgment rendered against them to the extent of their resources. This is perfectly reasonable, as a partnership in some respects resembles a fraternity.

(1) It should be considered whether only the surety of a partner should be indemnified, or is this, indeed, a personal advantage to all? I think the latter to be the better opinion; if, however, the surety should undertake to defend the action of the partner, he can profit by it; for Julianus says, in the Fourteenth Book of the Digest, that the defender of the partner can only have judgment rendered against him to the extent of the resources of said partner. And he adds that the same rule applies to one who acts as a defender of a patron. This rule is also generally applicable to all those who are sued to the amount of the means which they possess.

(2) This exception, however, should not be granted to the father or master of a partner, if the partnership was contracted by the direction of either; because it will not be granted to the heir and other successors of the partner, for the reason that we do not accord the same privilege to heirs or successors not to have judgment rendered against them beyond the extent of their resources.

(3) But how can an estimate of the financial resources of a partner be made? It has been established that the indebtedness of the partner should not be deducted; and this Marcellus stated in the Seventh Book of the Digest; unless, as he says, the debts had been contracted with reference to the partnership itself.

(4) It must also be considered whether the partner should, in a case of this kind, furnish security for what he cannot pay, that is to say, make a bare promise to do so. I think that this is the better opinion.

(5) If, where there are three partners, one of them should bring an action against one of the others, and recover his entire share, and then another should bring an action against the remaining partner, but is unable to recover his entire share because the said partner is not

solvent; the question arises whether he who failed to obtain all that he was entitled to, can bring an action against the one who received the entire amount of his share, for the purpose of making a division, that is to say, of placing all the shares upon the same footing, since it is unjust that one should obtain more and the others less from the same partnership? This opinion is founded upon equity.

(6) In order to determine whether a partner is able to pay the amount which he owes, we must take into account the time when the judgment was rendered.

(7) Anyone is held to be able to make payment who has committed a fraudulent act in order to avoid doing so, for it is not just for anyone to profit by his own fraud. This should be understood to apply to all those against whom suit is brought to the extent of their resources. If, however, a party is unable to make payment, not on account of fraud, but because of his own negligence, it must be held that judgment should not be rendered against him.

(8) An action on partnership can also be brought against the heir of the partner, even though he may not be a partner, for even if he is not one, he is, nevertheless, the successor to the profits of the partnership.

We observe the same rule with reference to partnerships for the collection of taxes and others of the same kind, namely that the heir is not a partner unless he has been admitted to the partnership; still, all the profits of the partnership belong to him, to the same extent that he is responsible for the losses which may occur either during the lifetime of the partnership in the collection of taxes, or afterwards.

This rule is not applicable in the case of voluntary partnerships.

(9) If one of two masters bequeaths a legacy, without his freedom, to a slave held in common, this legacy belongs entirely to the surviving partner. Nevertheless, the question arises whether he can bring an action on partnership, for the division of the legacy, against the heir of the deceased partner? Julianus says that Sextus Pomponius states that the opinion of Sabinus is that the legacy cannot be divided. Julianus says, that there are good grounds for this opinion, for what has been acquired has not been done by reason of the partnership, but on account of the share of the partnership in the slave. It is not necessary for a division to be made of what a partner does not acquire through the partnership, but by means of his own property.

(10) A partnership is terminated by the non-existence of those who compose it; by loss of its property; by the will of the partners; and by legal proceedings. A partnership, therefore, is held to be dissolved when either the persons composing it, the property belonging to it, the agreement of the partners, or judicial proceedings relating to it, come to an end. The partners cease to exist, through the alteration of civil rights either in its greatest, intermediate, or least degree, or by death. The property is held to be lost where none remains, or its condition is changed; for no one can be a partner in property which is no longer in existence, nor in such as has been consecrated for religious purposes, or forfeited to the State. A partnership is terminated by the will of the parties, by withdrawal.

64. *Callistratus, Questions, Book I.*

Hence, if partners begin to act separately, and each one of them transacts business on his own account, there is no doubt that the partnership is dissolved.

65. *Paulus, On the Edict, Book XXXII.*

It is terminated by legal proceedings when the purpose for which it was formed is changed, either by stipulation or judicial decision; for Proculus says that a partnership is dissolved whether it be general or special, whenever legal steps are taken for the purpose of putting an end to it.

(1) Labeo says that a partnership is dissolved where the property of one of the partners is sold by his creditors.

(2) Labeo also says that if the partnership was formed for the purpose of purchasing or leasing something, that then, any profits which may have accrued, or any loss which may have taken place, must be divided in common after the death of one of the partners.

(3) We have stated that a partnership can be dissolved by the dissent of the parties, that is, if all of them are of one mind in this respect. But, what if only one of them should withdraw? Cassius stated that he who retires from the partnership releases his partners from responsibility, so far as he himself is concerned, but does not release himself from liability to them.

This rule, however, should only be observed where the withdrawal is made from fraudulent motives; as, for instance, if we form a general partnership, and afterwards an inheritance passes to one of the partners and he retires on this account; if the inheritance should be productive of any loss, this must be borne by the partner who withdrew from the partnership, but he can be compelled by an action on partnership to share with the others any profits arising from the same. If he should acquire any property after his withdrawal, it will not be shared with the other partners, because fraud has not been committed with reference to it.

(4) Moreover, if we form a partnership for the purchase of certain property and afterwards you wish to purchase it yourself, and for this reason you withdraw from the partnership, you will be liable to the extent of my interest in said property. But if you withdraw because the purchase was displeasing to you, you will not be liable even if I purchase it; because in this instance no fraud exists. These opinions were also held by Julianus.

(5) Labeo also stated in his work on recent cases, that if one partner should withdraw from the partnership at a time when it was the interest of the other for it not to be dissolved; he will be liable to the action on partnership; for if we form a partnership for the purchase of slaves, and, after doing so, you withdraw from the association at a time which is not favorable for the sale of the slave, in this case, you will be liable to an action on partnership, because you have rendered my position worse.

Proculus holds this opinion to be correct only where it is the interest of the partnership not to be terminated; for greater consideration is usually shown to what is beneficial to the partnership, than for the private advantage of one of the partners.

These rules are only applicable where nothing has been agreed upon with reference to these matters, when the partnership was formed.

(6) Where a partnership has been formed for a certain time, one of the partners, by withdrawal from it before the time has elapsed, releases his partner from liability to himself, but he does not release himself from liability to his partner. Hence, if any profit is obtained after his withdrawal, he will not be entitled to any share of it; but if any expenses have been incurred, he must also pay his share, unless his withdrawal took place on account of some necessity. When, however, the time has elapsed, either party is free to withdraw, because this can be done without fraudulent intent.

(7) We can also withdraw from a partnership by the agency of others, and therefore it is held that an agent can also withdraw in behalf of his principal. Let us consider, however, whether what has been stated on this point applies to him to whom the general management of the partnership property has been entrusted, or to him to whom special directions on this subject have been given; or can the withdrawal legally be made in either instance? The latter is the more correct opinion, unless the principal expressly forbade the agent to withdraw.

(8) It is also settled that my partner can give notice of his withdrawal to my agent. Servius says in a note on Alfenus that it is in the power of the principal, when notice of withdrawal is given to his agent, to ratify or reject it at his pleasure; therefore, he will be held to be released from liability to whose agent notice of withdrawal was given; but he, also, who gave notice to the agent of his withdrawal, will be released if he so desires; as we have stated with reference to one partner who personally notifies the other of his withdrawal.

(9) A partnership is dissolved by the death of one of the partners, even though it was formed with the consent of all, and several survive, unless some other arrangement was made when the partnership was formed; nor can the heir of a partner succeed to the partnership, but he can share in the profits of it afterwards. Moreover, any loss resulting from fraud or negligence in transacting the business before the death of the partner, must be made good to the heir, as well as by him.

(10) Moreover, a partnership formed for any special purpose is terminated when the business for which it was entered into is finished. If, however, one of the partners should die, while the affairs of the partnership were still unchanged, and the reason for the formation of the partnership should only appear after his death, we must then make the same distinction as in the case of a mandate; namely, that if the death of one of the partners was unknown to the other, the partnership will continue to exist; but if it was known, it will be dissolved.

(11) Just as the partnership does not pass to the heirs of a partner, so also it does not pass to an arrogator; lest, otherwise, a partner might become associated with persons against his will. The party who was arrogated will, however, remain in the partnership, for even if a son under paternal control should be emancipated, he will still continue to be a partner.

(12) We have stated that a partnership can also be dissolved by the confiscation of property, which is held to relate to the forfeiture of all the property of a partner to the State, for the latter is considered as dead when another partner succeeds him.

(13) If any expense should be incurred with reference to the partnership property, after the partnership has been dissolved, a partner cannot recover said expense in an action on partnership, because it is not true that this was done in behalf of the other partner, or on account of the partnership interest; but, in an action for the division of property held in common, account must be taken of this expense, for although the partnership may have been dissolved, the division of the property nevertheless remains.

(14) Where money belonging to a partnership is in the hands of one of the partners, and the capital of one of the latter is, to a certain extent, diminished; suit should only be brought against the partner who has possession of the money; and, after what is due to him has been deducted, all of them can bring suit for the balance which is due to each one.

(15) It is sometimes necessary to bring an action on partnership while the partnership is still in existence; as, for instance, where the latter was formed for the purpose of collecting taxes; if on account of various contracts it is to the advantage of neither partner to withdraw from the partnership, and one of them fails to place what he has collected in the common fund.

(16) Where one of the partners is married, and the partnership is dissolved during the marriage, the said married partner can take the dowry of his wife out of the partnership property, in preference to any other claim; because it should be in the hands of him who sustains the burdens of marriage. If, however, the partnership is dissolved after the marriage has ceased to exist, he should receive the dowry on the very day when it should be paid.

66. *Gaius, On the Provincial Edict, Book X.*

If at the time when the partnership property is divided, circumstances exist which make it certain that the dowry, or even a portion of the same, should not be given up; the judge should order it to be divided among the partners.

67. *Paulus, On the Edict, Book XXXII.*

Where one of the partners sells the property of the partnership with the consent of the others, the price ought to be divided, and security furnished to indemnify him for the future; and if the said partner has already suffered any loss, it must be made good to him. If, however, the purchase-money is divided without any security being given, and the partner who made the sale was compelled to pay something on account of it; can he recover from some of the partners what he has not been able to collect from the others, where all of them are not

solvent? Proculus thinks that this burden should be sustained by the others, if it cannot be collected from some of them; and that this can be defended on the ground that when the partnership was formed, a community of profit as well as loss was established.

(1) Where one of several partners, who did not belong to a general partnership, lent money which belonged to all of them, and collected the interest, he should only divide the interest if he lent the money in the name of the partnership; for if he did this in his own name, since he ran the risk of losing the principal, he is entitled to retain the interest.

(2) Where a partner incurs some necessary expense with reference to the business of the partnership, he can bring an action on partnership for the interest, if he should have borrowed the money at interest. But where he used his own money for this purpose, it is held, and not without reason, that he has a right to claim the same amount of interest which he could have collected if he had lent the money to anyone else.

(3) Judgment cannot be rendered against a partner to the extent of his resources, unless he acknowledged that he is a partner.

68. *Gaius, On the Provincial Edict, Book X.*

No partner, even though the partnership is a general one, can alienate a larger amount than that which composes his share.

(1) The question arises whether a party is held to have committed an act to avoid making payment of the amount for which he is responsible, who disposes of his property fraudulently to avoid a future suit, or who does not make use of an opportunity for profit on this account? The better opinion is that, in this instance, the Proconsul had in mind a party who had disposed of his property, and this we can infer from the interdicts in which the sentence, "Because you have committed fraud in order to avoid being in possession," is inserted.

69. *Ulpianus, On the Edict, Book XXXII.*

When a partnership is formed for the purpose of making purchases, and it is agreed upon that one of the partners shall furnish the others with provisions, and shall leave the transaction of the business to them, if he does not provide them with supplies, an action on partnership, as well as one on sale, can be brought against him.

70. *Paulus, On the Edict, Book XXXIII. A* perpetual partnership cannot be formed.

71. *The Same, Epitomes of the Digest of Alfenus, Book III.*

Two persons formed a partnership to teach grammar, and to share among themselves any profits that might be obtained from this profession. After having agreed in the articles of partnership on what they wished to be done, they then stipulated with one another as follows: "Whatever is written above must be carried out, and cannot be opposed, and if the said provisions are not complied with, then twenty thousand sesterces shall be paid."

The inquiry arose whether if any of these provisions was violated, an action on partnership could be brought? The answer was that if, after their agreement had been made with reference to the partnership, they had stipulated as follows: "Do you promise that these provisions shall be observed as herein set forth?" The result would be that if the parties had done this for the purpose of changing their contract, an action on partnership would not lie, but the whole matter would be considered to have become a stipulation. But if they had not stipulated in these terms, "Do you promise that these provisions shall be observed as herein set forth?" but, as follows, "If these provisions are not observed, then ten *aurei* shall be paid;" it was held by him that the matter had not become a stipulation, but only what related to the penalty had been altered, because the party promising had not bound himself to do both things, that is, he would make payment and also perform the agreement, and that if he did not do so he would suffer the penalty; and therefore an action on partnership would be available.

(1) Two fellow freedmen formed a partnership for the purpose of sharing all "gains, profits,

and emoluments," and afterwards one of them, having been appointed an heir by his patron, a legacy was left to the other. The answer was that neither of them was obliged to place what he received in the partnership fund.

72. *Gaius, Diurnal, or Golden Matters, Book II.*

One partner is liable to another on the ground of negligence, that is to say of failure to act and lack of diligence. Negligence in this instance, however, is not understood to mean want of the most exact diligence, for it is sufficient for him to employ the same diligence in the partnership affairs as he is accustomed to do in his own; because where anyone takes a partner who displays very little diligence he has only himself to blame.

73. *Ulpianus, Opinions, in Answer to Maximin, Book I.*

Where persons form a partnership of their entire property, that is to say of whatever property either one may subsequently acquire, an estate which falls to either of them must be placed in the common fund.

(1) He also stated to Maximin that, where persons form a partnership of their entire property in such a way that whatever is expended or gained shall be to the common profit or expense; any sums which may be expended for the children of either must be charged to both.

74. *Paulus, On the Edict, Book LXII.*

Where anyone has formed a partnership, and makes a purchase, it belongs to him individually, and not to the common fund, but he can be compelled by an action on partnership to make it common property.

75. *Celsus, Digest, Book XV.*

Where a partnership has been formed with the understanding that Titius shall have the regulation of the shares, and Titius dies before he renders a decision, the partnership is void; because the intention was that no other partnership should exist than that which is subject to the decision of Titius.

76. *Proculus, Epistles, Book V.*

You formed a partnership with me under the condition that Nerva, our common friend, should decide with reference to the shares thereof; and Nerva decided that you should be a partner to the extent of one-third, and I to the extent of two-thirds of the capital. You ask whether this should be ratified in accordance with the rights of the partnership, or whether we are equal partners, nevertheless? I think that it would have been better for you to have made the inquiry whether we were partners to the extent of the shares which he had established, or whether to the extent of those which would have been apportioned by a good citizen; for there are two kinds of arbiters, one whose award we should obey whether it be just or unjust, which rule must be observed when recourse is had to arbitration by common consent of the parties. There is another kind, whose award must be compared with that which would be rendered by a good citizen, although the party who is to give it has been expressly selected;

77. *Paulus, Questions, Book IV.*

For instance, when the intention of a lease is involved, and the decision of the lessor is required.

78. *Proculus, Epistles, Book V.*

I think that, in the case stated, the judgment of a good citizen should be followed, and all the more so, because a decision in an action on partnership is one where good faith is concerned.

79. *Paulus, Questions, Book IV.*

Wherefore, if the award of Nerva is so improper that its manifest injustice is apparent, it can be corrected by a judgment on the ground of good faith.

80. *Proculus, Epistles, Book V.*

What would be the result if Nerva decided that one party should be a partner to the extent of one thousand shares, and the other to the extent of two thousand shares? The decision of a good citizen could not fail to be that we are not partners to the same extent; for example, just as if one of us should bring into the partnership more labor, skill, credit, and money than the other.

81. *Papinianus, Questions, Book IX.*

Where a partner promised a dowry in behalf of his daughter, and, before he paid it, died, having left her his heir, and she afterwards brought an action against her husband for her dowry; she was released by a receipt from her husband.

The question arose whether, if she brought an action on partnership, she ought to receive the amount of the dowry as a preferred claim, if it had been agreed between the partners that the dowry should be taken out of the common fund? I say that the contract was not an unjust one, provided that the girl had not made it merely with reference to one of the partners; for, if the agreement was reciprocal, it did not make any difference if only one of the partners had a daughter.

Moreover, if the father should recover the dowry which he had given after the death of his daughter during marriage, the money ought to be returned to the partnership, for we should interpret the contract equitably in this way. If, however, the marriage should be dissolved by a divorce during the existence of the partnership, the dowry would be recovered with its accessories, so that it could again be given to another husband. But if the first husband was not able to restore the dowry, another could not be taken from the funds of the partnership, unless this had been expressly agreed upon. In the example proposed, however, it seems to be most probable that the dowry was actually paid, or at least promised. For if the daughter had received the dowry by operation of law, after she became the heir of her father, the money ought not to be placed in the partnership fund, because she would be entitled to it, even if there should be another heir. But, if she was released by a receipt from her husband, money should not be credited to the partnership which had not been paid.

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

One partner is not bound for the debts contracted by another, according to the law of partnership, unless the money was deposited in the common chest.

83. *Paulus, Manuals, Book I.*

The question arose whether, where a tree which grows on the boundary line, or a stone which extends on each side of the line of two contiguous tracts of land, will belong proportionately to the owner of each tract; or, if the tree is cut down, or the stone removed, it will remain undivided; as occurs where two masses of metal belonging to two owners are melted together the entire mass becomes the common property of both; and thus, in this instance where a tree is separated from the soil, there is all the more reason for considering it to belong to both owners, than is the case with a mass of metal; since it only forms one body composed of the same substance. It is in accordance with natural reason, however, that, after the separation of the stone or the tree, each of the two owners should have the same share of the same to which he was entitled while it remained in the earth.

84. *Labeo, Abridgments by Javolenus, Book VI.*

Whenever a partnership is formed by the direction of anyone, either with the son of the latter or with another person, a direct action can be brought against the one who was in view when the partnership was formed.